Suplicz v Golub Corp.
2018 NY Slip Op 34156(U)
June 7, 2018
Supreme Court, Onondaga County
Docket Number: Index No. 2016EF1064
Judge: Donald A. Greenwood

At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on April 10, 2018.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

ILONA SUPLICZ,

Plaintiff,

v.

THE GOLUB CORPORATION d/b/a PRICE CHOPPER,

Defendants.

DECISION AND ORDER ON MOTION

Index No.: 2016EF1064
RJI No.: 33-18-0330

APPEARANCES: **ROBERT A. QUATTROCCI, ESQ., OF STANLEY LAW OFFICES, LLP**
For Plaintiff

KAREN J. KROGMAN DAUM, ESQ., OF SMITH, SOVIK, KENDRICK & SUGNET, P.C.
For Defendant

Defendant moves for summary judgment dismissal in this matter that concerns a slip and fall at a Price Chopper super market which took place on October 30, 2015. The complaint alleges that plaintiff was in the floral department and slipped and fell on water that leaked from the floral containers. The plaintiff, who was eighty years old at the time of the fall, suffered a fractured right hip. Defendant's motion is predicated upon the arguments that there was no substance or alleged slippery condition on the floor or in the alternative that defendant did not create or have actual or constructive knowledge of the alleged condition. As the proponent of the motion the defendant is required to establish through the submission of admissible, non-

speculative evidence that it is entitled to dismissal as a matter of law on these grounds in the first instance. *See, Altieri v. Golub Corp.*, 292 AD2d 734 (3rd Dept. 2006).

It has done so through reliance on plaintiff's deposition testimony and her medical records, as well as affidavits from store employees. Plaintiff testified that she suffered from weakness in her right leg, which is supported by her medical records. Plaintiff also testified that she had a cane inside her vehicle on the date of the incident which she did not bring into the store. She further indicated that after she fell she notified Price Chopper employees who filled out an incident report. Plaintiff reported that her right side was weak and "gave out" which caused her to fall down. Defendant has demonstrated that plaintiff testified consistently with the incident report, which states that she reported that she fell as a result of her right leg giving out and that she stated that she saw a drop of water on the ground after her fall, but did not know how big the alleged water drop was and thought that it came from a flower bucket nearby. She also testified that she did not know how long the drop of water had been on the floor before her fall or how it got there and that none of her clothing was wet after the fall. Affidavits are provided from both Mason Gable and Jeanette Stevenson, Price Chopper employees, who were both at work on the date of the fall. Gable is a co-manager and notes that plaintiff testified that there were stairs inside of the store near the Starbucks area where she had been having coffee with her husband. He indicates there is not currently nor has there ever been stairs inside the store near that area. On the date of the incident he was notified by another employee about the fall and went to the area within moments of the notification. According to his affidavit, the floor was dry and he did not observe any slippery condition. He completed the incident report and indicates that plaintiff admitted to him that her right side gave out, causing her to fall. Gable

states that he specifically asked her if she had slipped on anything on the floor and she replied "no". Part of his job responsibility was to make sure the store was safe and clear for customers and to respond to any complaints. He notes that the store has policies and procedures in place to ensure the aisles and floors are clear, safe and dry for customers and throughout the day either himself or another employee checks the aisles and floors and that the checks are ongoing and frequent to ensure customer safety. Gable also indicates that in addition to not seeing any slippery condition on the floor, he did not create any alleged condition complained of by the plaintiff. Jeanette Stevenson's affidavit indicates that she did not notice a slippery condition in any part of the store before plaintiff's fall. She reported to Gable her prior inspections of the floor before and after the fall, which was then documented in the incident report. She indicates that she inspected the area five minutes before the fall and that the floor was dry. Stevenson states that she again inspected the floor after plaintiff's fall and it was dry. According to Stevenson, plaintiff likewise admitted to her that she fell because her right leg was weak and gave out. In addition, defendant points to the plaintiff's medical record from the date of the accident wherein plaintiff stated that she had "a history of falls of unknown origin, roughly three in the past couple of months".

Defendant has met its initial burden of demonstrating that it is not liable here. First, it has shown that plaintiff fell due to her weak leg and that there was no substance or alleged condition on the floor and thus summary judgment dismissal of the complaint is warranted. *See, Balashanskaya v. Poly Med Community Care Center, PC*, 122 AD3d 558 (2d Dept. 2014). Defendant has likewise shown that the plaintiff cannot identify any alleged condition that caused her to fall without engaging in speculation. A plaintiff's inability to identify the cause of the fall

is fatal to a claim of negligence in a slip and fall case because a finding that the defendant's negligence if any proximately caused plaintiff's injuries cannot be based on speculation. *See, Smart v. Zambito*, 85 AD3d 1721 (4th Dept. 2011). The record shows that plaintiff was specifically questioned about whether she knew what made her fall and she answered "no" on two different occasions, and instead testified about a drop of water that she observed after the fall.

Even assuming that plaintiff fell because of an alleged dangerous condition, defendant has met its burden by making a *prima facie* showing that it neither created the alleged hazardous condition, nor had actual or constructive notice of it. *See, Arzola v. Boston Property Ltd. Partnership*, 63 AD3d 655 (2d Dept. 2009). Defendant has shown that the record is devoid of any proof that defendant created any alleged slippery or dangerous condition and in fact plaintiff testified she did not know how the alleged drop of water got on the floor or how long it was there. When a plaintiff does not know how the slippery condition was created there is no triable issue of fact pertaining to defendant's creation of the slippery condition. *See, Cerkowski v. Price Chopper Operating Co., Inc.*, 68 AD3d 1382 (3rd Dept. 2009); *see also, Baia v. Alright Parking Buffalo, Inc.*, 27 AD3d 1153 (4th Dept. 2006).

