Yates v Sears Holdings Mgt. Corp.
2018 NY Slip Op 34101(U)
September 12, 2018
Supreme Court, Orange County
Docket Number: Index No. EF002426/I7
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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MICHELLE YATES,

Plaintiff,

–against–

SEARS HOLDINGS MANAGEMENT CORPORATION,

Defendant.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF002426/17

DECISION AND ORDER

Motion Date: August 29, 2018

The following papers numbered 1 through 3 were read and considered on a motion by the Defendant, pursuant to CPLR 3025(b), for leave to amend the caption, and pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Notice of Motion- Thebaud Affirmation- Exhibits A-H 1-3

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is denied.

Introduction

The Plaintiff Michelle Yates commenced this action to recover damages allegedly arising from a trip and fall in a K-Mart store.

The Defendant Sears Holdings Management Corporation moves to amend the caption to name K-Mart Corporation as the sole defendant in the case, and for summary judgment dismissing the complaint on the ground that the Plaintiff will be unable to prove her case.

The motion is denied.

Factual/Procedural Background

In her complaint, the Plaintiff alleges that, on January 25, 2016, at approximately 11:00 a.m., she tripped and fell due to a dangerous and defective condition existing in the Defendant's store, to wit: the Defendant allowed a "small step ladder to exist at the end of the aisle causing the walkway to become dangerous."

In her verified bill of particulars, the Plaintiff alleges, *inter alia*, that the Defendant, "failed to remove liquid and/or water and/or ladders in an area that the defendant knew or should have known was an area where customers would walk when entering and exiting the beauty aisle."

At an examination before trial, the Plaintiff testified that she tripped and fell in the K-Mart in New Windsor near the stationery area (Motion, Exhibit E, pp. 45-46) She had been to the store five to ten times before (T-45-47). She testified:

> I was walking down an aisle 12 and, I know I'm using my hands, made a right turn at an end cap of the aisle and there was a small ladder right at the end cap, like, a foot stool and my right foot caught it and I fell. I couldn't see it, you know, coming around -- there wasn't a cone or anything. I just tripped on it and fell.

(T-50-52).

When asked if she also slipped on liquid, she testified:

> No. My foot hit the ladder. I know I was a little wet, my pants were a little wet. So there must have been a little water on the floor but I did not slip on the water.

(T-52).

The Plaintiff identified a "[s]mall stepstool ladder" shown to her in a photograph as the same type of stepladder/stool she had tripped on (T-53). She did not recall seeing a stepladder/stool in the same place during prior visits (T-53-55). Prior to her accident, she did

not complain to any store personnel about stepladders/stools (T-56). She had not seen any stepladders/stools in the aisles on subsequent visits (T-60). After her accident, she spoke to an associate at the store who filled out an accident report (T-89).

At an examination before trial, Robert Avezzano testified that he was an asset protection manager at the subject store on the date in question (Motion, Exhibit F). His job responsibilities included theft resolution; safety programs; safety inspections; training employees on asset protection policies and procedures, and maintaining the physical security of the store (T-9). He monitored the store from a room with closed circuit televisions to deter theft, etc. (T-13). If he observed a dangerous condition in the store, he would either correct it himself or contact someone on the floor to correct that condition (T-14). There were no employees who were specifically tasked with cleaning the aisles and looking for dangerous conditions (T-24). There were janitors (T-24). There was also a store manager (T-11).

At one point on the day in question, he was called and told that the Plaintiff had been injured in the store (T-20). There were no cameras in the area of the health and beauty section where she fell (T-22). When he arrived at the accident site, the Plaintiff was on the floor, on her back (T-25). She complained her neck hurt (T-25). The only people around her when he arrived were other K-mart employees (T-26). There were around 10 to 12 employees working at that time (T-27). He took one photograph of a spot of water on the floor (T-33). He would take photographs after an accident of anything that might have contributed to the accident (T-34). The water appeared to be "smudged," was black and brown in color, and appeared to contain some rock salt (T-58). He observed the water after the Plaintiff had already been brought out by paramedics, which was after there had been multiple people in the area, including the

paramedics, who had brought a wheeled cart in from outside (T-60). In general, he would note in the accident report anything that might have contributed to an accident, such what kind of shoes a person was wearing, the general conditions of the floor, the weather, etc. (T-51).

Avezzano identified a two-step stepladder in a photograph as the same type that was sold in the store (T-38). Occasionally employees would use them for work, although they were not supposed to (T-38). Employees were provided with staircase-type ladders with railings on the side (T-39, 57). If not damaged, stepladders used by employees would be sold (T-38). He had seen employees use the store stepladders once or twice in the four or five months he was at the store (T-39). He didn't remember seeing a stepladder/stool near the Plaintiff, and the Plaintiff did not mention a stepladder/stool to him (T-41-43, 46). When he asked her how she fell, she told him that she wasn't sure (T-47). He did not hear what the Plaintiff said to the first responders (T-47). He did not recall if he saw any stepladders/stools anywhere in the vicinity of where the Plaintiff fell (T-48).

The Motion at Bar

Based upon the foregoing, the Defendant moves to amend the caption to name K-Mart Corporation as the sole defendant in the case, and for summary judgment dismissing the complaint on the ground that the Plaintiff will be unable to prove her case.

In support of its motion, the Defendant submits an affirmation from counsel, Andrew Thebaud.

Thebaud notes that the Plaintiff testified that she had visited the subject store at least 5 to 10 times prior to the alleged accident, but that she had never observed a stepladder/stool left unattended in the store aisles, had never observed an employee using such a stepladder/stool, and

had never made a complaint about such a condition.

