Martinez v Whole Foods Mkt. Group, Inc.
2018 NY Slip Op 32318(U)
September 17, 2018
Supreme Court, New York County
Docket Number: 162485/2015
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 47

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CLAUDIA MARTINEZ,

Plaintiff,

-against- Index No. 162485/2015

WHOLE FOODS MARKET GROUP, INC. and
WHOLE FOODS MARKET INC.

DECISION/ORDER

Defendants,

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PAUL A. GOETZ, J.:

In this personal injury action, defendants Whole Foods Market Group, Inc. and Whole Foods Market Inc. (collectively, Whole Foods or defendants) move for summary judgment, pursuant to CPLR 3212, to dismiss the complaint.

Plaintiff Claudia Martinez (Martinez or plaintiff) alleges that she was caused to trip and fall due to a crack in the floor of the Whole Foods Market she was traversing at 10 Columbus Circle, New York, New York. As a result, plaintiff alleges she sustained fractures to her left foot, and sprained and strained both her left foot and ankle (Bill of Particulars [BOP] at ¶ 10).

Plaintiff contends that defendants breached their duty to maintain the floor in good repair and free of obstruction, hazzard and defect and were negligent in providing a proper, safe and clear pathway at the location where she fell (complaint at ¶¶ 19-21). Plaintiff avers that defendants caused the alleged defective condition and had both actual and constructive notice thereof (BOP at ¶¶ 7-9).

For the reasons stated below, defendants' motion for summary judgment is granted.

I. Background

On the day of the incident, Monday, April 28, 2014, plaintiff was shopping for breakfast and lunch at approximately 8:00 a.m. at the Whole Foods located near her job (Martinez Examination Before Trial [EBT] at 17-19). Plaintiff testified that she was picking up items on her way to work and was wearing open toe shoes with about a half inch to one inch high heel of medium width when she was caused to stumble forward (*id.* at 18-19, 26-27).

At the outset, contrary to the allegations in the complaint and the BOP, plaintiff did not fall to the ground that morning. Indeed, at her deposition, plaintiff testified that, as she was walking between the salad bar and the sushi place that morning, "all of a sudden the left heel of my shoe got caught in the crack on the marble floor and it tripped me where I kind of like went forwards, and I tried to keep myself from hitting the floor, and in the process I twisted my left foot" (*id.* at 19).

Plaintiff further relates that a store employee by the name of Egypt Dean (Dean) went over to her within seconds and Whole Foods Associate Store Team Leader Darreck Reisinger (Reisinger) came shortly thereafter to her side (*id.* at 22-24). Martinez hobbled over to the sushi place where she was able to sit on cushions and was given ice for her left foot (*id.*).

II. Contentions

In their motion papers, defendants argue that there was no crack in the floor at the time of plaintiff's alleged incident and that they did not cause the alleged hazardous condition nor did they have actual or constructive notice of any defect. Defendants contend that plaintiff's deposition reveals that she did not know what caused her to trip and did not see a crack or any other debris or defect on the ground. In addition, defendants assert that plaintiff only determined

well after the incident that she tripped on a crack when she returned to the store to take photographs of the area where she claims that she tripped.

Defendants also argue that Reisinger who responded to plaintiff immediately after the incident, testified that he observed the area where plaintiff tripped and that he did not see a crack, debris, or any other defect at that time. Defendants point out that Reisinger stated at his EBT that plaintiff advised him that she had "slipped on something which caused her to lose her balance and her ankle hurting" (Reisinger EBT at 21-22) and that when he asked her what she had slipped on, that plaintiff responded at the time of the incident that she did not know (*id.* at 22:5-6). Furthermore, Reisinger stated that he inspected the floors prior to the incident for defects, cracks or chips in the area and that at no time between December 2013 and the April 28, 2014 incident did he observe any such condition where plaintiff tripped (Reisinger EBT at 28-29).

In opposition, plaintiff argues that she caught her left heel in a crack in the marble floor causing her to stumble forward and twist her foot (Martinez EBT at 19). Plaintiff disputes defendants' assertion that she did not identify the specific crack that caused her injury. Plaintiff points to her testimony stating that there were no wet or foreign substances on the ground (*id.* at 20) and describing the crack as "kind of deep and slippery" (*id.*). Plaintiff explains that she did not mention the crack to Reisinger at the time of the incident because she "was in so much pain" (*id.* at 28). Plaintiff's testimony reveals that although she took a photograph of the area where the incident occurred a month later, she had been back to Whole Foods prior to the time when she took the photograph and noticed the crack on those visits (*id.* at 29).

