CHAROFF v. MARMAXX OPERATING CORP. et al

2020 | Cited 0 times | E.D. Pennsylvania | April 7, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATALIA CHAROFF Plaintiff, v. MARMAXX OPERATING CORP. d/b/a TJ MAXX; TJX COMPANIES, INC. d/b/a TJ MAXX; and, TJ MAXX DEPARTMENT STORE

Defendants.

MEMORANDUM Jones, II J. April 7, 2020

I. INTRODUCTION

Plaintiff Natalia Charoff commenced the above-captioned matter against Defendants MarMaxx Operating Corporation d/b/a/ TJ Maxx, TJX Companies Inc. d/b/a TJ Maxx, and TJ Maxx Department Store, alleging she sustained injuries after a liquid substance inside the Langhorne, Pennsylvania TJ Maxx store caused her to slip and fall. Currently before the court is For the reasons set forth herein, said Motion shall be denied. II. BACKGROUND

a. Procedural History Plaintiff commenced this litigation by filing a Writ of Summons in the Philadelphia Court of Common Pleas on October 14, 2018. (ECF No. 1, Ex. A.) On October 24, 2018, Plaintiff filed a Complaint and shortly thereafter, Defendants removed the matter to federal court on the

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CIVIL ACTION NO. 18-4712

basis of diversity. (ECF No. 1.) Defendants then filed an Answer and the matter was referred to an arbitration panel. (ECF Nos. 3, 9.) A hearing was held in July 2019, at which time Plaintiff

requested a trial de novo. (ECF No. 16.) However, shortly thereafter, Defendants moved for summary judgment. (ECF No. 18.) Plaintiff filed a Response thereto (ECF Nos. 21, 22), and Defendants filed a Reply. (ECF No. 23.) 1

The matter is now ripe for disposition. b. Undisputed Facts

The undisputed facts 2

establish that on September 9, 2016, Plaintiff slipped and fell at a TJ Maxx store located at 2424 East Lincoln Highway in Langhorne, Pennsylvania. (SUF ¶ 2; RSUF ¶ 2.) When Plaintiff first entered TJ Maxx, she went to the back of the store to get a box of -18:1, April 23, 2019.) Plaintiff then walked to the front of the store to purchase the cookies, but discovered they were not marked with a price. -5, 10-17.) She returned to the rear of the store and retrieved another box before heading back up to the front once again. (SUF ¶¶ 11-12; RSUF ¶¶

1 In addition to their original submissions, both parties filed multiple supplements, as well as responses thereto. Namely, Plaintiff first filed a Surr Reply, which included the report of professional engineer. (ECF No. 24.) Defendants then filed a Response to said report. (ECF No. 26.) Defendants also filed a Supplemental Brief in support of their Motion, which discussed a recent Third Circuit opinion regarding the issue of spoliation. (ECF No. 27.) Plaintiff filed a response (ECF No. 28), as well as a brief relying on supplemental authority from the Superior Court of Pennsylvania. (ECF No. 29.) Defendants then filed a Response, distinguishing that case. (ECF No. 30.) Neither party ever sought leave to file any of the last five submissions of record (ECF Nos. 26-30), as is required by See (Rev. Dec. 2, 2016), Civ. Cases, § A party may move to file a reply or sur-reply brief. A motion for leave to file such must be accompanied by (1) a short memorandum indicating why the party wishes to supply the court with additional information, and (2) the proposed reply or sur-reply brief itself. However, in the interest of time and efficacy, the court shall consider these filings for purposes of the instant ruling. 2

11- -7.) As she approached the check-out area approximately twelve (12) feet from where the cashiers were located Plaintiff slipped and fell. (SUF ¶ 12-14; RSUF ¶ 12- 14 -9, 22:6-14, 27:13-28:1.)

During her deposition, Plaintiff testified that she did not see anything on the floor prior to her fall, but that after she slipped, she noticed dirty wet 31:21-24, 32:7-8.) Plaintiff further stated that she touched the wet spots and they felt slimy and -6.) Plaintiff described the spilled liquid as being about one (1) foot wide, and said she did not know how it got there or how long it had been there. (SUF ¶ 1 -23.) was using a mop; Plaintiff assumed the employee was using the mop to clean, but she did not know for certain. (SUF ¶ 1 -15.) Plaintiff also stated she did not observe any customers spilling liquids in the area where she fell. (SUF ¶ 1 33:22-24, 34:1.)

