McCready v Trade Fair Stores, Inc.
2015 NY Slip Op 31800(U)
September 11, 2015
Supreme Court, Queens County
Docket Number: 5019/2013
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

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DEBORAH McCREADY,

Plaintiff,

- against -

TRADE FAIR STORES, INC. D/B/A TRADE FAIR SUPERMARKET,

Defendant.

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Index No.: 5019/2013

Motion Date: 8/18/15

Motion No.: 96

Motion Seq.: 2

The following papers numbered 1 to 15 read on this motion by defendant for an order pursuant to CPLR 3212(b) granting summary judgment in favor of defendant and dismissing plaintiff's complaint; and on this cross motion by plaintiff to reopen discovery requiring defendant to abide by the terms of the preliminary conference order and provide names and addresses for witnesses and/or respond to plaintiff's combined demands which were duly served.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits...............	1 - 4
Notice of Cross Motion-Affidavits-Exhibits...........	5 - 8
Defendant's Reply Affirmation........................	9
Defendant's Affirmation in Opposition-Exhibits......	10 - 11
Plaintiff's Reply Affirmation-Affidavits-Exhibits...	12 - 15

This is an action for damages for personal injuries allegedly sustained by plaintiff on March 17, 2012 when she slipped and fell on a spill while shopping in the Trade Fair Supermarket (Trade Fair) located at 22-20 36th Avenue, Astoria, Queens County, New York.

This action was commenced by the filing of a summons and complaint on March 15, 2013. Issue was joined by service of defendant's answer on April 30, 2013. Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint.

In support of the motion, defendant submits an affidavit from counsel; a copy of the pleadings; the transcript of the examination before trial of plaintiff; an affidavit from Mohammed Chowdhury, a manager of Trade Fair; a copy of the so-ordered stipulation extending the time to serve summary judgment motions; correspondence from defendant’s counsel’s office to plaintiff’s counsel’s office; and an orthopedic medical report from Edward A. Toriello, M.D. dated September 4, 2014.

At her deposition taken on June 15, 2014, plaintiff testified that on March 17, 2012 at 7:30 p.m. she left her house to go shopping at Trade Fair. She was walking to the cashier when the accident occurred. She did not see what she slipped on before she slipped. Before she slipped, she was looking straight ahead towards one of the cash registers. She did not look at the ground at any point. She does not know which foot or feet slipped. She fell on her right side. She does not know what she slipped on, but it was white and it looked like it could have been ice cream, butter, milk or half and half. She states that the spill was approximately 8 to 10 inches in area and was a white liquid. A person that helped her up said that earlier he thought something had fallen and nobody had cleaned it up. Another person nearby said someone had spilled something and it was not wiped up yet. The person did not say how long it had been there. Plaintiff never made any complaints about the floor or the white substance before the accident occurred.

In his affidavit Mr. Chowdhury states that he was employed by Trade Fair as the manager at the subject store on the date of plaintiff’s accident. He states that the floors were cleaned by a commercial cleaning service the night before plaintiff’s accident at approximately 11:00 p.m. During that cleaning, the floors were swept and mopped. During the day of the accident, an employee was responsible for cleaning in the supermarket from 6:00 a.m. to 2:00 p.m. Another employee was responsible for cleaning from 2:00 p.m. to 10:00 p.m. Mr. Chowdhury states that this “employee who performed cleaning on the date and time of the plaintiff’s accident walked through each aisle of the supermarket, the area by the cash registers, and the entrance area approximately every 25-30 minutes cleaning and looking for any areas that needed cleaning.” He further states that “I spoke with the employees who

were working on the day at the time of the plaintiff's accident and they were not advised of any spillage on that date in the area alleged by the plaintiff in this lawsuit."