Defendant has likewise demonstrated that it did not have any actual notice of any alleged condition, as the employees did not observe any dangerous condition on the area of the fall beforehand or were not aware of any complaints pertaining to the condition before the fall. *See, Navetta v. Onondaga Galleries, LLC*, 106 AD3d 1468 (4th Dept. 2013). Plaintiff testified she never complained to the store before her fall nor were there any other complaints. With respect to constructive notice, defendant has met its burden by showing that the alleged defect was not

visible and apparent, nor did it exist for a sufficient length of time prior to the accident to permit defendant's employees to discovery and remedy it. *See, Gordon v. American Museum of Natural History*, 67 NY 2d 836 (2007). Defendant has shown that there was no condition that was visible and apparent as plaintiff did not see any liquid on the floor before the fall. *See, Williams v. County of Erie*, 119 AD3d 1444 (4th Dept. 2014); *see also, DeJesus v. CEC Entertainment*, 138 AD3d 1390 (4th Dept. 2016). Defendant has also demonstrated in the first instance that any alleged condition did not exist for a sufficient amount of time for defendant to discover and remedy it as defendant's employee inspected the area near the fall minutes before it happened and there was no indication of any liquid substance. *See, McClaren v. Price Chopper Supermarkets, Inc.*, 226 AD2d 982 (3rd Dept. 1996); *see also , Maiorano v. Price Chopper Operating Co.* Inc., 221 AD2d 698 (3rd Dept. 1995). Defendant has therefore made a *prima facie* showing that it did not create the condition or have actual or constructive knowledge of the alleged presence of water on the floor. See, *Maiorano, supra.* As such, "it is incumbent upon the plaintiff to make an affirmative evidentiary showing that a genuine issue of fact" exists. *Id.*

Plaintiff has failed to do so here. Plaintiff's counsel notes that the plaintiff was eighty two years old at the time of her deposition, and that her medical records show that her cognitive abilities have decreased since the accident, and that she suffered from some memory issues. When asked during her deposition about her previous statement that her right side was weak when she fell, plaintiff then referred to flower buckets and a rug next to it and that after her fall almost an entire roll of paper towel was used to clean up the water. However, plaintiff's subsequent contradictory testimony concerning the same facts, even if taken as true and given every favorable inference, do not establish that the defendant had actual or constructive notice of

a spill of water near the water and therefore fails to raise an issue of fact as to whether defendant had notice of the alleged dangerous condition. *See, Hyna v. Reese*, 52 AD3d 1254 (4th Dept. 2008). In addition, although plaintiff argues that a question of fact exists concerning notice as to whether defendant's employees completed a reasonable inspection, the defendant's evidence concerning the inspection within a reasonable time is unrefuted. Nor did plaintiff raise an issue of fact through the affidavit from her husband, which claims he observed his wife walked by the display where she slipped and fell and that he noticed that there was water on the floor near the display. Even setting aside the fact that the affidavit directly contradicts plaintiff's deposition testimony that her husband was in a different aisle of the store when the incident occurred and giving plaintiff the benefit of every favorable inference from the affidavit, it still does not refute the defendant's proof that there was no notice as notice based upon the inspection which occurred five minutes prior to plaintiff's fall. Thus, while defendant has met its initial burden in showing that it did not create the alleged dangerous condition through the Stevenson and Gable affidavits, as well as through plaintiff's testimony wherein she stated that she did not know how the alleged drop of water got on the floor, plaintiff has failed to establish how the alleged dangerous condition was created. She only conclusorily stated that defendant created the alleged drop of water on the floor and there was no testimony from plaintiff that the water came from flowers in the flower display. *See, Tenkate v. Tops Market, LLC,* 38 AD3d 987 (3rd Dept. 2007). Speculation as to how the alleged dangerous condition was created does not suffice. *See, Cerkowski,* supra; *see also, Baia, supra*. In addition, plaintiff did not create an issue of fact as to whether the defendant created the alleged water on the floor as plaintiff has provided nothing to contradict the employee affidavits. Plaintiff's failure to meet her burden

with respect to constructive notice is clear inasmuch as she did not demonstrate the existence of an issue of fact with respect to whether the alleged water was visible and apparent or whether the alleged dangerous condition existed for a sufficient amount of time to discover and remedy it. Plaintiff failed in her burden in opposition to show the source of the alleged dangerous condition and/or length of time the water was on the floor and failed to offer any facts as to the source of the alleged condition and the length of time it existed. Inasmuch as plaintiff did not know how long the alleged water was on the floor, she failed to create a question of fact as to constructive notice. *See, Anthony v. Wegmans Food Markets, Inc.,* 11 AD3d 953 (4th Dept. 2004). Plaintiff's speculation concerning the source of the water and the length of time it was on the floor is insufficient to raise a triable issue of fact. *See, Anthony, supra.*

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the defendant's motion for summary judgment dismissal is granted.

ENTER

Dated: June 7, 2018
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Defendant's Notice of Motion, dated February 9, 2018.

2. Affidavit of Karen J. Krogman Daum, Esq. in support of defendant's motion, dated February 9, 2018, and attached exhibits.

3. Affidavit of Jeannette Stephenson, dated February 6, 2018.

4. Affidavit of Nathan Gable, dated February 6, 2018, and attached exhibit.

5. Defendant's Memorandum of Law, dated February 9, 2018.

6. Affirmation of Robert A. Quattrocci, Esq. in opposition to defendant's motion, dated March 23, 2018, and attached exhibits.

7. Affidavit of Joseph Suplicz, dated March 23, 2018.

8. Reply Affidavit of Karen J. Krogman Daum, Esq., dated March 28, 2018.

9. Defendant's Reply Memorandum of Law, dated March 28, 2018.