

Purple & White Supermarkets, Inc. v ULM 1 Holding Corp.

2009 NY Slip Op 33082(U)

December 24, 2009

Supreme Court, New York County

Docket Number: 602058/2006

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 602058/2006
PURPLE & WHITE SUPERMARKETS
vs.
ULM 1 HOLDING
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

1 this motion to/for _____

PAPERS NUMBERED
1-6
7-8
9-10


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 decided by the attached decision, order & Judgment*

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/24/09


JANE S. SOLOMON v.s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
PURPLE & WHITE SUPERMARKETS, INC.,

Plaintiff,

Index No.: 602058/2006

-against-

ULM 1 HOLDING CORP.,

Defendant.

DECISION and ORDER

FILED

DEC 30 2009

-----x
JANE S. SOLOMON, J.:

NEW YORK
COUNTY CLERK

Plaintiff Purple & White Supermarkets, Inc. is the lessee of a large supermarket located at 225 West 57th Street, New York, New York (Store). Defendant, ULM 1 Holding Corp. (ULM) is the owner of the adjacent 26 story building with an address on Broadway, in Manhattan (Building). ULM erected a sidewalk shed around the building and over the front of Plaintiff's Store. Plaintiff sues for damages and ULM moves for summary judgment on the grounds that the complaint is without merit and that it acted lawfully. For the following reasons the motion is granted.

FACTS

The Store is a Morton Williams Associated Supermarket with large display windows and signage on West 57th Street, just west of the Building. On October 20, 2005, ULM obtained a permit, expiring on October 17, 2007, from the Department of Buildings (DOB) to erect the shed around the Building; the permit expired on October 17, 2007. The shed extended 20 feet across the front of the Store. While the shed was in place, ULM hired

an engineer to make a Local Law 11/98 inspection. The engineer found that an "unsafe condition" existed which, under Local Law 11/98, required that ULM "immediately commence such repairs . . . and shall undertake such measures as may be required to secure public safety . . ." (Local Law 11/1998, Motion Ex. C).

The plywood walls above the shed were plastered with advertisements for HSBC Bank USA. Plaintiff contends that the shed was not erected in preparation for building renovation, but, rather, for the revenue from the advertising; therefore, it argues, ULM abused its right to erect the shed. Notably, the advertising violated the DOB Rules and Regulations, and was removed after several months.

In any event, ULM's work was not finished until September 2007, and the shed was removed the next month. Plaintiff alleges that ULM's actions constitute negligence, gross negligence, nuisance, and interfered with its quiet enjoyment of the Store, and it claims lost profits of \$7,000 to \$10,000 per week.

DISCUSSION

ULM argues that it was required by law to erect the shed to protect pedestrians from potential hazards of falling masonry; that after receiving the permit, it erected the shed and then hired engineers to formulate a plan of repair. Thereafter, it received bids, hired a contractor, ordered replacement stone,

obtained a work permit and effectuated the repairs (Motion, ex. L). ULM argues that it did nothing wrong and cannot be held liable to Plaintiff.

Plaintiff counters that when ULM received its shed permit, it assumed a "special use duty" to act with due care in the use of the shed, and that the advertising on the shed not only did not comply with the conditions of the permit, but actually camouflaged and obscured its premises from the view of passersby. It further argues that ULM was required to commence work immediately, yet it did not. Plaintiff's claim is that this conduct sufficiently establishes negligence and nuisance.

A. Negligence & Gross Negligence:

"The doctrine of special use . . . authorize[s] the imposition of liability upon an adjacent occupier of land for injuries arising out of circumstances where permission [has been] given, by a municipal authority, to interfere with a street solely for private use and convenience in no way connected with the public use Consequently, where the abutting landowner derives a special benefit from that [public property] unrelated to the public use, the person obtaining the benefit is required to maintain the used property in a reasonably safe condition to avoid injury to others" (*Kaufman v. Silver*, 90 NY2d 204 [1997][Internal quotation marks omitted]). The common thread

in most special use cases was the installation of something "exclusively for the accommodation of the owner of the premises . . ." (*Balsam v. Delma Engineering Corp.*, 139 AD2d 292 [1st Dept. 1988]).

Examples of exclusive accommodations include: an owner receiving a license to embed iron rails into the sidewalk to facilitate easier trash removal, and an owner receiving a license to place an above ground oil filler cap on the street to assist in the delivery of heating oil (*Id.*). A sidewalk shed erected pursuant to safety regulations is not exclusively for the accommodation of the owner; rather, it is for the safety of the public so that the special use doctrine does not apply.

Accordingly, Plaintiff has failed to establish any material facts in issue regarding any duty owed to it by ULM upon which a claim of negligence may rest, and summary judgment is granted in favor of ULM on the claims of negligence and gross negligence.

B. Nuisance

"Primarily, a sidewalk shed is intended as protection from danger above. To that end, such obstruction of the passageway as is reasonably necessary can in no sense be a nuisance. If, however, the obstruction is so needless and so dangerous as to be unreasonable, under all the circumstances of

[* 6]

time and place, or if there is a failure to comply with some specific provisions of the law which directly or indirectly creates a dangerous situation, the one who creates the danger may be charged with liability, because the obstruction is then a nuisance" (*West v. City of New York*, 265 NY 139 [1934]).

It is uncontested that the sidewalk shed was required, and Plaintiff offers no proof that having it extend beyond ULM's building line was not proper. Also, it is uncontested that the shed was erected and maintained in a safe manner. Accordingly, summary judgment is granted in favor of ULM on the claim for nuisance.

C. Covenant of Quiet Enjoyment

"A covenant for quiet enjoyment is implied in every lease" (*Fifth Ave. Bldg. Co. v. Kernochan*, 221 NY 370 [1917][emphasis added]; see also, 74 NY Jur 2d, Landlord and Tenant § 227). Here, Plaintiff is not ULM's tenant. There is no relationship between them which would support this claim and summary judgment is granted on this issue in favor of ULM.

For the foregoing reasons is hereby is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; the Clerk is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: December 24, 2009

ENTER:



A handwritten signature in black ink, appearing to be 'JS', is written over a horizontal line.

J.S.C

JANE S. SOLOMON

FILED
DEC 30 2009
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COUNTY CLERK'S OFFICE