

Sanchez v Barnes & Noble, Inc.

2007 NY Slip Op 32949(U)

September 13, 2007

Supreme Court, Suffolk County

Docket Number: 0011948/2002

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6-29-07
ADJ. DATE 8-14-07
Mot. Seq. #010- MG
011 - XMotD

-----X
DERLIN SANCHEZ, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 BARNES & NOBLE, INC., GREKO N.Y. CORP., :
 AMTECH LIGHTING & ELECTRICAL :
 SERVICES, LKG ASSOCIATES, LLC., LKG :
 ASSOCIATES and B. DALTON BOOK SELLERS, :
 INC., :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers 19 - 20; Answering Affidavits and supporting papers 21 - 35; Replying Affidavits and supporting papers 36 - 37; 38 - 39; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (010) by defendant, Amtech Lighting & Electrical Services, for summary judgment dismissing the action and cross claims in its favor is granted; and it is further

ORDERED that the cross motion (011) by defendant, Barnes & Noble, Inc., s/h/a Barnes & Noble Corporation, for summary judgment dismissing the action in its favor and for indemnification is determined as hereinafter stated.

In this premises liability action, plaintiff, Derlin Sanchez, alleges that defendants were negligent in the maintenance of lighting fixtures at the magazine racks in a book store located at 5001 Jericho Turnpike in the Town of Huntington, New York. The premises were owned by defendant, LKG Associates, leased by defendant, B. Dalton Booksellers, Inc. and operated by defendant, Barnes & Noble, Inc. s/h/a Barnes & Noble Corporation (hereinafter referred to as "Barnes & Noble"). Plaintiff

further alleges that defendants Greko N.Y. Corporation (hereinafter referred to as "Greko") and Amtech Lighting & Electrical Services, s/h/a Amtech Electrical Corporation (hereinafter referred to as "Amtech") were also negligent in inspecting and maintaining the lighting in the store. Plaintiff alleges that he sustained permanent injuries after receiving an electrical shock from an exposed wire on April 23, 2002 in the Barnes & Noble store after he reached for a magazine at the second magazine rack. Procedurally, by order dated December 11, 2003 (Jones, J.), the court held Greko in default and granted both plaintiff's motion for partial summary judgment and defendant Amtech's cross motion for summary judgment as against Greko. Before the court is a motion by Amtech for summary judgment dismissing the action and all cross claims as against it. Barnes & Noble cross-moves for summary judgment dismissing the action and for contractual and common law indemnification as against Amtech.

In support of its motion, defendant Amtech contends that it had no duty to plaintiff, had no notice of the lighting condition and did not create the condition. Amtech submits, *inter alia*, the pleadings; bills of particulars; a copy of the contract between Greko and Barnes & Noble; a copy of the contract between Amtech and Barnes & Noble; copies of deposition transcripts of plaintiff, James May, Christine Ducroiset, Reynold Williams, Dotty McNally, and non-party Joseph Cohen. In its cross motion, defendant Barnes & Noble incorporates by reference Amtech's submissions.

A review of the Greko contract reveals that Greko agreed to provide general services and maintenance for the store to streamline the routine and emergency repair and maintenance needs including doors, locks, electrical and plumbing. The maintenance would be provided on an on-call basis when notified by the store managers. Electrical service consisted of the following: all necessary repairs and/or replacements of existing electrical service, outlets, receptacles, restroom ventilation fans, smoke detectors, electrical components leading up to light fixtures, disconnects, timers, contactors and circuit breakers. The contract excluded the following electrical work: HVAC electrical system, underground or outside work, switch gear, lightning damage/shorts, new wiring/outlets, emergency lighting units and building and parking lot lighting.

The Lighting Maintenance Agreement between Amtech and Barnes & Noble provided for a regular inspection on a monthly basis. During inspections, Amtech agreed to replace all inoperative covered lamps, ballasts, lamp holders and wiring within lighting fixtures up to sixteen foot ceiling heights. Amtech also agreed to inspect and repair all exterior lighting and signs.

Plaintiff, Derlin Sanchez, testified to the effect that on the date of the accident, he was present in the Barnes & Noble store with his brother, Jeffrey. After he reached for a magazine, he felt a shock in his right hand, was thrown backward and struck his head on a pillar. He states he lost consciousness for a short time. He regained consciousness a few minutes later and noticed the wires under the top shelf of the magazine rack from his position on the floor. Non-party Jeffrey Sanchez testified to the effect that he was standing near his brother prior to the accident and saw his brother fall to the floor out of the corner of his eye. His brother pointed out the loose wire to him. Although he had visited the store approximately five times before, he never saw loose wiring in that area. He also stated that there were no witnesses to the accident.

Mr. May testified to the effect that he was the manager of the Barnes & Noble store in 2002. He was off on the date that plaintiff was allegedly injured. He stated that no one had complained about the

affected light fixture or requested that the light fixture be replaced prior to that date. He also stated that there were no previous reports of electrical shocks in the magazine area prior to plaintiff's accident. He recalls receiving a phone call from the assistant manager, Christine Ducroiset, who told him about plaintiff's accident. He instructed her to call Greko and to turn off the power to that area, as well as close off the area to the customers. The next day when May returned to work he checked the area and did not see any problem at the magazine rack and thought Greko came to fix it.

Christine Ducroiset testified to the effect that she was working as assistant manager of the store on the date that plaintiff was allegedly injured. She stated that after she was notified that plaintiff was injured, she went to the magazine area and spoke to plaintiff and his brother. She saw wires hanging from the light bulb fixture. After calling the manager, Mr. May, she followed his directions. She did not recall any electricians working in the area of the accident on that day or prior to that day. Ms. Ducroiset stated that Barnes & Noble employees regularly clean the floor by the magazine racks, dust and restock the magazine shelves at least twice daily. She averred that she received no complaints from employees or customers about any wires in any of the magazine racks at the store prior to plaintiff's accident. She stated that if there was an electrical problem she would notify the manager on duty and would call Greko for repairs.

