Michel v Petsmart, Inc.

2014 NY Slip Op 33103(U)

November 20, 2014

Supreme Court, Queens County

Docket Number: 3510/2013

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

TATYANNA MICHEL,

Plaintiff,

- against -

PETSMART, INC.,

Defendant.

Index No.: 3510/2013

Motion Date: 10/10/14

Motion No.: 61

Motion Seq.: 3

- x

The following papers numbered 1 to 15 were read on this motion by defendant, PETSMART, INC., for an order pursuant to CPLR 3212(b) granting summary judgment in favor of defendant and dismissing the plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affidavits-Memo of Law.....	1 - 8
Affirmation in Opposition-Affidavits-Exhibits.....	9 - 14
Reply Memorandum-Memo of Law.....	15 - 20

This is an action for damages for personal injuries sustained by the plaintiff, Tatyanna Michel, on October 7, 2012, when she purportedly slipped and fell on a wet floor while walking inside the Petsmart Store located at 4 West Circle, Valley Stream, Nassau County, New York. In her verified bill of particulars dated June 3, 2013, plaintiff asserts that she was caused to slip on urine that was not properly cleaned up and allowed to remain on the floor in an aisle adjacent to a yellow sign which was lying flat on the floor in the middle of the aisle. She also testified at her deposition that she slipped on the yellow caution sign that was laying flat in the aisle. Plaintiff alleges that as a result of the accident she sustained, inter alia, a torn meniscus of the right knee requiring arthroscopic surgery; a tear of the medial meniscus of the left

knee, and a sprain of the left shoulder.

The plaintiff commenced this action by filing a summons and complaint on February 22, 2013. Plaintiff claims that the defendant had constructive notice of the hazardous condition as the wet floor was visible, apparent, and existed for a sufficient length of time prior to the accident that the defendant had sufficient time to notice and remedy the dangerous condition. In addition, the plaintiff claims the defendant was negligent in creating and allowing the wet condition to exist on the floor and failed to take measures to remedy or correct the dangerous condition.

Issue was joined by service of the defendant's answer dated March 5, 2013. Plaintiff filed a Note of Issue on May 21, 2014. The matter is presently scheduled on the calendar of the Trial Scheduling Part for December 16, 2014. The defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint. Petsmart alleges that it had no notice, either constructive or actual of the allegedly collapsed wet floor sign which plaintiff contends caused her to slip and fall.

In support of the motion, the defendant submits an affirmation from counsel, Carl M. Perri, Esq., a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of the examination before trial of the plaintiff, Ms. Michel; a copy of the store's incident report form; eyewitness reports; a copy of the transcript of the deposition testimony of Petsmart Store Manager Osric Burrowes; an affidavit of Osric Burrowes; and a photograph depicting yellow caution signs lying flat in an aisle of the store.

The plaintiff, age 40, testified at an examination before trial on December 9, 2013 that she is employed as a nurse at Coney Island Hospital and Queens Long Island Medical Group. She testified that on October 7, 2012 she was at the Petsmart Store in Valley Stream to retrieve her dog who was there for grooming. She entered the store with her fiancé and two daughters. She stated that she turned to her right and proceeded down the aisle towards the rear of the store where the grooming salon was located. She then proceeded with her two daughters to the front of the store to pay for some merchandise. Her fiancé remained in the rear with the dog. They walked up the center aisle towards the cashier at the front of the store. She testified that when she was approximately in the middle of the store, she slipped on a wet floor sign that was lying flat on the wet floor. She stated that the floor was wet. It seemed to her that the floor had just

been mopped and the sign that was adjacent to the wet area on the floor was flat causing her to also slip on the sign. She stated that her right foot slipped on the wet floor and her left foot was on top of the sign. The sign slid out with her left foot on it. She slipped with her right foot on the moisture and slipped again when putting her foot on the yellow sign while trying to keep herself from falling. She stated that she was looking straight ahead and did not see the sign because it was lying flat on the ground. She stated that other than the wet floor sign laying flat on the floor, there were no other warning signs or cones. She stated that the liquid she slipped on was a mixture of urine and ammonia that was used to mop it up. She stated that the store manager called an ambulance and she was transported to North Shore Franklin Hospital.

