

**Douamba v Costco Wholesale Corp.**

2018 NY Slip Op 33175(U)

December 5, 2018

Supreme Court, Kings County

Docket Number: 512673/2015

Judge: Edgar G. Walker

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE KINGS

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WENDY DOUAMBA

Plaintiff,

Hon. Edgar Walker

Part 90

-against-

Index No. 512673/2015

COSTCO WHOLESALE CORPORATION,

Defendants.

-----X

Defendant's motion seeking summary judgment on the issue of liability pursuant to CPLR 3212 is granted.

The instant action arises out of a slip and fall accident that occurred in Kings County on September 9, 2014. The plaintiff alleges that she was walking toward the sink in the women's bathroom in defendant Costco Wholesale's store located at 976 3<sup>rd</sup> Avenue, Brooklyn, New York, when she slipped and fell on water that she claims was negligently left on the floor by the defendant.

In support of its motion, the defendant points to the plaintiff's deposition testimony wherein she stated that she hadn't seen any water prior to her fall, but that she did remember seeing spots of water on the floor after she fell, although she was unable to recall how many or how large the spots were. The defendant also notes that the plaintiff could not remember whether the water was coming from the exterior of the sink drain or from another pipe adjacent to the wall, and that she did not know whether or not the water that she slipped on came from somebody else who had previously washed their hands. In addition, the defendant offers the deposition testimony of Judy Couvertier, the Assistant General Manager at the subject Costco store, who testified that she was at work on the date of the incident; that there was only one women's bathroom in the building; that as part of her duties as the Assistant General

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Manager she inspected that bathroom at least once an hour and would specifically check the sinks and pipes underneath for water or other issues during every inspection, and that she found no problems on the date of the accident. She further testified that there were neither any issues nor any records of any issues with that bathroom, the sinks, or any of the pipes therein on either the date that the plaintiff claims her accident occurred or at any point earlier that year or in all of 2012 or 2013. Based on the foregoing, the defendant argues that it neither created nor had actual or constructive notice of any defective condition in the women's bathroom and that the plaintiff's action should be dismissed.

In opposition to the defendant's motion the plaintiff submits her own affidavit in which she states that there was water leaking from underneath the sink closest to her, and that it was dripping and forming puddles on the floor on the spot where she fell. In her affidavit the plaintiff further states that the water that she fell on did not come from other customers washing their hands, but from water streaming from the sink. The plaintiff also offers several photographs that were allegedly taken at the time of the incident, including one of herself on the floor of the Costco women's bathroom, one of her being treated by emergency personnel in which she claims that the leaking pipe is visible underneath the sink behind her, and one of the bathroom floor itself that she claims depicts the actual water spot where she slipped. Finally, the plaintiff submits an affidavit from her husband in which he states that he entered the bathroom immediately after she had fallen and that upon entering he could clearly see water streaming out of the sink pipe closest to the plaintiff, forming a puddle next to her.

In reply, the defendant argues that most of the arguments presented in the plaintiff's opposition papers are fabricated and that both her's and her husband's affidavits clearly and directly contradict the testimony that she gave at her deposition. The defendant also argues that the photos annexed to the plaintiff's opposition papers are not authenticated and therefore should not be considered either.

Finally, the defendant reiterates its argument that the plaintiff is speculating as to both where she thinks the water that she allegedly slipped on came from as well as to how much water, if any, was actually on the floor.

The court finds that the defendant has made a prima facie showing that it neither had notice of, nor created, the condition that the plaintiff claims caused her accident. Zarbaliyeva v. Fone Management Enterprises, Inc., 300 A.D.2d 581, 582 (2d Dep't 2002) [citations omitted]; Yearwood v. Cushman & Wakefield, Inc., 294 A.D.2d 568, 569 (2d Dep't 2002); Bykofsky v. Waldbaum's Supermarkets, Inc., 619 N.Y.S.2d 760 (2d Dep't 1994). Although objected to by the defendant, the Court has reviewed the photographs submitted and sees neither a defect with the pipe under the sink, nor any water streaming onto the floor, let alone any puddle in the spot where plaintiff claims she fell. The affidavits offered by the plaintiff and her husband are clearly tailored in an attempt to raise issues of fact where none exist to avoid summary judgment being granted to the defendant.

At her deposition, the plaintiff testified that she did not see any water on the floor prior to her fall, but that after she fell she saw some water spots, though she could not tell whether the water was coming from the exterior of the sink pipe or from another pipe adjacent to the wall. However, in the affidavit attached to her opposition papers, the plaintiff states that she could tell that the water was streaming from the sink nearest to the spot where she claims she fell. In her affidavit, she also states that she saw puddles of water on the floor, as opposed to the mere spots of water that she testified about seeing at her deposition. At her examination before trial the plaintiff also testified that she did not know where the water that she claims she slipped on had come from, and acknowledged the possibility that the water could have come from another customer who had just finished washing their hands. In her affidavit the plaintiff completely contradicts her prior testimony by stating that she now knows that it

came from the sink pipe.

Based on the foregoing, the Court finds that the plaintiff's affidavit is a belated attempt to avoid the consequences of her earlier deposition by raising a feigned issue of fact and is insufficient to raise a triable issue of fact. Twarog v. Ortiz-Deviteri, (2d Dep't 2016). As such, the defendant's motion for summary judgment is granted in its entirety.

This constitutes the Decision and Order of the Court.

Dated: 12/5/18



Hon. Edgar G. Walker, J.S.C.

**HON. EDGAR G. WALKER**

  
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