Reynold Williams testified to the effect that he was an electrician employed by Amtech. He stated that he was present at the store on the April 17, 2002 visit for which there was a work order. On April 17, six days prior to plaintiff's accident, he replaced a ballast at the entrance to the store and some light bulbs throughout the store. He stated that the work order did not refer to repairs to fixtures in any magazine rack. He further averred that if he had performed any work to the affected fixture he would have written it on the work ticket and would also have notified the store manager. He was not aware of and had not observed loose wires or cables in the magazine racks on April 17 or anytime prior to plaintiff's accident. When he checked the magazine racks, he visually checked the lights, and if they were lit, he made no further inspection. On April 17, he visually inspected the lights at the magazine racks and all were functioning properly. He never heard any complaints that wires were dangling under the magazine racks prior to the accident. He made no repairs to the magazine racks prior to the accident date.

Dotty McNally testified to the effect that she is employed by Barnes & Noble, Inc. as the Director of Store Operations in Manhattan. She procures supplies and services for the stores. She stated that a lighting service contract was in effect on the date of plaintiff's accident with Amtech. She stated that Amtech was responsible for maintaining fluorescent fixtures on the magazine racks. She also stated that a general service agreement was in effect with Greko for plumbing, locks and small items.

Non-party Joseph Cohen testified to the effect that he worked for Barnes & Noble as a bookseller and cashier on the date of plaintiff's accident. After plaintiff's accident, he inspected the fixture and noticed that the bulb was missing and wires were hanging from the fixture. He notified Christine Ducroiset to assist the plaintiff in the magazine section and he then went back to his cashier duties. He was not aware of prior problems with lighting fixtures in the store.

Turning to the cross motion, defendant Barnes & Noble contends that it did not create or have notice of the alleged condition. In addition, defendant places the responsibility of inspection and

replacement of lighting fixtures upon Amtech.

In opposition, plaintiff submits, *inter alia*, the affidavit of Martin Kanner, an electrical engineer. Mr. Kanner opines that the lighting fixtures were slovenly installed and maintained which gave rise to the situation which injured plaintiff. He further states that it was a violation of good and accepted practice to attach the fluorescent lighting fixtures so closely to the magazines. He states that the Amtech electrician should have inspected the BX cable leading to the lighting fixture. He concludes that there was insufficient clearance between the tops of the magazines and the lighting.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 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 (*State Bank of Albany v McAuliffe*, 97 AD2d 607, 467 NYS2d 944 [1983], *app den* 65 NY2d 741 [1885]), 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 of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

The threshold question in any negligence action is whether defendant owed plaintiff a duty of care. Ordinarily a breach of a contractual obligation will not be sufficient in and of itself to impose a duty owed to third parties, which would result in tort liability (*Church v Callanan Indus.*, 99 NY2d 104, 752 NYS2d 254 [2002]). Only three sets of circumstances create exceptions to this general rule. First, tort liability may ensue if the promissory to the contract, through his affirmative actions, creates or exacerbates a dangerous condition. Second, if a plaintiff reasonably relies upon defendant's continuing performance of a contractual obligation to her detriment, tort liability might be imposed. Third, liability could be imposed if a comprehensive maintenance contract is such that the contracting party entirely assumes the duty of another to maintain the premises safely (*Church v Callanan Indus.*, *supra*; *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 746 NYS2d 120 [2002]). "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" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]).

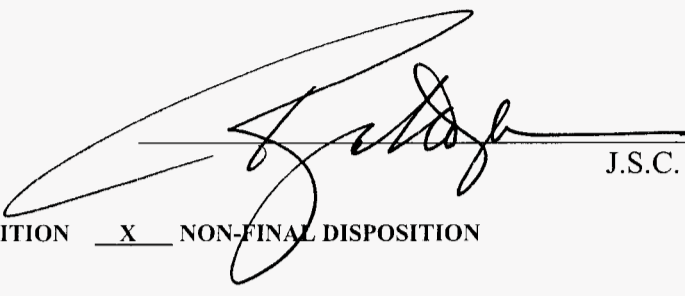
Amtech has demonstrated its entitlement to judgment as a matter of law. In the instant situation, there is no evidence that bare wires were present in the past, and, except for plaintiff's unsupported conclusory allegation to that effect, there is also no proof that the lighting fixtures or the wiring were defective, dangerous or had been negligently installed (*De Vizio v Hobart Corporation*, 142 AD2d 508, 530 NYS2d 144 [1988]). In addition, there is no evidence that Amtech created the dangerous condition in that it had not replaced any magazine rack lighting fixtures prior to plaintiff's accident. Further, Barnes & Noble's manager and assistant manager testified that they called Greko for lighting repairs. Thus, Amtech cannot be charged with assuming the exclusive duty to maintain the premises safely. Likewise, plaintiff's expert fails to raise an issue of fact that Barnes & Noble had actual or constructive notice of the condition, since its employees were at the magazine racks on a continual basis throughout the day to straighten and replace the magazines and would have noticed hanging wires. Inasmuch as there is no proof that the purported defective condition was visible and long standing, plaintiff has failed

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to raise an issue of fact to preclude summary judgment.

Accordingly, the motion and cross motion for summary judgment are granted. Barnes & Noble's request for indemnification as against Amtech is denied as academic.

Dated: SEP 13 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION