Kok Kheong Yeong v Bank of E. Asia (U.S.A.) N.A.
2010 NY Slip Op 31199(U)
May 14, 2010
Supreme Court, New York County
Docket Number: 105959/07
Judge: Judith J. Gische
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SCANNED ON 5/19/2010

[* 1]

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

PRESENT: HON. JUDITH J. GISCHE J.S.C. *Justice*

PART 10

Index Number : 105959/2007

YEONG, KOK KHEONG

vs.

BANK OF EAST ASIA

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

this 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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED MAY 19 2010 NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 5/14/10

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

KOK KHEONG YEONG,

Plaintiff,

-against-

THE BANK OF EAST ASIA (U.S.A.) N.A. and EAST ASIA PROPERTIES (US), INC.,

Defendants.

Decision/Order
Index No.: 105959/07
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m [§ 3212] w/RDL affirm, exhs	1
Pltf's opp w/SK affirm, exhs	2
Defs' reply w/RDL affirm, exhs	3
Pltf's sur-reply w/SJK affirm	4

FILED
MAY 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff, Kok Kheong Yeong ("Yeong"), to recover monetary damages for the personal injuries he allegedly sustained when he slipped and fell on ice on the sidewalk abutting defendants' property. Defendant, East Asia Properties (US), Inc. (the "Owner"), owns the building abutting the sidewalk where the alleged incident occurred and defendant, the Bank of East Asia (U.S.A.) N.A. (the "Bank"), is a domestic corporation and a commercial ground floor tenant at the premises.

Both defendants, who are jointly represented, have answered the complaint and now move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint

against them. Since issue has been joined and defendants' motion was brought timely after plaintiff filed the note of issue, the motion will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order is as follows:

Arguments

Plaintiff claims that he slipped and fell on ice on the sidewalk abutting the building located at 202 Canal Street, New York, New York (the "building"). The accident is alleged to have occurred on February 15, 2007 at approximately 11:00 a.m. Plaintiff claims defendants were negligent because the defendants had notice of, but failed to correct, the dangerous condition at the premises. Defendants contend that the plaintiff cannot establish its *prima facie* case and the complaint should be dismissed because there is no evidence establishing that defendants created or had notice of the dangerous condition alleged.

Plaintiff served a Verified Bill of Particulars dated July 19, 2007 and he has been deposed. Miguel Ocasio ("Ocasio"), chief engineer for Colliers ABR Union, the managing agent of defendants, was also deposed on behalf of the defendants.

Plaintiff testified at his deposition that on the date of the accident, it was cold and cloudy, and that it snowed the day before. Plaintiff stated that after crossing the street, he stepped over piles of snow in order to get onto the sidewalk, he took four or five steps, and then slipped and fell in front of the Bank. After he fell, he noticed "a lot of frozen ice . . . it was pieces and chunks of ice . . . stuck on the sidewalk." Plaintiff stated that the ice was "dirty and very slippery."

Ocasio testified at his deposition that he was the chief engineer for Colliers ABR Union, the managing agent for Owner and that among his duties were snow and ice removal from the sidewalk outside the building when needed. Ocasio testified that he uses a snow blower to remove snow and he shovels when the snow accumulation is under two inches. He testified that he also spreads salt, using a salt spreader, when it snows and he "throw[s] the salt down every hour to hour and a half . . . [on] the entire sidewalk." Ocasio stated that if it had snowed the day before, and there was ice on the sidewalk, it was his practice to use an ice chipper to break up the ice and spread salt on the sidewalk approximately three times before 11:00 a.m. He testified that he would never leave ice on the sidewalk without attempting to remove it.

Plaintiff also provides the sworn affidavit of non-party witness Mei Yi Lai ("Lai"). Lai states that she arrived at the scene only a few minutes after plaintiff fell. She noticed that the sidewalk in front of the Bank was "covered with many patches of ice, and there was neither sand nor salt."

Defendants argue that Lai's affidavit should not be considered by the court because plaintiff failed to comply with this court's order, dated October 1, 2009, requiring defendants to provide Lai's last known address.

