

**Smith v Sears Holding Corp.**

2015 NY Slip Op 32426(U)

December 23, 2015

Supreme Court, New York County

Docket Number: 150405/2012

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 29

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Smith, Crystal

Plaintiff,

Index No. 150405/2012

-against-

Sears Holding Corporation d/b/a Kmart,  
One Penn Plaza, LLC and Sears Holding Management  
Corporation d/b/a/ Kmart

Defendants.

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**KALISH, J.:**

The Defendants' motion to reargue the Court's prior decision denying the Defendants' motion for summary judgment is hereby denied as follows:

Relevant Background, Underlying Dispute and Deposition Testimonies

Without reiterating the entirety of the pleadings, in the underlying personal injury action, the Plaintiff alleges in sum and substance that on November 17, 2011 at approximately 4:45 p.m. she slipped and fell on an accumulation of water, liquid and/or some other slippery substance in the women's bathroom of a "Kmart" located at 250 West 34<sup>th</sup> Street, New York County. At the time of the Plaintiff's accident she was working for the Olan Mills Portrait Studio, which is located in the Kmart. The Plaintiff alleges that the accident and the injuries she sustained therein were the result of the Defendants' negligence in the ownership, operation, maintenance and control of the subject premises.

The Defendants previously moved for summary judgment dismissing the Plaintiff's action on the bases that they did not create or have constructive notice of the slippery condition that allegedly caused the Plaintiff's accident. The Court reviewed all of the Parties' submitted motion papers including the Defendants's moving papers, the Plaintiff's opposition and the Defendants' reply to the Plaintiff's opposition.

On June 23, 2015, the Court conducted oral argument on the Defendants' motion for summary judgment. Based upon the Court's review of the Parties' submitted moving papers and the arguments presented at oral argument, the Court indicated on the record that the Defendants' motion for summary judgment was denied. The Court found that there were issues of fact as to whether or not the Plaintiff slipped due to water dripping from a faucet under the sink located in the bathroom where the accident occurred. The Court stated on the record that although the Defendants had met their prima facie burden for summary judgment, the Plaintiff had established that there was an issue of fact as to whether or not the Plaintiff's accident was caused by a leaky faucet in the subject bathroom. Specifically, the Court referred to the Plaintiff's EBT testimony, wherein she testified that while she was laying on the floor immediately after the accident, she saw water on the ground, observed that she was wet and saw that the faucet under a nearby sink was dripping.

The Defendants now move to reargue the Court's prior decision denying summary judgment on the bases that the Court overlooked and/or misapprehended the facts and law.

Parties' contentions in the instant motion

In support of the instant motion to reargue, the Defendants argue in sum and substance that the Court "overlooked and misapprehended" the Plaintiff's assertions in its review of the Plaintiff's deposition testimony. Specifically, the Defendants argue that although the Plaintiff asserted that at some point after the incident, she saw water dripping from a faucet located under the sink close to the restroom

stall and that there was a small “puddle” directly under the faucet, the Plaintiff did not indicate that she saw water anywhere else on the floor of the restroom. The Defendants further refer to the deposition testimony of Kmart’s Loss Prevention manager Jose Pagan, who testified that he looked at the PVC pipes and the faucet under the sink and that they were both dry. The Defendants argue that the Plaintiff’s assertion that she slipped on water that may have come from the faucet underneath the sink is mere speculation.

In opposition to the instant motion for reargument, the Plaintiff argues that while the Defendants’ original motion for summary judgment argued that they did not create the puddle of water (that the Plaintiff slipped on) and that they did not have actual or constructive notice of its existence, the instant motion to reargue only addresses the issue of creation. The Plaintiff argues that since the Defendants’ instant motion to reargue does not address the issues of active or constructive notice, the Defendants would not be entitled to summary judgment even if the Court were to accept the Defendants’ arguments for reargument.

The Plaintiff further argues that the Court did not misapprehend any laws or facts in denying the Defendants’ prior motion for summary judgment. The Plaintiff argues that the Defendants’ own witness testified that a puddle existed and that both testimonial and photographic evidence show that the Plaintiff could have slipped on said puddle. The Plaintiff’s counsel also refers to specific sections of both the Plaintiff’s deposition testimony and the deposition of the Defendant’s witness Mr. Pagan to show that the Court did not misapprehend any laws or facts in determining that there were issues of fact as to whether or not the Plaintiff slipped due to a leaky faucet. Specifically, the Plaintiff’s counsel argues that the Plaintiff testified that she fell close by the “second sink” and that after the accident she saw that the faucet under the sink was dripping and there was a puddle of water under the sink. The Plaintiff also refers to the Mr. Pagan’s testimony that after the accident he saw the Plaintiff lying on the bathroom

floor surrounded by water, that she informed him that she had slipped and fallen on water, that her clothes and hands were wet, and that after the accident a maintenance worker cleaned up the water. Plaintiff's counsel also refers to Plaintiff's testimony that she smelled an odor in the bathroom that suggesting that the it had been recently mopped, and Mr. Pagan's testimony that the bathroom floor was mopped at times. Taken together, the Plaintiff argues that said testimony was sufficient to create an issue of fact, and that the Court did not misapprehend any facts or laws in denying summary judgment.

In reply to the Plaintiff's opposition, the Defendants argue that they only seek to reargue that portion of the Court's prior decision indicating that there was an issue of fact as to whether or not the Defendants created the subject condition that allegedly caused the Plaintiff's accident. The Defendants' further indicate that they do not concede that they had actual or constructive notice of the subject condition.

#### Analysis

#### The Defendants have failed to meet their burden on the instant motion to reargue

CPLR §2221 (d) (1) - (3) sets forth the requirements for motions to reargue:

(d) A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the Court of appeals.

The Defense bears the initial burden on a motion to reargue a prior decision pursuant to CPLR §2221. Further "[a] motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.' Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (William P. Pahl

Equip. Corp. v. Kassis, 182 AD2d 22, 27 (NY App Div 1st Dept 1992) citing Schneider v. Solowey, 141 AD2d 813 (NY App Div 2nd Dept 1988); Pro Brokerage, Inc. v. Home Ins. Co., 99 AD2d 971 (NY App Div 1st Dept 1984); Foley v. Roche, 68 AD2d 558 (NY App Div 1st Dept 1979); see also Kent v 534 E. 11th St., 80 AD3d 106 (NY App Div 1st Dept 2010); Matter of Carter v Carter, 81 A.D.3d 819 (N.Y. App. Div. 2nd Dept 2011)).

Upon review of the Defendants' submitted papers, this Court finds that the Defendants have failed to establish that this Court overlooked or misapprehended any matters of fact or law in rendering its prior decision denying the Defendant's prior motion for summary judgment. Specifically, the Defense has failed to establish that this Court overlooked or misapprehended any matters of fact or law in determining that the Plaintiff created an issue of fact as to whether or not the Plaintiff's accident was caused by a leaky faucet.

Further, the Defendants' instant motion for reargument merely repeats the arguments they presented in their prior motion for summary judgment, refers to the same sections of the depositions in support of said arguments and repeats the same arguments that Defendants' counsel presented at oral argument in support of the prior motion for summary judgment. The Defendants' major point of contention in the instant motion to reargue is that the Court should not have read the Plaintiff's deposition testimony to suggest that the Plaintiff observed a leaking faucet and puddle of water in the immediate vicinity of her accident. Instead, the Defendants argue that the Court should conclude that the Plaintiff was a substantial distance away from the alleged "puddle" at the time of her accident. The Defendants further argue in sum and substance that Mr. Pagan's deposition testimony does not establish that the water he observed surrounding the Plaintiff and on the Plaintiff's clothes after the accident was present when the accident occurred or had any causal relationship to the accident. As such, the Defendants are not arguing that the Court "overlooked or or misapprehended" any matters of fact or law in denying the Defendants' prior motion, but merely seeking to relitigate the Court's prior decision upon the same arguments and deposition testimony.

In sum and substance, the Defendant is asking the Court to reevaluate the Defendants' prior arguments and reexamine the same deposition testimonies the Court reviewed in denying the Defendants' prior motion for summary judgment, in order to reach the opposite conclusion. As previously stated, reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided by the Court.

Accordingly, the Defendants' motion for reargument is hereby denied.

There are issues of fact in the underlying action as to whether or not the Defendants created and/or had actual or constructive notice of the subject condition that allegedly caused the Plaintiff's accident.

