Short Form Order

Index Number: 15856-2004

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

Hon. Emily Pines
Justice Supreme Court

Motion Date: 11-27-2006
Submit Date: 01-25-2007
Motion No.: 002 MG
CASEDISP

X

PAUL QUICK,

Plaintiff,

-against-

G.G.'S PIZZA & PASTA, INC., and RONKONKOMA COMMONS, LLC.,

Defendants.

X

G.G.'S PIZZA & PASTA, INC., and RONKONKOMA COMMONS, LLC.,

Third Party Plaintiffs,

-against-

FRANK PERSO JR., and ASPHALT MAINTENANCE COMPANY,

Third Party Defendants.

X

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ORDERED, that Defendants' motion for summary judgment dismissing Plaintiff's complaint is granted.

Plaintiff, PAUL QUICK, commenced the instant action by filing a Summons and Complaint on August 3, 2004 and issue was joined by Defendants' service of an Answer on October 12, 2004. Thereafter, Defendants commenced a Third-Party Action against FRANK PERSO, JR., and ASPHALT MAINTENANCE COMPANY by

service of a Third-Party Summons and Complaint dated September 22, 2005. Third-Party Defendants have failed to answer and have not submitted any papers in response to this motion.

Plaintiff seeks damages for injuries sustained on April 9, 2004, on property known as Blockbuster Shopping Plaza, 600 Portion Road, Ronkonkoma, New York (the "subject premises"), which property is owned by defendant Ronkonkoma Commons LLC ("Ronkonkoma Commons"). Defendant G.G.'s Pizza & Pasta, Inc. ("G.G.'s Pizza"), was a tenant of the shopping plaza at the time of the incident. Plaintiff claims that he was riding his bicycle through the parking lot of the subject premises on his way home from the supermarket when he hit some sort of a "bump" or "depression" causing the bicycle to skid, him to lose control, fall to the ground, breaking his left arm. The accident occurred in an area of the parking lot closest to the store occupied by G.G.'s Pizza.

Both Defendants move, pursuant to **CPLR §3212,** for an Order dismissing the complaint on the ground that they did not create the allegedly hazardous condition nor did they have actual or constructive notice of such condition. Defendants also argue that any alleged defect was not the proximate cause of Plaintiff's injuries, rather Plaintiff's own actions in the operation of the bicycle caused the accident. Moreover, Defendants argue that even if there was a defect, any such defect was open and obvious such that Defendants would not be responsible. Finally, Defendant G.G.'s Pizza argues that since it was merely a tenant in the shopping plaza and Ronkonkoma Commons retained control over the parking lot and its maintenance and repair, it can not be held liable for the accident.

In support of the motion, Defendants have submitted a copy of the pleadings, the Verified Bill of Particulars, the transcripts of the examinations before trial of Plaintiff and Arvind Parikh, and a copy of the lease between Ronkonkoma Commons and G.G.'s Pizza. The submissions reflect that at Plaintiff's deposition testimony he testified that he "recognized" the "bump" as having seen it a couple of times

before, but had not traveled over it, but rather "by it" (**Plaintiff's EBT at p. 52**). He testified that when he went over the bump, he skidded on sand and gravel, that he hit the brakes hard and fell to the left when he couldn't get control over the bicycle. (**Plaintiff's EBT at p. 53-54, 58**). At the time of the accident, plaintiff was carrying a shopping bag with groceries on the handlebars of the bicycle. **(Plaintiff's EBT at p. 31)**. Plaintiff identified the area on of the accident on photographs submitted at the examination before trial. (**Plaintiff's EBT at p. 62-63**). Regarding notice, Defendants argue that Plaintiff has not provided any proof of any either Defendants' actual notice of the alleged defect or dangerous condition in the parking lot or how long the alleged condition actually existed such that defendants would have had adequate opportunity to cure the purported defect. There is no testimony regarding notice in the transcript of Plaintiff's deposition.

Defendants have also submitted the deposition testimony of Arvind Parikh, owner of Defendant Ronkonkoma Commons, LLC, and also the owner of H & A Stationary, a tenant in the subject shopping center. Mr. Parikh testified that Defendant Ronkonkoma Commons owns the parking lot where Plaintiff's accident occurred and that it is responsible for repairing the parking lot. (Parikh EBT at p. 10.). Mr. Parikh testified that he first became aware of Plaintiff's accident when he was served with the summons in this action. **(Parikh EBT at p. 10)**. He testified that when he received the summons, he called the principal of G.G.'s Pizza to try to find out what happened but that he did not have any details. **(Parikh EBT at p. 11-12)**. He then went to the parking lot, by himself, to see the entire area to see if there were any holes but that he did not observe any holes or cracks. **(Parikh EBT at p. 13)**. Mr. Parikh did not bring any records with him to the deposition so he could not testify at that time regarding whether any portions of the parking lot had been repaved between 1999 to 2004. **(Parikh EBT at p. 15)**. Mr. Parikh did testify however, that he had not received any complaints about the parking lot area outside of G.G.'s Pizza prior to the date of the accident on April 9, 2004, that he never received

complaints from any customers or persons about the condition of the parking lot and that noone from G.G.'s Pizza ever asked to have any portion of the parking lot repaired. **(Parikh EBT at p. 27-28.)**.

