Poliah v National Wholesale Liquidators, Inc.
2016 NY Slip Op 31378(U)
June 14, 2016
Supreme Court, Queens County
Docket Number: 702322/14
Judge: Darrell L. Gavrin

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

JENNIFER POLIAH and SHASTRI POLIAH,	Index No. 702322/14
Plaintiffs,	Motion Date April 14, 2016
- against-	
NATIONAL WHOLESALE LIQUIDATORS, INC., NWL HOLDINGS, INC. and NSC WHOLESALE HOLDINGS, LLC.,	Motion Cal. No. 142
Defendants.	Motion Seq. No. 2

The following papers numbered 1 to 11 read on this motion by defendant, NSC Wholesale Holdings, LLC (NSC), pursuant to CPLR 3212 for summary judgment in its favor on the grounds that it bears no liability for the subject accident as a matter of law and on this cross motion by plaintiffs for summary judgment in their favor and against defendant, NSC, on the issue of liability.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-3
Notice of Cross Motion - Affirmation - Exhibits.....	4-7
Reply Affirmation.....	8-11

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

In this action, plaintiffs seek damages for personal injuries allegedly sustained by plaintiff, Jennifer Poliah, on June 26, 2013, at approximately 1:45 P.M., while shopping at a National Wholesale Liquidator store operated by defendant, NSC,[1] located at 71-01 Kissena Boulevard in Queens County, New York.

[1]Counsel for defendant NSC, Paul McBride, affirms that the other named defendants, National Wholesale Liquidators, Inc. and NWL Holdings, Inc., are bankrupt entities, who have not appeared in this action.

Plaintiff, Jennifer Poliah, testified that while removing a patio cushion from a display of patio cushions hanging on hangers on a rod, the cushion hit an approximately eight-foot long ladder which was laying on its side on the floor in front of the display, and the ladder fell on her foot. Plaintiff, Jennifer Poliah, also testified that she did not see the ladder prior to its falling.

Defendant, NSC's assistant store manager, Jay Rana, testified as follows: There were approximately five or six ladders for employees' use at the store and the largest of these was the subject ladder. That ladder is typically used during the night shift to move merchandise on and off high shelving because it would present a safety concern if used when customers were in the store. If he saw the ladder on the floor in one of the aisles, he would return it to the back room where it is stored. On the date of the accident, he inspected the store at approximately 9:00 or 9:30 A.M. Later that day, at approximately 2:00 P.M., a customer came to his office at the front of the store and notified him that someone had been hurt by a ladder in the seasonal department, which is located in aisles six and seven. Upon his arrival on the scene approximately five minutes later, he did not see a ladder, but did see plaintiff, Jennifer Poliah siting on a box. He did not know how the ladder became present in the aisle where plaintiff, Jennifer Poliah's accident occurred. He neither directed any co-workers to use the ladder on the date of the accident, nor recalled seeing a ladder in use by an employee in the store during daytime hours.

Defendant, NSC, now moves for summary judgment dismissing plaintiffs' complaint and all cross claims against it. Plaintiffs cross-move for summary judgment in their favor and against defendant, NSC, on the issue of liability.

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, *supra*.) Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), or credibility assessment. (*See Ferrante v American Lung Association*, 90 NY2d 623 [1997].) Once this showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact. (*See Alvarez v Prospect Hosp.*, *supra*.)

The owner or possessor of property has a duty to maintain the property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." (*Basso v Miller*, 40 NY2d 233, 241[1976].) A defendant who moves for summary judgment in a premises liability case has the initial burden of making a *prima facie* showing that it did not create the hazardous condition which allegedly caused the injury, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. (*See Beri v Chung Fat*

Supermarket, Inc., 125 AD3d 587 [2015]; *see also Minor v 1265 Morrison, LLC*, 96 AD3d 1024 [2012]; *Alexander v New York City Hous. Auth.*, 89 AD3d 969 [2011].) To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff was injured. (*See Williams v SNS Realty of Long Island, Inc.*, 70 AD3d 1034 [2010]; *see also Braudy v Best Buy Co., Inc.*, 63 AD3d 1092 [2009]; *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598 [2008].)

