Monsanto v Target Corp.
2018 NY Slip Op 30303(U)
February 7, 2018
Supreme Court, Suffolk County
Docket Number: 15-14469
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 15-14469
CAL. No. 17-01231OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 8-3-17
ADJ. DATE 10-5-17
Mot. Seq. # 003 - MG; CASEDISP

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FRANCES MONSANTO,

Plaintiff,

- against -

TARGET CORPORATION d/b/a TARGET STORES,

Defendant.

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Attorney for Plaintiff:
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Upon the following papers numbered 1 to 43 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1- 31; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 32-38; Replying Affidavits and supporting papers 39-43; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted.

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained at defendant's store located in Huntington Station, New York on June 22, 2014. The complaint, as amplified by the verified bill of particulars, alleges, among other things, that defendant created a dangerous condition by displaying dumbbell weights on shelves without restraints, and was negligent in failing to display the weights on the floor and in failing to warn plaintiff of the dangerous condition.

Defendant now moves for summary judgment dismissing the complaint on the grounds that it did not create a dangerous condition by maintaining the weights on display shelves, and plaintiff is unable to identify the cause of her own injuries. In support of the motion, defendant submits copies of the pleadings, the bill of particulars, transcripts of the parties' deposition testimony and of nonparty Robert Totan, affidavits by employees of the Target store in Huntington and photographs of the shelving display and the dumbbell that allegedly fell on plaintiff's foot.

Plaintiff testified at her deposition that on the date of the incident she went to the Target Store with her fiancé, Robert Totan, and their two children. She testified that they went to Target to purchase diapers and look at exercise equipment. Plaintiff testified that they went to the sporting goods department and that there was an end-cap display of dumbbells. She testified that her fiancé removed some of the dumbbells and was "playing around" with the various weights that were on the shelves, and after he put them back, she removed a dumbbell from the third shelf to try it out and that she performed curls. She testified that she placed the weight back on the shelf and then felt pain on her left big toe. She testified that she looked down and saw one of the dumbbells next to her foot, but that she did not see the dumbbell fall from the shelf and does not know how the incident occurred. Plaintiff testified that the weight had a neoprene casing and two ends that were in the shape of a hexagon with six flat edges on them. When questioned about whether the weight that fell was the one that she put back on the shelf, she testified that she does not know. Plaintiff further testified she assumed that the shelf was slanted and that the dumbbell rolled off of it. However, she testified that she did not observe any slants in the shelf nor did she see the dumbbell fall.

Nonparty Robert Totan testified that he and plaintiff were shopping at the Target Store, and that plaintiff was testing out weights that were on the shelves of an endcap display. He testified that there were approximately four shelves, that the first shelf was on the floor and that there was approximately one and a half feet between the shelves. He testified that the shelves were flat and parallel to the floor, and that the weights were stationary. Totan testified that he observed plaintiff place the dumbbell back on the shelf and her take her hand away, but that he did not see the dumbbell fall or know how it landed on her foot. He testified that as they walked away from the display he heard plaintiff scream and observed a dumbbell on the floor. Totan was shown photographs of a dumbbell and the weight display and testified that the dumbbell was a 10-pound weight, encased in neoprene, and its ends were hexagon shaped.

Kenneth Mahoney testified that he has worked for TargetCorporation for seven years and is currently an executive team leader. He testified that employees are known as team members, and that they attend an orientation and training program when they begin employment with Target Corporation. He testified that the training varies depending upon the department the team member is assigned to Mahoney testified that items for sale are displayed in the store according to planograms created at Target's executive offices. He testified that the Target team members are required to follow the planogram when displaying the items in their departments and to regularly inspect the shelves to ensure the items are properly displayed. According to Mahoney, the dumbbell that allegedly fell on plaintiff's foot is known as a "C9," a ten-pound neoprene dumbbell, that should be displayed on the third shelf from the bottom shelf. He testified as to the space that must be maintained between the shelves.

Mahoney testified that he worked at the subject Target Store from August 2013 until March 2016, and that he was working on the day of the incident. He testified that he was paged to the sporting goods department of the store and observed plaintiff sitting on the floor in front of the endcap holding her foot. He testified that he prepared an incident report based on plaintiff's statements and that plaintiff signed the report.

An affidavit by Anthony Abeles, a team member of the subject Target Store, is submitted. In his affidavit, Abeles states that he was working in the electronics department at the time the incident occurred. He states that a male customer approached him and told him that his fiancé dropped a weight on her foot, so he went to the endcap where the dumbbells are displayed and observed plaintiff lying on the floor. He states that he inspected the shelves and avers that the dumbbells are covered in a neoprene casing, that they have hexagon end pieces so they cannot roll, and they are displayed on flat shelves and not in stacks. He states that he has worked at the subject Target Store since 2013, and that he is unaware of any similar incidents and is unaware of any complaints regarding the display. Abeles states that after he inspected the area, he contacted a team leader to create an incident report.

