Moore v A & C Supermas, Inc.
2019 NY Slip Op 33697(U)
December 19, 2019
Supreme Court, New York County
Docket Number: 161064/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 2

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YVETTE MOORE,

Plaintiff,

-against-

A & C SUPERMAS, INC., individually and/or d/b/a ASSOCIATED SUPERMARKETS,

Defendant.

---X

DECISION & ORDER

SEQ. NO. 002

INDEX NO.:161064/2017

HON. KATHRYN E. FREED, J.S.C. :

The following documents filed with NYSCEF were considered in deciding this motion: 44-58; 60-62; and 65-70.

Plaintiff Yvette Moore commenced this negligence action seeking to recover damages for personal injuries she allegedly sustained in a slip and fall accident.

Defendant A & C Supermas, Inc., individually and/or d/b/a Associated Supermarkets, moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor and dismissing the complaint. Plaintiff opposes the motion.

Plaintiff cross-moves for an order directing that a negative inference charge to be given against defendant as a result of its failure to preserve video evidence. Defendant opposes the cross motion.

FACTUAL BACKGROUND

This case arises from an incident on August 8, 2016, in which plaintiff allegedly slipped and fell on a large red liquid puddle that had accumulated on the floor of the defendant's supermarket

located at 2444 Adam Clayton Powell, Jr., Blvd., New York, New York (the supermarket). Plaintiff alleged that the supermarket was owned and operated by defendant. She further alleged that defendant was negligent in its operation and management of the supermarket, specifically that it failed to keep the aisles of the store in a reasonably safe condition.

Deposition Testimony Of Plaintiff

At her deposition, plaintiff testified that, on the day of the accident, she was shopping at the supermarket for approximately fifteen to twenty minutes before she slipped and fell in the vegetable aisle on a red, burgundy-colored liquid substance (tr at 44). Plaintiff estimated that the accident occurred between 11:00 a.m. and 11:30 a.m. and that she did not see the substance until she slipped on it (tr at 49-50, 62). Plaintiff further testified that the spill emanated from the bottom crate of a stacked set of crates (tr at 57-59, 60). According to plaintiff, there were no caution signs or warnings of a wet floor or a spilled substance. Plaintiff observed John Sanchez (Sanchez), the manager of the supermarket, standing at the end of the aisle where she slipped and claimed that he saw her fall. Plaintiff called out to Sanchez for help after she fell and he immediately came over to her and instructed another worker to clean up the spill (tr at 66). Additionally, plaintiff said that she previously complained to Sanchez about renovation work being conducted at the supermarket. (tr at 37-39).

Affidavit And Deposition Testimony Of John Sanchez (Defendant's Owner/Manager)

Sanchez testified that he was the owner and manager of the supermarket. He further testified that he was responsible for opening the supermarket every day at 7:00 a.m. and that he

performed inspections of the store by walking the floors, as well as by monitoring the aisles by watching video taken by surveillance cameras while he was in his office. (tr at 44-47). Sanchez represented that his inspections of the supermarket included walking through each aisle checking for any empty boxes, plastics in the aisle, water, and broken bottles (tr at 40, 41).

On the day of the alleged incident, Sanchez testified that on the day of the accident, he was walking around the store conducting his inspection when, as he was walking from aisle 7 to aisle 8, he saw plaintiff on her knee on the floor, toward the back of aisle 8 (tr at 18,19). He claimed that plaintiff got up on her own and continued shopping. He did not see any crates in the aisle or any red or burgundy substance on the floor. Sanchez did, however, observe two clear drops of water in the area where plaintiff claims to have fallen (tr at 22,36). He further testified that he was not informed or notified of any spills or substances on the floor prior to plaintiff's accident (aff at ¶ 3).

