

Marcus v Namdor, Inc.
2006 NY Slip Op 30473(U)
July 24, 2006
Supreme Court, New York County
Docket Number: 0113775/03
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

SHIRLEY MARCUS,

INDEX NO. 113775/03

MOTION DATE 5/18/06

- v -

MOTION SEQ. NO. 002

NAMDOR, INC.,

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion(s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
AUG 02 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUL 24 2006

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
SHIRLEY MARCUS,

Plaintiff,

-against-

NAMDOR, INC. and GRISTEDE'S FOODS
NY, INC., THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC. and ANSONIA
ASSOCIATES LIMITED PARTNERSHIP,

Defendants.

-----X
NAMDOR, INC. and GRISTEDE'S FOODS
NY, INC.,

Third-Party Plaintiffs,

-against-

THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC. and ANSONIA ASSOCIATES
LIMITED PARTNERSHIP,

Third-Party Defendants.

-----X
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers

Motion Sequence No. 002

Def Namdor motion [sj & dismiss] w/GM affirm in support, exhs

Pltf' s affirm in opp (MHL) w/exhs

Def Namdor affirm in reply (GM)

Transcript dated 5/18/06

Motion Sequence No. 003

Def Ansonia motion [sj & dismiss] w/JLJ affirm in support, exhs

Def Ansonia affirm in reply (JLJ) w/exh

Transcript dated 5/18/06

Decision/Order

Index No.: 113775/03

Seq. Nos.: 002, 003 & 004

Present:

Hon. Judith J. Gische

J.S.C.

Numbered

FILED

AUG 02 2006
COUNTY CLERK'S OFFICE
NEW YORK

Motion Sequence No. 004

Def A&P motion [sj & dismiss] w/RJD affirm in support, exhs	8
Def Namdor affirm in partial opp (GM) w/exh	9
Def A&P reply in further support (RJD)	10
Def Namdor affirm in reply (GM)	11
Def A&P reply in further support (RJD)	12
Transcript dated 5/18/06	13

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff asserts she sustained personal injuries as a result of defendants' negligence. Two of the defendants commenced a third party action for indemnification, and plaintiff amended her complaint to include, and assert direct claims, against the third-party defendants. The third-party defendants have asserted cross-claims against one another, and made counterclaims against the third-party plaintiffs.

All four defendants have brought motions for summary judgment seeking dismissal of the amended complaint, as well as the counterclaim and cross-claims between them. Only Great Atlantic & Pacific Tea Company ("A&P") seeks the additional relief of summary judgment on its claims for indemnification. Since issue has been joined, and these motions are timely, they will be considered. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). Given the common legal arguments and allegations in these motions, they are hereby consolidated for consideration and decision.

Background and plaintiff's allegations

Plaintiff, who was 80 years old at the time of her accident, fell in front of the Gristede's supermarket ("Gristede") located at 2109 Broadway in Manhattan, as she was leaving the store. She describes her accident as follows: "I took a step and there

was a slope and I lost my balance and went down, fell.”

Plaintiff claims that she sustained injuries as a result of her fall, including a fracture. She claims that the sidewalk directly in front of the supermarket's entrance/exit is sloped downward on the sidewalk at a “profound pitch.” She claims she did not notice the slope because it was night-time and the slope was not properly illuminated or marked. Plaintiff claims that the defendants (or any one of them) created, maintained, etc., this dangerous condition. Although plaintiff has shopped at this supermarket a number of times (more than 20) over the years, and sometimes at night, she never complained to any of the defendants about the slope, or poor lighting.

Defendant Namdor, Inc. operates the Gristede's supermarket where plaintiff fell. Gristede's subleases the store from A&P. A&P's lease is with defendant Ansonia Associates Limited Partnership (the “landlord”). Since each defendant seeks summary judgment dismissing the plaintiff's amended complaint, each must establish its defenses. Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 (1979). With respect to its indemnification claims by A&P against Gristedes and Ansonia, A&P has the added burden of proving its *prima facie* case against them. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

If the proponent of summary judgment meets its initial burden of proving that it is entitled to summary judgment as a matter of law, the burden then shifts to the opponent (here plaintiff) who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). The disputed issues must be real and not just shadowy semblances, which is why

summary judgment requires parties to lay bare their proof. SJ Capelin v. Globe, 34 NY2d 338 (1974).

Defendant's contentions and legal arguments

Though moving separately defendants present uniform arguments about why the plaintiff's amended complaint must be dismissed. Any distinctions between their motions are addressed primarily to the indemnification claims they have made.

The defendants contend that there is no defect or dangerous condition in front of the Gristede supermarket; therefore summary judgment should be granted dismissing the amended complaint. They contend that plaintiff's allegations of a "profoundly pitched" slope are unsubstantiated. Although none of the defendants concedes there is a ramp or slope at the sidewalk, each contends that even if there is a slope, it is so trivial, so gentle, so as to be no defect at all, let alone a dangerous condition. They argue that the area is smooth and has no cracks.

The defendants each deny any knowledge (constructive or actual) of a dangerous condition or defect where plaintiff fell. They offer photographs of the sidewalk where plaintiff fell. The photographs were examined and identified by plaintiff at her deposition as being of the sidewalk where the accident occurred.