Even assuming arguendo that the Court were to grant the Defendants' motion for reargument, upon reexamination of the prior motion papers and arguments made by the Parties at oral argument, the Court would still find that there was an issue of fact as to whether or not the Defendants created and/or had actual or constructive notice of the subject condition that allegedly caused the Plaintiff's accident.

The Defendants specifically indicate that they are not seeking to "reargue" the Court's determination that they made out their prima facie burden on the prior motion for summary judgment, and that they are only seeking to "reargue" the Court's determination that there was an issue of fact as to whether or not the Defendants created the subject condition that allegedly caused the Plaintiff's accident. However, said description mis-characterizes the Court's prior determination denying the Defendant's motion for summary judgment.

The Defendant's original moving papers addressed the Plaintiff's deposition testimony, which presented two potential theories as to why the bathroom floor was slippery. Specifically, the Plaintiff's deposition testimony suggested the possibilities that the floor was slippery due to a previous mopping and/or that the faucet underneath a nearby sink was leaking. The Defendants argued in sum and substance that they neither created nor had actual or constructive notice of either of these potential "causes" of the Plaintiff's accident. As part of their arguments on these points, the Defendants argued that there were insufficient bases to believe that the accident was caused by liquid left over from mopping and/or that accident was caused by a leaky faucet under a sink in the bathroom.

As stated on the record following oral argument, this Court found that the Defendants had met their prima facie burden on the motion for summary judgment, however, there were issues of fact as to whether or not the Plaintiff's accident was caused by water dripping from the leaky faucet as described by the Plaintiff. Said ruling implies that there were issues of fact as to whether or not the Defendant created the leaky condition and that there are also issues of fact as to whether or not the Defendants had actual or constructive notice of the alleged leak.

Having reviewed of the papers submitted on the prior motion for summary judgment and the arguments presented at oral argument, the Court now confirms that there are issues of fact as to whether or not the Plaintiff's accident was caused by a leaky faucet and whether or not the Defendants created and/or had actual or constructive knowledge of said condition.

The Plaintiff testified at her deposition in sum and substance that she slipped on a slippery surface in the bathroom of the subject Kmart, that after the accident she saw that the faucet under the nearby sink was dripping, and that there was a puddle of water nearby. Further, although the Defendants' witness, Mr. Pagan, testified that he looked at the faucet under the sink and saw that it was not leaking, he also testified that after the accident he found the Plaintiff lying on the floor of the bathroom surrounded by water, with wet clothes.

The Court recognizes that the Plaintiff's testimony as to the leaky faucet directly contradicts Mr. Pagan's testimony that the faucet was not leaking. The Court further recognizes that the Defendants submitted an affidavit by an employee Vida Thomas, who stated that she was in the bathroom less than five minutes prior to the accident and observed no leaking water or liquids present on the floor. However, the Plaintiff's testimony that she observed the leaky faucet immediately after her accident and Mr. Pagan's testimony that he found the Plaintiff on the ground wet and surrounded by water immediately following the accident, are sufficient to create an issue of fact as to whether the faucet was leaking and whether said leak lead to the Plaintiff's accident. Specifically, the Plaintiff's testimony that she saw the faucet dripping after the accident and Mr. Pagan's testimony that there was enough water to surround the Plaintiff and wet her clothes call into question both Ms. Thomas' affidavit that there was no leaking water or liquids present on the floor less than five minutes prior to the accident and Mr. Pagan's testimony that the faucet was not leaking. Taken together with the Plaintiff's testimony that she saw a leaky faucet immediately after the accident, Mr. Pagan's testimony that there was water surrounding the Plaintiff on the floor of the bathroom following the accident and that the Plaintiff's clothes were wet is sufficient to create an issue of fact as to the condition of the bathroom and whether or not the Defendants created and/or had actual or constructive knowledge of said condition.

Accordingly, there were issues of fact warranting the denial of the Defendants' prior motion for summary judgment.




Conclusion

Accordingly, and for the reasons so stated the Defendants' motion to reargue the Court's prior decision denying the Defendants' prior motion for summary judgement is hereby denied in its entirety.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: December 23, 2015

ENTER:

  
\_\_\_\_\_, JSC  
**HON. ROBERT D. KALISH**  
J.S.C.