Plaintiff highlights that Reisinger did not witness the incident nor does he recall how he learned about it that day (Reisinger EBT at 18). Reisinger took a photograph of the area in

question, but no photograph was submitted in support of defendants' motion. Furthermore, Reisinger does not recall Dean's presence at the time of the incident, he remembers a different employee and does not know the source of the information that he relied upon to complete the incident report (*id.* at 19-21). He is unable to explain why the report was not completed until June 11, 2014, approximately six weeks after the date of the incident (*id.* at 24). At his deposition, Reisinger was shown a photograph of the location of the incident and the defect which caused it. Although he was in charge of inspecting the floor, he could not tell whether or not the photograph depicted the location of the accident as he understood it to be (*id.* at 25-26).

Turning to the issue of notice, plaintiff contends that the moving defendants failed to meet their burden to establish a lack of constructive notice as a matter of law.

Plaintiff argues that there is no testimony or any evidence by defendants as to when the floor was last inspected prior to the accident, or even as to whether there was a general schedule for such inspections. Plaintiff points out that Reisinger testified that products would be transported on the floor either with electrical powered jacks, hand powered manual jacks, shopping carts, U-boats or hand trucks (Reisinger EBT at 35-36). Plaintiff adds that notice of a deep crack in a marble floor, unlike a wet spot or a piece of food or debris which could have been dropped moments before the accident, can be reasonably inferred in light of the presence of numerous employees in the area of the condition.

While plaintiff did not specifically examine the crack immediately after her injury, she contends that she knew about the crack and felt her foot going through it. Plaintiff contends that her testimony clearly establishes that she saw the crack on subsequent visits before she took the photographs and that she customarily visits Whole Foods three to four times a week. Plaintiff

avers that her affidavit clarifies that she saw and identified the crack in the specific location of her accident within a day or two of the accident (Martinez aff at ¶ 3).

Plaintiff argues that she can establish a prima facie case of negligence based wholly on circumstantial evidence. Plaintiff contends that her proof need not exclude any other possible cause of the accident, but must make those other causes sufficiently remote or technical to enable the jury to reach a verdict based, not on speculation, but upon reasonable inferences drawn from the evidence. Here, the logic of common experience as applied to the circumstances shown by the evidence supports plaintiff's claim, giving the plaintiff the benefit of every favorable inference.

In reply, defendants argue that they met their prima facie burden by showing that plaintiff failed to identify the cause of her trip at the time of the incident on April 28, 2014 and that Whole Foods had no actual or constructive notice. Defendants contend that plaintiff failed to raise a triable issue of fact.

Defendants underscore that whether Martinez saw the crack at issue one day, two days or a few weeks later, it is undisputed that she did not see the crack on the day of the incident, and that she is engaging in speculative, after-the-fact conjecture. Defendants continue by stating that there is simply no way for Martinez to know if this particular crack existed on the date of the incident, much less that this crack caused her to trip on that day. In addition, the subject crack could have been created at any time after the incident by any number of factors or causes after plaintiff's incident.

Defendants reiterate that Reisinger, whose testimony is uncontroverted, testified that he inspected the floor on the date of the incident in the area where plaintiff tripped, that he did not

see any deep crack or defective condition and that Martinez stated to him that she didn't know specifically what she had slipped on.

Reisinger also testified that Whole Foods had established and followed reasonable floor inspection procedures followed on the day of the incident and that there is no evidence in the record that Whole Foods created the alleged defective condition, or had actual or constructive notice thereof. In particular, Reisinger testified that, periodically, throughout the day, at specific times, Whole Foods team members would walk different areas following a map, clean any spills or other issues, and document same. Reisinger testified that he also inspected the floor for any cracks, chips, or damage along those lines. In addition, there was a complaint procedure in place for customers to report any spillage or other issue and there was also a building maintenance person in charge of making any necessary repairs as directed by the store team leader.

Defendants qualify plaintiff's affidavit as self-serving and tailored to avoid the consequences of her deposition testimony. Indeed, plaintiff swore at her deposition that, about three and a half years after the incident, she recalled that she returned to Whole Foods a day or two after the incident and she saw the crack at the specific location of her injury. However, plaintiff does not identify that location, nor does she describe how she found the exact spot where she tripped, nor does she explain why she failed to take a picture during this visit, or why it took her a few weeks to do so.