Defendant also argues that even if the court does not dismiss the complaint on the grounds that defendant did not have notice of the alleged condition, the complaint should be dismissed as the injury claimed herein was not proximately caused by any breach of duty by defendant. Defendant submits Dr. Toriello's affirmed report stating that plaintiff's triple arthrodesis surgery following the subject accident was not caused by or exacerbated by the subject accident. Rather, the surgery addressed a pre-existing unrelated condition in her right foot. Defendant also submits the report of plaintiff's physician Dr. Charles Lombardi in which he indicates prior to the subject accident that plaintiff would benefit from a triple arthrodesis surgery with Achilles tendon lengthening. The report from Dr. Lombardi was not affirmed and therefore is inadmissible (see Lazu v Harlem Group, Inc., 89 AD3d 435 [1st Dept. 2011]; Migliaccio v Maraca, 56 AD3d 393 [1st Dept. 2008]). Based on these facts, this Court finds that the conclusory and generalized statement by Dr. Toriello is insufficient to demonstrate a lack of proximate cause on this summary judgment motion.

In opposition, plaintiff's counsel contends that defendant failed to demonstrate that it did not have notice of the spill. Specifically, at her deposition plaintiff testified that a manager described as "an African man, dark skin, about 5-10, about 40 years old" came over to her after she got up and she spoke with him for about ten minutes. In her affidavit submitted with the opposition papers, plaintiff states that the manager she was referring to at her deposition is Jeff and that Jeff said to her "he thought something had fallen and nobody cleaned it up because he hadn't been in the store, so nobody had cleaned it up." On the cross motion, plaintiff's counsel argues that defendant has failed to produce Jeff or any manager who matches the description set forth by plaintiff, and as such, discovery must be reopened.

In reply, defendant's counsel contends, inter alia, that plaintiff's contradictory affidavit should be disregarded.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position

(see Zuckerman v. City of New York, 49 NY2d 557[1980]). A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall case involving the property 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 (see Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Bruk v Razag, Inc., 60 AD3d 715 [2d Dept. 2009]). 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 defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]). "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 fell" (Birnbaum v New York Racing Association, Inc., 57 AD3d 598 [1986]; see Pryzywalny v New York City Tr. Auth., 69 AD3d 598 [2d Dept. 2010]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Braudy v Best Buy Co., Inc., 63 AD3d 1092 [2d Dept. 2008]).

Here, although Mr. Chowdhury testified about generalized practices and routines with regard to the cleaning of the supermarket, there is no testimony in the record and no evidence elicited as to what the employees responsible for cleaning did in particular on the day of plaintiff's accident and no testimony with regard to when the area where plaintiff allegedly slipped had last been inspected.

Accordingly, the evidence submitted by defendant was insufficient to demonstrate, prima facie, that defendant did not create the condition nor to show that it did not have actual or constructive notice of the condition prior to plaintiff's accident (see Altinel v John's Farms, 113 AD3d 709 [2d Dept. 2014]; Mercedes v City of New York, 107 AD3d 767 [2d Dept. 2013]; Klerman v Fine Fare Supermarket, 96 AD3d 907[2d Dept. 2012][the deposition testimony of the defendant's manager which merely referred to the general inspection practices of the supermarket and provided no evidence as to when the produce aisle was last inspected before the plaintiff's fall was insufficient to satisfy the defendant's initial burden on the issue of lack of constructive notice]).

As defendant failed to establish its entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of plaintiff's opposition papers (see Giraldo v Twins Ambulette Serv., Inc., 946 NYS2d 871 [2d Dept. 2012]; King v 230 Park Owners Corp., 95 AD3d 1079[2d Dept. 2012]; Hill v Fence Man, Inc., 78 A.D.3d 1002 [2d Dept. 2010]).

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

ORDERED, that defendant's motion for summary judgment is denied; and it is further

ORDERED, that plaintiff's cross motion to reopen discovery is granted to the extent that a deposition of defendant's manager referred to as "Jeff" shall be taken within thirty (30) days of this Order.

Dated: September 11, 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.