

Mejia v ERA Realty Company

2008 NY Slip Op 31543(U)

May 14, 2008

Supreme Court, Nassau County

Docket Number: 1112-06/

Judge: Thomas P. Phelan

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 5
NASSAU COUNTY

GUADELUPE MEJIA a/k/a FRED MEJIA and
JOSEPH MEJIA,

Plaintiff(s),

-against-

ERA REALTY COMPANY, EDWARD COHEN,
ROBERT COHEN and CIRCLE A FOODS, INC.,

Defendant(s).

ORIGINAL RETURN DATE: 02/04/08
SUBMISSION DATE: 04/08/08
INDEX No.: 11112/06

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1
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Defendants, ERA REALTY COMPANY, EDWARD COHEN and ROBERT COHEN ("ERA and Cohen"), move for summary judgment dismissing the complaint against them (motion sequence #1), and defendant, CIRCLE A FOODS, INC. ("Circle A") moves for summary judgment dismissing the complaint against it (motion sequence #2). Plaintiffs oppose the motion.

It is well settled that on a motion for summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If this initial burden is not met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*).

Where, as here, defendants move for summary judgment in a trip and fall type action based upon defendant's lack of notice of the alleged dangerous condition, "defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (citations omitted)" (*Beltram v. Metropolitan Life Ins. Co.*, 259 AD2d 456, 457 [2d Dept. 1999]).

This action was brought by plaintiffs to recover damages sustained as a result of an alleged trip and fall in the parking lot defendant Circle A's convenience store located at 305 Rockaway Turnpike, Lawrence, New York, which occurred on or about February 12, 2006.

MOTION SEQUENCE #1

Defendants, ERA and Cohen, claim their entitlement to summary judgment based upon the following: (1) ERA is an out-of-possession landlord, being the holder of a triple-net lease, and tenant, Circle A, is solely responsible for the maintenance and repair of the parking lot; (2) there is no evidence that ERA ever received notice or violated any statutory safety regulation; and (3) the action is barred by the "storm in progress rule."

"As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property" (*Ellers v. Horwitz Family Ltd. Partnership*, 36 AD3d 849, 850 [2d Dept. 2007] [citation omitted]). ERA submits a copy of the lease between it and 305 Rockaway Turnpike Groceries, Inc., as well as an Assignment and Assumption of Lease assigning the lease to Circle A. The lease provides that "Tenant shall have the exclusive use of the parking facilities adjacent to the Premises, and shall be responsible for maintenance, repairs and snow removal." (Amended and Additional Clauses ¶71, Ex. O).

Plaintiff argues that the lease also contains a right of re-entry and that ERA and Cohen, therefore, should be charged with constructive notice. Moreover, it is alleged by plaintiffs that there were statutory violations. In support of their allegation, the affidavit of Stanley Fein, P.E., a professional engineer, is submitted. Mr. Fein opines that "defendants violated § 212-30 of the Code of the Village of Lawrence" (¶22, Ex. I).

That section provides, in pertinent part, as follows: "All parking spaces shall be paved, oiled or covered with gravel, shall be suitably drained, shall be maintained in good condition and shall have adequate means of ingress and egress." (Def's Reply Ex. G). Counsel for ERA submits that that section is not applicable here in that when reading Article IV as a whole, it is clear that it is only applicable to those uses designated in § 212-27. In reaching that conclusion, counsel relies on § 212-32, which provides, in pertinent part, as follows: "Parking spaces required by §§ 212-27 through 212-34 shall be maintained in accordance with the provisions of §§ 212-27 through 212-34, as long as such buildings or premises are used for the purposes requiring such parking spaces to be furnished." (Id.). A convenience store is not a listed use.

"Constructive notice may be found where an out-of-possession landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists (citations omitted). Here, however, there was no specific statutory violation." (*Briggs v. Country Wide Realty Equities, Ltd.*, 276 AD2d 456,457 (2d Dept. 2000)).

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“Under the so-called ‘storm in progress’ rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm (see *Dowden v. Long. Is. R.R.*, 305 A.D.2d 631).” (*Marchese v. Skenderl*, _____ NYS2d _____, 2008 WL 1990004 [2d Dept. 2008]).

