Cirisano v ASJ Melville LLC
2018 NY Slip Op 32431(U)
September 27, 2018
Supreme Court, Suffolk County
Docket Number: 15-14779
Judge: David T. Reilly

SHORT FORM ORDER

COPY

INDEX No. 15-14779
CAL. No. 17-02080OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 1-31-18
ADJ. DATE 4-4-18
Mot. Seq. # 001 - MG; CASEDISP

NASTASIA CIRISANO,

Plaintiff,

- against -

ASJ MELVILLE LLC, FEDEX KINKO'S OFFICE AND PRINT SERVICES, INC. & FEDEX OFFICE AND PRINT SERVICES, INC.,

Defendants.

C. ALEX MALTESE, ESQ.
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Upon the following papers numbered 1 to 71 read on this motion for summary judgment: Notice of Motion and supporting papers 1-45; Answering Affidavits and supporting papers 46-65; Replying Affidavits and supporting papers 66-71; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants ASJ Melville, LLC and FedEx Office and Print Services, Inc., formerly known as FedEx Kinko's Office and Print Services, Inc., for summary judgment dismissing the plaintiff's complaint against them is granted.

This action was commenced by plaintiff to recover damages for personal injuries she allegedly sustained on October 25, 2014, when she tripped and fell on a stack of paper reams at the FedEx Office Print & Ship Center located at 680 Walt Whitman Road, Melville, New York. The complaint, as amplified by the bill of particulars, alleges that defendants were negligent, among other things, in creating a dangerous condition by displaying reams of paper in low stacks in a walkway, which caused plaintiff to trip and fall.

Defendants now move for summary judgment dismissing the complaint on the ground that the stack of paper, the alleged dangerous condition, was open and obvious and not inherently dangerous. In support of the motion, defendants submit copies of the pleadings, the bill of particulars, photographs of the subject store, transcripts of the parties' deposition testimony, and an affidavit by Hugh Russell.

Plaintiff testified that she went to the FedEx office center to make copies of documents, and that she had been to the subject FedEx center several times. She testified that she traversed a light-colored path inside of the store that leads to the service counter where there are approximately three cash registers, and that she utilized the register in the center of the counter, as it is the area where the store employee makes the copies for her. Plaintiff testified that there were no other persons in line at the middle register, and that she observed a stack of paper reams on the floor leaning against the counter as she approached the register. She testified that the stack of reams were the height of her knees, and that she stood to the right of the stack while she waited for the store employee to make her copies. She testified that after the documents were returned to her, she paid the cashier at the register where she had been standing the entire time, turned to her left and tripped and fell. She testified that after her fall she observed the stack of paper was upright, intact, and at the same height as when she arrived at the store.

Hugh Russell testified at a deposition and submitted an affidavit. He testified that he has been working for FedEx Office and Print Services, Inc. for eight years, and he was the manager of the subject store at the time of the incident, but he was not working on that day. He testified that the store is a copy and print center and also provides shipping and faxing services, and that his duties include account management, hiring, training and development of employees, and general floor maintenance. Russell testified that the store receives a monthly "plan-a-gram" (POG) from the corporate office which informs the store of monthly promotions and how to display the items. He testified that all store employees review the PGO and change the displays monthly in accordance with the POG. He testified that paper reams are displayed in stacks at the most visible sections of the store, and that store employees are responsible for ensuring the height of the stacks are maintained at a level which is visible to customers.

Russell testified that team members conduct walkthroughs in the store throughout the day and that the frequency depends upon customer traffic. Russell testified that the operational guidelines state the stacks of paper should be placed in the middle of the largest section of the store, at waist level, to ensure visibility. He testified that he learned of the incident on Monday morning from a store employee, who was working at the time of the incident and told him that he observed plaintiff stumble and fall, but did not see what caused her to fall. In his affidavit, Russell states that he was shown a picture of the accident site, which he believes was provided by plaintiff's counsel. He states that the picture depicts the reams of paper that were stacked for the month of October 2014. He states that the promotion for such month was for Hewlett Packard paper and that it was packaged in pink and black. The picture is annexed to his affidavit, and it depicts two stacks of approximately eight paper reams against the counter, and a shopping bag on top of the stack.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima

facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980].

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]). Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (***Etminan v Esposito***, 126 AD3d 854, 6 NYS3d 103 [2d Dept 2015]; ***Blatt v L'Pogee, Inc.***, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]). However, a property owner is not a guarantor of safety, and is only charged with a duty to use reasonable care under the circumstances in maintaining its property in a safe condition (*see* ***Peralta v Henriquez***, 100 NY2d 139 [2003]; ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). 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 (***Costidis v City of New York***, 159 AD3d 871, 70 NYS3d 74 2018 [2d Dept 2018]; ***Gerner v Shop-Rite of Uniondale, Inc.***, 148 AD3d 1122, 50 NYS3d 459 [2d Dept 2017]; ***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 NYS2d 179 [2d Dept 2010]).

In a trip-and-fall case, a defendant moving for summary judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Arzola v Boston Props. Ltd. Partnership***, 63 AD3d 655, 656, 880 NYS2d 352 [2d Dept 2009]). While generally, it is for the jury to determine whether a dangerous or defective condition exists on the property of another so as to create liability (***Coriat v Miller***, 2018 NY Slip Op 05998 [2d Dept]; ***Trincere v County of Suffolk***, 90 NY2d 976, 977, 665 NYS2d 615 [1997]), there is no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous (***Bartholomew v Sears Roebuck & Co.***, 159 AD3d 786, 69 NYS3d 813 [2d Dept 2018]; ***Mathis v D.D. Dylan, LLC***, 119 AD3d 908, 990 NYS2d 581 [2d Dept 2014]; ***Boyle v Pottery Barn Outlet***, 117 AD3d 665, 985 NYS2d 291 [2d Dept 2014]; ***Mathew v A.J. Richard & Sons***, 84 AD3d 1038, 1039, 923 NYS2d 218 [2d Dept 2011]).

