Tata v Westland S. Shore Mall, L.P.
2007 NY Slip Op 30390(U)
March 23, 2007
Supreme Court, Suffolk County
Docket Number: 5212-2005
Judge: Melvyn Tanenbaum
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SHORT FORM ORDER

INDEX No. 5212-2005

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #002-Mot D
R/D: 103006
S/D 021307

BARBARA TATA and JOSEPH TATA

Plaintiff,

- against -

WESTLAND SOUTH SHORE MALL, L.P. GLORIA JEAN'S, INC. and COFFEE PAR TEA, INC.,

Defendants.

PLTF'S/PET'S ATTY:
GREENBERG & STEIN, ESQ.
275 Madison Avenue, Suite 110
New York, New York 10016

DEFT'S/RESP'S ATTY:
MORENUS CONWAY GOREN & BRANDMAN
58 South Service Road, Suite 350
Melville, New York 11747

Upon the following papers numbered 1 to 25 read on this motion for an order pursuant to CPLR §3212 ______ Notice of Motion/Order to Show Cause and supporting papers 1-13 ; Notice of Cross Motion and supporting papers ______ Answering Affidavits and supporting papers 14-23 Replying Affidavits and supporting papers 24-25 Other ______; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendants, WESTLAND SOUTH SHORE MALL, L.P. ("Westland") , GLORIA JEAN'S INC. ("GJI"), and COFFEE PAR TEA, INC. ("CPT"), seeking an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiff's complaint is denied.

On January 10, 2003 plaintiff BARBARA TATA ("Tata") allegedly slipped and fell on a wet area while walking in a common space between stores in the South Shore Mall. Plaintiff claims that defendants placed free samples of coffee in cups on a table in the common space and failed to adequately supervise or maintain distribution of such coffee samples and that patrons spilled coffee and discarded cups on the floor causing this wet, dangerous condition. Plaintiff asserts that defendants negligent failure to maintain the floor area where she fell in a reasonably safe condition was a proximate cause of her fall and resultant injuries.

Defendants motion seeks an order granting summary judgment dismissing plaintiffs complaint claiming the evidence cannot establish that defendants had actual or constructive notice of the alleged dangerous condition and did not affirmatively create the condition. In support of the motion, defendants submit an affidavit from a "Westfield" general manager and two affirmations of counsel and claim that no proof is presented to show that defendants had prior notice of the wet floor condition. Defendants claim plaintiffs testimony establishes that the wet floor conditions occurred when children spilled coffee cups filled with liquid between 5 to 15 seconds before she fell. It is defendants position that under such circumstances no basis exists to find defendants liable since there was no prior notice of the claimed dangerous condition. Defendants also claim that they did not create the dangerous condition since the sample coffee cups were taken off tables by customers without the supervision of the store employees. Dependants argue that this situation is analogous to actions in which a supermarket store customer is injured when falling over a fruit or vegetable dropped on the store aisle. Defendants maintain that a supermarket is not responsible for such injuries where a customer drops items unless the store has actual and/or constructive notice of the floor condition prior to the accident.

In opposition plaintiffs submit an affidavit from Barbara Tata, an affidavit from plaintiff "Tata's" daughter and an affirmation of counsel and claim that substantial issues of fact exist which require a plenary trial. Plaintiffs claim that defendants breached a duty of care by providing free samples of coffee on a table in front of a "Gloria Jean's" store without adequate supervision to maintain the area. Plaintiffs claim the tiles in the area where plaintiff fell were doused with coffee which had been spilled by customers who also discarded coffee cups on the floor. Plaintiff "Tata" claims that she saw children spilling coffee from cups on the floor near where she fell and saw additional coffee stains in the area. Plaintiff's daughter claims that she had passed by the Gloria Jean's store on 5 or 6 occasion prior to "Tata's" accident and saw accumulation of cups and spilled coffee on the floor in front of the Gloria Jean's Store. It is plaintiffs position that defendants negligent failure to properly supervise and maintain this area caused and allowed an unsafe condition proximately causing plaintiffs fall. Plaintiffs contend that defendants had actual and constructive notice of the dangerous condition and created the wet floor condition. Plaintiff maintains that under these circumstances significant issues of fact exist sufficient to defeat defendants summary judgment motion.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (PALKA v. EDELMAN, 40 NY2d 781, 390 (NYS2d 393 (1976); PALSGRAF v. LIRR CO., 248 NY 339 (1928); Prosser, "Torts" 4 Edition §30, 41-42 and 53)). He must further demonstrate that defendants' acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (SHEEHAN v. CITY OF NEW YORK, 40 NY2d 496, 387 NYS2d 92 (1976)).

A landowner owes a duty to another on his land to keep it in a reasonably safe condition (BARSO v. MILLER, 40 NY2d 233, 241, 386 NYS 2d 564 (1976)SMITH v. TAYLOR, 279 AD 2d 566, 719 NYS 2d 686 (2d Dept., 2001)). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (MARTINEZ v. SANTORO, 273 AD 2d 448, 710 NYS 374 (2d Dept., 2000); SADLER v. TOWN OF HURLEY, 280 AD 2d 805, 720 NYS 2d 613 (3rd Dept., 2001).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property (BALSAM v. DELMA ENGINEERING CORP, 139 AD 2d 292, 296-297 (1st Dept., 1988) leave to appeal denied, 73 NY2d 783 (1989); PAPPALARDO v. NY HEALTH & RACKET CLUB, 279 AD 2d 134, 718 NYS 2d 287 (1st Dept., 2000).

In a slip and fall case a plaintiff may only recover when she is able to show that the defendant either created the condition which caused the accident or had actual or constructive notice of the condition (ANDERSON v. KLEIN'S FOODS, 139 AD2d 904 (4th Dept., 1988), aff'd 73 NY2d 835 (1989); MOSS v. JNK CAPITAL, 211 AD2d 769, 621 NYS2d 679 (2d Dept., 1995)). Constructive notice may be inferred where the alleged defect was visible and apparent for a sufficient length of time prior to the accident so as to permit the defendant to discover and remedy it (GORDON v. AMERICAN MUSEUM OF NATURAL HISTORY, 67 NY2d 836 (1986); FASOLINO v. FASHION BUG, 77 NY2d 847, 567 NYS2d 640 (1991)).

Moreover a defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition (OSORIO v. WENDELL TERRACE OWNERS CORP., 276 AD2d 540, 714 NY2d 116 (2d Dept., 2000)).

Based upon the submission of evidence by the parties significant questions of fact exist surrounding the issue of defendants negligence sufficient to defeat defendants application and to therefore require a plenary trial. Accordingly, it is

ORDERED that defendants motion for an order pursuant to CPLR §3212 is denied.

Dated: March 23, 2007

MELVYN TANENBAUM

J.S.C.

NON-FINAL DISPOSITION