Turso-Drasche v Banana Republic, LLC
2018 NY Slip Op 31463(U)
July 6, 2018
Supreme Court, New York County
Docket Number: 151169/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
---X
PATRICIA TURSO-DRASCHE,

Plaintiff,

-against-

BANANA REPUBLIC, LLC and THE GAP, INC.,

Defendants.
---X

Index No. 151169/16
Motion Seq. No. 002

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In this negligence action, defendants Banana Republic, LLC and The Gap, Inc. (collectively, Banana Republic) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

On December 21, 2015, plaintiff Patricia Turso-Drasche was shopping in a Banana Republic store on Broadway and 66th Streets in Manhattan when she tripped on the foot of Banana Republic employee. Prior to the accident, Turso-Drashce was moving from the back of the store with some items she hoped to purchase. The employee who tripped her, Jacob Oswell (Oswell), was talking to his supervisor, Samantha Castillo (Castillo). As plaintiff approached Oswell, his back faced her, but she began to pass by him as he ended his conversation with Castillo, and he swung his foot into plaintiff's path. Plaintiff tripped and fell.

DISCUSSION

It is well settled that the proponent of a motion for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487

NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v. New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]).

Defendants argue that they are entitled to summary judgment because they did not breach any duty of care toward plaintiff. More specifically, defendants argue that it was not foreseeable that plaintiff would pass so closely to Oswell. In support, defendants cite *to Greene v Sibley, Lindsay & Curr Co.*, 257 NY 190 [1930]) and *Prado v City of New York* (19 AD3d 674 [2d Dept 2005]).

In *Greene*, the plaintiff received change after purchasing an item in a store and then tripped over a mechanic who was fixing a cash register. The plaintiff had seen the mechanic before she received her change, but had not noticed that the mechanic, who had been standing, kneeled down to fix the cash register. She tripped on his feet, which jutted into her path. Judge Cardozo, writing for the Court, noted that "[t]he measure of the defendant's duty was reasonable care" (257 NY at 192). *Prado* involved a municipal, who, while pushing a cart on a sidewalk, tripped a woman with his "outstretched leg" (19 AD3d at 674). The Appellate Division held that defendants "could not have reasonably anticipated that a pedestrian would ignore the presence of a delivery person trying to move a heavy cart across the sidewalk and pass so close as to trip over that person's outstretched leg" (*id.*).

Defendants argue that they have no duty to plaintiff because it was not foreseeable that, by turning around after his conversation with Castillo ended, Oswell would cause a customer to trip and fall. Defendants state this argument with a somewhat sharper edge, contending that it was not foreseeable that "plaintiff would ignore Mr. Oswell's presence and attempt to pass so close to him as to ignore the possibility that he may change positions at the drop of a dime" (Prisco aff at 11).

Plaintiff argues in opposition that the accident was foreseeable, as customers frequently walk in the aisle and the aisle was narrowed by the presence of a swimwear mannequin. Plaintiff

does not cite to any cases that would blunt or limit the precedential effect of *Greene* and *Prado*. The court is not aware, and plaintiff does not provide, any cases which places a duty on workers at stores to look behind them before moving or to announce a change of body position. While it would have been better if Oswell had done this before moving and his failure to do so was likely a but-for cause of plaintiff's accident, no caselaw suggests that he had a legal obligation to do so. Here, it was not reasonably foreseeable that his turning around would cause an injury to a customer in the store. Thus, defendants have not breached any duty to plaintiff and plaintiff's negligence claims arising from Oswell's actions must be dismissed.

Plaintiff argues that the Complaint should not be dismissed, *en masse*, as defendants fail to address their claims for negligent training. Defendants describe those claims as "to conclusory allegations of negligent training" and argue that they implicitly addressed these claims by arguing that Oswell's actions were not negligent. Here, defendants are correct as the Appellate Division has held that, in the context of negligent hiring, retention, and training claims, that "if the employee was not negligent, there is no basis for imposing liability on the employer" (*Karoon v New York City Transit Auth.*, 241 AD2d 323 [1st Dept 1997]). Thus, the plaintiff's negligent hiring claims must fall as a corollary of the court's finding that Oswell did not act negligently. As a result, plaintiff's entire complaint must be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that defendants Banana Republic, LLC and The Gap, Inc.'s motion for summary judgment dismissing the Complaint is granted; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that counsel for defendants serve a copy of this order, along with notice of entry upon counsel for plaintiff within 10 days of entry.

Dated: July 6, 2018

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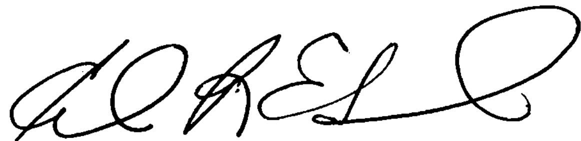

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.