| **Dibartolo v Wakefern Food Corp.** |
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| 2021 NY Slip Op 31083(U) |
| March 31, 2021 |
| Supreme Court, New York County |
| Docket Number: 152326/2018 |
| Judge: Verna Saunders |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. VERNA L. SAUNDERS** **PART** **IAS MOTION 36**
*Justice*

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**INDEX NO.** 152326/2018

JOHN DIBARTOLO,
Plaintiff,

**MOTION SEQ. NO.** 002

- v -

WAKEFERN FOOD CORP., SOUTHAMPTON POOH LLC, SHOP-RITE SUPERMARKETS, INC. D/B/A SHOPRITE OF SOUTHAMPTON, and THE STOP & SHOP SUPERMARKET COMPANY LLC,
Defendants.

**DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for **SUMMARY JUDGMENT**.

In this personal injury action, plaintiff asserts that he was injured while making a delivery to the receiving area of the Stop & Shop Supermarket in Southampton, New York. Defendants Southampton Pooh, LLC and the Stop & Shop Supermarket Company, LLC ("Stop & Shop") move the court pursuant to CPLR 3212 seeking summary judgment and a dismissal of the complaint.[1]

Plaintiff opposes the motion.

Plaintiff was employed by Canada Dry/Pepsi Cola Bottling Company as a delivery driver. When delivering to defendant's store, plaintiff would utilize a hand truck or U-boat to transport the load up a ramp and through the back door where the deliveries are unloaded. The ramp is an inclined walkway leading from the parking lot to the receiving area. There is a wall along the right side of the ramp and metal handrailing along the left side of the ramp. On June 5, 2017, plaintiff loaded about fifteen pieces of Canada Dry product onto his U-boat cart. On the date of the accident, plaintiff weighed approximately 185 lbs and the load weighed approximately 300 lbs. After the U-boat was loaded, plaintiff pushed the U-boat up the ramp. Plaintiff noticed some milk crates along the wall of the ramp which he maneuvered passed to arrive at the top of the ramp. While at the top of the ramp, plaintiff stepped in front of the U-boat, used his left hand to hold on to the front of the U-boat (his left arm was inside and through it) and his right hand to open the door. (Plaintiff tr at 54-55). The door has to be pulled open causing plaintiff to take a few steps back while holding the U-boat at the top of the inclined ramp. (Plaintiff tr at 55-56). As the door "swung" open, plaintiff let go of the door and "grabbed the railing" to assist him in pulling the U-boat up into the doorway when his "footing gave out" and the U-boat began pulling him down the ramp. (Plaintiff tr at 56-58). Plaintiff asserts that the handrailing "gave out" and was "floppy" as he grabbed it but that on prior occasions the railing did not appear loose. (Plaintiff tr at 69). Plaintiff called his manager to report the incident but did

[1] Plaintiff filed a Stipulation of Voluntary discontinuance against defendants Wakefern Food Corp. and Shop-Rite Supermarkets, Inc. d/b/a Shoprite of Southampton (NYSCEF Doc No 8).

not report the incident to Stop & Shop. Plaintiff could not recall what occurred after the incident other than driving back to the Melville depot where he was advised to see the Pepsi-Cola doctor.

Defendants argue that as plaintiff cannot establish a dangerous condition existed; notice of the condition; or that the alleged condition caused his injuries, a summary determination is warranted. As to plaintiff's assertion that the handrail "gave out" or was loose, defendants argue that no evidence has been offered to establish constructive or actual notice of any defect. In support of its contentions, defendants rely on plaintiff's deposition testimony wherein he states that he made deliveries to the subject location approximately two to three times per week, for approximately five years prior to this accident, utilizing the ramp, handrail, and door handle. Prior to the date of the accident, plaintiff did not encounter problems with the ramp, door handle, or the railing. Furthermore, according to the sworn affidavit of Debbe Mistretta, customer service manager of the Stop & Shop location, defendants had not received any prior complaints or incident reports regarding the ramp, door, or handrail. Defendants maintain that any injury to plaintiff's shoulder is a result of his own doing as he overloaded his U-boat to approximately 115 lbs more than his body weight, attempted to roll the cart down the incline while holding it with only one hand, and refused to release his grip of the cart when he lost control of it.

In opposition, plaintiff argues that there was a loose screw on the door handle which existed prior to the accident; the milk crates on the ramp narrowed the passageway; the railing at the bottom of the ramp was loose for a period of time before the accident; and the railing at the top of the ramp came out of the concrete when plaintiff grabbed it. Plaintiff contends defendants knew of the conditions causing his accident and even assuming that they did not have actual notice the defect, they did, however, have constructive notice as the defect existed for a significant period of time. Plaintiff argues that defendants have failed to establish they maintained the property in a reasonably safe condition or, that they had no knowledge of the defect. In support of this contention, plaintiff relies on the testimony of defendant's witness, Debbe Mistretta, who testified that she recalled the railing becoming loose in June 2017 but was unsure as to when. Plaintiff also maintains that the repair of the railing in 2015, after it was struck by a truck, was not sufficiently remedied as plaintiff testified that the bottom of the railing was loose. Finally, plaintiff avers that assuming *arguendo* that plaintiff was negligent in his conduct, such negligence is not a complete bar to recovery.