Plaintiff opposes the motion via Affirmation of his counsel and supporting affidavit of Plaintiff. Plaintiff's counsel argues that the motion should be denied because Defendants have failed to demonstrate a lack of notice of the defective or dangerous condition and that Mr. Parikh failed to provide the records of any repairs to the subject premises. Moreover, he argues that the failure to submit an affidavit from any of the employees of G.G. Pizza or any maintenance employees who were working at the time of the accident is fatal to the motion for summary judgment. Thus, he argues that the motion should be denied due to incomplete discovery pursuant to **CPLR §3212(f)**.

Additionally, Plaintiff argues that the issue of whether Plaintiff failed to avoid the defective condition (i.e., Plaintiff's comparative negligence) should be determined by the trier of fact and not on a motion for summary judgment and that there is no evidence that the defect was open and obvious. Finally, Plaintiff's counsel argues that the lease between G.G.'s Pizza and Ronkonkoma Commons requires G.G.'s Pizza to repair the area of the parking lot where the accident occurred.

In Reply papers, Defendants' counsel argues that they demonstrated by the testimony of the owner of Ronkonkonma Commons, Mr. Parikh, that there was no actual or constructive notice of a defective condition. As to the Plaintiff's claim of incomplete discovery, Defendants argue that they have complied with all discovery requests and that Defendants do not have any repair records, other than when the parking area was cleaned, holes and cracks filled with hot tar and seal coated and re-striped in 2002. Defendants have annexed to their Reply papers an Affidavit from Mr. Parikh in which he states that he made a complete search of his records (as he indicated in his EBT testimony he would) and that the only

document he had with regard to repairs was for work done in 2002. He further states in his Affidavit that he traveled through the parking lot on a daily basis and never received a complaint about its condition nor did he observe any conditions he perceived as dangerous.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Winegrad v. New York University Medical Center,*** 64 N.Y2d 85, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. ***State Bank of Albany v. McAullife,*** 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983). Pursuant to **CPLR §3212(f)**, however, the Court has discretion to deny a motion for summary judgment if facts essential to justify opposition to the motion may exist but may not be stated without additional discovery. ***Spatola v. Gelco Corp.,*** 5 A.D.3d 469, 773 N.Y.S.2d 101 (2d Dept. 2004). For the Court to deny the motion as premature however, it must be demonstrated that there is a likelihood that further discovery will lead to such evidence and the "'mere hope' that evidence sufficient to defeat the motion may be uncovered during the discovery process is not enough." ***Mazzaferro v. Barterama Corp.,*** 218 A.D.2d 643, 630 N.Y.S.2d 346 (2d Dept. 1995).

It is well settled that "'liability for a dangerous or defective condition on [real] property is generally predicated upon ownership, occupancy, control or special use of the property... Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property.'" ***Usman v. Alexander's Rego Shopping Center, Inc.,*** 11 A.D.3d 450, 782 N.Y.S.2d 757 (2d Dept. 2004), ***quoting, Turrisi v. Ponderosa, Inc.,*** 179 A.D.2d 956, 578 N.Y.S.2d 724. In order

to impose liability, it is required that Plaintiff prove either actual or constructive notice of the defective condition by defendant or that the defendant created such condition. ***Rabadi v Atlantic & Pacific Tea Company, Inc.***, 268 A.D.2d 418, 702 N.Y.S.2d 316 (2d Dept 2000). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit Defendant's employees to discover and remedy it. ***Id.*** If a Defendant moves for summary judgment dismissing the complaint based upon lack of notice, a *prima facie* showing affirmatively establishing the absence of notice as a matter of law must be made. ***See, Beltran v. Metropolitan Life***, 259 A.D.2d 456, 686 N.Y.S.2d 79 (2d Dept. 1999). The burden would then shift to the plaintiff to show notice.

In the case at bar, Defendants have made a *prima facie* showing of the lack of notice and Plaintiff has failed to show notice. Plaintiff's claim that the motion must be denied as premature pursuant to **CPLR §3212(f)** is without merit. Mr. Parikh testified at his deposition that he had not received any complaints from anyone regarding the condition of the parking lot, nor did he personally observe any defects or dangerous conditions. Although he did not have the parking lot repair records at the time of his testimony, his subsequent Affidavit indicates that there were no repairs to the parking subsequent to 2002. There is no indication that further discovery will lead to additional evidence. Plaintiff has failed to demonstrate a triable issue of fact with regard to actual or constructive notice of any purported defective or dangerous condition. Plaintiff failed to provide any testimony demonstrating that the purported defect was present for any length of time sufficient to give constructive notice to Defendant Ronkonkoma Commons such that it should have been discovered and remedied. Therefore, the motion for summary judgment dismissing the complaint must be granted as to Ronkonkoma Commons, LLC.

With regard to Defendant G.G.'s Pizza, the motion for

summary judgment must also be granted. The submissions reflect that G.G.'s Pizza was only a tenant in the subject premises, did not retain control over the parking area under its lease with Ronkonkoma Commons, and was not otherwise responsible for the repair and/or maintenance of the parking area where Plaintiff's accident occurred. Specifically, Mr. Parikh, the principal of Ronkonkoma Commons, testified that it, rather than G.G.'s Pizza, was responsible for the parking lot area. Since G.G.'s lacked any ownership or control of that area, it cannot be held responsible for Plaintiff's injuries. The motion for summary judgment dismissing the complaint as to G.G.'s Pizza is also granted.

Based upon the foregoing, the motion for summary judgment is granted and the complaint is dismissed in its entirety.

The foregoing constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: March 28, 2007
Riverhead, New York

Emily Pines

Hon. Emily Pines
J. S. C.