(SUF ¶ 24; RSUF ¶ 24; ECF No. 21-4, Warner Dep. 10:15-20, Mar. 17, 2019.) Warner spoke with

Plaintiff, and she showed him where she had fallen. (SUF ¶ 16, 25; RSUF ¶ 16, Dep. 36:4-10, 37:15-22; Warner Dep. 10:24, 11:1-4.) Warner observed small drops of liquid on the floor. (SUF ¶ 26; RSUF ¶ 26; Warner Dep. 16:18-24, 17:1-3.) Warner believed the spilled liquid covered an area of approximately one (1) foot. (SUF ¶ 28; RSUF ¶ 28; Warner Dep. 38:1- 13.) Warner did not believe anyone witnessed Plaintiff fall. (SUF ¶ 29; RSUF ¶ 29; Warner Dep. 36:7- her someone would be in touch regarding the incident. -24, 38:3.) Neither Warner nor

any other store employee told Plaintiff they knew about the spill prior to her fall. (SUF ¶ 18; -24, 68:1-3.)

Plaintiff testified that she slipped around 5:45 p.m. and had been in the store approximately 15 minutes before the incident occurred. (SUF ¶¶ 7-8; RSUF ¶¶ 7- Dep.17:3-8.) Plaintiff left the store about 10 minutes after she fell. (SUF ¶ 21; RSUF ¶ Dep. 39:11-13.)

b. Disputed Facts 3 clear. (SUF ¶ 27; RSUF ¶ 27.) employee who witnessed he a policy or procedure in place to monitor for and address spills as they occurred. Finally,

ce.

A party asserting that a fact is genuinely disputed must support the assertion by citing to particular parts of materials in the record, which may include depositions. See Fed. R. Civ. P. 56(c)(1)(A). However, when the non-movant provides rebuttal evidence, conclusory, self-serving insufficient to withstand a motion for summary judgment. See Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 161 (3d Cir. 2009) (citing Blair v. Scott Specialty Gases, 283 F.3d 595, 608 (3d Cir. 2002)) (internal quotation marks omitted); see also Irving v. Chester Water Auth., x 125, 12 self-serving deposition testimony

3 Plaintiff raised three new issues in her Response Brief, which Defendants subsequently disputed in their R Statement of Facts (either disputed or undisputed), this Court shall treat them as disputed facts and address each in turn. T applicable Policies and Procedures; namely, those pertaining to motions for summary judgment. Procedures (Rev. Dec. 2, 2016), Civ. Cases, § D (2) (delineating procedures for raising and addressing disputed and undisputed facts on summary judgment).

is insufficient to raise a genuine issue of material fact when other evidence of record rebuts the testimony).

i. Liquid on Floor Plaintiff disputes clear. (SUF ¶ 27; RSUF ¶ 27.) believe [it was clear], Warner Dep. 38:21-22.) This Court finds said

statement to be a distinction without a difference. Thus, this dispute does not constitute a genuine issue of material fact.

ii. Whether an Employee Witnessed Plaintiff Fall Plaintiff maintains that there was a TJ Maxx employee who was right next to her when she fell, and that said employee witnessed the incident sp. Br. -24.) In response, Defendants argue -serving testimony, evidence confirming the existence of this person at the scene of the incident or that the person

was, in fact, a store employee[. (Surreply 1.) no evidence that th created the condition, had notice of the condition or that he was present for any length of time before fall. (Reply 2.) While Defendants are correct that Plaintiff offers nothing more than her own self-serving testimony to support this fact, self-serving testimony may be utilized by a party at summary judgment Waldron v. SL Indus., 56 F.3d 491, 501 (3d Cir. 1995) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). Because Defendants point to no evidence of record that disputes employee witnessed her fall, and Warner, the store manager, testified that there were likely

between four (4) and eight (8) employees working at the time (Warner Dep. 47:7-8), this constitutes a genuine issue of material fact to be resolved at trial. 4

iii. Policy and Practice for Monitoring and Cleaning Spills Defendants or staff for inspecting, monitoring, or cleaning the floor of the store after a maintenance service (citing Warner Dep. 35:3-6). In response, Defendants cite to testimony for the proposition that there was no specific employee tasked with monitoring the floor for spills; instead, to monitor the floor and help clean up spills. (Reply 2) (citing Warner Dep. 35:3-22.) The

record . Warner testified that communicated over the walkies to another team member that we had a spill in whichever

specific area, get me supplies, and I would stay with the area, until the person came over with the supplies. -17.) This Court therefore finds this fact to be undisputed by the record.