Further, Thebaud notes, contrary to the allegations in her Bill of Particulars, the Plaintiff expressly denied slipping on any liquid.

Thebaud notes that Avezzano, who investigated the accident, testified that he did not see a stepladder/stool at the accident site, and that the Plaintiff did not state that she had tripped over a stepladder/stool. Further, he notes, Avezzano testified that the stepladder/stool upon which the Plaintiff allegedly tripped was store merchandise. Thus, Thebaud asserts, although Avezzano testified that employees had "sparingly used the depicted stool for work-related reasons in the past, there was no repeated pattern of employees using merchandise to perform work related functions."

Given such testimony, Thebaud argues, there is no evidence to support a finding that the Defendant created or otherwise had actual or constructive notice of the alleged condition at issue. Rather, he asserts, the record is devoid of any evidence to suggest that a K-Mart employee was using the stepladder/stool at issue and left it unattended. Indeed, he notes, the stepladder/stool was merchandise, and not solely in Defendant's possession. Thus, he asserts, it was "subject to being used and controlled by other customers on the incident date, perhaps within moments of Plaintiff's accident."

In any event, he argues, the Plaintiff will be unable to establish that the alleged dangerous condition existed for a sufficient period of time to have permitted K-Mart employees to have remedied the condition.

Finally, he asserts, Sears Holdings Management Corporation is not the proper defendant in this action. Rather, the proper defendant is K-Mart Corporation.

Discussion/Legal Analysis

A property owner has a duty to maintain his or her premises in a reasonably safe condition. *Dow v. Hermes Realty, LLC*, 155 A.D.3d 824 [2nd Dept. 2017]. To impose liability on a property owner for a slip and fall or trip and fall on an alleged dangerous condition on property, there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time. *Dow v. Hermes Realty, LLC*, 155 A.D.3d 824 [2nd Dept. 2017].

A defendant who moves for summary judgment in a slip and fall or trip and fall case has the initial burden of establishing, *prima facie*, that it neither created nor had actual or constructive notice of the alleged hazardous condition. *Mandarano v. PND, LLC*, 157 A.D.3d 664 [2nd Dept. 2018]. To constitute constructive notice, a defect must be visible and apparent for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it. *Mandarano v. PND, LLC*, 157 A.D.3d 664 [2nd Dept. 2018].

Here, although the Plaintiff expressly denied that she slipped on any liquid, she did testify that she tripped and fell on a stepladder/stool that was left in an aisle at an end-cap.

Thus, to demonstrate a *prima facie* entitlement to judgment as a matter of law, the Defendant must present evidence either that the alleged dangerous condition did not exist, or that, if it did, it lacked actual or constructive notice of the same. This burden was not met.

First, to the extent that the Defendant's arguments might be read to be asserting such, Avezzano's testimony that he did not remember seeing a stepladder/stool in the area of the accident, and that the Plaintiff did not tell him that she tripped on the same at the time of the accident, does not demonstrate, *prima facie*, that a stepladder/stool was not present; even when

considered in conjunction with the Plaintiff's inconsistent allegations as to the nature of the alleged dangerous condition at issue. Rather, this presents a question of fact for the jury.

Similarly, Avezzano's testimony that the type of stepladder/stool at issue was merchandise available to shoppers, and not intended for use by employees, does not demonstrate, *prima facie*, that the Defendant did not create the alleged dangerous and defective condition at issue, *i.e.*, that a customer, not an employee, left the stepladder/stool in the aisle, and that the Defendant did not have sufficient time to remedy the condition. This is particularly true in light of Avezzano's testimony that employees did in fact sometimes use such stepladders/stools for work.

Finally, the Defendant did not demonstrate, *prima facie*, that it lacked constructive notice of the alleged dangerous condition.

Avezzano did not testify that he was in charge of patrolling the store for dangerous conditions, or that he or any other employee under his supervision or direction did in fact do so on the day in question. Indeed, he testified that the store did not have employees specifically tasked with doing so. Rather, the gist of Avezzano's testimony is that he monitored the store from a room with closed circuit television cameras, primarily for theft and wrongdoing, but that he would report and/or remedy any dangerous condition he observed. However, he testified, there was no camera monitoring the area where the Plaintiff allegedly tripped and fell.

The Defendant otherwise presented no testimony or evidence demonstrating a lack of constructive notice of the alleged dangerous condition at issue. *See e.g., Mandarano v. PND, LLC*, 157 A.D.3d 664 [2nd Dept. 2018][defendants established their *prima facie* entitlement to judgment as a matter of law by submitting evidence of their trash collection and disposal

practices, deposition testimony regarding the routine cleaning of the sidewalk each morning, and deposition testimony from several witnesses who walked through the area shortly before the plaintiff's accident and did not observe the condition that allegedly caused his fall].

Thus, that branch of the motion which is for summary judgment dismissing the complaint is denied regardless of the lack of opposition papers. *Dow v. Hermes Realty, LLC*, 155 A.D.3d 824 [2nd Dept. 2017].

As to the remaining branch of the motion, the Defendant offers nothing, other than the conclusory, bare allegation of its attorney, that K-Mart Corporation is the proper Defendant. Indeed, the Court notes, although this would seem merely logical, this issue was not raised in the Defendant's answer, although, in the complaint, the situs of the accident is expressly alleged to be a K-Mart store.

Thus, that branch of the motion is denied, with leave to renew. Obviously, this would appear a compelling subject for a stipulation.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is denied; and it is further,

ORDERED, that the parties are directed to, and shall, appear, through respective counsel, for a Pre-trial Conference on Wednesday, November 14, 2018, at 9:15 a.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: September 12, 2018
Goshen, New York

ENTER

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