Velocci v Stop & Shop
2019 NY Slip Op 33273(U)
November 1, 2019
Supreme Court, New York County
Docket Number: 155971/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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ANTHONY VELOCCI,

Plaintiff,

-against-

STOP AND SHOP, THE STOP AND SHOP SUPERMARKET COMPANY, LLC, EQUITY ONE REALTY AND MANAGEMENT NE, INC., EQUITY ONE (CLOCKTOWER) LLC, and CHRISTOPHER LUISI,

Defendants.

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Index No. 155971/2017

Motion Sequence No. 003

HON. ROBERT D. KALISH, J.S.C.:

In this personal injury action, plaintiff Anthony Velocci alleges that he slipped on the floor of defendants' supermarket due to the presence of a four-to-five-inch puddle of water which may have originated from a nearby freezer containing bags of ice for sale. Defendants move pursuant to CPLR 3212 for summary judgment based, in relevant part, on that they did not cause, create, or have actual or constructive notice of the allegedly dangerous condition, while plaintiff cross moves for summary judgment in his favor on the issue of liability. For the following reasons, Defendants' motion is granted, the cross motion is denied, and the action is dismissed with prejudice.[1]

"In a slip-and-fall case, the defendant moving for summary judgment has the burden of demonstrating, prima facie, that it did not create the alleged hazardous condition or have actual

[1] At oral argument, plaintiff conceded that defendants Equity One Realty and Management NE, Inc. and Equity One (Clocktower) LLC were entitled to dismissal of the complaint as against them insofar as they are out-of-possession owners with no duty to third parties such as plaintiff.

or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD3d 1307, 1308 [1st Dept 2011], *quoting Zerilli v W. Beef Retail, Inc.*, 72 AD3d 681, 681 [2d Dept 2010]; *see Manderson v Phipps Houses Servs., Inc.,* 173 AD3d 459, 459–60 [1st Dept 2019]; *Roman v Met-Paca II Assocs., L.P.*, 85 AD3d 509, 509–10 [1st Dept 2011]; Colt v Great Atl. & Pac. Tea Co., 209 AD2d 294 [1st Dept 1994]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Piacquadio v Recine Realty Corp.,* 84 NY2d 967 [1994]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon*, 67 NY2d 836, 837). Moreover, "[t]he absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law" (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [2010] *citing Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2002], *lv denied* 99 NY2d 509 [2008]. Furthermore, "a general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall" (*Piacquadio, supra*). Once the defendant has met its burden, the burden shifts to the plaintiff on the question of notice (*Strowman v Great Atl. & Pac. Tea Co.*, 252 AD2d 384, 384–86 [1st Dept 1998]).

An absence of notice may be established by the testimony of defendant's employees that a routine inspection did not disclose the condition and a plaintiff's own testimony that the condition was not visible before the accident (*see Manderson*, 173 AD3d 459, 459–60 [1st Dept 2019] ; *Phillip v Young Men's Christian Ass'n of Greater New York*, 117 AD3d 413, 413–14 [2014]; *Roman,* 85 AD3d 509, 509–10 [1st Dept 2011]; *Grossman v City of New York*, 157 AD3d

600 [1st Dept 2018]). While evidence that the condition was recurrent may go toward establishing constructive notice, a plaintiff must submit proof of sufficiently frequent prior incidents (*see Robinson v City of New York*, 173 AD3d 485 [1st Dept 2019]). Such evidence will not be probative where the defendant has established that the issue was addressed by regular maintenance or repairs and that the alleged condition was not apparent to the plaintiff or following an inspection prior to the accident (*Manderson*; *Lucas v St. Barnabas Hosp.*, 109 AD3d 746 [1st Dept 2013]). Nor may plaintiff avoid summary judgment by offering speculation as to the cause of the condition (*see Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dept 2013]; *Goldman v Waldbaum, Inc.*, 248 AD2d 436, 437 [1st Dept 1998]; *Kokin v Key Food Supermarket, Inc.*, 90 AD3d 850 [2d Dept 2011]).

Expert testimony regarding a hazard based upon an inspection made years after an accident is to be disregarded (*Burko v Friedland*, 62 AD3d 462 [2009]; *Kruimer v Nat'l Cleaning Contractors, Inc.*, 256 AD2d 1 [1998]). Likewise, a plaintiff's affidavit recounting prior observations of the condition which contradicts earlier testimony and is thus tailored to avoid its consequences should not be considered (*Vaughn v Harlem River Yard Ventures II, Inc.*, 118 AD3d 604, 605 [1st Dept 2014]; *Freiser*, 84 AD3d 1307, 1308–09, *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 1st Dept [2008]).

Here, defendants have met their prima facie burden by proffering the testimony of an employee, Janice Leise, who conducted routine "Clean Sweep" inspections from end to end of the store every day, and who inspected the area near the freezer within approximately 30 minutes of when the accident occurred without noting any hazardous condition. Further, plaintiff's own testimony confirms that the water was not visible prior to the accident. Plaintiff has offered nothing but speculation that customers or employees may have created the condition in the past

by placing bags of ice on the floor, and the claim in his affidavit that he actually witnessed such conduct contradicts his prior deposition testimony (*see* Frost affirmation, exhibit D [Anthony Velocci tr] at 44, lines 2–25; at 45, lines 2–25; at 46, lines 2–4).

Moreover, there is no evidence in the record as to any prior incident involving the subject area or that any clear water condition on the floor was recurrent. The expert affidavit of plaintiff's professional engineer, Robert L. Grunes faults the "absence of any abatement, remediation or warning efforts by the store; notwithstanding [the store manager's] stipulation that store procedure called for these responses." Based upon the proof submitted, there is no showing that such efforts were necessary prior to the alleged accident of plaintiff. The Court finds Mr. Grunes' assertion, based on his observations years after the incident, that the subject water may have emanated from the freezer or been created as a result of store employees' work restocking ice, to be entirely speculative and completely without merit.

