Lopez v Marshalls
2013 NY Slip Op 33147(U)
November 25, 2013
Sup Ct, Queens County
Docket Number: 28626/11
Judge: Bernice D. Siegal

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

----------X

Flor Lopez,

Plaintiff,

-against-

Marshalls,

Defendant.

----------X

Index No.: 28626/11
Motion Date: 9/25/13
Motion Cal. No.: 109
Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §3212 granting summary judgment to the defendant, dismissing plaintiff's complaint with prejudice.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5- 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendant, Marshalls, moves for an Order pursuant to CPLR 3212 granting Defendant summary judgment and dismissing plaintiff's Complaint.

Facts

Plaintiff, Flor Lopez ("Lopez" or "Plaintiff") brought the within action for personal injuries

allegedly sustained as a result of a slip and fall on several keeters a/k/a size tags on the floor at Marshalls at 48-18 Northern Blvd, Long Island City, New York.

Lopez contends that as she was walking in Marshalls when she slipped on numerous keeters on the floor. Lopez states in her deposition that the first time she saw the keeters was while she was on the floor.

Defendants submits the deposition testimony of Donna Byfield, the Store Manager, however she was not at the premises the day of the accident.

Defendants attach the affidavit of Fernando Duran, a former employee, wherein he states that he only saw one small red keeter on the floor at the scene of the accident. Duran testified that the area in question was inspected between 2:00PM and 3:00PM on the date in question and that the accident took place between 2:30PM and 3:00PM. Duran also testified that he received no prior complaints with respect to the keeters at the subject store.

Discussion

CPLR §3212(b) provides, in relevant part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

Summary judgment is a drastic measure "that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues.'" (*Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574 [2d Dept 2004], quoting *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]); *see also Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2nd Dept 2009]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). The role of the court in considering a motion

for summary judgment is not to resolve "issues of fact or matters of credibility," but rather, to determine whether such issues exist (*Pearson*, 63 AD3d at 895; *Kolivas v Kirchoff*, 14 AD3d 493, 493 [2nd Dept 2005].) Further, "in determining a motion for summary judgment, facts alleged by the nonmoving party and inferences which may be drawn from them must be accepted as true" (*Doize*, 6 AD3d at 574). The party moving for summary judgment must submit "evidentiary proof in admissible form," to show that there are no material issues of fact to be decided by the court (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If a moving party meets its burden for a summary judgment, the opposing party can defeat the judgment by "show[ing] facts sufficient to require a trial of any issue of fact." (*id*.)

To demonstrate entitlement to summary judgment in a slip-and-fall case, the defendants have to establish that it maintained the premises in a reasonably safe condition and that it did not create a dangerous or defective condition on the property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it. *(Villano v. Strathmore Terrace Homeowners Ass'n, Inc.*, 76 A.D.3d 1061 [2nd Dept 2010].) Defendants, as movants for summary judgment, had the initial burden of establishing the lack of actual or constructive notice. (*Mahoney v. AMC Entertainment, Inc.,* 103 A.D.3d 855 [2ND Dept 2013]; *Lowe v. Olympia & York Companies (USA), Inc.*, 238 A.D.2d 317 [2nd Dept 1997]). Here, the defendant established it they did not receive prior written notice of the dangerous condition upon which the plaintiff allegedly tripped and fell and that it did not create the dangerous condition through an affirmative act.(See *Masotto v. Village of Lindenhurst*, 100 A.D.3d 718 [2nd Dept 2012]; *Torre v. Huguenot Properties, Inc.*, 77 A.D.3d 732 [2nd Dept 2010].)

However, as part of defendants' "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 fell."(*Levine v. Amverserve Ass'n, Inc.*, 92 A.D.3d 728, 729 [2nd Dept 2012]; *Jackson v. Jamaica First Parking, LLC*, 91 A.D.3d 602 [2nd Dept 2012].) Herein, defendant establishes that the area was last inspected within a few minutes prior to the subject accident. Accordingly, Defendant met its initial prima facie burden.

In opposition, Plaintiff contends that Duran's affidavit is inadmissible as Plaintiff had made a request to depose Duran but was told that Duran no longer works for Defendant and therefore Defendant could not produce Duran. Plaintiff argues that Duran, in his affidavit, does not explicitly state that he no longer is employed by Marshalls, rather, he states that "[o]n September 28, 2011, I was employed as a Store Manager..." However, Byfield testified at her deposition that Duran retired sometime in 2011. In addition, Plaintiff contends that she served a Subpoena on Duran demanding that he appear for a deposition but Duran has not responded to the demand. Duran is a non-party and therefore not under the control of the Defendants. (*See Ewadi v. City of New York*, 66 A.D.3d 583 [1st Dept 2009].) Moreover, a party may not "rely upon mere hope that evidence sufficient to defeat summary judgment may be uncovered during the discovery process." *(Piltser v. Donna Lee Management Corp.*, 29 A.D.3d 973 [2nd Dept 2006]; *Baron v. Newman*, 300 A.D.2d 267 [2nd Dept 2002].)

In addition, photos of the store two weeks after the accident is insufficient to raise a triable issue of fact. "It is well settled that photographs may be used to prove constructive notice of an alleged defect shown in the photographs if they are taken reasonably close to the time of the accident, and if there is testimony that the condition at the time of the accident was similar to the condition shown in the photographs." (*DeGiacomo v. Westchester County Healthcare Corp*., 295 A.D.2d 395,

395 [2nd Dept 2002]; *Muniz v. New York City Transit Authority*, 30 A.D.3d 388 [2nd Dept 2006].) There is no testimony that the conditions in the store were substantially as shown in the photographs attached to the opposition. In addition, the presence of keeters on the floor at a certain time two weeks after the accident does not raise a triable issue of fact with respect to whether the "keeters were on the floor at the time of the subject incident. In addition, there is no way of knowing how the keeters, in the photographs, got onto the floor.

Accordingly, Plaintiff failed to raise a triable issue of fact for trial.

Conclusion

For the reasons set forth above, Defendant's motion for summary judgment is granted and the complaint is dismissed.

Dated: November 25, 2013

_____

Bernice D. Siegal, J. S. C.