Federal Court Notice Standard in Premises Cases

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Defendants in personal injury cases sometimes remove a case to federal court because of several advantages: stricter discovery rules and deadlines, familiarity with federal court practice, more defense-friendly juries, and expert discovery, to name a few. But one seemingly advantageous reason is often overlooked by defense attorneys, particularly those defending retailers or other premises owners: namely, the defendant-friendly federal court notice standard that applies to summary judgment motions. The federal court standard puts the burden of proof on the plaintiff to make out a *prima facie* case of notice. In state court, the defendant has the burden of proof of showing lack of notice. This article looks at whether the federal court notice standard makes a difference in the outcome of summary judgment motions, particularly in cases involving transient conditions, like a spill or debris on a store floor, that cause a slip-and-fall.

The Federal Court Notice Standard

Premises slip-and-fall cases can be removed to federal court under diversity jurisdiction, typically where the defendant is a regional or nationwide retailer with a principal place of business and state of incorporation outside of New York. In diversity cases, the federal court applies the state court substantive negligence law for property owners—that the store must have created or had actual or constructive notice of the dangerous condition.

On a summary judgment motion in New York State court, a defendant arguing lack of notice has the burden of proof of establishing that it neither created nor had notice of the dangerous condition. Proving lack of notice requires that the defendant submit evidence of the last specific inspection of the accident location. The defendant cannot rely solely on its general inspection practices and procedures or on gaps in the plaintiff's proof.[1]

However, on a summary judgment motion in federal court under Rule 56, the burden shifts to the plaintiff to establish a *prima facie* case of notice. This burden shifting standard occurs in federal court because the evidentiary burdens that the respective parties will bear at trial guide district courts in their determination of summary judgment motions. At trial, the plaintiff has the burden of proof of notice, meaning that he bears that same burden of proof in a summary judgment motion. Unlike the application of New York State substantive law on a negligence claim, federal courts sitting in diversity apply this burden shifting standard because this is a procedural, not a substantive, matter.

The federal court burden-shifting standard has been explained and detailed in numerous cases involving retailers. This burden shift means that the defendant does not need to put forth affirmative evidence showing that it did not create the spill or have notice of it. Rather, the defendant need only point to the lack of

[1] *Gregg v. Key Food Supermarket*, 50 A.D.3d 1093 (2d Dep't 2008); *Birnbaum v. New York Racing Ass'n, Inc.*, 57 A.D.3d 598 (2d Dep't 2008) (discussing the state court burden of proof).

evidence regarding an essential element of the plaintiff's claim.[2]

In theory, the notice standard appears to be a compelling reason to remove a case to federal court. But does it make a difference in the outcome of a summary judgment motion? In other words, are there scenarios where a motion would be granted or denied in state court, but not in federal court?

The Notice Standard in Practice

Typically, plaintiffs in slip-and-fall cases do not know how a spill or debris got there. They are simply shopping and then fall, afterwards noticing a spill or some debris in the aisle. If a plaintiff is going to offer any evidence on notice, it is usually some circumstantial evidence that can be inferred from the condition of the spill (e.g., dried, sticky, with cart marks, etc.) or because of some nearby evidence (e.g., a pallet of merchandise that is being stocked).

The defendant may have a manager or other employee who testifies that he or she inspected the area sometime before the accident and there was no dangerous condition. Therefore, there are four common fact patterns in these cases:

- Scenario 1: Plaintiff has evidence of notice (usually circumstantial) and defendant has no evidence of when area was last inspected.
- Scenario 2: Plaintiff has evidence of notice and defendant has evidence of when area was last inspected.
- Scenario 3: Plaintiff has no evidence of notice and defendant has evidence of when area was last inspected.
- Scenario 4: Plaintiff has no evidence of notice and defendant has no evidence of when area was last inspected.

[2] *Painchault v. Target Corp.*, 2011 U.S. Dist. LEXIS 103496 (E.D.N.Y. 2011); *Simoes v. Target Corp.*, 2013 U.S. Dist. LEXIS 83896 (E.D.N.Y. 2013) (discussing the federal court burden of proof).

In Scenarios 1, 2, and 3, the outcome should be the same in either federal or state court. In Scenario 1, in state court the defendant cannot meet its *prima facie* burden of showing when the area was last inspected, and in federal court the plaintiff satisfies her burden of proof, and so the motion would be denied. In Scenario 2, similarly we see issues of fact regardless of which party has the initial burden. In Scenario 3, the plaintiff would not be able to meet her burden of proof in federal court and summary judgment should be granted to the defendant without the need to consider the defendant's evidence. In state court, the defendant would satisfy its initial burden, which the plaintiff would be unable to rebut. In either court, the defendant would win summary judgment.

