

McCoy v Dollar Tree Stores, Inc.

2024 NY Slip Op 32367(U)

June 27, 2024

Supreme Court, Bronx County

Docket Number: Index No. 20349/2018E

Judge: Kim Adair Wilson

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

-----X

SHAWN MCCOY,
Plaintiff,

Index No. 20349/2018E

-against-

Hon. KIM ADAIR WILSON
Justice Supreme Court

DOLLAR TREE STORES, INC.,
Defendants.

-----X

The following papers NYSCEF Doc No. (19 - 40), read on this SUMMARY JUDGMENT MOTION, (Seq. No. 1).
Noticed on 10/25/2022 and duly submitted as NYSCEF Doc. No. 19.

	NYSCEF Doc. No.
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	
Replying Affidavit and Exhibits	
Other: Stipulation	

Upon the foregoing papers,

This motion is decided in accordance with the annexed Decision and Order.

Dated: June 27, 2024

Hon. 
KIM ADAIR WILSON, J.S.C.

- 1. CHECK ONE.....
- 2. MOTION IS.....
- 3. CHECK IF APPROPRIATE.....

- CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

Motion is Respectfully Referred to Justice:
Dated: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

-----X

SHAWN MCCOY,
Plaintiff,

-against-

DOLLAR TREE STORES, INC.,
Defendants.

-----X

Kim Adair Wilson, J.:

DECISION AND ORDER
Index No. 20349/2018E
Motion Seq. #: 001

HON. KIM ADAIR WILSON

“NOTICE OF MOTION” (NYSCEF Doc 19) dated and filed October 25, 2022, respectively, and signed by one Timothy G. Darmody, Esq. (Mintzer, Sarowitz, Zeris, Ledva, & Meyers), counsel for defendant, Dollar Tree Stores, Inc. (“Dollar Tree”), seeking an Order, “pursuant to CPLR Rule 3212, granting summary judgment to defendant, dismissing plaintiff’s Verified Complaint [.]” is decided as set forth below.

The instant matter was commenced on January 10, 2018, by the filing of plaintiff’s Verified Complaint seeking monetary damages for injuries allegedly sustained by plaintiff on or about October 2, 2017, when he slipped and fell while in a business establishment on the premises located at 867 Longwood Avenue, Bronx, New York, owned and controlled by defendant Dollar Tree. The Complaint alleges one cause of action sounding in negligence. Defendant Dollar Tree filed its Verified Answer (NYSCEF Doc 2) on February 5, 2018, asserting a general denial as well as seven affirmative defenses. Plaintiff filed his Note of Issue (NYSCEF Doc 29) on October 28, 2022, three days subsequent to the filing of the instant motion.

Defendant Dollar Tree now moves for summary judgment against plaintiff. In support, movant submits its annexed Affirmation in Support (NYSCEF Doc 20); an annexed Memorandum of Law (NYSCEF Doc 27); a “REPLY AFFIRMATION” (NYSCEF Doc 40), dated and filed February 2, 2023, respectively; photos of the aisle where the alleged incident occurred (NYSCEF Doc 24); and the deposition transcripts of plaintiff Shawn McCoy (NYSCEF Doc 25) and witness Maisha Chambers (NYSCEF Doc 26).

In opposition, plaintiff submits his Affirmation in Opposition (NYSCEF Doc 34), dated and filed January 20, 2023, by one Steven T. Lane, Esq. (Constantinidis & Associates, P.C.), counsel to the plaintiff; the deposition transcripts of plaintiff Shawn McCoy (NYSCEF Doc 35) and witness Maisha Chambers (NYSCEF Doc 36); and the marked photos depicting the incident location (NYSCEF Doc 37) as well as unmarked photos (NYSCF Doc 38).

Movant contends that plaintiff's Complaint should be dismissed because plaintiff, who was only inside the store for ten or fifteen minutes before the incident occurred, cannot establish that Dollar Tree created, or had actual or constructive notice of, the alleged dangerous condition. Movant offers the deposition transcript of Maisha Chambers (NYSCEF Doc 26), who is the assistant manager at the Dollar Tree where the incident occurred, who attested that an employee had swept the aisle twenty minutes prior to the alleged accident, but observed no wet surfaces, broken glass, or pickles on the floor, and that she had otherwise received no prior complaints of a broken jar or loose pickles in the aisle. In contrast, plaintiff submits his own deposition testimony (NYSCEF Doc 35) stating that, upon observing plaintiff laying in the aisle amidst broken glass, pickles and pickle juice, Chambers remarked to her subordinate, in sum, that she had previously instructed him to clean "this" up an hour ago, and that the subordinate thereafter conceded, in sum, that he had not completed the task. Plaintiff also highlights that that Dollar Tree has not conclusively established that the subject aisle was cleaned twenty minutes prior to the accident, in that Chambers did not testify that she swept the floor herself, but that a subordinate had been directed to do so, and that said subordinate has not been produced for deposition by the defendant. In reply, movant dismisses the comments of Chambers and the unnamed subordinate as hearsay and therefore inadmissible on summary judgment.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72 (2003); *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Winegrad v New York University Medical Center*, 64 N.Y.2d 851 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad, supra* at 853. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to rebut the movants claims and establish that triable issues of fact exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

A defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury. *Ross v. Betty G. Reader Revocable Tr.*, 86 A.D.3d 419, 421 (1st Dept. 2011). A defendant can meet its burden of showing that it lacked constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically showing that the alleged condition did not exist when the area was last inspected or cleaned before the plaintiff fell. *Velocci v. Stop & Shop*, 188 A.D.3d 436, 439 (1st Dept. 2020).

Upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that movant Dollar Tree has not met its burden to demonstrate entitlement to summary judgment against the plaintiff. Specifically, the

deposition testimony of Maisha Chambers does not demonstrate that the alleged defective condition did not exist upon the last inspection of the accident site, because Chambers attested that she did not conduct the inspection and cleanup herself, but instead that she directed a male cashier to do so (See NYSCEF Doc 26 at p.23). Chambers therefore does not offer competent testimony that the subject location was inspected prior to plaintiff's alleged accident, nor that the defective condition itself did not exist when the area was last inspected or cleaned before the plaintiff fell (*see Velocci, supra* at 439). Since movants have failed to carry their initial summary judgment burden, defendant Dollar Tree's motion is **DENIED** without considering the sufficiency of the opposing papers (*Winegrad, supra* at 853).

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.


Accordingly, it is hereby

ORDERED that defendant Dollar Tree Stores, Inc.'s motion, pursuant to CPLR Rule 3212, granting summary judgment to defendant, dismissing plaintiff's Verified Complaint, is DENIED; and it is further

ORDERED that the movant is directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and to file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated: June 27, 2024
Bronx, New York



Hon. Kim Adair Wilson, J.S.C.