Osric Burrowes, the store manager at the Valley Stream location of Petsmart, testified at an examination before trial on May 20, 2014. He stated that generally when pets have an accident in the aisles a store employee mops it up with a special quick drying solution and places a wet floor sign in the vicinity. On the day of the plaintiff's accident he was informed by a sales associate that an individual had fallen on the floor. He went to the scene and observed the plaintiff sitting on the floor. Plaintiff's daughter told him that her mother slipped on the sign and fell. He observed the wet floor sign flat on the ground. Other than the sign he did not see a wet area on the floor. He identified the Petsmart incident report in which he wrote that the customer told him that she did not see the wet floor sign on the floor and slipped on it. A witness, Denise Baez, also told Burrowes that plaintiff stepped on the sign and fell to the floor. The store manager had plaintiff's daughter prepare a witness report in which her daughter, Ashley Michel, wrote that her mother didn't see the wet floor sign in the middle of the floor and slipped on it. Mr. Burrowes also identified a photograph of the scene showing the collapsed wet floor sign lying on the floor in the aisle. He stated that the employees are advised to pick up dog waste and urine when they see it on the floor.

Defendant also submits an affidavit from Osric Burrowes stating that no one from Petsmart was aware that a wet floor sign was lying flat on the floor when plaintiff slipped on it.

Defendants argue that the plaintiff's complaint should be dismissed because Petsmart had no actual or constructive notice of the allegedly collapsed wet floor sign which plaintiff contends caused her to slip and fall. Defendant also argues that the collapsed sign on the floor was an open and obvious condition

(citing Salisbury V. Sundance, Inc., 2006 Mich. App. LEXIS 38 [2006]).

In opposition, plaintiff's counsel, Stuart Wagner Esq., asserts that defendant's counsel has mischaracterized the evidence with respect to the cause of the plaintiff's fall. Whereas the plaintiff testified at her deposition that she slipped on a wet area consisting of urine and ammonia on the floor as well as on an adjacent collapsed sign, the defense counsel directs his motion only to the portion of the testimony in which she stated that she slipped on the sign.

With respect to notice, plaintiff claims that the wet area was a recurring condition which defendant was fully aware of. Counsel asserts that Mr. Burrowes testified that because Petsmart permits customers to bring their dogs to the store, the employees are aware that the pets often relieve themselves on the selling floor aisles. Counsel claims that where a property owner had actual knowledge of the tendency of a particular dangerous condition to reoccur he is charges with constructive notice of each specific recurrence of the at condition (citing Bush v Mechanicville Warehouse Corp., 69 AD3d 1207 [3d Dept. 2012]). Therefore, the plaintiff contends that the combination of urine and ammonia on which plaintiff claims she fell is a hazardous condition known to the defendant that reoccurs as a matter of course on the floors in the store. Counsel asserts that the defendant has failed to show in what manner it purported to discharge its duty to keep the premises reasonably safe from this known recurring hazardous condition. Specifically, it is asserted that the defendant failed to provide any proof whatsoever as to whether any one from the store inspected the aisle at any time prior to the accident. Thus, it is argued that there is a question of fact as to whether the condition existed for a sufficient period of time prior to the plaintiff's fall to have permitted defendant to discover the condition and take remedial action.

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto, this court finds as follows:

To impose liability on a defendant for a slip and fall on an allegedly dangerous condition on a floor, there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time (see Rodriguez v Sixth President, Inc., 4 AD3d 406 [2d Dept. 2004]).

"A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (Rallo v Man-Dell Food Stores, Inc., 117 AD3d 705 [2d Dept. 2014]; Petersel v Good Samaritan Hosp. of Suffern, N.Y., 99 AD3d 880 [2d Dept. 2012]). "To meet its initial burden on the issue of lack of constructive notice, a 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" (Farren v Board of Educ. of City of N.Y., 119 AD3d 518 [2d Dept. 2014]; Birnbaum v New York Racing Assn., Inc., 57 AD3d 598 [2d Dept. 2008]).

However, while a landowner has a duty to maintain its premises in a reasonably safe manner (see Basso v Miller, 40 NY2d 233 [1976], Rivas-Chirino v Wildlife Conservation Socy., 64 AD3d 556 2d Dept. 2009], there is no duty on the part of a landowner to warn against, and a court is not precluded from granting summary judgment, where the condition complained of is an open and obvious condition that is readily observable by those employing the reasonable use of their senses and is not inherently dangerous (see Brande v City of White Plains, 107 AD3d 926 [2d Dept. 2013]; Boyd v New York City Hous. Auth., 105 AD3d 542 [1st Dept. 2013]; Buccino v City of New York, 84 AD3d 670[1st Dept. 2011]). No duty exists to prevent or even warn of conditions which can be readily perceived by the use of ones senses.

