

Gordon v Simon Property Group, Inc.

2007 NY Slip Op 32834(U)

September 7, 2007

Supreme Court, Suffolk County

Docket Number: 0028851/2005

Judge: Elizabeth H. Emerson

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NO.: 28851-05SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTYPRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 2-15-07; 3-21-07

SUBMITTED: 5-9-07

MOTION NO: 001-MG

002-MD

JAMES GORDON, X

Plaintiff,

-against-

SIMON PROPERTY GROUP, INC. d/b/a SMITH
HAVEN MALL, INC. and TKR DEPENDABLE
CORPORATION d/b/a ARCTIC ICES,Defendants.
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Upon the following papers numbered 1 to 39 read on this motion for summary judgment; Notice of Motion and supporting papers 1-13; 14-28; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 29-32; Replying Affidavits and supporting papers 33-36; 37-39; it is,

ORDERED that for the purposes of this determination the motion by defendant TKR Dependable Corporation d/b/a Arctic Ices (# 001) for summary judgment dismissing the complaint and the motion by defendant Simon Property Group, Inc. d/b/a Smith Haven Mall, Inc. (# 002) for summary judgment dismissing the complaint are consolidated; and it is further

ORDERED that the motion by defendant TKR Dependable Corporation d/b/a Arctic Ices (# 001) for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion by defendant Simon Property Group, Inc. d/b/a Smith Haven Mall, Inc. (# 002) for summary judgment dismissing the complaint and all cross claims against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, James Gordon, at approximately 2:15 p.m. on June 19, 2004, when he slipped and fell in a puddle of liquid, which allegedly contained ice, in a common area of a shopping mall in Lake Grove, New York, owned by defendant Simon Property Group, Inc. d/b/a Smith Haven Mall, Inc. ("Simon Property"). Defendant TKR Dependable Corporation d/b/a Arctic Ices ("Arctic Ices") owns a kiosk selling Italian ices and drinks. The gravamen of the complaint is that defendants were negligent in maintaining their property in a reasonably safe condition and failing to warn plaintiff as to the dangerous and hazardous condition.

Defendant Arctic Ices now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it did not create the allegedly dangerous condition and it owes no duty of care with respect to any unsafe condition in that it did not own or control the subject common area. In support, Arctic Ices submits, *inter alia*, the pleadings, a bill of particulars, the deposition testimony of plaintiff, James Rundgren, a mall manager employed by Simon Property, and Tim Roth, the owner of Arctic Ices as well as the lease agreement between Simon Property and Arctic Ices.

At his examination before trial, plaintiff testified to the effect that he and his wife came to the Smith Haven Mall to do their shopping. While walking in front of Baker Shoes and carrying a large cup of soda in his right hand, he slipped and fell in a puddle approximately 8 to 10 inches in diameter where a slushy remainder of spilled liquid was in the center. The color of the puddle was red. He did not see the puddle before he fell because he was looking at a cell phone booth. After the incident, plaintiff was "saying something to the cell phone employee about getting that cleaned up and getting security over [there]." Plaintiff observed the employee call security and custodial staff. Approximately 15 minutes later, a custodian came and mopped up the liquid on the floor. Thereafter, plaintiff went up to the security office on the second level and reported the incident to a security officer. Plaintiff finally testified that he believed that the ice in the puddle came from Arctic Ices, approximately 30 feet away from the incident site, because "[it was] exactly the color of the stuff they were selling."

At his deposition, James Rundgren testified to the effect that he is a mall manager of the Smith Haven Mall, employed by Simon Property, and that Control Building Services was hired by Simon Property to provide maintenance and housekeeping services and is responsible for cleaning spills in the mall's common areas. Mr. Rundgren testified that "the housekeepers clean only the common areas and so whether the food originates in the common area or originates in an in-line store and is carried into the common area there's really no difference so they really have to be diligent in all sectors of the mall for spills of food." Mr. Rundgren also testified that his job is "to make sure that the mall is clean to the standards set forth in the contract" between Simon Property and Control Building Services and that, if there is a situation where "[he] believe[s] that the mall isn't being adequately cleaned, [he] take[s] [his] concern to the operations director that works for Control [Building Services] and request he remedy that situation." Mr. Rundgren further testified that "all of the responsibilities of the vendors that sold food products in these kiosks in the aisles is contained in their lease agreement with the mall."

At his deposition, Tim Roth testified to the effect that he is the owner of Arctic Ices

and owns a kiosk in the mall selling Italian ices and drinks. The distance between his kiosk and the accident site was approximately 40 feet. Generally, he picks up some spillage in the aisle “immediately in front of” his kiosk, but not “throughout the mall.”

Under the lease agreement between Simon Property and Arctic Ices, Arctic Ices was obligated to “maintain the Space, including all windows, doors, entry ways, electrical system, lighting, walls, carpets, security devices, HVAC systems and other portions thereof, in good condition and repair.” Addendum B in the lease agreement, titled “Kiosk Guideline,” stated that “[t]enant shall keep their area in a clean and safe condition *** Tenant is also required to keep the kiosk completely clean by dusting and wiping down the kiosk, fixtures and lights.” Nevertheless, the lease is silent concerning Arctic Ices’ obligation to maintain the common areas of the mall.

Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises and, without possession, or a right to maintain or control a common area, a tenant ordinarily owes no duty of care with respect to any unsafe condition existing there (*see, Gibbs v Port Auth. of New York*, 17 AD3d 252, 794 NYS2d 320 [2005]; *Kozak v Broadway Joe’s*, 296 AD2d 683, 745 NYS2d 139 [2002]; *Masterson v Knox*, 233 AD2d 549, 649 NYS2d 108 [1996]). Liability may be found where there is some indication that the tenant created the dangerous condition, owned or retained any control over the subject area, or had the authority to correct the condition (*see, Kozak v Broadway Joe’s, supra*). The determinative question is one of possession or control (*see, Smalls v New York Hous. Auth. Tenants Assn. of Woodside*, 276 AD2d 619, 715 NYS2d 322 [2000]; *Welwood v Association for Children with Down Syndrome*, 248 AD2d 707, 670 NYS2d 556 [1998]).

Here, the adduced evidence indicates that Arctic Ices did not have an exclusive right to possession of the subject accident site which is the common area of the mall and that it had no right or obligation to maintain this area. Moreover, it also indicates that Arctic Ices did not direct or control the housekeeping service including cleaning spills in the mall’s common areas. Furthermore, there is no evidence that Arctic Ices created the dangerous condition which caused the subject accident. In opposition, plaintiff and defendant Simon Property failed to submit evidence to raise a triable issue of fact (*see, Vergara v A & S Twins Constr. Corp.*, 41 AD3d 588, 837 NYS2d 742 [2007]). Moreover, the motion by Arctic Ices is not premature since plaintiff and defendant Simon Property failed to offer an evidentiary basis to show that further discovery might have led to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of Arctic Ices (*see, Arpi v New York City Tr. Auth.*, 42 AD3d 478, 840 NYS2d 107 [2007]). Under these circumstances, Arctic Ices owes plaintiff no duty of care with respect to maintain the common area. Thus, Arctic Ices is not liable for permitting the existence of a dangerous condition (*see, Welwood v Association for Children with Down Syndrome, supra*). Accordingly, the motion by defendant Arctic Ices for summary judgment is granted. The action is severed and shall continue against the remaining defendants.

Defendant Simon Property moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that there is no evidence that Simon Property had actual or constructive notice of the allegedly dangerous condition. In support, Simon Property submits, *inter alia*, the pleadings, a bill of particulars, the deposition testimony of plaintiff, James

Rundgren, Tim Roth and non-party witness John Walther, a security officer at the mall.

At his examination before trial, Mr. Walther testified to the effect that he is a security officer and supervisor of the Smith Haven Mall, employed by IPC International. Mr. Walther testified that plaintiff came into the security office and reported the subject accident to him. When he got to the accident site, it was already cleaned up and “the floor was completely dry.”

Defendant landowner, as the movant in this case, is required to make a prima facie showing establishing the absence of actual or constructive notice as a matter of law (*see, Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 758 NYS 2d 133 [2003]; *Dwoskin v Burger King Corp.*, 249 AD2d 358, 671 NYS2d 494 [1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (*Piacquadio v Recine Realty Corp.* 84 NY2d 967, 622 NYS2d 493 [1994]). Moreover, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see, Moons v Wade Lupe Constr. Co.*, 24 AD3d 1005, 805 NYS2d 204 [2005]; *Fasano v Greenwood Cemetery*, 21AD3d 446, 799 NYS2d 827 [2005]). It is incumbent on the landowner to show lack of constructive notice in that the dangerous condition which caused the accident was not visible or apparent for a sufficient length of time to permit the landowner, in the exercise of reasonable care, to remedy the defect (*see, Olsen v Martin*, 32 AD3d 625, 820 NYS2d 354 [2006]).

Here, Simon Property failed to establish its entitlement to judgment as a matter of law. There are questions of fact as to how long the allegedly dangerous condition existed (*see, Park v Caesar Chemists*, 245 AD2d 425, 666 NYS2d 679 [1997]) and whether Simon Property exercised reasonable care under the circumstances (*see, McCummings v New York City Tr. Auth.*, 81 NY2d 923, 597 NYS2d 653 [1993]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). Accordingly, the motion by defendant Simon Property for summary judgment dismissing the complaint and all cross claims against it is denied.

DATED: September 7, 2007

HON. ELIZABETH HAZLITT EMERSON

J. S.C.