iv. Evidence Spoliation Plaintiff further contends Defendants destroyed relevant evidence she requested, therefore, summary judgment is precluded. In particular, Plaintiff insurer, Zurich Insurance Company requested preservation of any video recording taken on the

4 the only contemporaneous documentation of record does not say that there were no witnesses to the fall; instead, it says . (Warner Dep. Ex. F, ECF No. 18-4 at 63.) The manner in which Warner worded this information in the report raises a reasonable inference that his deposition, Warner testified that he did not recall whether there were any witnesses. (Warner Dep. 36:9.)

day of her fall. (Ex. G, ECF No. 21-8.) Plaintiff sent the letter six (6) days after her fall, on September 15, 2016. (-8.) Because Keith Martin, ention Manager, testified that in 2016, videos were kept from between eight (8) to thirty (30) days, 5 can only lead to the belief, without any other explanation, that the tapes were destroyed in a 8.)

surveillance footage for th Reply 4) Resp. Br., Ex. H). Defendants also argue

Reply 5.) Defendants provide further support for their argument through means of yet another Supplemental Brief, Pace v. Wal- Mart Stores E., LP. In Pace, the court held that when there was testimony that a slip and fall eras, that [the] no adverse inference could be drawn from the defendants failure to produce said video. (Second Supp. Br. 2) (citing Pace, No. 18-3313, 2020 U.S. App. Lexis 2796, at *3, 7 (3d Cir. Feb. 25, 2020).

However, Plaintiff maintains Defendants have failed to address the issue of actual notice, and thus the facts of her case as distinguishable from those in Pace. Plaintiff further contends notes that Defendants have not addressed whether other relevant video

5 Martin Dep. 28:7-9, June 26, 2019.

footage exists, or provided an explanation for their fai Second Surreply Br. 1-2, ECF No. 29 at 1-2.) 6

Relying on the Pennsylvania Superior Court matter of , Plaintiff argues that when a defendant provides no explanation for its failure to produce a video, spoliation is an issue best left to the jury. (Second Surreply Br. 2, ECF No. 29 at 2 (citing 213 A.3d 263, 269 (Pa. Super. Ct. 2019)). 7

general the party that has prevented production did so out of the well-founded fear that the contents Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 334 (3d Cir. 1995) (citations omitted). This rule applies only if the evidence in question is relevant, within the , and the party appears to have actually suppressed or withheld it. Id. Courts will not make an unfavorable inference if the evidence has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for. Id. (citation omitted). any tendency to make a fact more or less probable than it would be R. Evid. 401(a)-(b) (emphasis added).

6 -R Although it is indeed an the number of replies and surreplies filed in this matter render that title unhelpful. Accordingly, this Court shall refer to said document as The court further notes that neither side has included page numbers in any of their multiple submissions. As such, this Court shall provide parallel citations to the corresponding ECF document when necessary, for the sake of clarity. 7 Pace, Defendants argue that because Marshall is a state court ma -2.) The court in Pace did state that hether a litigant is entitled to an adverse inference based on spoliation is a procedural question governed by federal law in diversity cases, so Pennsylvania state court decisions on the issue are merely persuasive Pace, 2020 U.S. App. Lexis 2796, at *7 n.1. However, Pace a non-precedential, unpublished opinion is likewise not binding upon this Court.

In this case, Insurance. (Warner Dep. 20:6-11.) Martin testified that if

-4.) Martin further testified that in September 2016, there were approximately 16 cameras in the store

and that requests to preserve video would typically come from Zurich, and video would be mailed directly to them if there was any relevant video. (Martin Dep. 23:9-11, 23-25.) Additionally, Martin stated that if Zurich had requested video in response to Pla request was made, but because he no longer had access to his emails from the time in question,

he could not say whether Zurich sought the video. (Martin Dep. 30:4-9.) Martin testified that there was video of the incident, the store would try to get it, and if there was no video, it would

inform Zurich of this fact via email. (Martin Dep. 31:21-32:15.) Again, because he no longer had access to emails from the time of the incident, Martin could not say whether he had provided Zurich with a copy of the video, or whether he had told them he could not locate any footage. (Martin Dep. 32:13-15.)

This Court draws an adverse inference from Defendants failure to produce surveillance videos, and infers that Defendants failed to do so out of the well-founded fear that the contents would harm [them]. Brewer, 72 F.3d at 334. Defendants point to no evidence that suggests Zurich failed to contact them to obtain the videos. B s testimony, it would have been standard protocol for Zurich to reach out to him after it received a preservation letter. (Martin Dep. 30:4-9.)

This Court finds unavailing Defendan only sought video of the precise spot where she fell; Defendants base their position on semantics. Plain interrogatories the alleged accident occurred[, which could easily be read to refer to the store itself. (Interrog. ¶ 12, ECF 21-9.) Assuming arguendo f the interrogatory is accurate and it refers only to the precise location of the accident, was explicitly broad in scope, and it should have caused Defendants to preserve video of other parts of the store. Specifically, the letter sought and the surrounding areas in [sic] the location (from all camera angles) even if you do not capture the actual fall (Resp. Br. Ex. G, ECF No. 21-8) (emphasis added).

This distinguishes s case from Pace. The plaintiff in Pace had only requested [he] Pace, 2020 U.S. App. Lexis 2796 at *2. Similarly, Mr. Pace -Mart had actual notice of the liquid that caused him to slip and fall. I Id. at *5-6. Plaintiff herein is arguing that Defendants had actual notice, and video evidence might speak to this issue.

I letter in this case was seeking preservation of footage beyond that of the exact location where she fell; it sought all videos from the time of the accident. These videos may have been . See Fed. R. Evid. 401(a)-(b) (noting that relevant evidence is evidence that). It is

possible that the surveillance cameras captured employees actions in other areas of the store that might indicate whether they had previous knowledge of the spill. hinges on there being an employee in the area that witnessed her fall; video footage might have

captured this employee. Accordingly, for purposes of the instant motion, this Court draws an adverse

inference from Defendants failure to preserve the video footage. II. STANDARD OF REVIEW

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine [dispute] as to any material fact and that the Celotex, 477 U.S. at 322; Fed. R. Civ. P. party to go beyond the pleadings and come forward with specific facts showing that there is a Santini v. Fuentes, 795 F.3d 410, 416 (3d Cir. 2015) (internal citations and quotation marks omitted). Therefore, in order to defeat a motion for summary judgment, the non-movant must establish that the disputes are both: (1) material, meaning concerning facts that will affect the outcome of the issue under substantive law; and (2) genuine, meaning the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

y judgment movant to show the absence of

that is, pointing out to the district court that there is an absence of evidence to

., 266 F.3d 186, 193 (3d Cir. 2001) (quoting Celotex, 477

favor and Williams v. West Chester, 891 F.2d 458, 460 (3d Cir. 1989) (citation omitted). Accordingly,

sufficient to Celotex, 477 U.S. at 322. view the facts and any

reasonable inferences drawn therefrom in the light most favorable to the party opposing InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 160 (3d Cir. 2003). III. DISCUSSION

Defendants argue they are entitled to judgment as a matter of law because Plaintiff cannot offer any evidence to show Defendants had actual or constructive notice of the hazardous condition. (Br. 10.) Plaintiff maintains Defendants had actual notice of the spilled liquid, (citing Dep. 29:19-30:2.) In the alternative, Plaintiff argues Defendants had constructive notice of the liquid.

Under Pennsylvania law, a plaintiff alleging negligence must establish that: (1) the defendant owed her a duty of care; (2) the defendant breached that duty; (3) there was a causal connection between the conduct and (4) she suffered actual loss or damage . R.W., 888 A.2d at 746. The duty owed by a business owner depends upon whether the person entering [the business] is a trespasser, McDowell v. Moran Foods, LLC, 680 F. Appx 72, 74 (3d Cir. 2017) (quoting Carrender v. Fitterer, 469 A.2d 120, 123 (Pa. 1983)). A store customer is considered an invitee. Id.; see also Nelson v. Dollar Tree, Inc., CIVIL ACTION NO. 18-2242, 2019 U.S. Dist. LEXIS 44248, at *8 (E.D. Pa. March 18, 2019) A business invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. As compared to

other categories, a landowner owes the highest duty of care to a business invitee. Under this duty, a landowner must protect a business invitee not only from known dangers, but also from dangers that might be discoverable with reasonable care. Nelson, 2019 U.S. Dist. LEXIS 44248, at *8-9. To that end, the possessor of land may be deemed liable if s/he . . .

(a) knows, or by the exercise of reasonable care, would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that such invitees will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect such invitees against the danger. White v. Atkore Corp., CIVIL ACTION NO. 16-1422, 2018 U.S. Dist. LEXIS 94200, at *7 (E.D. Pa. June 4, 2018) (citing Restatement (Second) of Torts § 343 (1965)).

The fact that an accident occurred does not in and of itself prove that a defendant breached the duty of care, nor does it establish or prove negligence. Sheil v. Regal Ent. Group, 563 F. Appx. 216, 218 (3d Cir. 2014) (citing Estate of Swift by Swift v. Northeastern Hosp., 690 A.2d 719, 722 (Pa. Super. Ct. 1997)). Rather, to establish that a breach occurred, a plaintiff must present evidence whi the [defendants] had a hand in creating the harmful condition, or [that they] had actual or construId. (quoting § 343 of the Restatement (Second) of Torts). A plaintiff can establish actual notice by showing that the business knew of the condition, or that it was one which the business knew frequently occurred. Id. (citing Moultrey v. Great A & P Tea Co., 422 A.2d 593, 596 (Pa. Super. Ct. 1980)). In contrast, o establish constructive notice, a p the condition existed for such a length of time that in the exercise of reasonable care the [business] should have known of it. Id. (quoting Moultrey, 422 A.2d at 596).

This Court shall address each type of notice in turn.

A. Actual Notice Plaintiff presents no argument that the spilled liquid is traceable to Defendants or their agents. Rather, she argues Defendants were negligent because they failed s Resp. Br. 7.) Plaintiff contends there was a salesperson present when she fell, and maintains that Defendants therefore had actual notice of the spilled (citing Dep. 29:19-30:2). is no evidence confirming the existence of this person at the scene of [the] incident or that the

- Reply 1.)

self-serving testimony may be utilized by a party at summary judgment. Waldron, 56 F.3d at 501 (citing Celotex Corp., 477 U.S. at 324) (noting that testimony was under oath and subject to cross examination, [and] no other evidenc disputed material fact issue to be resolved at trial. As previously explained, this Court finds there is a genuine issue of material fact regarding fall. This, coupled with

the fact that there is reason to believe Defendants failed to produce surveillance out of the well-founded fear that the contents would harm [them this issue. Brewer, 72 F.3d at 334.

B. Constructive Notice Defendants next argue that Plaintiff cannot establish that they had constructive notice of as, the source of the liquid confirmed that there was no attempt by [Defendants] to discover any adverse floor condition, and

there has been no explanation as to the inability to produce video footage of the store on the date

Constructive notice requires proof that the condition had been present long enough that, in the exercise of reasonable care, the defendant[s] should have known [about] Thomas v. Family Dollar Stores of Pa., LLC, No. 17-4989, 2018 U.S. Dist. LEXIS 196569, at *10 (E.D. Pa. Nov. 19, 2018) (citations omitted).

To determine whether [a defendant] had constructive notice of the harmful condition, Pennsylvania courts consider the following factors: (i) time elapsing between the origin of the defect and the accident; (ii) the size and physical condition of the premises; (iii) the nature of the business conducted thereon; (iv) the number of persons using the premises and the frequency of such use; (v) the nature of the defect and its location on the premises; (vi) its probable cause; and (vii) the opportunity which defendant, as a reasonably prudent person, had to remedy it. Ames v. Columbia Props. Phila., LLC, No. 14-1253, 2015 U.S. Dist. LEXIS 55860, at *13-14 (E.D. Pa. Apr. 25, 2018) (citing Lanni v. Pa. R.R. Co., 88 A.2d 887, 889 (Pa. 1952)). Just as with this regarding the issue of actual notice, this issue again turns on spoliation. Taking into account the spoliation inference Defendants triggered through their failure to produce video evidence, this Court infers that the surveillance footage is adverse to Defendants. Even though the parties agree that the precise location of the spill was not captured on video, the requested footage of the surrounding area might have shown employees passing e.g. someone holding a leaking container or walking into frame covered in liquid from the spill). This footage may have helped Plaintiff to establish whether Defendants had constructive notice. As previously noted surrounding the location of her fall distinguishes this case from Pace. Thus, this Court finds that there is a genuine issue of material fact regarding whether

Defendants had sufficient time to discover the spilled liquid. Summary judgment is therefore precluded. See Baynes v. Home Depot U.S.A., Inc., No. 09-3686, 2011 U.S. Dist. LEXIS 62685, at *15 (E.D. Pa. 2011) (taking into account a spoliation inference and holding that a defendant s failure to retain all but twenty minutes of surveillan s [sic] fall greatly prejudices her case. It is all but impossible to establish the length of time the substance was on the floor without this evidence, which is s [sic] case. IV. CONCLUSION

For the reasons set forth hereinabove, Defendants Motion for Summary Judgment shall be denied.

An appropriate Order follows.

BY THE COURT:

/s/ C. Darnell Jones, II J.