Feeney v Price Chopper Operating Co., Inc.

2013 NY Slip Op 30043(U)

January 13, 2013

Sup Ct, Albany County

Docket Number: 8303-10

Judge: Joseph C. Teresi

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SUPREME COURT
STATE OF NEW YORK — COUNTY OF ALBANY

JEAN FEENEY and PAUL RYDER,

Plaintiffs,

DECISION and ORDER
INDEX NO. 8303-10
RJI NO. 01-12-108369

-against-

PRICE CHOPPER OPERATING CO., INC.,

Defendant.

Supreme Court Albany County All Purpose Term, January 8, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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(John J. Criscione, Esq.)
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Albany, New York 12204

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C.
(Alaina K. Laferriere, Esq.)
Attorneys for Defendant
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TERESI, J.:

Defendant moves for summary judgment pursuant to CPLR 3212 and seeks the dismissal of the complaint. The plaintiff opposes the motion and maintains questions of fact preclude the granting of summary judgment.

Plaintiff, Jean Feeney, commenced this action to recover for injuries she sustained in a slip and fall on April 24, 2008 in defendant's Glenmont, New York store. The plaintiff claims she slipped on a cellophane meant wrapper that was on the floor in front of the meat counters. The plaintiff alleges an unknown Price Chopper employee witnessed her fall. The plaintiff claims the employee picked up a partially crumpled bloody cellophane meat wrapper with a Price Chopper sticker affixed to it and stated "oh look, here's what you slipped on." Both plaintiffs contend they saw the cellophane meat wrapper in the area where the fall occurred. The plaintiffs also allege the meat department counter person was handed the meat wrapper which he discarded.

In support of the motion, the defendant alleges the plaintiff cannot prove the actual cause of her fall. The defendant maintains the plaintiff is unable to identify an allegedly dangerous or defective condition which caused her to fall. The defendant contends plaintiffs' negligence allegations are based upon speculation and conjecture. The defendant claims the plaintiffs are unable to prove liability without hearsay testimony. The defendant alleges it did not have either actual or constructive notice of the cellophane meat wrapper on the floor in front of the meat department. The defendant alleges all meat wrapping is done in the back of the meat department and never done on the sales floor.

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. (Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v City of New York, 49 NY2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not

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issue determination. (Barr v. County of Albany, 49 NY2d 557 [1980], and all evidence must be viewed in the light most favorable to the opponent to the motion. (Davis v. Klein, 88 NY2d 1008 [1996]).

In moving for summary judgment, defendant bore the initial burden of establishing that it maintained its premises in a reasonably safe condition, had no actual or constructive knowledge of the condition and did not create the allegedly dangerous condition. (Musilli v. Kohler Co., 50 AD3d 1600 [4th Dept. 2008]; Montuori v. Town of Colonie, 277 AD2d 643 [3rd Dept. 2000]). "A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence such as affidavits by persons having knowledge of the facts . . . and showing the cause of action has no merit." (GTF Mktg. v. Colonial Aluminum Sales, 66 NY2d 965 [1985]). Failure to make such showing requires denial of the motion regardless of the sufficiency of the opposing papers. (Winegard v. New York Univ. Med. Center, 64 NY2d 851 [1985]).

To establish a prima facie case of negligence, the plaintiff must demonstrate (1) that the defendant owed her a duty of reasonable care, (2) a breach of the duty, and (3) a resulting injury proximately caused by the breach. (Solomon v. City of New York, 66 NY2d 1026 [1985]). An owner of realty owes a duty to maintain the property in a reasonably safe condition. (Basso v. Miller, 40 NY2d 233 [1976]) and one who has fallen as a result of a defect must prove that the property owner had either actual or constructive notice of the defect in order to recover. (Early v. Hilton Hotels Corp., 73 AD3d 559 [1st Dept. 2010], Zavaro v. Westbury Property Investments Co.., 244 AD2d 547 [2nd Dept. 1997]). Plaintiff must demonstrate that defendant either created the condition by its own affirmative act, was aware of a specific condition yet failed to correct it, or was aware of an ongoing and recurring unsafe condition which regularly went unaddressed.

(O'Connor-Milel v. Barhite & Holzinger, 234 AD 2d 106 [1st Dept. 1996]). 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 a defendant to discover and remedy it (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]).

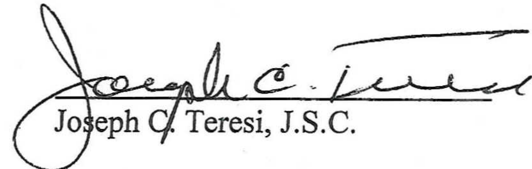
Defendant's motion for summary judgment is denied. This Court is unable to determine as a matter of law that the defendant is entitled to summary judgment. The Court cannot determine as a matter of law that the defendant did or did not have constructive notice of the dangerous condition at the meat counter. There are questions of fact that cannot be resolved by summary judgment. The plaintiffs indicate an unidentified Price Chopper employee witnessed the fall, picked up the cellophane meat wrapper and stated that it was the cause of her fall. Viewing the evidence presented in a light most favorable to the plaintiffs, the Court finds the plaintiffs raised questions of fact regarding the condition of the meat aisle which precludes summary judgment.(Cerniglia v. Loza Rest. Corp., 98 AD3d 933 [2nd Dept. 2012]).

"Whether a dangerous or defective condition exists on the property of another to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." (Trincere v. County of Suffolk, 90 NY 2d 976 [1997]).

This Decision and Order is being returned to the attorney for the plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relived from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
January 13, 2013



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated November 9, 2012;
2. Affidavit of Alaina K. Laferriere, Esq. dated November 9, 2012 with attached exhibits A-M;
3. Affidavit of Damien J. Garczynski dated October 19, 2012;
4. Affidavit of Frank Mancino dated October 22, 2012;
5. Defendant's Memorandum of Law dated November 9, 2012;
6. Affidavit of Paul Ryder dated December 28, 2012;
7. Affidavit of Jean Feeney dated December 28, 2012 with attached exhibit A;
8. Affidavit of John J. Criscione, Esq. dated December 31, 2012 with attached exhibit A;
9. Plaintiff's Memorandum of Law dated December 31, 2012;
10. Affidavit of Alaina K. Laferriere, Esq. dated January 7, 2013;
11. Defendant's Reply Memorandum of Law dated January 7, 2013.