SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 515846/18
Motion Date: 9-14-20
Mot. Seq. No.: 2

----------X

DAWN R. MOSES,

Plaintiff,

-against-

DECISION/ORDER

GATEWAY CENTER PROPERTIES PHASE II, LLC,
GATEWAY SHOPRITE ASSOCIATES, LLC,
SHOPRITE OF GATEWAY CENTER and
THE RELATED COMPANIES, LP,

Defendants.

----------X

The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law	3
Other	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the plaintiff moves for an order pursuant to CPLR § 3212 granting her partial summary judgment on the issue of liability and dismissing the affirmative defense alleged by defendant GATEWAY SHOPRITE ASSOCIATES, LLC that the accident was solely or partially due to plaintiff's own negligence.

Plaintiff commenced this action claiming that on November 5, 2017, she suffered personal injuries while shopping at defendant's supermarket when a metal shelf fell on her right leg and ankle. After defendant Gateway Shoprite Associates, LLC stipulated that it owned, operated and maintained the supermarket, plaintiff discontinued the action against all the other named defendants.

MS#02-XMD

The evidentiary materials that plaintiff submitted in support of the motion included the deposition testimony of the plaintiff and Alonzo Garraway, one of defendant's Assistant Managers. The plaintiff testified that on the day of the accident, while she was shopping at defendant's supermarket, she felt something hit her right leg and ankle. She turned and saw it was a supermarket shelf that had fell on her. The shelf then dropped to the floor. She did not see the shelf before it fell on her.

Mr. Garraway testified that following the accident, he had the opportunity to look at a surveillance video which captured the happening of the accident and certain events that preceded the accident. When asked what he saw in the video, he testified as follows:

> "I remember the shelf falling onto the lady's foot. I'd seen when Alicia [a store employee] placed the shelf on the side. I don't fully remember how it fell onto her foot, but from my recollection someone hit the shelf and it fell on the floor."

He further testified that standing a shelf up on its side is against store policy. The surveillance video was not submitted in support of the motion.

The gist of plaintiff's argument is that summary judgment should be granted because the unrefuted proof demonstrates that one of defendant's employees removed the shelf before the accident and stood it up on its side in violation of store policy.

The defendant had a duty to maintain its premises in a reasonably safe manner (*see Basso v. Miller,* 40 N.Y.2d 233, 386 N.Y.S.2d 564, 352 N.E.2d 868). In order for a defendant to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed, that the defendant affirmatively created the condition or had actual or constructive notice of its existence and that the defective condition was the proximate cause of the injuries (*Lezama v. 34–15 Parsons Blvd, LLC,* 16 A.D.3d 560, 560, 792 N.Y.S.2d 123; *see Friedman v. 1753 Realty Co.,* 117 A.D.3d 781,

783, 986 N.Y.S.2d 175; *Tavarez v. Pistilli Assocs. III, LLC*, 161 A.D.3d 1129, 1130, 77 N.Y.S.3d 450, 451). The issue of whether a dangerous or defective condition exists depends on the facts of each case and is almost always a question of fact for the jury (*see Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977, 665 N.Y.S.2d 615, 688 N.E.2d 489; *Guerrieri v. Summa,* 193 A.D.2d 647, 598 N.Y.S.2d 4; *Schechtman v. Lappin,* 161 A.D.2d 118, 554 N.Y.S.2d 846). Thus, to prevail on the motion, it was incumbent upon the plaintiff to establish the above elements as a matter of law (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572, citing *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see also* CPLR 3212[b]). If the plaintiff made such a showing, to defeat the motion, the defendant was required to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). If the defendant failed to make such a showing, the motion must be denied regardless of the sufficiency of the opposing papers (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240). In deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inferences must be drawn in that party's favor (*see McNulty v. City of New York,* 100 N.Y.2d 227, 230, 762 N.Y.S.2d 12, 792 N.E.2d 162; *Boyd v. Rome Realty Leasing Ltd. Partnership,* 21 A.D.3d 920, 921, 801 N.Y.S.2d 340; *Erikson v. J.I.B. Realty Corp.,* 12 A.D.3d 344, 783 N.Y.S.2d 661).

Here, the plaintiff did not establish her prima facie entitlement to summary judgment. Assuming Mr. Garraway's testimony concerning what he observed on the surveillance video is admissible, whether the store employee who placed the shelf on its side created a defective condition is a question of fact for the jury, not a question that can be decided as a matter of law. The fact that the store employee who stood the shelf on its side violated store policy does not in

itself establish liability. Plaintiff was still required to demonstrate the existence of a defective condition under common law standards (*see Gilson v. Metropolitan Opera,* 5 N.Y.3d 574, 577, 807 N.Y.S.2d 588, 841 N.E.2d 747; *Rahimi v. Manhattan & Bronx Surface Transit Operating Auth.*, 43 A.D.3d 802, 804, 843 N.Y.S.2d 557, 559). For this reason alone, plaintiff's motion for summary judgment on the issue of liability must be denied.

The court further finds that there are questions of fact as to proximate cause and whether plaintiff own negligence contributed to the accident.

Accordingly, it is hereby

ORDRED that plaintiff's motion is **DENIED** in its entirety.

This constitutes the decision and order of the Court.

Dated: October 13, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020