

Varghese v Planet Kids of Broadway, Inc.

2008 NY Slip Op 30284(U)

January 24, 2008

Supreme Court, New York County

Docket Number: 0101348/2006

Judge: Joan Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN

PART 11

J.S.C.

Index Number : 101348/2006

VARGHESE, NIXY

VS.

PLANET KIDS OF BROADWAY

SEQUENCE NUMBER : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision and order*

WHICH/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
 FEB 04 2008
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: January 24, 2008

J
HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION **J.S.C.**

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
NIXY VARGHESE,

Plaintiff,

INDEX NO. 101348/06

-against-

PLANET KIDS OF BROADWAY, INC., PLANET
KIDS, BRANIC INTERNATIONAL REALTY CORP.,
and GLEN WESTERLIND,

Defendant.

-----X
JOAN A. MADDEN, J.:

In this action for damages for personal injuries, defendants Branic International Realty Corp. (“Branic”) and Glenn Westerlind move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against them.

As the parties moving for summary judgment, defendants bear the initial burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985).

Plaintiff alleges he was injured on February 8, 2003, when he slipped and fell as a result of snow and ice on the sidewalk adjacent to the building located at 2688 Broadway in Manhattan. At his deposition, plaintiff testified that he fell on the sidewalk in front of the Planet Kids retail store, approximately one-half to one foot from the building line. It is not disputed that defendant Branic is the owner of the building, and defendant Westerlind is the managing agent. It is also not disputed that defendant Planet Kids of Broadway, Inc. leases the premises directly adjacent to

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the sidewalk, and operates a retail store known as Planet Kids. In support of the motion, defendants Branic and Westerlind submit a copy of lease, which provides in Paragraph 48(E) that the “Tenant, at its own cost and expense, shall keep all sidewalks and curbs adjacent thereto, which are located in front of the Demised Premises, free from snow, ice, dirt, and rubbish.”

An owner or lessee of property owes no duty to pedestrians to remove ice and snow that naturally accumulates on the sidewalk in front of its premises unless the owner or lessee made the sidewalk more hazardous. See Rhymer v. Nalpantidis, 232 AD2d 299 (1st Dept 1996), lv app den, 89 NY2d 814 (1997). A failure to remove all the snow and ice is not negligence. Stewart v. Heleviyim, 186 AD2d 731 (2nd Dept 1992). Only when an owner or lessee has affirmatively undertaken to clean the sidewalk of ice and snow is it “required to exercise reasonable care in doing so or be held liable in negligence where its acts created or increased the hazard inherent in ice and snow on city sidewalks.” Glick v. City of New York, 139 AD2d 402, 403 (1st Dept 1988).

Here, the moving defendants have met their burden of proving entitlement to summary judgment. By its clear and express terms, the lease obligated the tenant to clean the snow and ice from the sidewalk in front of the Planet Kids store where plaintiff alleges he fell. Plaintiff has not produced any competent evidence showing or tending to show that defendants Branic or Westerlind, as the owner and managing agent, took any affirmative steps to remove snow or ice from the sidewalk in front of the Planet Kids store. Defendant Westerlind merely testified that the building superintendent was responsible for clearing the sidewalk in front of the entrance to the “SRO hotel” which is located above the ground floor of the building and has its own entrance to the building which is separate from the Planet Kids commercial space. Westerlind also

[* 4]
testified that if the superintendent saw snow and ice on the sidewalk in front of the commercial space, he would not clear the sidewalk, but would “make sure that the commercial space was taking care of the sidewalk.”

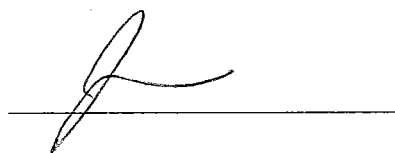
Absent evidentiary proof showing or tending to show that the owner or its managing agent made any attempt to remove snow and ice from the sidewalk area in front of the Plant Kids store, plaintiff has failed to demonstrate the existence of a triable issue of material fact sufficient to defeat summary judgment. Defendants Branich and Westerlind, therefore, are entitled to summary judgment dismissing the complaint as against them.

Accordingly, it is

ORDERED that motion by defendants Branich International Realty Corp. and Glenn Westerlind for summary judgment dismissing the complaint as against them is granted, and the complaint is dismissed in its entirety as against defendants Branich International Realty Corp. and Glenn Westerlind, and the Clerk is directed to enter judgment accordingly.

DATED: January 28, 2008

ENTER:



J.S.C.

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