Scenario 4 is interesting. Theoretically, in state court, the defendant would not be able to meet its *prima facie* burden because there is no evidence of when the area was last inspected. The motion should be denied regardless of the plaintiff's evidence. In federal court, the plaintiff would be unable to meet her burden, and the motion should be granted even though the defendant has no evidence of when the area was last inspected. This sounds like a compelling reason to remove cases to federal court, but does the standard make a difference in practice? Are there federal cases where the court has acknowledged that the notice standard made a difference in the outcome?

There are numerous federal court opinions where the federal court notice standard is detailed at length at the beginning of the opinion, but rarely do we see it applied to the facts of the case. Often, federal court opinions will find that the plaintiff's proffered evidence of notice is speculative and insufficient. For example, the plaintiff may argue that a nearby "wet floor" sign, a stack of merchandise presumably being stocked by employees, or a description of the spill or debris shows that the

store had constructive notice.[3] In these cases, it is the fine line between speculation and inference that is determinative of the motion, not the burden of proof. This determination is often judge- and fact-specific, and the notice standard makes little to no difference. If anything, federal court judges may be more likely to overanalyze the facts and thereby be more likely to deny summary judgment.

There is one case where the notice standard was discussed in-depth in the facts of the case. In *Doona v. OneSource Holdings, Inc.*, 680 F. Supp.2d 394 (E.D.N.Y. 2009), the plaintiff fell on a spill on the floor of a restroom. The defendant was a cleaning company hired to clean the restroom. The plaintiff did not know how long the spill was there. The defendant did not know when the restroom was last inspected. The plaintiff argued that the size of the puddle showed that it could have been created by the negligent cleaning of the defendant. In discussing the notice standard, and its application to the case, the court stated:

> This distinction between the two standards is important in a case like the instant matter, which relies to a large extent on speculation and inference from a slim set of baseline facts. . . . But while application of the federal standard is likely to determine how the court rules on the instant motion and may thus dispose of the plaintiff's claims more expeditiously, it is not outcome determinative of the lawsuit, because if the case proceeded to trial, the plaintiff would still be unable to prove that the defendant created the danger or was on notice of its existence.

The court granted summary judgment to the defendant, saying that the plaintiff's evidence was "speculation and conjecture," which was insufficient to satisfy her initial burden. The court went on to say that:

> Because there is an absence of affirmative evidence one way or the other as to creation of the harm or notice of its existence, whoever has the burden of proof at the summary judgment phase of presenting specific, affirmative evidence, is unlikely to prevail. The plaintiff, like the defendant, is unable to produce affirmative evidence of creation or notice of the condition, but because the federal standard requires him to do so to defeat summary judgment, his claims must fail.

However, the court then stated that the important issue in this case was the "boundaries between fact, inference, and speculation" and that the plaintiff's proffered evidence of notice was speculative, and thus, insufficient. Therefore, despite the lengthy discussion of the federal court notice standard in *Doona*, the decision was more about the evidence than the notice standard.

Analysis and Conclusion

In theory, shifting notice standard should make a difference in summary judgment motions in cases where neither the plaintiff nor the defendant has any evidence to support or refute a claim of notice. In practice, the court's decision is more likely to hinge on whether or not inferences of notice can be drawn from the facts. One judge might find that a description of

[3] *See, e.g., Robinson v. Wal-Mart Stores, Inc.*, 2000 U.S. App. LEXIS 31857 (2d Cir. 2000) (granting defendant summary judgment based on plaintiff's speculative argument that description of puddle as "sticky" showed constructive notice); *Bynoe v. Target Corp*., 2012 U.S. Dist. LEXIS 189649 (E.D.N.Y. 2012) (deciding summary judgment on constructive notice based on description of spilled syrup from fruit cup); *Casiano v. Target Stores*, 2009 U.S. Dist. LEXIS 92211 (E.D.N.Y. 2009) (plaintiff slipped on spilled detergent described as "dried, pasty, and sticky," which the court found speculative to show notice); *Cooper v. Pathmark Stores, Inc.*, 998 F.Supp. 218 (E.D.N.Y. 1998) (plaintiff slipped and fell on spilled fabric softner and argued that presence of employee stocking wagon nearby showed creation, which court found speculative); *Quarles v. Columbia Sussex Corp*., 997 F. Supp. 327 (E.D.N.Y. 1998) (coffee spill at defendant's hotel).

a spill or the presence of a nearby box or bucket is sufficient to allow a jury to infer notice, whereas another judge might find this same evidence speculative. More often than not, it is these facts, not the quasi-procedural notice standard, that will sway a judge, and this applies in both federal and state court. Therefore, the federal court notice standard should be considered as an additional reason to remove a case to federal court, but it is insufficient, in and of itself, for removing a case. ▪

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