Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

x

SHARON LESLIE,

Plaintiff,

-against-

KING KULLEN GROCERY CO., INC. d/b/a KING KULLEN SUPERMARKET,

Defendant.

x

Index No. 603446/2015

Motion Submitted: 04/03/17
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Defendant supermarket moves this Court for an Order granting summary judgment in its favor and dismissing the complaint. Plaintiff opposes the requested relief.

Plaintiff commenced this action to recover damages for personal injury that she suffered when she fell at defendant's supermarket on August 27, 2013. The accident occurred at approximately 6:30 p.m. Plaintiff and her co-worker were at the supermarket to pick up creamer from the dairy area of the market, located in the rear of the store. Plaintiff's co-worker did not witness the accident; she was walking ahead of plaintiff. Plaintiff claims that she slipped on grapes, causing her to fall to the floor and sustain injuries.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of

fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

It is axiomatic that a store owner or owner of an establishment to which the general public is invited is charged with the duty to maintain those premises in a reasonably safe condition (*see generally*, ***Peralta v. Henriquez***, 100 NY2d 139 [2003]; ***Gradwohl v. Stop &Shop Supermarket Company, LLC***, 70 AD3d 634 [2d Dept 2010]).

Of course, a property owner may be held liable for damages resulting from a hazardous condition on its premises if it created the hazardous condition or had either actual or constructive notice of the condition in sufficient time to remedy it. (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837 [1986]). To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (***Borenkoff v Old Navy***, 37 AD3d 749, 750 [2d Dept 2007]).

In order to be entitled to summary judgment, a defendant property owner must establish that it maintained its property in a reasonably safe manner, and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be present on the premises (***Gradwohl***, ***supra*** at 636).

Plaintiff testified that she went to the King Kullen on August 27, 2013, with her co-worker, to buy creamer. She could not testify as to the exact route they took to reach the creamer, but they entered the store through the produce department and then proceeded to the back of the store where the dairy area is located. Plaintiff had been to the store before, but could not state when she was there last, or how many times she had been there before.

They got the creamer from the dairy section and then walked toward the store's salad bar. The salad bar was located on the opposite side of the store. Plaintiff did not reach the salad bar because she fell before she reached that section. When asked if she recalled how far from the dairy section her accident occurred, or how long after she left the dairy department that the accident occurred, she did not know. Plaintiff also did not recall what products were located in the area where her accident occurred.

Plaintiff testified that as she approached the area where she fell, she did not observe anything on the floor in that area. She was looking straight ahead just before she fell. According to her testimony, plaintiff did not recall which foot slipped, or whether

both of her feet slipped. She also did not recall whether her foot/feet slipped out in front of her, or behind her, or to one side or the other.

At the time of her accident, plaintiff was wearing rubber flip-flops, and she was carrying the creamer in her hands. When she fell, plaintiff testified that she fell backwards, falling onto her back and striking her head on the floor. Plaintiff stated that she lost consciousness, but did not know how long she remained unconscious. After she regained consciousness, she looked at the floor and saw "a wet area and smushed" grapes. Plaintiff could not estimate how many grapes there were, and she thought they were green grapes. She described the size of the wet area on the floor as being "the width of me at least and the length of my thighs and calves," but she was unable to estimate the size in terms of inches or feet. Her legs were "sticky from the ground and wet, and it was kind of a little crusty laying there."

Plaintiff described the store's floor as being a light color, and that the lighting within the store was "average for a store." Plaintiff had no difficulty seeing prior to her accident, and there were no displays or items that obstructed her view of the floor in the area where she ultimately fell.

Plaintiff had no idea how long it took for defendant's employees to arrive, nor does plaintiff know how long it took ambulance personnel to arrive at the scene. Once she was on the ambulance gurney, she looked down at the floor and did not see any additional wet portions of the floor other than where she had fallen; she did not see any footprints in the wet area where she fell, nor did she observe any shopping cart tracks or debris in that wet area. Plaintiff did not recall if the wetness on the floor was clear or colored.

There were no wet floor signs or warning cones in the area where plaintiff's accident occurred. Plaintiff did not know if there were grape displays in the area where her accident occurred, nor did she know how long the grapes had been on the floor. Plaintiff did not see any employees in the area where her accident occurred at the time that she fell. Plaintiff had never previously made any complaints to defendant's personnel concerning the condition of the store.

Plaintiff's co-worker, Eileene Occhiogrosso, testified that she and plaintiff were on a dinner break from their employment, and they decided to buy coffee and creamers for their coffee pot at work. They drove to King Kullen to purchase the coffee and creamers, and entered the store through the produce department. They walked to the back of the store, made a right, and proceeded to the dairy section, which was also in the back of the store, but on the opposite side. They walked to the dairy section without incident and retrieved the items they wished to purchase. She and plaintiff then went back toward the produce section. Somewhere between the dairy and produce departments, plaintiff's accident occurred. Occhiogrosso estimated that the accident

happened closer to the produce section than to the dairy section, but she was unable to estimate distance in terms of feet or inches.

At the time of the accident, Ms. Occhiogrosso was walking in front of plaintiff, so she did not see plaintiff fall. Ms. Occhiogrosso "just turned around and [plaintiff] was on the floor." The two were in the store for a total of about ten to fifteen minutes before the accident occurred. When asked to estimate how long of a period of time elapsed between the time that they reached the back of the produce department and headed toward the dairy section, selected their products, turned back, and reached the accident location, Ms. Occhiogrosso answered, "[w]ell, we were in a rush, so I would say probably five minutes maybe."