It is undisputed that plaintiff observed the stack of reams of paper leaning against the counter before the incident, and that the walkway leading to the counter was clear and unobstructed. Plaintiff was shown photographs of the store and testified that the photographs accurately depict the subject area. Although the photographs were not taken on the date of the incident and do not show any stacks of paper, it is evident that they would have been readily observable at any height, were not obstructing the walkway, and more significantly, plaintiff testified that she did in fact see them prior to the incident.

Here, defendant established as a matter of law that the stack of paper reams "was open and obvious, as it was not only readily observable by those employing the reasonable use of their senses, but was known to the plaintiff prior to the accident and, as a matter of law, was not inherently dangerous" (***Genefar v Great Neck Park Dist.***,156 AD3d 762, 763, 67 NYS3d 262 [2d Dept 2017]; ***Fisher v Southland Corp. Eyeglasses***,

271 AD2d 403, 707 NYS2d 325 [2d Dept 2000]). Defendant also established it did not have notice of a dangerous condition (***McNee v ShopRite***, 116 AD3d 742, 982 NYS2d 898 [2d Dept 2014]). The deposition testimony of Hugh Russell established 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]).

Having established their 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, 404 N.E.2d 718, 427 NYS2d 595). In opposition, counsel argues that the transcript of plaintiff's deposition testimony is inadmissible as it is unsigned and unattested. 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]). Furthermore, plaintiff submits the unsigned transcript in opposition to the motion, thus acquiescing to its accuracy (***Gallway v Muintir, LLC***, 142 AD3d 948, 38 NYS3d 28 [2d Dept 2016]).

Plaintiff also submits an affidavit and report by Jerry Birnbach, who states that he is a store designer and retail safety expert. Birnbach states that he reviewed the complaint, medical records, photographs, transcripts of deposition testimony of plaintiff and Hugh Russell, general liability report, Fedex safety procedure guide and checklist, team member handbook, reset plan-o-gram and verified bill of particulars. He concludes that the regulations by the FedEx office store are contradictory to industry standards and do not ensure that their store is reasonably safe and hazardous free. While he states that he will refer to the manuals of Walmart, Target and Winco, such manuals were not enumerated as documents that he states he reviewed, and neither the manuals or relevant provisions of same are submitted. Additionally, such retail stores are not within the same industry as the subject FedEx store which is primarily a shipping and printing center, and therefore lack probative value on the issue of reasonableness (*see* ***Trimarco v Klein***, 56 NY2d 98, 451 NYS2d 52 [1982]).

In his report, Birnbach discusses various topics, inapplicable here, and compares "industry standard" to FedEx handbook and manuals. However, he does not site any particular authority or refer to the specific manuals when he compares "industry standard" to Fedex. Nor does Birnbach present other corroborating evidence to support his assertions (*see* ***Buchholz v Trump 767 Fifth Ave., LLC***, 5 NY3d 1, 798 NYS2d 715 [2005]). For instance, he states that "industry standard product displays in aisles" should be above 36 inches, as the customer's line of sight is out of focus below 36 inches above the floor. "Due to this fact, the industry requires displays that are free standing in aisles have adequate clearance on all sides to accommodate the ADA regulation of 36" minimum wide aisles." Assuming arguendo, that this statement is accurate, and is supported by specific authority, it is undisputed that the subject incident did not occur in an aisle of the store, and it is thus irrelevant to the subject display and incident.

Plaintiff argues further that defendants violated the FedEx handbooks and that such violation is evidence of negligence. Birnbach sites the FedEx "Center Safety Procedure Guide," and submits a copy of the guide. Under the heading of Housekeeping, the guide states that floor stacks should be no higher than five feet and no lower than two feet. A POG for an unidentified paper company is also submitted.

According to the POG, the paper stacks for that company were suggested to be at least 36 inches high. Birnback opines that the subject stack was sixteen inches high and violated FedEx policy. Violation of a companies internal policies, rules and procedures do not equate with negligence and do not usurp the common law standard of care in negligence, which is to use reasonable care under the circumstances (*see* ***Sherman v Robinson***, 80 NY2d 483, 591 NYS2d 974]1992]; ***Gilson v Metropolitan Opera***, 5 NY3d 574, 807 NYS2d 588 [2005]).

Birnbach's report fails to address and discuss the unique facts surrounding plaintiff's fall, and is insufficient to raise a triable issue of fact. To defeat a motion for summary judgment, a party opposing such motion must lay bare his or her proof, in evidentiary form. Conclusory allegations are insufficient to defeat the motion (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065; ***Burns v City of Poughkeepsie***, 293 AD2d 435 [2d Dept 2002]). Rather than submitting an affidavit by plaintiff, counsel submits his own affirmation. 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 NYS2d 460 [2d Dept 2014]). The cases cited by counsel are distinguishable from the facts of this case, as they all involve a plaintiff who did not observe the dangerous condition before they were injured. Here, the deposition testimony of plaintiff establishes that the paper reams were open and obvious, and not inherently dangerous, and no competent evidence in opposition is submitted to raise a triable issue of fact on that matter. Accordingly, defendants' motion for summary judgment dismissing the complaint against them is granted.

Dated: Sept 27, 2018

J.S.C.
HON. DAVID T. REILLY

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**