In reply, defendants argue plaintiff never fell and that his footing "gave out" when he chose to hold on to his U-boat cart which outweighed him by 115 lbs while using one arm placed through the front of the bars of the U-boat cart to steer and control it. Defendants aver that plaintiff should have let go of the cart once he lost control of it. Defendants maintain plaintiff never testified to losing his footing due to a slippery substance on the ramp; milk crates on the ramp; or the door handle. With respect to the alleged defect of the railing, defendants argue that plaintiff testified he lost control of the cart before he grabbed for the railing and that prior to the incident he never experienced loosening of the railing. As such, defendants argue that the railing was not the cause of plaintiff's accident and even assuming it was, they did not have notice of the defect. Defendants submit that plaintiff's assertion that the repair to the handrail in 2015 did not remedy the defect, is speculation and should be rejected by the court insofar as the railing being damaged and repaired two years prior to the accident does not constitute notice of a dangerous condition.

A movant seeking summary judgment in its favor must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) The evidentiary proof tendered must be in admissible form. (*See Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065 [1979].) Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact, (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) The proof raised by the opponent to the motion "must be sufficient to permit a finding of proximate cause 'based not upon speculation, but upon a logical inference to be drawn from the evidence.'" (*Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005], quoting *Schneider v Kings Highway Hops. Ctr.*, 67 NY2d 743 [1986].)

Under the common law, an owner of real property is duty-bound to maintain his/her property in a reasonably safe condition. (*see Peralta v Henriquez*, 100 NY2d 139, 143 [2003]); *Basso v Miller*,40 NY2d 233,241 [1976]; *Cupo v Karfunkel*,1 AD3d 48, 51 [2d Dept. 2003].) Thus, an owner must utilize reasonable care in the maintenance of a property, with such care being measured by all attendant circumstances, such as the likelihood of injuries to others, the seriousness of the injury, and the burden involved in avoiding the risk. (*see Peralta*, 100 NY2d at 143-144; *Basso*, 40 NY2d at 241.)

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach. (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981].) A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall. (*see Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014].)

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 defendants' employees to discover and remedy it or warn about its existence (*see Lewis v Metro. Transp. Auth.*, 64 NY2d 670, 670 [1984]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986].) Additionally, neither a general awareness that a dangerous condition may be present nor the observation of a condition in another area is sufficient to create constructive notice. (*id.* at 838 [internal citations omitted]).

In applying these legal principles to the facts in the instant matter, based on the admissible evidence submitted, the court finds that defendants have failed to demonstrate that they did not create or have actual or constructive notice of the alleged defective condition prior to plaintiff's accident.

Plaintiff's arguments regarding the milk crates on the ramp or loose screws on the door handle are inconsequential as plaintiff testified that he passed the crates on the ramp and opened the door without issue. What remains in contention here is whether plaintiff's accident was caused by a defective handrail and whether defendants had actual or constructive notice of the purportedly defective handrail.

According to plaintiff's deposition testimony, he delivered to this location several times per week utilizing the ramp, the door, and the handrailing. The handrailing was used as a pulling apparatus upon which plaintiff would brace himself while he pulled his U-boat cart filled with

products onto the landing at the top of the ramp and into the door where deliveries are unloaded. Plaintiff did not grab the handrailing to prevent himself from slipping or tripping as he testified that there was no debris or substance causing him to slip or trip. Plaintiff also testified that the railing became loose as he grabbed it and that prior to that occasion he did not experience any problems with the railing at the top of the ramp. Plaintiff did testify, however, that the railing at the bottom of the ramp "gave out" on him in the past but this was the first occasion the railing at the top of the ramp had given out or become loosened. To the extent that plaintiff argues that since the railing at the bottom of the ramp was loose, it bears on the likelihood that the railing at top of the ramp was loose or would become loose, the court finds this argument to be without merit and unsupported by the record. Furthermore, a general awareness that a dangerous condition may be present or the observation of a condition in another area is insufficient to establish constructive notice. (*Gordon* at 838).

However, at Debbe Mistretta's July 16, 2019 deposition, she stated that she had not reviewed any records prior to her testimony but she recalled being aware that the handrail became loose sometime in June of 2017. (Mistretta tr at 11; 17). She also testified that prior to plaintiff's accident she was unaware of any accident or incident on the ramp and/or involving the handrail. (Mistretta tr at 23). In her sworn statement dated January 8, 2020, annexed to the moving papers, Mistretta avows that she became aware of plaintiff's incident after June 5, 2017 and that a search of the records revealed that there were no incidents, prior accidents, or injuries reported involving the ramp, door or handrail prior to June 5, 2017. Mistretta further affirms that her record search revealed no records for repair requests for work to be performed on the handrail prior to June 5, 2017. Her sworn statement did not address her prior testimony where she asserts that she became aware of the handrail becoming loose in June 2017 thus, whether or not Mistretta observed that the handrail became loose before or after plaintiff's accident on June 5, 2017 is unclear. Furthermore, Mistretta was not asked nor did she indicate during her testimony or in her sworn statement whether her observation of the loosening of the handrail occurred at the bottom or at the top of the ramp. Thus, on this record a summary determination is unwarranted as issues of fact remain. Based on the foregoing, it is

**ORDERED** that defendants' motion for summary judgment is denied; and it is further

**ORDERED** that the parties are directed to appear remotely for a settlement conference on June 2, 2021, for which the videoconference links, etc. shall be provided no later than May 21, 2021.

This constitutes the decision and order of the Court.

**March 31, 2021**

**HON. VERNA L. SAUNDERS, JSC**

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| CHECK ONE: | [X] | CASE DISPOSED | | [ ] | NON-FINAL DISPOSITION | | |
| | [ ] | GRANTED | [X] DENIED | [ ] | GRANTED IN PART | [ ] | OTHER |
| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | [ ] | INCLUDES TRANSFER/REASSIGN | | [ ] | FIDUCIARY APPOINTMENT | [ ] | REFERENCE |