Kenneth V. Thompson, plaintiff's supermarket industry expert, opines in his affidavit that it is the custom and practice in the industry to place absorbent rubber mats or carpeting and cones in front of ice coolers, as it is well known in the industry that the ice freezers cause an accumulation of water on the floor in front of the freezer on a consistent basis (aff of Thompson ¶ 4). Mr. Thompson further opines that this is caused by bags being dragged out of the freezer, rested on the floor, put into shopping carts, and parked in front of the freezer during restocking (*id.* ¶ 4–5). Mr. Thompson further opines that it is the custom and practice in the industry to have an abatement, warning, and written clean-up system in place (*id.* ¶ 7).

As to the foregoing, read in opposition to defendant's motion and in the light most favorable to plaintiff, the expert affidavit of Mr. Thompson fails to raise a genuine issue of material fact. In the first instance, the subject ice freezer is not an inherently dangerous condition

of the type that would require an owner of premises to warn its guests by means of cones, signs, or other demarcations. To the extent that water may pose a hazard on a supermarket floor, and to the extent such water may emanate from or be incident to an ice freezer, the possibility of a dangerous condition existing due to such water is no more inherently dangerous in a supermarket than water tracked in during rainy weather, water emanating from the vegetable misters, any other frozen food items in the frozen foods aisle that may produce condensate, or even more transient conditions such as an errant banana peel, a broken glass bottle, or spilled milk, all of which have been found by the Appellate Division in one case or another to be subject to the same analytical framework: whether the premises owner caused, created, or had actual or constructive notice of the allegedly dangerous condition (*see eg. Kerson v Waldbaums Supermarket*, 284 AD2d 376 [2d Dept 2001]). In no event are such conditions inherently dangerous. Otherwise the defendant would be "required to cover all of its floors with mats []or to continuously mop up all moisture" (*Kovelsky v City Univ. of NY*, 221 AD2d 234, 235 [1st Dept 1995].) This is not the law, and this Court declines the invitation of plaintiff in the instant application to extend the duty of an owner of premises as to its flooring in the first instance.

Although the presence or absence of a mat may raise a genuine issue of material fact in a slip and fall case in a supermarket, whether it does is dependent on whether the owner had actual notice of a recurrent condition (*see Rosado v R & E Corp.*, 106 AD3d 481, 481–482 [1st Dept 2013]). The instant case is distinguishable from *Rosado* in that, here, defendants have shown prima facie that there had been no complaints of water on the floor and no accidents in the area where plaintiff alleges that he fell. Defendants have further shown prima facie that there was not even a general awareness that a dangerous condition might be present here. In opposition, there is no testimony connecting the subject water to the ice freezer other than mere speculation.

Second, assuming for the sake of argument that, as Mr. Thompson opines, it is the custom and practice in the industry to place mats and cones near ice freezers to guard against the type of danger that plaintiff speculates caused his fall, Mr. Thompson has failed to connect the alleged custom and practice to a duty of care that the defendants in this case owed to their customers. Mr. Thompson cites to no specific examples of such mats being placed in any store, nor does he provide the basis for his conclusory opinion that this is the custom and practice. While Mr. Thompson does state that water may result from bags being dragged out of the freezer, rested on the floor, put into shopping carts, and parked in front of the freezer during restocking, there is no evidence in the instant case that this resulted in a "consistent accumulation of water" at any sort of "regular interval." The affiant makes no reference to the subject store and is entirely speculative on this point. As such, it is unclear whether the subject aisle where plaintiff alleges that he fell had within it the type of "ice freezer" or "ice cooler" about which Mr. Thompson is opining, and whether the specific area where plaintiff fell would fall within the ambit of the alleged custom and practice. Even setting aside the entire notice analysis and any issues of proximate cause, the connection between Mr. Thompson's cursory affidavit and the facts of this case is speculative and tenuous, rendering it wholly inapplicable here.

The case cited by plaintiffs, *Fortgang v Chase Manhattan Bank*, is distinguishable from the instant matter, on the facts, as, similarly to *Rosado*, there was no dispute that defendants were aware of a dangerous condition, and the issue of fact was whether they had breached their duty of care to a plaintiff as to whether they remedied or protected against it so as to avoid liability (23 NY23 895 [1969]). Further, the expert in *Fortgang* opined as to the positioning of mats placed on a lobby floor, and the facts of that case demonstrated that the defendant had placed mats but had left a small area of the floor uncovered. The issue of fact was "whether the building

lessee maintained properly placed mats on the lobby floor during rainy weather and kept the uncovered areas free of excessive moisture" (*id.*). Here, it is unclear whether Mr. Thompson is referring to the type of freezer present in defendant's store when he refers to an "ice freezer" or "ice cooler" in his affidavit. Further, here, defendants have shown prima facie that they did not cause, create, or have actual or constructive notice of a dangerous condition, and that there was no recurrent condition. If defendants can be said to have had a general awareness of a dangerous condition, it is only as to those types of hazards, such as spills, condensate, fallen produce, and broken glass that are part and parcel of the operation of a supermarket. As to those, defendants have shown prima facie that they did not breach their duty of care to plaintiff by their use of the Clean Sweep inspection program and the affidavit of Ms. Leise.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion is granted, the cross motion is denied, and the action is dismissed with prejudice; and it is further

ORDERED that defendants shall, within 10 days of entry, serve a copy of this order with notice of entry on plaintiffs and on the clerk, who is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: NOV. 1, 2019

ENTER:

HON. ROBERT D. KALISH J.S.C.

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