Discussion

Summary Judgment – Burden of Proof

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v City of

New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

On this motion, defendants have the initial burden of making a *prima facie* showing that they neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. *See* Manning v. Americold Logistics, LLC, 33 A.D.3d 427 (1st Dept. 2006).

Negligence

It is black letter law that a landowner or possessor has a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party (Perez v. Bronx Park South, 285 A.D.2d 402 [1st Dept. 2001]). This common law duty is tempered by a requirement that a plaintiff seeking recovery must establish that the possessor of land had actual or constructive

notice of the hazardous condition which precipitated the injury (Pappalardo v. Health & Racquet Club, 279 A.D.2d 134 [1st Dept. 2000]). To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it. Pappalardo, *supra*.

On this motion for summary judgment, defendants have the burden of proving their defenses. Thus, defendants must prove that they did not create the dangerous condition alleged nor did they have a sufficient opportunity, within the exercise of reasonable care, to remedy the situation (*see* Gordon v. American Mus. of Nat. Hist., 67 N.Y.2d 836 [1986]; Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246 [1984] *aff'd* 64 N.Y.2d 670 [1984]; *see*, Mercer v. City of New York, 223 A.D.2d 688, 689 [1996] *aff'd* 88 N.Y.2d 955 [1996]). Defendants have not established lack of notice. According to the NOAA National Climatic Data Center, which plaintiff provided in connection with this motion, there was no snow fall on the date of the accident but it had snowed the day before. Consequently, a reasonable jury could find that any snow accumulation left on the ground would have been there for at least a few hours, if not longer. This is constructive, if not actual, notice of a dangerous condition.

Even if defendants did not have notice of a dangerous condition, there are disputed triable issues of material fact whether defendants exercised reasonable care in how it maintained the sidewalk and whether or not defendants spread salt on the ground that day. Although defendants are not insurers of plaintiff's safety while at the premises, a property owner or possessor may be liable if it has failed to properly

maintain the premises for its anticipated use (Schmerz v. Salon, 26 A.D.2d 691 *aff'd* 19 N.Y.2d 846 [1966]).

While Ocasio states that he would never leave ice on the sidewalk and that it is his usual custom and practice to spread salt every hour to hour and a half, this testimony alone is not enough for defendants to make a *prima facie* showing for summary judgment dismissing the complaint. There are issues of fact about how long their was ice on the sidewalk that particular day and whether or not there was evidence of salt on the ground.

According to plaintiff and Lai, the sidewalk was covered with ice and they did not observe any salt on the ground. While defendants contend that the affidavit of Lai should not be considered by the court, the court finds that Lai's statement can be considered. Lai is a non-party witness and is not under plaintiff's control. Plaintiff provided defendants with Lai's name and phone number at his deposition on April 30, 2009 and provided defendants with Lai's address in a letter dated November 17, 2009.

Even without Lai's affidavit, there are sufficient material disputed issues of fact for plaintiff to defeat defendants' motion for summary judgment. As the moving party, defendants have a greater burden to produce evidentiary facts than its adversary (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). By their very nature, negligence cases do not lend themselves to summary judgment because the issue of whether the defendant (or plaintiff) acted reasonably under the circumstances is rarely an issue that can be decided as a matter of law (Ugarriza v. Schmieder, 46 N.Y.2d 471 [1979]). Here, not only have defendants failed to met their burden of proof, but there are triable issues of fact requiring the denial of defendants' motion (Winegrad

v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Rotuba Extrudes v. Ceppos, 46 NY2d 223 [1978]). The determination of whether defendants were negligent is for the trier of fact to decide (Ugarriza v. Schmieder, *supra*).

Since the note of issue was filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision and order on the Clerk in Trial Support so that the case may be scheduled for trial.

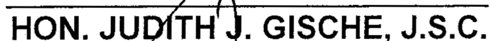
Conclusion

Defendants' motion for summary judgment is denied as it has not tendered sufficient evidence to eliminate any material issues of fact from the case. Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve the Office of Trial Support with a copy of this decision and order so the case may be scheduled for trial. Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 14, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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