ERA submits copies of the statements that plaintiff Guadelupe Mejia submitted to his insurance carrier. Said statements were signed on March 7 and 14, 2006, respectively, and stated that: “I slipped on the ice . . .” (Exs. R and S). A weather report also submitted shows that it was snowing at the time of the incident and that there was an accumulation of snow on the ground (Ex. Q). These defendants have established *prima facie* evidence that the “storm in progress” rule is applicable in this action.

Based upon all of the foregoing, defendants’, ERA REALTY COMPANY, EDWARD COHEN and ROBERT COHEN, motion for summary judgment dismissing the complaint and cross claim against them is granted.

MOTION SEQUENCE #2

Defendant Circle A contends that plaintiff cannot establish either actual or constructive notice and that the injury was sustained during a storm in progress. Besides adopting the statements of facts and documents of the co-defendants, the deposition of Prabhakar Sharma is submitted in support of the motion. Mr. Sharma testified that he is and has been a cashier at Circle A (Ex. A p. 9). He further testified that he was not aware of anyone having made complaints about the parking lot or outside lighting prior to the date of the incident (Id. pp. 15 and 16). Harshad Patel, the owner of Circle A, also testified that he never received any complaints (ERA Ex. M, p. 57).

Plaintiff Guadelupe Mejia claims in his deposition of February 26, 2007, that he fell because there was a hole in the ground and it was dark (Id. Ex. K, p. 29). Mr. Mejia also testified that it was snowing (Id. p. 36). Although Mr. Mejia had been visiting Circle A three or four days a week for the past ten years (Id. p. 24), he testified that he did not remember seeing the hole, did not know how long it had been there and did not know if anyone else ever saw the hole before the incident (Id. p. 36).

Circle A has established *prima facie* that it did not create or have actual or constructive notice of the alleged condition. (See, *Scola v. Sun Int’l North America*, 279 AD2d 466 [2d Dept. 2001]). The burden now shifts for plaintiffs to come forward with sufficient evidence to raise a triable issue of fact (Id.). In opposition to defendant’s motion for summary judgment, plaintiffs submit the affidavit of Stanley H. Fein, P.E., who performed a site inspection on June 12, 2006 (Ex. I ¶ 12). Mr. Fein opines that there was insufficient lighting in the area. He bases his opinion upon Mr. Mejia’s testimony that it was dark at the time of the accident. Mr. Fein further opines that “the subject hole . . . was the result of the deterioration of the asphalt in the subject parking lot which existed for an extended period of time” (Id. ¶19). His opinion is based on the “variation in color, the presence of weeds growing in said hole and the fact that it was made up of different composites” (Id. ¶20).

The professional engineer's examination of the premises was four months after the incident. Plaintiffs have failed to submit proof that the hole, if in fact it existed at all, was visible and apparent and present for a sufficient length of time before the accident to permit Circle A to discover and remedy it. (*See, Scola v. Sun Int'l North America, supra*). Moreover, Mr. Mejia initially claimed that he slipped on ice, not a hole. Defendants have established *prima facie* evidence that the "storm in progress" rule is applicable in this action. The bare conclusory allegations contained in the affidavit of plaintiffs' expert are insufficient to raise a triable issue of fact and defeat Circle A's motion for summary judgment. (*Id.*).

Based upon all of the foregoing, defendant's, Circle A's, motion for summary judgment dismissing the complaint and cross claim against them is granted.

This decision constitutes the order of the court.

Dated: 5-14-08

HON THOMAS P. PHELAN
Thomas P. Phelan

J.S.C.

Sullivan Papain Block McGrath & Cannavo PC
Attn: Deanne M. Diblasi, Esq.
Attorneys for Plaintiffs
55 Mineola Boulevard
Mineola, NY 11501

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NASSAU COUNTY CLERK'S OFFICE

Saretsky Katz Dranoff & Glass, LLP
Attn: Robert B. Weissman, Esq.
Attorneys for Defendants ERA Realty, Edward Cohen and Robert Cohen
475 Park Avenue South
New York, NY 10016

Jacobson & Schwartz
Attn: Scott Wein, Esq.
Attorneys for Defendant Circle A Foods
510 Merrick Road
P. O. Box 46
Rockville Centre, NY 11571