SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice PART 35

Index Number : 153702/2015
THOMAS, TANIQUA
vs.
COSTCO WHOLESALE CORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/25/17
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

In this personal injury action, defendant Costco Wholesale Corporation ("defendant") moves for summary judgment dismissing the complaint of the plaintiff, Taniqua Thomas ("plaintiff").

Factual Background

Plaintiff testified at her deposition that while inside Costco warehouse store in New York, New York on September 6, 2014, she was struck from behind by a motorized shopping cart operated by an unidentified male customer. After the incident, plaintiff prepared a Member First Report of Incident, and a Costco assistant front end manager, Diondra Young ("Ms. Young"), was called to assist. Upon Ms. Young's arrival, she found plaintiff bleeding from the back of her ankle.

According to the deposition testimony of Ms. Young, any Costco member can use the carts as a courtesy to get around the store. The carts are repaired and maintained by the company that provides the carts to the store. Ms. Young was unaware of any prior incidents involving motorized carts or of any mechanical issues with the carts other than dead batteries. Ms. Young was also unaware of any prior complaints regarding the carts.

The Member First Report of Incident indicates that "member lost control of motorized chair and slammed into back of right ankle."

In support of dismissal, defendant argues that it had no duty to protect against the unforeseeable actions of the unidentified operator of the motorized shopping cart. Plaintiff's deposition testimony establishes that there is no evidence that the subject cart was defective or that the unidentified motorist's operation of the cart was a concern. Nor is there any proof that

Dated: _____ _____, **J.S.C.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

defendant knew or should have known of the manner in which the subject cart was being operated prior to the accident. Furthermore, there is no evidence or caselaw to support plaintiff's claim that defendant's purported failure to supervise her or others caused her accident. And, plaintiff cannot identify that any dangerous condition existed and failed to identify the subject cart or the defect that caused the motorized cart to strike her.

In opposition, plaintiff argues that she need not prove foreseeability of the precise manner in which the accident occurred or the precise type of harm produced to establish foreseeability. The testimony demonstrates that defendant breached its duty to maintain its property in a reasonably safe condition in allowing patrons to use motorized shopping carts. Ms. Young was unaware of any safety rules and regulations implemented by defendant as to the operation of the carts. And, there are no accident prevention policies in place for the use of such carts. Nothing was required of a customer in order for a customer to use the cart. The absence of any protocol as to the use of the carts raises an issue of fact as to defendant's negligence. Furthermore, the use of the carts by a patron unskilled in operating such a cart is not a readily observable condition of which plaintiff could have been aware prior to her accident. And, that plaintiff does not know the identity of the person operating the cart is of no moment.

In reply, defendant adds that it had no duty to prevent the accident under the circumstances. In the absence of evidence of what caused the accident, there can be no finding that plaintiff's injuries arose from any foreseeable hazard that any presumed duty would exist to prevent. That the cart was motorized is immaterial as to whether defendant owed plaintiff any duty under the circumstances. And, there is no evidence that defendant's action or inaction was the proximate cause of plaintiff's accident.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014] *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set

forth averments of factual or legal conclusions" (*Genger v. Genger*, 123 AD3d 445, 447 [1st Dept 2014] lv to appeal denied, 24 NY3d 917 [2015] *citing Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

"Negligence requires both a foreseeable danger of injury and conduct unreasonable in proportion to that danger" (*Miller v. Hannaford Bros. Co.*, 252 A.D.2d 725, 675 N.Y.S.2d 436 [3d Dept 1998] *citing Wells v. Finnegan*, 177 A.D.2d 893, 576 N.Y.S.2d 653; see, Palsgraf v. Long Is. R. Co., 248 N.Y. 339, 162 N.E. 99); the foreseeability of the risk defines defendant's duty to plaintiff (*Miller v. Hannaford Bros. Co.*, *supra citing Wells v. Finnegan, supra*, at 894, 576 N.Y.S.2d 653).

Further, it is well-established "that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk" (*Zuk v. Great Atlantic & Pacific Tea Co., Inc.*, 21 A.D.3d 275, 799 N.Y.S.2d 504 [1st Dept 2005] *citing Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 [1976] and *Pappalardo v. New York Health & Racquet Club*, 279 A.D.2d 134, 141-142, 718 N.Y.S.2d 287 [2000]). "In order to recover damages for a breach of this duty, a party must establish that the landlord created, or had actual or constructive notice of the hazardous condition which precipitated the injury (*Zuk v. Great Atlantic & Pacific Tea Co., Inc.*, *supra, citing Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969, 622 N.Y.S.2d 493, 646 N.E.2d 795 [1994] and *Mejia v. New York City Tr. Auth.*, 291 A.D.2d 225, 226, 737 N.Y.S.2d 350 [2002]). "Moreover, in order to constitute constructive notice, 'a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owner's] employees to discover and remedy it'" (*Zuk v. Great Atlantic & Pacific Tea Co., Inc.*, *supra, citing Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774 [1986] and *O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106, 650 N.Y.S.2d 717 [1996]).

Here, the record lacks evidence establishing that the occurrence that caused plaintiff's injury was a foreseeable risk of defendant's alleged negligence (*see, Di Ponzio v. Riordan*, 89 N.Y.2d 578, 584, 657 N.Y.S.2d 377, 679 N.E.2d 616).

Further, there is no evidence that the unidentified patron (or any patrons operating the motorized carts) exhibited careless or dangerous behavior before the incident in regard to the operation of the motorized carts. Nor is there any evidence that defendant received complaints about carts being misused or improperly operated (*see e.g., Kelly v. Berberich*, 36 A.D.3d 475, 828 N.Y.S.2d 332 [1st Dept 2007]). There is no evidence that plaintiff's injury was a foreseeable risk of the defendant's actions in providing motorized carts. Thus, defendant met its initial burden by demonstrating the absence of any factual questions with respect to the foreseeability of plaintiff's injury.

Defendant also made a *prima facie* showing of entitlement to judgment as a matter of law on the ground that it neither created the condition through an affirmative act of misfeasance nor had actual or constructive notice of the condition that caused plaintiff's accident. The evidence

demonstrates that plaintiff's accident was caused by an unexpected and unforeseeable occurrence that defendant had no opportunity to control, and for which it therefore cannot be held liable (*see Horst v. 725 Food Corp.*, 248 A.D.2d 184, 669 N.Y.S.2d 811 [1st Dept 1998]).

In response, plaintiff failed to tender evidentiary proof warranting a trial on the issue of defendant's negligence. Although plaintiff need not establish the precise manner in which the accident occurred or the precise type of harm produced to establish foreseeability, plaintiff cites no caselaw or evidence indicating that merely allowing patrons to use motorized shopping carts in and of itself does not constitute negligence. Plaintiff also failed to present any evidence of actual or constructive notice of the unidentified member's misuse or dangerous use of the motorized cart. There is no evidence that the subject motorized cart was defective or dangerous. Plaintiff's remaining arguments lack merit and fail to raise an issue of fact.

Therefore, defendant's motion to dismiss the complaint is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Costco Wholesale Corporation for summary judgment dismissing the complaint of the plaintiff, Taniqua Thomas, is granted; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated 6/5/17 **ENTER** _____, **J.S.C.**

HON. CAROL R. EDMEAD
J.S.C.

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**