

Agnesini v Skechers USA Retail, LLC

2024 NY Slip Op 31271(U)

April 10, 2024

Supreme Court, New York County

Docket Number: Index No. 152772/2020

Judge: Leslie A. Stroth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 12M

Justice

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TERESA AGNESINI,

Plaintiff,

- v -

SKECHERS USA RETAIL, LLC, SKECHERS USA, INC.

Defendant.

-----X

INDEX NO. 152772/2020
MOTION DATE 11/28/2023
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 60, 61, 62, 63, 65, 67, 68, 69, 70

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

This action for negligence arises out of an incident on September 19, 2018, when plaintiff Teresa Agnesini (plaintiff) allegedly pricked her finger on a sharp object in a shoe at a Skechers shoe store located at 1515 Broadway in Times Square, Manhattan, which is owned by defendants Skechers USA Retail, LLC, and Skechers USA, Inc. (collectively, defendants). Plaintiff commenced this action by Summons and Complaint on March 13, 2020, seeking recovery for alleged psychological injuries as a result of the incident.

Defendants now move for summary judgment, pursuant to CPLR 3211 and 3212, dismissing all claims against them.

I. Undisputed Facts

On the day of the incident, plaintiff went to the Skechers shoe store located at 1515 Broadway, Times Square, Manhattan, and was assisted by a sales associate. Plaintiff chose a display sample shoe, and the sales associate retrieved a boxed pair of shoes for plaintiff to try on. At this Skechers store, the inventory is not available on the sales floor for customers to try on, and

the only way to obtain shoes to try on is for the sales associate to retrieve them from the stockroom. The sales associate returned with a box of shoes and handed it to plaintiff. When plaintiff reached her hand inside the first shoe to discard the packing paper, she was pricked by a sharp object, which appeared to be a needle. According to plaintiff, the shoes were in pristine condition, and looked brand new. Plaintiff did not look at the shoe before removing it from the box and did not inspect the shoe to see if it had anything in it prior to inserting her hand inside the shoe.

Plaintiff alleges that the incident caused her to experience emotional distress and other psychological injury resulting from the fear of contracting and subsequently transmitting HIV/AIDS and other infectious diseases. Plaintiff's finger has fully recovered, and she never tested positive for HIV or any other infectious disease as a result of this incident.

II. Analysis

It is well-established that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon v City of New York*, 66 NY2d 1026 (1985). “[B]efore a defendant may be held

liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability.” *Pulka v Edelman*, 40 NY2d 781 (1976). Indeed, the threshold question in analyzing a negligence claim is whether the defendant owed a duty of care to the plaintiff. *See Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002).

In the instant matter, defendants argue that they have met the standard of reasonable care and that the alleged psychological injuries plaintiff claims to have suffered are too remote, too speculative to be actionable, and not proximately caused by any wrongdoing on the part of defendants. Furthermore, defendants maintain that there is no issue of material fact to substantiate plaintiff’s emotional distress claim because there is no proof of any physical injury, or actual exposure to HIV/AIDS. This is corroborated by the fact that, as plaintiff concedes, there is no evidence that the sharp object in question was contaminated with HIV; plaintiff tested negative for HIV following the incident. Furthermore, defendants argue that the doctrine of *res ipsa loquitur* is not applicable here as plaintiff cannot demonstrate that defendants had exclusive control over the merchandise when thousands of weekly customers make it impossible to control all merchandise. Additionally, then Skechers District Sales Manager for New York and New Jersey, Stefanie Graciani, who oversaw the store in question for 2 years prior to the instant incident, had never heard of a customer being injured by a sharp object in a shoe; defendants argue that this fact, and the random nature of a sharp object in a shoe box, makes the incident unforeseeable. *See* NYSCEF Doc. No. 45, Skechers Affirmation. pp. 5. Thus, defendants could not have had notice such that they then owed a duty to plaintiff to protect her against same.

Plaintiff opposes, alleging that defendants were negligent by failing to exercise reasonable care with respect to the ownership, operation, management, and control of the premises, causing

plaintiff to be stuck by a needle that, plaintiff claims, was placed sticking up from inside of the shoe. Plaintiff also claims that defendants increased the risk of injury by allowing unsafe conditions and practices to exist, and by failing to properly train and supervise their employees. Plaintiff further asserts that the incident caused her to experience emotional distress and other psychological injury spurred from fear of contracting and subsequently transmitting HIV/AIDS and other similar infectious disease. In light of this, plaintiff asserts that defendants are not entitled to summary judgment because factual issues remain as to whether the accident was caused by defendants' negligence, and as to whether plaintiff reasonably feared exposure to a contagious disease.

It is well-settled that absent proof of a likelihood of contracting AIDS, recovery for emotional distress for same will be denied as overly speculative and remote. *See Bishop v Mount Sinai Medical Center*, 247 AD2d 329 (1st Dept 1998). The Court of Appeals has ruled on this issue, and affirmed the position of the First Department. In the case of *Ornstein v New York City Health & Hospitals Corporation*, 10 NY3d 1 (2008), the Court of Appeals stated:

New York Courts have required plaintiffs who have not tested HIV positive to come forward with proof that, due to negligence of another party, they were exposed to HIV through "a scientifically accepted method of transmission of the virus, and that the source of the blood or fluid was in fact HIV positive." *citing Bishop v. Mt. Sinai Medical Center*, 247 AD2d 329 (1st Dept 1998).

In the instant matter, plaintiff generally states that the sharp object in question could theoretically have transmitted disease, yet she does not allege that she was actually exposed to HIV/AIDS or other diseases. In addition, plaintiff makes no assertion that the sharp object was infected itself. Therefore, regardless of whether defendants owed a duty of care to plaintiff or not, plaintiff's claim fails as a matter of law as she has failed to submit any proof of physical,

psychological, or emotional injury or damages through a physician's report, expert's opinion, or any other admissible evidence.

III. Conclusion

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Skechers USA Retail, LLC, and Skechers USA, Inc. is granted, and the complaint is dismissed in its entirety as against defendants, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants; and it is further

ORDERED that a copy of this order with notice of entry be served by defendants upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 30 days of this Order.

The foregoing Constitutes the Order and Decision of the Court.

4/10/2024
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


HON. LESLIE A. STROTH
J.S.C.