A&P argues separately that it is an out of possession sub-landlord, and therefore, not in control of the premises at the time of plaintiff's accident. A&P contends further that any negligence is solely attributable to Gristedes or Ansonia because Gristedes was the tenant in occupancy at the time of the accident, and Ansonia is the property owner. Relying upon its prime lease with Ansonia, A&P contends it is Ansonia's responsibility to make repairs, therefore Ansonia must

indemnify A&P for any damages that plaintiff recovers against A&P. It makes similar arguments with respect to its sublease agreement with Gristedes.

Ansonia, Namdor and Gristedes separately argue that assuming *arguendo* there is a defect, it was created or caused by A&P because it had construction work done on the sidewalk before it took occupancy of the store in 1997. A&P disputes it made any alterations to the sidewalk.

Discussion

The *prima facie* elements of a premises liability negligence case are that the defendants either created a dangerous condition, or had actual or constructive notice of the condition, and that such defects are visible and apparent. Segretti v. Shorestein Company East, LP, 256 AD2d 234 (1st dept. 1998). Defendants have not only proved that they did not have (actual or constructive) notice of any dangerous condition or defect at the premises, they have proved their *prima facie* case, that there is no dangerous condition or defect in front of the Gristede supermarket where plaintiff fell.

Defendants have done so in a number of ways. They have provided photographs that have been identified by plaintiff as depicting the area where she fell. While the photographs may be insufficient to demonstrate that, as a matter of law, any slope on the sidewalk is too trivial to be actionable, they may be considered by the court, nonetheless to see if there are factual disputes to be tried. Corrado v. City of New York, 6 AD3d 380 (2nd dept. 2004). Inspection of these photographs reveal no discernable height differential or inequality in the area where plaintiff fell that would make it unsafe. It shows the area as being smooth, and just barely a slope or "swell."

Plaintiff has failed to come forward with any evidence the defendants (or any one of them) created a dangerous condition. Westbrook v. WR Activities-Cabrera Supermarket, 5 AD3d 69 (1st dept. 2004); Noto v. Mermaid Restaurant, 156 AD2d 435 (2nd dept. 1989); D'Ambrosio v. City of New York, 55 NY2d 454 (1982). Thus, for example, she does not claim or argue that the slope violates any applicable code or ordinance. Bowser v. West 125th St Thom McAnn, Inc., 270 AD2d 194 (1st dept. 2000). Nor has she had an expert take measurements of the sidewalk to establish that there is a "profound pitch" as she avers. See: Tirella v. American Properties Team, Inc., 145 AD2d 724 (3rd dept. 1988) [*summary judgment denied, affidavit by expert that water was too hof*]; Vichnevskaja v. 200 West 86th Apartment Corp., 23 AD3d 314 (1st dept. 2005) [*plaintiff uncertain about how accident happened, but jury trial on whether steps were defective*]. As a matter of law, differences in elevation on a sidewalk of about one inch have been held to be non-actionable. Morales v. Riverbay Corp., 226 AD2d 271 (1st dept. 1996).

Although plaintiff has also stated that area should have been better lit, or that she did not see the slope because of how the area was illuminated, notably she does not attribute her accident to the area being dark. Her claim is that she fell or stumbled because of the defective condition of the sidewalk, or the slope. In any event, plaintiff has failed to produce any evidence in inadmissible form that the lighting in the area was inadequate, violated a code, etc., to establish a factual dispute for trial.

While defendants proved that plaintiff cannot establish her *prima facie* case, and the plaintiff has not come forward with proof in admissible form that there are factual

disputes requiring a trial of this case, each defendant's motion for summary judgment is granted. Plaintiff's contention, that she because the sidewalk had a downward slope, and therefore defective or a dangerous condition, is nothing more than speculation, or a "shadowy semblance" of a factual dispute, insufficient to defeat defendants' respective motions for summary judgment. SJ Capelin v. Globe, supra.

The Clerk shall enter judgment in favor of each defendant dismissing plaintiff's complaint and each cause of action therein.

There being no liability, the remaining arguments by the defendants about indemnification (contractual or common law) becomes academic. All of the claims in that action arise from or relate to the now dismissed claims in the main action. The court hereby dismisses the third party action as well, because none of the defendants have argued there claims in that action that survive the dismissal of plaintiff's complaint. Therefore, A&P's motion for summary judgment in connection with the third party complaint is denied as moot.

Conclusion

It is hereby:

ORDERED that the respective motions by defendants Namdor, Inc., Gristede's Foods NY, Inc., The Great Atlantic & Pacific Tea Company, Inc., and Ansonia Associates Limited Partnership for summary judgment are hereby GRANTED and the amended complaint of Shirley Marcus is hereby DISMISSED in its entirety; and it is further

ORDERED that the Clerk shall enter judgment against plaintiff Shirley Marcus in favor of defendants Namdor, Inc., Gristede's Foods NY, Inc., The Great Atlantic & Pacific Tea Company, Inc., and Ansonia Associates Limited Partnership dismissing the amended complaint and each cause of action asserted therein against them; and it is further

ORDERED that the Clerk shall also enter judgment dismissing the third party action against defendants The Great Atlantic & Pacific Tea Company, Inc., and Ansonia Associates Limited Partnership because the third-party plaintiff's claims are rendered moot upon dismissal of the amended complaint.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
July 24, 2006

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
AUG 02 2006
COUNTY CLERK'S OFFICE
NEW YORK