

**Payen v Western Beef Supermarket**

2011 NY Slip Op 33736(U)

December 8, 2011

Supreme Court, Nassau County

Docket Number: 010248/10

Judge: Thomas P. Phelan

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

HON. THOMAS P. PHELAN,

*Justice.*

TRIAL/IAS PART 2  
NASSAU COUNTY

\_\_\_\_\_  
THERESE PAYEN,

Plaintiff,

ORIGINAL RETURN DATE: 09/19/11  
SUBMISSION DATE: 10/11/11  
Index No. 010248/10

-against-

WESTERN BEEF SUPERMARKET,  
WESTERN BEEF RETAIL, INC.,  
WESTERN BEEF PROPERTIES, INC.,  
SEROTA ROOSEVELT, LLC, and  
DOES 1-10,

MOTION SEQUENCE #001

Defendants.  
\_\_\_\_\_

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Reply.....	3

Defendants, WESTERN BEEF SUPERMARKET, WESTERN BEEF RETAIL, INC., WESTERN BEEF PROPERTIES, INC. and SEROTA ROOSEVELT, LLC (collectively "Western"), move for summary judgment dismissing the complaint against them. Plaintiff opposes the motion.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine

whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, 68 NY2d 320).

This action was brought by plaintiff to recover damages allegedly sustained as a result of a slip and fall around the dairy aisle at the Western Beef Supermarket located in Roosevelt, New York, which occurred on or about July 2, 2007. It is alleged that there was a watery substance on the floor.

Where, as here, defendants move for summary judgment in a slip and fall type action based, *inter alia*, upon defendants' lack of actual or constructive notice of the alleged dangerous condition, "defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (citations omitted)" and that it did not create the condition. (*Beltram v. Metropolitan Life Ins. Co.*, 259 AD2d 456, 457 [2d Dept. 1999]).

Defendants submit the deposition transcripts of plaintiff and McRae Pinnock, a representative of the Western defendants, as well as the affidavit of Mr. Pinnock. Mr. Pinnock avers that at the time of the accident he was the store manager. He further states that his duties include overseeing the store's operations, managing store employees and walking the entire store every 15 to 20 minutes to ensure that the store is clean and running smoothly (¶¶1, 3). He did not notice any wet condition in the area where plaintiff fell but did notice a drop of water near the ice machine several feet away (¶5).

Mr. Pinnock further avers that approximately 8-15 minutes prior to the accident, while on his rounds, he did not see nor was he told that there was any liquid, drops or wetness on the floor (¶7). Mr. Pinnock did not receive any complaints, and there were no prior similar incidents (¶8).

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Based upon Mr. Pinnock's affidavit and his testimony at his deposition, the Western defendants submit that there is no evidence that said defendants either created or had notice of the condition. Plaintiff argues that it is possible that the condition was caused by the ice machine.

Defendants "established their prima facie entitlement to judgment as a matter of law by proffering evidence showing that they neither created nor had actual or constructive notice of the alleged water condition that caused the plaintiff's injuries (citations omitted). In response, the plaintiff failed to raise a triable issue of fact as to causation or notice, relying, instead, on speculation as to the source of the water (citation omitted)" (*Costello v. Zaidman*, 58 AD3d 593 [2d Dept. 2009]).

Accordingly, the Western defendants' motion to dismiss the complaint against them is granted.

This decision constitutes the order of the court.

Dated: \_\_\_\_\_

12-8-11

HON THOMAS P. PHELAN

\_\_\_\_\_  
THOMAS P. PHELAN, J.S.C. XXX

**ENTERED**  
DEC 12 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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