An affidavit by Devin Colfer is submitted. Colfer states that he was working as a team leader on the date of the incident and responded to the accident scene, where he observed plaintiff being attended to by Kenneth Mahoney and Anthony Abeles. He states that plaintiff stated that she was trying out dumbbells that weighed between five and ten pounds at the endcap display and dropped one on her foot. Colfer describes the weights and the shelving and such description comports with Abeles' description. He avers that each Target employee is obligated to maintain their department in good order and is trained to regularly inspect the area for safety issues and incorrect shelving. He states that he patrolled the subject area every ten minutes and performed inspections on the subject display, and that he did not observe any improper shelving of the dumbbells, and that the shelves were completely flat. He avers that if he did observe an improperly displayed item, or a slanted shelf, he would have remediated it. He states further that he is not aware of any similar incidents nor has anybody ever complained about the display.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Store owners owe a duty to their customers to maintain their premises in a reasonably safe condition (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003];***Taub v JMDH Real Estate of Garden City Warehouse, LLC***, 150 AD3d 1301, 56 NYS3d 220[2d Dept 2017]). Additionally, a retailer has "a duty to inspect for and to discover such [latent] defects as a reasonable physical inspection would disclose" (***Naples v Janesville Apparel Co.***, 34 AD2d 577, 578, 309 NYS2d 663 [2d Dept 1970]).

A defendant store owner moving for summary judgment in a personal injury action arising from an alleged hazardous or defective condition on its property has the burden of establishing that it maintained its property in a reasonably safe condition and did not create or have notice of a dangerous condition on its premises that poses a foreseeable risk to its customers (***Russo v Home Goods, Inc.***, 119 AD3d 924, 990 NYS2d 95 [2d Dept 2014]). However, a landowner has no duty to protect or warn against conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses (*see* ***Mathew v A.J. Richard & Sons***, 84 AD3d 1038, 1039,

923 NYS2d 218 [2d Dept 2011]; ***Tyz v First St. Holding Co., Inc.***, 78 AD3d 818, 910 NYS 2d 179 [2d Dept 2010]).

Here, defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that no dangerous or defective condition existed on its premises at the time plaintiff was "trying out the weights" (*see* ***Ingram v Costco Wholesale Corp.***, 117 AD3d 685, 985 NYS2d 272 [2d Dept 2014]; ***Hofmann v Toys "R" Us, NY Ltd. Partnership***, 272 AD2d 296, 707 NYS2d 641 [2d Dept 2000]). Defendant also established it did not have notice of a hazardous condition (***McNee v ShopRite***, 116 AD3d 742, 982 NYS2d 898 [2d Dept 2014]). The affidavits of defendant's employees and the deposition testimony of Kenneth Mahoney establish that prior to the incident no similar injuries occurred at the subject display and no one had ever complained about the display (***McDonald v Fitzgerald***, 154 AD3d 927, 62 NYS3d 513 [2d Dept 2017]). Additionally, defendant established that it did not have constructive notice of any dangerous condition, as defendant's submissions show that regular inspections were performed in the subject store. More significantly, both plaintiff and her fiancé, who are the only known witnesses to the subject incident, do not know how the dumbbell fell to the ground. Plaintiff's speculation that it rolled off a slanted shelf could readily be countered with speculation that she did not properly place it back on the shelf. It is well settled that a plaintiff's inability to identify the cause of his or her injuries in a premises liability case is fatal to the claim, as the trier of fact would be caused to speculate as to the cause of the accident (*see* ***Vojvodic v City of New York***, 148 AD3d 1086, 51 NYS3d 534 [2d Dept 2017]; ***Rivera v J. Nazzaro Partnership, L.P.***, 122 AD3d 826, 995 NYS2d 747 [2d Dept 2014]). Such inability to identify the cause of the accident is sufficient to establish a property owner's prima facie case for dismissal (***Christopher v N.Y. City Transit Auth.***, 300 AD2d 336, 752 NYS2d 76 [2d Dept 2002]).

Having established its prima facie case, the burden shifts to plaintiff to proffer evidence in admissible form sufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). In opposition, plaintiff submits an affirmation of her attorney and a photograph of the subject display. Counsel argues that defendant was aware that a dangerous condition existed as the top shelf has a "fence" in front of it, but the bottom three shelves do not. The photograph depicts four shelves with different types of weights displayed on them. The bottom three shelves contain dumbbells with hexagon edges, and the top shelf has kettlebells on it and a guardrail in front of them. The "fence" appears to be between six and seven inches high. Counsel's argument is insufficient to defeat defendant's motion. Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS 2d 615 [1997]; ***Grundstrom v Papadopoulos,*** 117 AD3d 788, 986 NYS 2d 167 [2d Dept 2014]). However, absent any evidence that a particular condition is "actually defective or dangerous," summary judgment in favor of defendant is appropriate" (***Touloupis v Sears***, 155 AD3d 807, 808, 63 NYS3d 518 [2d Dept 2017]).

It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (*see* ***Friends of***

Animals, Inc. v Associated Fur Mfrs., 46 NY2d 1065, 416 NYS2d 790; ***Burns v City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]).

Counsel further argues that the transcript of Kenneth Mahoney's deposition testimony taken on November 9, 2016, which is unsigned and unattested, should not be considered by the Court. However, the deposition transcript is certified as accurate by the court reporter and no challenge has been made to its accuracy (*see* ***Rosenblatt v St. George Health & Racquetball Assoc., LLC***, 119 AD3d 45, 984 NYS2d 401 [2d Dept 2014]; ***Femia v Graphic Arts Mut. Ins. Co.***, 100 AD3d 954, 954 NYS2d 632 [2d Dept 2012]; ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]).

Accordingly, defendant's motion for summary judgment dismissing the plaintiff's complaint is granted.

Dated: February 7, 2018
Riverhead, New York

WILLIAM G. FORD J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION