Sheehan v Empire Lube Inc. II
2007 NY Slip Op 31277(U)
April 30, 2007
Supreme Court, Queens County
Docket Number: 0008542/2005
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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JOHN M. SHEEHAN,
Plaintiff,

-against-

EMPIRE LUBE INC. II and JIFFY LUBE,
Defendants.

Index No.: 8542/05
Motion Date: 4/25/07
Calendar Number: 60

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The following papers numbered 1 to 9 read on this motion by defendants for an order pursuant to CPLR 3212 directing summary judgment in their favor and dismissing the complaint .

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits......................	1-4
Affirmation in Opposition-Exhibits............................	5-7
Reply Affirmation...	8-9

Upon the foregoing papers it is ordered that defendants' motion for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint as against it is granted for the following reasons.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v. Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312, 317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

The action herein stems from plaintiff being struck by the metal edge of the door frame while he was exiting the Jiffy Lube store, located at 50 Jericho Turnpike, Floral Park, New York, on April 18, 2004. At his deposition, Plaintiff said that he entered the store from the subject door and spoke with an employee about plaintiff's flat auto tire. Plaintiff had no problem opening the subject door. However, when he opened the door to leave, he pushed the door out and it ricocheted back toward him and struck him. As a result of being struck by the door,

plaintiff claims to have suffered injuries and brought this action to recover damages.

Defendants now move for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint on the grounds that it did not create the condition which caused plaintiff's accident and they did not have actual or constructive notice of the alleged condition which plaintiff claims caused his accident. Plaintiff opposes this motion claiming that defendant has not established a prima facie entitlement to summary judgment and, in any event, defendants had constructive notice of the dangerous condition which requires a denial of the motion.

In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence. Lezama v 34-15 Parsons Blvd. LLC, 16 AD3d 560 (2d Dept. 2005.) On a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law. *See*, Colt v. Great Atlantic & Pacific Tea Company, Inc. 209 AD2d 294 (1st. Dept. 1994.) Summary judgment in favor of a defendant is also appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous. Lezama v 34-15 Parsons Blvd. LLC, *supra*.

Initially, this court is satisfied that defendants have made a prima facie showing of entitlement to judgment as a matter of law. It has submitted evidence, inter alia, the deposition testimony of plaintiff, which is in pertinent part set forth above. It has also submitted the deposition testimony of Daryl Mohammed, Assistant Manager of defendants store, that indicates he worked at the store from November 2002 until August 2004 and he was working at the date and time of the subject accident. He stated that he was responsible for checking over the premises to ensure things were working properly. He was responsible for the front door of the store and had never heard any complaints about the door and had never noticed anything wrong with the door. In fact, he had never observed any repairs or adjustments being made to the front door. This evidence establishes that defendants neither created the condition nor had actual or constructive notice of the condition. Pollio v Nelson Cleaning Company, 269 AD2d 512 (2d Dept 2000.) This evidence also establishes that the door was not defective. Lezama v 34-15 Parsons Blvd. LLC, *supra*. Consequently, the burden shifted to the opponent of this motion to show that defendant created the condition or had actual or constructive knowledge of the hazardous condition which caused plaintiff to fall and that defendant had a reasonable time to correct the condition. *See*, Ford v Citibank, N.A. 11 AD3d 508 (2d Dept 2004.)

Plaintiff claims that defendant had constructive notice of the condition since it is clear

that the defective door, which plaintiff identifies as a shortened chain that prevented the door from being fully opened, existed for a considerable length of time. Plaintiff relies upon, inter alia, Mr. Mohammed's and his own testimony and photographs of the door. He states that he took photos of the door about three weeks after the accident. Plaintiff claims that the testimony indicates the door was in the same condition for a year and the photos indicate that the door was not capable of being opened fully. According to him this evidence establishes constructive notice of a defective condition.

While plaintiff's evidence regarding the longevity of the alleged defective door does provide evidence that the condition existed for a sufficient period of time to establish constructive notice, he has not established that a defect exists. It is well settled that photographs may be used to prove constructive notice of an alleged defect shown in the photographs if they are taken reasonably close to the time of the accident, and if there is testimony that the condition at the time of the accident was similar to the condition shown in the photographs. DeGiacomo v. Westchester County Healthcare Corp., 295 A.D.2d 395 (2d Dept 2002.) However, the photographs do not indicate that a defect existed. It is clear that the door was able to open widely and sufficiently to allow people to enter and exit the store. Significantly, plaintiff has not introduced any expert testimony that the door was not performing according to industry standards. The plaintiff's evidence was insufficient to permit an inference that the door was somehow defective simply because it "ricocheted back very fast and very quickly" on the plaintiff. Therefore, there is no basis for an inference that the door was defective. Hunter v. Riverview Towers, Inc., 5 A.D.3d 249 (1st Dept 2004.) Accordingly, plaintiff has not met his burden and defendants' motion for summary judgment based upon lack of a defective condition is granted and the complaint and any cross-claims are dismissed.

DATED: April 30, 2007

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ORIN R. KITZES, J.S.C.