LEGAL CONCLUSIONS

Summary judgment is drastic relief since it denies a litigant of the opportunity to go to trial. Thus, summary judgment should only be granted where there are no triable issues of fact (*see Andre v Pomeroy,* 35 NY2d 361 [1974]). The focus for the Court is on issue finding, not issue determination (*see Genesis Merchant Partners, L.P. v Gillbride, Tusa, Last & Spellane, LLC,* 157 AD3d 415 [1st Dept 2018]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the movant

has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

A defendant who moves for summary judgment in a trip and fall case has the initial burden of making a prima facie showing that it neither created the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it (*Rosario v Prana Nine Props.*, 143 AD3d 409 [1st Dept 2016]). To meet this burden, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*Fama v City of New York*, 118 AD3d 459 [1st Dept 2014]).

<u>Defendant's Motion For Summary Judgment</u>

Defendant argues that it is entitled to summary judgment as a matter of law because the evidence before the court establishes that it 1) did not cause or create the alleged condition, and 2) had no actual and/or constructive notice of the alleged condition.

In support of its motion, defendant submits the deposition testimony of plaintiff and Sanchez as well as an affidavit by Sanchez. Sanchez conducted inspections of the supermarket on the day of the accident and neither he nor any of the supermarket's employees noticed, or were notified of, any substance on the floor where plaintiff claims she fell. He also denied that there were any stacked crates in the aisle where plaintiff allegedly fell.

Defendant met its initial burden of demonstrating its entitlement to the relief sought by submitting evidence, including Sanchez's deposition testimony, that he had inspected the area in

question before the plaintiff fell, and that the aisle was free of debris, spills and stacked crates, which established that defendant did not create or have actual notice of the allegedly dangerous condition on the floor of the supermarket (*Suarez v Jesup Realty Group, LLC*, ___ AD3d ___ [1st Dept , December 5, 2019]). The burden therefore, shifts to the plaintiff to come forward with sufficient evidence in admissible form to raise a triable issue of fact as to whether the defendant created the condition or had actual or constructive notice thereof.

In opposition, plaintiff testified that her slip and fall was caused by a large red or burgundy colored liquid puddle that had accumulated from crates that had been stacked in the aisle where she fell. Plaintiff also testified that Sanchez was not only present in the aisle where she slipped and fell, but that he also observed the accident.

Thus, on the evidence presented, issues of fact exist as to whether crates were stacked in the aisle, and if so, whether defendant caused or contributed to the accident by stacking them; the size and visibility of the liquid substance that allegedly caused plaintiff's fall; and whether Sanchez and/or other employees of the supermarket knew or should have known about the puddle of red or burgundy liquid given that plaintiff's testimony that Sanchez was near her when she fell.

Accordingly, defendant's motion for an order granting summary judgment dismissing the complaint is denied.

Plaintiff's Cross Motion For A Negative Inference Charge

Plaintiff cross-moves for an order directing that a negative inference charge be given against the defendant due to its failure to preserve critical video evidence. Defendant opposes the cross motion.

"On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a culpable state of mind, which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense" (*Duluc v AC & L Food Corp.*, 119 AD3d 450, 451 [1st Dept 2014]); internal citations omitted). The burden is on the party requesting the sanction to make the requisite showing (*see Mohammed v Command Sec. Corp.*, 83 AD3d 605 [1st Dept 2011]).

Here, plaintiff has not met her burden of establishing that defendant destroyed the videotape with a culpable state of mind. Sanchez testified that video of plaintiff's alleged slip and fall was taped over by the video system during the normal course of business. Importantly, plaintiff has neither set forth evidence that she made a demand of defendant to preserve the videotape as evidence, nor that defendant is in violation of a prior order of this Court directing production of the videotape (*Smith v New York City Health & Hosps.Corp.*, 284 AD2d 121 [1st Dept 2001]).

Accordingly, plaintiff's cross motion for an order directing that a negative inference charge be given against defendant at trial based upon spoliation of evidence is denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff's cross motion for a negative inference charge is denied; and it is further

ORDERED that counsel are directed to appear for an early settlement conference before Mediator Miles Vigilante at 80 Centre Street, New York, New York, on January 9, 2020 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: December 19, 2019

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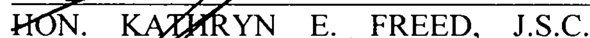

HON. KATHRYN E. FREED, J.S.C.