In this case, defendant, NSC, failed to sustain its initial burden of demonstrating that it did not create the alleged hazardous condition of the ladder laying on the floor in the store aisle. In support of its motion, defendant, NSC, submitted, among other things, the examinations before trial testimony of plaintiff, Jennifer Poliah and Jay Rana, defendant, NSC's assistant manager. As noted, plaintiff, Jennifer Poliah, testified that the subject ladder which was laying on the floor in the aisle fell on her foot, and Rana testified that the ladder typically was used during the night shift because it would present a safety concern to customers, and that had he discovered the ladder in an aisle, he would have returned it to the backroom. Defendant, NSC, failed to eliminate all material issues of fact as to whether the subject ladder had been left in an unsecured manner by one of its employees. (*See Gujral v Wal-Mart Stores, Inc.*, 69 AD3d 795 [2010].)

Defendant, NSC, also failed to sustain its initial burden of demonstrating that it did not have constructive notice of the alleged hazardous condition. Although Rana testified that he inspected the entire store on the date of the accident and did not see a ladder being used, his inspection occurred almost five hours prior to the time of plaintiff, Jennifer Poliah's accident. Thus, this testimony fails to eliminate all material issues of fact as to whether defendant, NSC, had constructive notice of the subject ladder on the floor of the aisle on the date of plaintiff, Jennifer Poliah's accident. (*See Lopez v Marshalls*, 123 AD3d 981 [2014]; *see also Stroppel v Wal-Mart Stores, Inc.*, 53 AD3d 651 [2008]; *Catanzaro v King Kullen Grocery Co.*, 194 AD2d 584 [1993]; *cf. Payen v Western Beef Supermarket*, 106 AD3d 710 [2013].)

Defendant, NSC, also seeks summary judgment dismissing the complaint as against it on the ground that the subject ladder was an open and obvious condition observable by the use of one's own senses, and was not inherently dangerous.

A property owner or possessor has no duty to protect or warn against an open and obvious condition, which is not inherently dangerous. (*See Barone v Risi*, 128 AD3d 874 [2015]; *see also Pellegrino v Trapasso*, 114 AD3d 917 [2014]; *Cupo v Karfunkel*, 1 AD3d 48 [2003].) "The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for a jury." (*Shah v Mercy Med. Ctr.*, 71 AD3d 1120, 1120 [2010]; *see Pellegrino v Trapasso, supra*; *Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008 [2008].) A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted. (*See Shah v Mercy Med. Ctr., supra*; *see also Villano v Strathmore Terrace Homeowners Assn.,*

Inc., 76 AD3d 1061 [2010]; *Mazzarelli v 54 Plus Realty Corp., supra.*)

Under the circumstances of this case, defendant, NSC, failed to establish as a matter of law that the alleged hazardous condition was open and obvious and not inherently dangerous. (*See Frank v JS Hempstead Realty, LLC*, 136 AD3d 742 [2016]; *see also Klee v Cablevision Sys. Corp.*, 77 AD3d 794 [2010]; *Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634 [2010].) Furthermore, contrary to defendant, NSC's contention, the fact that the alleged hazardous condition might have been open and obvious does not negate its duty to maintain its premises in a reasonably safe condition, but rather, raises an issue of fact concerning the injured plaintiff's comparative negligence. (*See Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610 [2011]; *see also Bradley v DiPaterio Mgt. Corp.*, 78 AD3d 1096 [2010]; *DeGruccio v 863 Jericho Turnpike Corp.*, 1 AD3d 472 [2003].)

Since defendant, NSC, failed to meet its threshold burden of establishing its prima *facie* entitlement to summary judgment as a mater of law, it is unnecessary to consider the sufficiency of plaintiffs' opposition papers. (*See Winegrad v New York Univ. Med. Ctr.*, *supra*; *see also Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610 [2011]; *Gradwohl v Stop & Shop Supermarket Co.*, *supra.*)

Accordingly, defendant, NSC's motion for summary judgment in its favor dismissing plaintiffs' complaint as against it is denied.

Plaintiffs' cross motion for summary judgment in their favor and against defendant, NSC, on the issue of liability is also denied. As illustrated above, there are triable issues of fact including whether the subject condition was inherently dangerous.

Dated: June 14, 2016

DARRELL L. GAVRIN, J.S.C.