After plaintiff fell, Ms. Occhiogrosso saw "one or two grapes by [plaintiff] that were smashed." She described the grapes as green grapes. Aside from the one or two green grapes, Ms. Occhiogrosso saw nothing else on the floor where plaintiff fell. Prior to the accident, Ms. Occhiogrosso did not see the grapes on the floor as they walked up that aisle towards the dairy section; however, she was not sure if she walked right through that same area prior to the accident; she testified, "[m]aybe. I really don't know." She did not have any conversations with defendant's employees prior to the accident, nor did she hear any public address announcements regarding cleanups or spills in the store.

According to Ms. Occhiogrosso, plaintiff did not tell her how she fell. Although Ms. Occhiogrosso had been to that King Kullen store on occasions prior to the accident, she was not there often, and she never made any prior complaints to any employee regarding the condition of the store.

Specifically, as to the grapes, Ms. Occhiogrosso did not know how the grapes got onto the floor, nor how long they had been there before plaintiff's accident occurred. She was also unaware of any specific complaints made to King Kullen concerning the presence of the grapes on the floor prior to the accident.

Ms. Occhiogrosso also filled out part of the store accident report pertaining to plaintiff's injuries, and she confirmed that plaintiff was "possibly" wearing flip-flops on the date of the accident.

The daytime store manager who testified, Paul Chalupa, was not present when plaintiff fell. According to the accident report that was identified by Mr. Chalupa, plaintiff's accident occurred in front of the seafood section, located in the back of the store, but nearer to the salad bar and produce sections, not near the dairy section.

Mr. Chalupa testified as to defendant's general cleaning procedures. As the daytime manager, he would walk the aisles commencing at 8:30 a.m. and then again later in the day. When the night manager, Joseph Lobiondo, came in at 2 p.m., he and Mr.

Lobiondo would walk around the entire store at approximately between 4 p.m. and 5:15 p.m. Mr. Chalupa would typically leave at 6 p.m. If Mr. Chalupa saw anything spilled on the store's floor, he would clean it up. Aside from the formal times that he walked the store, Mr. Chalupa testified that he was on the floor of the store all day long and would clean up anything that was spilled, whether it was a wet or dry substance. He would also place a wet floor sign up before going to the back room to retrieve a mop or broom. The floor warning signs were located at the front and at the ends of every aisle.

When Mr. Chalupa reviewed the accident form, he testified that a grape caused plaintiff to fall. When asked if a grape on the floor would be a condition that he would clean up, Mr. Chalupa answered, "yes." As to the grape that caused plaintiff's fall at approximately 6:30 p.m., Mr. Chalupa did not know where the grape came from, or how long it had been on the floor before plaintiff's fall. Mr. Chalupa was not aware of any prior incidents where produce was on the floor along the back aisle near the seafood section. Mr. Chalupa did not testify as to any inspection and/or cleaning procedure performed specifically on August 17, 2013.

The night manager present on duty when plaintiff fell, Mr. Lobiondo, testified that he did not recall any incident from August 27, 2013, but he remembered "there being a few incidents of people falling or some accidents happening." He estimated that from 2010 until 2014 there were "[a]t least four or five. . ." such incidents.

According to his testimony, he worked the 2 p.m. to 11 p.m. shift on August 27, 2013, but he had no specific recollection of plaintiff falling on grapes on that date. When he worked a 2 to 11 shift, his usual routine involved first unpacking items to place on shelves where needed, and then after 6 p.m., walking around the store to make sure that everything was neat and straightened up. If he saw anything that was spilled, he would either clean it up or call somebody to grab a mop while someone would stand there to make sure no one slips or falls. His "walk-throughs" included the back aisle of the store that went from the dairy section to the salad bar; however, when asked if he had any recollection of specifically doing a "walk-through" on August 27, 2013, he answered, "I don't remember that day." When asked if he had any records or notes showing what he saw or observed on August 27, 2013, he answered that he did not think so, but he "can check under the seat of [his] car or something."

Mr. Lobiondo reviewed the accident report prepared in connection with this accident indicating that plaintiff was "walking and slipped on a grape," but he testified that a review of the information in the report did not refresh his recollection as to the day of plaintiff's accident. Aside from that notation in the report, Mr. Lobiondo did not recall how many grapes were involved, nor could he describe what the floor looked like.

Here, defendant has established that it did not have actual notice of the grapes on the floor, and that it did not create the condition that caused plaintiff's fall; however,

viewing the evidence in the light most favorable to the plaintiff, defendant has failed to demonstrate, *prima facie*, that it lacked constructive notice of the alleged dangerous condition.

The testimony of defendants' employees as to general cleaning practices did not establish when, prior to the subject accident, the specific area was last cleaned or inspected, thereby failing to demonstrate that the alleged condition existed for an insufficient period of time for it to have been remedied (***Valdes v. Pepsi-Cola Bottling Company of New York, Inc.***, 2017 NY Slip Op 03794 [2d Dept 2017]; ***Santiago v. HMS Host Corporation***, 125 AD3d 838 [2d Dept 2015]; ***Rodriguez v. Shoprite Supermarkets, Inc.***, 119 AD3d 923 [2d Dept 2014]; ***Birnbaum v. New York Racing Association, Inc.***, 57 AD3d 598 [2d Dept 2008]; ***Annette Brothers v. 574 9th Ave. Rest. Corp.***, 2015 NY Slip Op 31964 [U] [Sup Ct New York County 2015]). Having failed to establish its *prima facie* entitlement to summary judgment as a matter of law, the Court need not consider the sufficiency of plaintiff's opposition papers (*see* ***Alvarez v. Prospect Hospital***, 68 NY2d 320 [1986]).

The foregoing constitutes the Order of this Court.

Dated: May 25, 2017
Mineola, NY

Karen V. Murphy
J.S.C.

ENTERED
JUN 01 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE