DeFisher v PPZ Supermarkets, Inc.
2018 NY Slip Op 30143(U)
January 24, 2018
Supreme Court, Wayne County
Docket Number: 76103
Judge: Daniel G. Barrett

At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 24th day of January, 2018.

PRESENT: Honorable Daniel G. Barrett

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

KRISTEN AND PAUL DEFISHER
Individually and as Husband and Wife,

Plaintiffs,

-vs-

PPZ SUPERMARKETS, INC. d/b/a
PATON'S MARKET PLACE
BPMZ, LLC,

Defendants

DECISION
Index No. 76103

Each of the parties has filed a Motion requesting relief. The Defendant filed a Motion of Summary Judgment dismissing the Plaintiffs' Complaint. The Plaintiffs have cross-moved seeking an adverse inference jury charge at the conclusion of the case based on spoilation of evidence.

SUMMARY JUDGMENT APPLICATION

The essence of the Plaintiffs' complaint is that Mrs. DeFisher fell in water at the entrance way to the Defendants' grocery store and sustained injuries. It is alleged that the Defendant had actual or constructive notice of this situation and failed to remedy it. The Defendant denies actual or constructive notice of the wet area and requests that the action be dismissed .

In support of this application, Defendants submitted an Affidavit of the store manager, Nathan Zecher. The store manager indicated that the first day of the month is a very busy day for the store. He has to retrieve shopping carts and assist shoppers loading their cars three to ten times per hour. These tasks required that he walk across the area where the Plaintiff fell. In addition, three to five times an hour he must approve shoppers' checks at the front desk. The front desk is located in an area with a clear view of where the Plaintiff fell. In all the trips to retrieve shopping carts, assist shoppers, and approve checks he never observed any moisture where the Plaintiff fell. His Affidavit contains that the statement that prior to the Plaintiff telling him that she fell, he had not seen and had no information concerning any water in the area of the fall that day.

The Plaintiff testified that she fell in an area just after entering the store. She did not observe the floor prior to falling but when she got up her pant leg was wet. Mr. DeFisher testified that it had been raining earlier in the day. When they arrived at noon the rain had stopped. He observed the parking lot was mainly dry but had a few puddles. He observed his wife fall at the store at the entry way and when she got up her pants were wet all down the side.

The Plaintiff did not immediately report this incident to the store manager. After shopping for a period of time her hands began to get numb and her leg started to bother her and blood was coming from her foot so she decided to fill out an accident report.

The store manager, Nathan Zecher, could not find the official reporting form so Mrs. DeFisher put the information on a sheet of paper. She put her name, the fact that she fell in the entry way and hit her hip, ankle and arm. She also indicated "wet area no rug". On this form Nathan Zecher, store manager, wrote his name, the time, 1:40, and "rainy day".

Mrs. DeFisher testified that the store manager apologized for so much water on the floor and then told her that he did not put out the sign for wet floors.

At his deposition, the store manager testified that he couldn't remember if Mrs. DeFisher told him what she fell on. He did not recall inspecting the area where the fall occurred after learning of its occurrence. He did not remember if it had been raining but assumed it had been as he wrote it down on the report. He did not recall when he went through the area before the 1:40 P.M. time written in the report.

In his October, 2017 Affidavit, the store manager indicated he had no memory of making any apology to Mrs. DeFisher and he was not aware of any accumulation of water in the area where she fell.

The role that the Court plays in a Summary Judgment application has been defined by case law. As a starting point, in deciding a Motion for Summary Judgment, the evidence will be construed in the light most favorable in the one moved against (Perella Weinberg Partners, LLC v Kramer, 153 A.D. 3d 443, [1st Dept. 2017]), and afford such party the benefit of every favorable inference (Ruggiero v DePalo, 153 A.D. 3d 870, [2d Dept. 2017]).

The Affidavit of the store manager leads one to believe that the floor surface in question was dry. The testimony of the Plaintiffs as well as the conversation with Mrs. DeFisher and the store manager leads one to believe that there was definitely water on the floor at the time of her fall.

The Court is forbidden from assessing credibility on a Summary Judgment Motion (Ferrante v American Lung Assn., 90 N.Y. 2d 623, 687 N.E. 2d 1308), or to engage in the weighing of evidence. (Scott v Long Is. Power and Auth., 294 A.D. 2d 348, [2d Dept. 2002]). Thus a Motion for Summary Judgment should not be granted where he facts are in dispute, or where there are issues of credibility. (Ruiz v Griffin, 71 A.D. 3d 1112, [2d Dept. 2010]).

The court in Padula v Big V Supermarkets, Inc., 173 A.D. 2d 1094 [3d Dept. 1991], held that a grocery store had at least constructive notice of tracked in moisture from snow in the parking lot of the store and held that the store was liable for the slip-and-fall accident suffered by the plaintiff customer in an interior area of the store. The plaintiff submitted proof that indicated that the area of the slip-and-fall was wet, and that the accident occurred in a heavy traffic area. The court reasoned that a reasonable inference could be drawn that the water that caused the plaintiff's fall had accumulated gradually by dripping from the wet carts and from customers' footwear, and that the process took a sufficient time so that the defendant could be charged with constructive notice of the condition. When a grocery store owner "invites the participation of the public" in its operation, the court explained, the owner necessarily must recognize and be ready to discharge a heightened duty arising out of the dangers reasonably to be expected from that participation. In the case at bar, it was raining earlier in the day. The carts were allowed to be taken out of the store to the shoppers' cars. An inference could be drawn that the Defendant had actual notice of a reoccurring condition and therefore could be charged with constructive notice of each specific reoccurrence of the condition.

Based on the foregoing, the application for Summary Judgment is denied.

SPOILATION OF EVIDENCE

It is undisputed that a video camera was recording activities in the area where the Plaintiff fell. The system is recorded over after seven or either days unless steps are taken to preserve it. No steps were taken in this case. The Plaintiffs are requesting that since the video evidence was not preserved that they be granted a favorable inference charge to the jury.

A spoilation sanction has been authorized even when the evidence was destroyed before the spoilator became a party to the action provided the party was on notice that evidence might be needed for future litigation. (See Enstrom v Garden Plaza Hotel, 27 A.D. 3d 1649 [4th Dept. 2006] and Mahiques v County of Niagara, 137 A.D. 3d 1649 [4th Dept. 2016]).

A loss of a video tape in a slip and fall case was addressed in Tomasello v 64 Franklin, Inc., 45 A.D. 3d 1287 [4th Dept. 2007]. The court held striking the defendant's affirmative offense alleging culpable conduct on the part of the customer, as a sanction for spoilation of evidence, was not warranted. The loss of the video tape did not prevent the plaintiff from establishing a prima facie case of negligence. The Court found the negative inference charge to the jury was appropriate.

A negative inference charge to the jury was given when the defendant failed to preserve video tape of the alleged assault against a patient in the patient's personal injury action against the hospital. (See Jennings v Orange Regional Medical Center, 102 A.D. 3d 654 [2d Dept. 2013]).

The Court will grant the negative inference charge to the jury.

Counsel for Defendant to prepare an Order consistent with this Decision.

Dated: January 24, 2018
Lyons, New York

Daniel G. Barrett
Acting Supreme Court Justice