Defendants argue that the picture of the crack, which was taken a month after the incident, is the sole purported evidence of the alleged cause of plaintiff's trip and that plaintiff attempted to create a claim where none existed by returning to the scene of her injury a month later and finding a mark on the floor to blame for her trip. Defendants also argue that contrary to plaintiff's suggestion that "electrical powered jacks, hand powered manual jacks, shopping carts,

U-boats and hand trucks" caused a defect in the floor, Reisinger testified that these objects did not damage the floor (Reisinger EBT at 36).

While defendants do not admit that a defective condition existed, they argue that Whole Foods did not have notice of any alleged defective condition and that the crack at issue could have been created by a customer, a store vendor, or a Whole Foods employee at any moment after plaintiff's incident. Defendants argue that based on the foregoing, plaintiff's attempt to infer notice to Whole Foods based on her assertion that it had numerous employees in the immediate vicinity of the condition is speculative.

Finally, defendants assert that, notwithstanding Reisinger's purported attempt to take a photograph on the date of the incident, no photograph was taken, but in any event, Reisinger did not see any defective condition on the floor as per his testimony. Defendants posit that the date of the incident report is immaterial in light of the fact that plaintiff took a picture of the alleged crack a few weeks after the incident.

III. Legal Standard

The principle is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case *(Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). However, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad*, 64 NY2d at 853; *People v Grasso,* 50 AD 3d 535, 545 [1st Dept 2008]).

While it is well established that "a plaintiff bears no burden to identify precisely what caused his slip and fall, mere speculation about causation is inadequate to sustain the cause of action" (*Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 631-632 [1st Dept 2009]). A defendant meets its burden of establishing prima facie entitlement to summary dismissal by demonstrating that plaintiff is unable to identify the cause of the accident (*Oettinger v Amerada Hess Corp.*, 15 AD3d 638, 639 [2d Dept 2005]).

To defeat a summary judgment motion, a plaintiff must present competent evidence connecting the incident with the alleged defective condition sufficient to raise a triable issue of fact (*Santiago v City of New York*, 61 AD3d 574, 575 [1st Dept 2009] [eyewitness did not state that he saw decedent's motorcycle hit a defect in the roadway and plaintiff's expert affidavit was conclusory and lacked factual basis as it relied on eyewitness affidavit]).

In the absence of direct evidence as to causation, proximate cause may be established by circumstantial evidence (*Oettinger*, 15 AD3d at 639). However, plaintiff must demonstrate the existence of "'facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred'" (*Affenito v PJC 90th Street LLC*, 5 AD3d 243, 245 [1st Dept 2004], quoting *Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986] [citation omitted]).

A plaintiff is not required to "exclude every other possible cause of the accident," but the record must render the other possible factors "sufficiently 'remote' or 'technical'" to enable the trier of fact to reach a verdict based on logical inferences drawn from the evidence rather than mere speculation (*id.*, quoting *Schneider*, 67 NY2d at 744). There can be many causes to an accident, and mere speculation as to the cause of the fall, is fatal to the cause of action (*Oettinger*, 15 AD3d at 639, quoting *Garvin v Rosenberg*, 204 AD2d 388 [2d Dept 1994]).

IV. Analysis

The record shows that the sole basis plaintiff offers for the inference that a dangerous condition existed is her testimony that she observed a crack in the marble floor in the area of the incident some time after the date of the incident, within a month thereafter (Martinez EBT at 20), or "within a day or two" of the incident (Martinez aff, ¶ 3).

Martinez recounts that she only pieced together the purported reason for her trip and injuries as follows:

> "Q. At that time immediately after you tripped and when you were sitting down after talking with Egypt and Darreck did you know that you tripped on the crack?
> A. At that time I didn't -- I wasn't exactly sure.
> Q. When did you determine that you tripped over the crack?
> A. It was when I had went back, and it came playing in my head how my left heel just got caught in it.
> That's how I...
> Q. Did you see the crack on the day of the incident?
> A. I wasn't looking at that time.
> Q. Was the first time that you remember seeing the crack, was that when you went back about a month later to take the photograph?
> A. Yes, it was around that time.
> Q. Had you been back to the Whole Foods between April 28, 2014 and the time that you took this photograph, had you been there?
> A. Yes.
> Q. You did you notice the crack in those times?
> A. Yes.
> Q. So you did see the crack before you took this photograph?
> A. Yes.
> Q. But not on the day of the incident?
> A. On the day of the incident I wasn't -- I didn't pay attention to it on the day of the incident. I was in a lot of pain, and I just went off to work, then I went back.
> Q. But you did not see the crack on the day of the incident; is that accurate?
> A. I didn't notice it then.
> Q. Did you prepare any written statement on the day of the incident at Whole Foods, yourself?
> A. No, I didn't prepare any report.
> Q. Did you see Darreck or Egypt preparing a report on the day of the incident?
> A. No.
> Q. Did you see Darreck or Egypt walk over to the area where you fell after you fell to observe the floor?