Here, the defendant, Petsmart, failed to make a prima facie showing that it was entitled to judgment as a matter of law on the ground that it had no notice of the condition which allegedly caused the plaintiff's fall. There was no testimony from the defendant's pre-trial witness nor any other evidence presented as to when the area in question was last cleaned or inspected. Although Mr. Burrowes testified that the employees are required to clean up any waste when they see it on the floor there was no testimony as to specifically when the aisle in question was last inspected. Here the defendant only provided testimony as to general cleaning and inspection procedures without indicating when the aisle where the plaintiff fell was last inspected, cleaned, or maintained (see Lamour v Decimus, 118 AD3d 851 [2d Dept. 2014]; Klerman v Fine Fare Supermarket, 96 AD3d 907 [2d Dept. 2013] Levine v Amverserve Assn., Inc., 92 AD3d 728 [2d Dept. 2013] ; Santos v 786 Flatbush Food Corp., 89 AD3d 828 [2d Dept. 2011]; Birnbaum v New York Racing Assn., Inc., 57 AD3d 598 [2d Dept. 2008];; Kazimir v Cornyn, 30 AD3d 380 [2d Dept 2006]).

Plaintiff claims that she fell in a wet area of the center aisle of the floor which she claims consisted of a mixture of urine and ammonia. The defendant claims that the floor was not wet in the area where the plaintiff slipped. Defendant asserts that the plaintiff's testimony that she fell in a wet area of the floor is feigned and contradicted by the incident reports which states that she slipped on the collapsed sign. Defendant asserts that the sign was open and obvious and not an inherently dangerous condition. However, the plaintiff clearly testified that there was liquid on the floor which precipitated her fall. She stated that after slipping with her right foot on the liquid she landed with her left foot on the sign which skated out from under her. Thus, there is a question raised by the testimony as to the exactly how the plaintiff fell which cannot be determined on a motion for summary judgment.

This Court finds that the testimony of the defendant's witnesses is not sufficient to satisfy the defendant's threshold burden of demonstrating lack of notice. As stated above, the defendant submitted no evidence whatsoever to establish when the area where the accident occurred was last inspected or cleaned and has not shown prima facie that there was no water on the floor or that the water was not on the floor for such time that the defendant could have discovered the hazardous condition and remedied it.

In addition this court finds that the defendant's evidence was insufficient to establish that the moist or wet condition of the floor, as well as the collapsed sign, was open and obvious and not inherently dangerous under the circumstances and did not present an unreasonable or foreseeable risk of harm (see Maneri v Patchogue-Medford Union Free Sch. Dist., 2014 NY Slip Op 07336 [2d Dept. 2014][whether a hazard is open and obvious is fact specific cannot be divorced from the surrounding circumstances as the condition may be rendered a trap where it is obscured or the plaintiff is distracted]; Doughim v M & US Prop., Inc., 120 AD3d 466 [2d Dept. 2014]; Russo v Home Goods, Inc., 119 AD3d 924 [2d Dept. 2014]). Here, the picture submitted by the defendant depicts the sign in a collapsed condition and low to the ground and would not be readily observable by those employing the reasonable use of their senses. Thus, given the totality of the circumstances, including the fact that the collapsed sign may be considered a tripping hazard, the defendant has failed to eliminate triable issues of fact as to whether there was liquid in the aisle and whether the liquid and adjacent collapsed sign created an unsafe condition for the plaintiff.

As defendant failed to establish its entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of the opposition papers submitted by the plaintiff (see Dixon v Superior Discounts & Custom Muffler, 118 AD3d 1487 [2d Dept. 2014]; Maloney v Farris, 117 AD3d 916 [2d Dept. 2014]; Giraldo v Twins Ambulette Serv., Inc., 96 AD3d 903[2d Dept. 2012]; King v 230 Park Owners Corp., 95 AD3d 1079[2d Dept. 2012]; Hill v Fence Man, Inc., 78 AD3d 1002 [2d Dept. 2010]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the defendant's motion for summary judgment dismissing the plaintiff's complaint is denied.

This matter remains on the calendar of the Trial Scheduling Part for December 16, 2014.

Dated: November 20, 2014
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.