Disp ____ Dec _x___ Seq. No. __1___ Type _SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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SHERRILL MILTON,

Plaintiff,

-against-

Index No. 52456/13

DECISION AND ORDER

LORD & TAYLOR, LLC,

Defendant.

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The following papers numbered 1 to 3 were read on this motion:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Affidavits and Affirmation in Opposition	2
Reply Affirmation	3

Defendant brings this motion seeking summary judgment dismissing the complaint in this personal injury action.

Plaintiff was shopping at Lord & Taylor in Scarsdale on April 27, 2012, a one-day-only charity sale, when she fell and sustained the alleged injuries. Plaintiff testified at her deposition that as she was walking through an Eileen Fisher aisle, another female customer bumped into her, causing her to catch her foot on the bottom of a clothing rack and fall. Plaintiff further testified that the legs of the clothing rack were shaped like a "T" and the legs protruded out from the base

towards the aisle. Plaintiff contends, and defendant disputes, that there was more merchandise displayed on the date of the incident because of the special sale that was going on. The parties also disagree about exactly how wide the aisle was. A loss prevention officer employed by defendant stated that the aisle was wide enough for two people to walk through comfortably. Plaintiff argues, in contrast, that the aisles formed by the clothing racks were too narrow and that the set-up of the floor within the department store posed risks to customers.

The Second Department has repeatedly stated "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.* 68 N.Y.2d 320 (1985). Here, defendant makes this prima facie showing by arguing that the path was wide enough for two people to pass by, and that the cause of plaintiff's fall was the pushing by the other customer. *See Lamia v. Federated Dept. Stores, Inc.*, 263 A.D.2d 498, 692 N.Y.S.2d 738 (2d Dept. 1999) (narrowness of pathway between racks was "readily observable" and thus there was no duty to warn).

In opposition to the motion, however, plaintiff argues that the department in which the accident occurred was haphazardly laid out on the day of the sale (whether as a result of the customers pawing through merchandise or not), and that the aisle

was not, in fact, wide enough for two customers to pass by each other. At her deposition, defendant's representative testified at one point that the aisle between racks was "shoulder width."[1] Significantly, neither party submits to the Court any measurements demonstrating the actual width of the aisle in question. The Court cannot thus determine on this motion whether the aisle was wide enough so that the sole proximate cause of the accident was the other customer pushing into plaintiff, or whether the narrowness of the aisle, plus the push, caused the accident. (As an aside, although the Court does not rely on the expert report submitted by plaintiff in ruling on this motion, the Court notes that, contrary to defendant's argument, the report need not be excluded as tardy. *Abreu v. Metropolitan Transp. Auth.*, 117 A.D.3d 972, 986 N.Y.S.2d 557 (2d Dept. 2014)).

The Court of Appeals has stated that "where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence." *Derdiarian v. Felix Contractor Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980). Since there is a material issue of fact as to whether the floor

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[1]She also testified later that the aisle was wide enough for two people to walk through, but not for three people walking abreast.

plan in the store and the design of the rack posed a danger to customers, there is also an issue as to whether the injury in the present case was a foreseeable consequence of the alleged negligence. "Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve." *Id.* *See also Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 985 N.Y.S.2d 448 (2014) ("questions of proximate cause and foreseeability should generally be resolved by the factfinder."); *Mirand v. City of New York*, 84 N.Y.2d 44, 614 N.Y.S.2d 372 (1994) ("Proximate cause is a question of fact for the jury where varying inferences are possible."). Accordingly, the issue of whether the plaintiff's injury is traceable to the allegedly negligent floor plan should also be left for the fact finder.

The parties are thus directed to appear for a Settlement Conference in the Settlement Conference Part, Courtroom 1600, on August 20, 2014 at 9:15 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
July 15, 2014

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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