A. Darreck did.
Q. What did Darreck do?
A. I think he took a picture and he was looking around there.
Q. A picture of the floor?
20 A. Yes."

(Martinez EBT at 28-30).

Plaintiff did not testify that she saw the crack "either immediately before or immediately after her accident, nor was any other substantial evidence of the existence of such a condition presented in opposition to the motion" (*Zanki v Cahill*, 2 AD3d 197, 198 [1st Dept 2003], *affd* 2 NY3d 783 [2004] [plaintiff offered nothing more than "speculation or guesswork" to support her contention that the alleged recurring condition, namely, evidence of spillage, was even present at the time she slipped and fell, or caused her accident] [internal citation omitted]).

Rather, plaintiff admits that, on April 28, 2014, she did not see what caused her incident (Martinez EBT at 29), that she did not see a crack (*id.*) and that she did not mention a crack on the ground to either Reisinger or Dean (*id.* at 28) nor did these employees mention a crack to her (*id.* at 32).

In *Harrison v New York City Tr. Auth.*, the Appellate Division, First Department affirmed the trial court's summary judgment dismissal of the plaintiff's complaint. Although the plaintiff alleged that she slipped on debris and fell back as she approached the turnstile of a subway station, she admited, in her deposition, that she did not see Metrocards and wrappers, which she attributed to be the reason for her fall, before she slipped. Rather, the plaintiff testified that she saw them after she fell and got up (94 AD3d 512, 512-513 [1st Dept 2012]). The court ruled that the defendant established a prima facie entitlement to summary judgment on the basis of the plaintiff's speculation as to what caused her fall (*id.*). Furthermore, the court noted that even if a Metrocard were the cause of the slip, the fact that a Metrocard could have been dropped a minute

before the incident negated any constructive notice in this instance. In any event, liability should be denied in light of the defendant's proof of an established and followed reasonable cleaning routine (*id*)..

In a similar vein, in *Rudner v New York Presbyt. Hosp.*, the Appellate Division, First Department upheld the Supreme Court's decision dismissing the plaintiff's complaint claiming that he fell in the doorway at the main entrance of defendant's property due to an alleged rise in the door's saddle. The Court ruled that the defendant established its entitlement to judgment as a matter of law by presenting the plaintiff's deposition testimony that she did not know what caused her fall at the time of the incident and found that the affidavits of the plaintiff's attorney and the attorney's girlfriend who, several weeks after the accident, observed the existence of a raised door saddle on one side "fail[ed] to raise a triable issue of fact as they would require a jury to speculate as to the existence of the alleged defective door saddle at the time of the accident" (42 AD3d 357, 358 [1st Dept 2007]; *see also Gold v 35 E. Assoc. LLC*, 136 AD3d 453 [1st Dept 2016 [holding the defendant met its prima facie burden by submitting the plaintiff and his friend's deposition testimony that they did not see anything on the steps before, and did not know what caused, the fall and that the plaintiff's admission that he noticed a substance on the steps weeks after the accident renders such proof speculative as to its existence at the time of the accident and as to causation]).

Here, plaintiff's admission that she did not see a crack on the date of the incident and that she was unsure of what caused her trip is fatal to her case. On this record, plaintiff's injury "could just as likely have been caused by some other factor than defendants' negligence" (*Acunia*, 68 AD3d at 632; *compare Gayle v City of New York*, 92 NY2d 936, 937 [1998] [the plaintiff demonstrated that it was "'more likely'" or "'more reasonable'" that the accident was

caused by the defendant's negligence rather than by some other agency). In *Manning v 6638 18th Ave. Realty Corp.*, the Appellate Division, Second Department found that the plaintiff did not see the alleged debris that caused her fall before or after the accident rendering any determination by the trier of fact speculative "[s]ince it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance" (28 AD3d 434, 435 [2d Dept 2006], quoting *Teplitskaya v 3096 Owners Corp.*, 15 AD2d 477, 478 [2d Dept 2001]).

Based on the foregoing, defendants demonstrated entitlement to summary judgment dismissal as a matter of law.

V. Conclusion

Accordingly, it is

ORDERED that defendants Whole Foods Market Group, Inc. and Whole Foods Market Inc.'s motion for summary judgment is GRANTED and the complaint is DISMISSED with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgement accordingly.

This constitutes the decision and order of the Court.

Dated:
9/17/18

ENTER:

Paul A. Goetz, J. S. C.