

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Polanco v. 756 Jomo Food Corp.

2023 NY Slip Op 00284 (App. Div. 2023) · No. 2022-01712 · Decided January 24, 2023

SUMMARY

The Appellate Division, First Department, reversed an order granting summary judgment to a supermarket in a slip-and-fall case involving grapes on the produce-aisle floor. The court held that the defendant failed to establish, as a matter of law, that it lacked constructive notice because it did not provide sufficient evidence that its cleaning and inspection routine was followed on the day of the accident.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Kern, J.P.; Oing, J.; Gesmer, J.; Scarpulla, J.; Rodriguez, J.
JURISDICTION	New York
DECIDED	January 24, 2023
DOCKET	2022-01712
DISPOSITION	reversed
PROCEDURAL POSTURE	Plaintiff appealed from an order granting defendant supermarket's motion for summary judgment dismissing the premises-liability complaint.
STANDARD OF REVIEW	Whether defendant established entitlement to summary judgment as a matter of law by demonstrating that it lacked actual or constructive notice of the alleged dangerous condition.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Marianela Polanco v. 756 Jomo Food Corp., doing business as Foodtown of Harlem

TOPICS

- premises liability
- negligence
- summary judgment
- standard of review
- appellate procedure

PRACTICE AREAS

premises liability

negligence

summary judgment

QUESTIONS PRESENTED

1. Whether defendant established as a matter of law that it lacked constructive notice of the grapes on the supermarket floor.
2. Whether defendant's generalized testimony about routine produce-aisle inspections and verbal cleaning protocols was sufficient to shift the summary-judgment burden to plaintiff.

HOLDINGS

1. Defendant failed to establish entitlement to summary judgment because it did not submit sufficient evidence, as a matter of law, that it lacked constructive notice of the dangerous condition.
2. General testimony that an employee was assigned to inspect and clean the produce aisle, that a manager walked the aisles, and that verbal protocols were based on common sense was insufficient to shift the burden to plaintiff.

KEY QUOTATIONS

“Accordingly, the burden did not shift to plaintiff to raise an issue of fact in opposition.”

FACTUAL BACKGROUND

Plaintiff alleged that she slipped and fell on grapes lying on the floor in the produce aisle of defendant's supermarket. She also alleged that the market floor was frequently littered with produce. Defendant showed that it did not create or have actual notice of the loose grapes, but its witnesses did not establish that the produce aisle had been specifically inspected or cleaned on the day of the accident or identify the steps taken during the last cleaning cycle before the fall.

PROCEDURAL HISTORY

The Supreme Court, New York County, granted defendant's motion for summary judgment dismissing the complaint in an order entered on or about March 2, 2022. The Appellate Division, First Department, unanimously reversed on the law and denied the motion.

DISPOSITION

reversed

CASES CITED

- Castillo-Sayre v. Citarella Operating LLC, 195 A.D.3d 513 (1st Dep't 2021)
- Frederick v. New York City Hous. Auth., 172 A.D.3d 545, 545 (1st Dep't 2019)
- Velocci v. Stop & Shop, 188 A.D.3d 436, 439-440 (1st Dep't 2020)

OPINION

PER CURIAM.

Polanco v 756 Jomo Food Corp. (2023 NY Slip Op 00284) Polanco v 756 Jomo Food Corp. 2023 NY Slip Op 00284 Decided on January 24, 2023 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: January 24, 2023 Before: Kern, J.P., Oing, Gesmer, Scarpulla, Rodriguez, JJ. Index No. 157638/17 Appeal No. 17150 Case No. 2022-01712 [*1]Marianela Polanco, Plaintiff-Appellant, v756 Jomo Food Corp., Doing Business as Foodtown of Harlem, Defendant-Respondent.

Michael H. Zhu, P.C., New York (Michael H. Zhu of counsel), for appellant. Chartwell Law, New York (Christopher G. Wosleger of counsel), for respondent. Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about March 2, 2022, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she slipped and fell on grapes that had fallen to the floor in the produce aisle of defendant's supermarket and that the floor in the market was frequently littered with produce. While defendant showed that it did not create or have actual notice of loose grapes in the produce aisle at the time of plaintiff's accident, defendant failed to submit sufficient evidence to show, as a matter of law, that it lacked constructive notice of the condition.

Specifically, defendant failed to show that its cleaning routine was followed on the day of the accident (see *Castillo-Sayre v Citarella Operating LLC*, 195 AD3d 513 [1st Dept 2021]; see also *Frederick v New York City Hous. Auth.*, 172 AD3d 545, 545 [1st Dept 2019]; *Velocci v Stop & Shop*, 188 AD3d 436, 439-440 [1st Dept 2020]). Its store manager testified generally that an employee was assigned to inspect and clean the produce aisle throughout the day and that he personally walked the aisles during the day, but he did not testify regarding any specific cleaning or inspection of the area in question on the day of plaintiff's fall.

A vice president testified that the cleaning protocols were verbal and were based on "common sense," but did not offer any information as to what steps were taken during the last cleaning cycle prior to plaintiff's accident, which also was not sufficient to establish lack of constructive notice on behalf of defendant.

Accordingly, the burden did not shift to plaintiff to raise an issue of fact in opposition. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: January 24, 2023

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