Rahkimova v Belen
2010 NY Slip Op 32520(U)
August 23, 2010
Supreme Court, Queens County
Docket Number: 22315/08
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

--X

MUKAMBAR RAHKIMOVA,

Plaintiff,

-against-

JOSE F. BELEN, HANHHREUM ASIANMART AND STANFORD DELTA, INC.,

Defendants.

--X

Index No. 22315/08
Motion Date: 4/7/10
Motion Cal. No: 11
Motion Seq. No: 3

The following papers numbered 1 to 9 read on this motion by defendants Hanhhreum Asianmart and Stanford Delta, Inc. for an order, pursuant to CPLR § 3212, granting defendants summary judgment dismissing the complaint and all cross claims and/or counterclaims.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits....................................	1 - 4
Affirmation in Opposition-Exhibits..	5 - 7
Reply Affirmation..	8 - 9

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is a personal injury action in which plaintiff Mukambar Rahkimova ("plaintiff") seeks to recover damages for injuries sustained by her as a result of an accident that occurred on April 2, 2008, at 141-40 Northern Boulevard, the location of a supermarket owned by defendants Hanhhreum Asianmart and Stanford Delta Inc. ("defendants"). The accident allegedly occurred as plaintiff was shopping for produce at the bins set up outside of the supermarket, when the vehicle operated by co-defendant Jose Belen ("Belen") struck a wooden mallet upon which the bins were placed that went into plaintiff's foot; co-defendant Belen was in the process of backing his vehicle into the parking lot. Defendants now move for partial summary judgment on liability based upon plaintiff's alleged "failure to prove a prima facie case against" defendants, contending that the accident was caused solely by the negligence of co-defendant Belen.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.3d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues' (citations omitted). A

motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility' (citations omitted)." Ruiz v. Griffin, 71 A.D.3d 1112 (2nd Dept. 2010); Bell v. Board of Educ. of the City of N.Y., 90 N.Y.2d 944, 946 (1997); D.B.D. Nominee, Inc., v. 814 10th Ave. Corp. 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position. See, Zuckerman v. City of New York, supra.

"To hold a defendant liable in common-law negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) that the breach constituted a proximate cause of the injury (see Ingrassia v. Lividikos, 54 A.D.3d 721, 724, 864 N.Y.S.2d 449)." Lynfatt v. Escobar, 71 A.D.3d 743 (2nd Dept. 2010); see, Pulka v. Edelman, 40 N.Y.2d 781, 782 (1976); Demshick v. Community Housing Management Corp., 34 A.D.3d 518 (2nd Dept. 2006); Vetrone v. Ha Di Corp., 22 A.D.3d 835, 837, (2nd Dept. 2005); Jamgotchian v. Armenian Church of Holy Martyrs, 6 A.D.3d 580, 581 (2nd Dept. 2004). It is beyond cavil that a property owner has a duty "to exercise reasonable care in maintaining its property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property." Kurshals v. Connetquot Cent. School Dist., 227 A.D.2d 593 (2nd Dept. 1996); see also, Rivas-Chirino v. Wildlife Conservation Soc'y, 64 A.D.3d 556 (2nd Dept. 2009); Jackson v. Supermarkets General Corp., 14 A.D.2d 650 (2nd Dept. 1995). Moreover, where, as here, "the general public is invited into stores, office buildings and other places of public assembly, the owner is charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress." Peralta v. Henriquez, 100 N.Y.2d 139 (2003), quoting Gallagher v. St. Raymond's Roman Catholic Church, 21 N.Y.2d 554, 556 (1968); see, Backiel v. Citibank, N.A., 299 A.D.2d 504, 505 (2nd Dept. 2002); Tarrazi v. 2025 Richmond Ave. Associates, 296 A.D.2d 542 (2nd Dept. 2002). Here, plaintiff sustained injury when the delivery truck operated by co-defendant Belen backed into the wooden mallet that was supporting produce bins adjacent to the parking lot, causing that wooden mallet to be pushed into plaintiff's foot and pushing her foot against another wooden mallet.

In order to establish prima facie entitlement to summary judgment, defendants must demonstrate they maintained its premises in a reasonable safe condition, and that they "neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof." Andrini v. Navarra, 49 A.D.3d 575, 576 (2nd Dept. 2008), quoting Richardson v. Rotterdam Sq. Mall, 289 A.D.2d 679 (3rd Dept. 2001); see, also, Fontana v. R.H.C. Dev., LLC, 69 A.D.3d 561 (2nd Dept. 2010); Lezama v. 34-15 Parsons Blvd, LLC, 16 A.D.3d 560 (2nd Dept. 2005); Bodden v. Mayfair Supermarkets, 6 A.D.3d 372 (2nd Dept. 2004). In support of their motion, defendants submitted plaintiff's deposition testimony; the deposition testimony of Jung Bang, defendants' store manager who supervised the employees and managed purchases and sales; the deposition testimony of Doo Young Kim, defendants' employee responsible for the

shopping carts; and the deposition testimony of co-defendant Belen, the owner and operator of the tractor truck involved in the accident, and who frequently made deliveries at defendants' location and was aware of the presence of the wooden mallets. Relying upon the deposition testimony, defendants conclude that plaintiff failed to present proof of their negligence or to "prove that the defendants were the proximate cause of the plaintiff's injuries. . ." As there is no factual dispute as to the happening of the accident, the issue is first, whether, as claimed by defendants, the accident was caused solely because of the negligence of co-defendant Belen; and second, whether any "actions or inactions" of defendants "were a proximate cause of plaintiff's injuries.

The evidence establishes that defendants breached their duty to maintain its property in a reasonablely safe condition, and created the dangerous condition that gave rise to plaintiff's injuries by the placement of produce bins on wooden pallets outside of the supermarket. "[A]n owner should be held liable for the creation of a dangerous or defective condition on property if a reasonable person in the owner's position would have known, or would have had reason to know, of the danger created, or would have had such knowledge imputed by operation of law." Walsh v. Super Value, Inc., __ A.D.3d __, 904 N.Y.S.2d 121, 125-126 (2nd Dept. 2010). Because the existence of produce bins on wooden pallets outside of supermarkets is a common occurrence and because it is common practice for delivery trucks to unload produce inside the parking lot, it cannot be said that the danger of having one's foot trapped between two pallets that are impacted by a truck is unforeseeable. In order to prevail on their motion for summary judgment, defendants were "'required to establish as a matter of law that they maintained the property in question in a reasonably safe condition and that they neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof'" (see Mokszki v. Pratt, 13 A.D.3d 709, 710, 786 N.Y.S.2d 222, quoting Richardson v. Rotterdam Sq. Mall, 289 A.D.2d 679, 679, 734 N.Y.S.2d 303; Hyman v. Queens County Bancorp, 307 A.D.2d 984, 986, 763 N.Y.S.2d 669, affd. 3 N.Y.3d 743, 787 N.Y.S.2d 215, 820 N.E.2d 859)." Andrini v. Navarra, 49 A.D.3d 575, 576 (2nd Dept. 2008). This they failed to do.

Having established that defendants failed to establish prima facie that it was not negligent, the next inquiry is, assuming their negligence, whether that negligence was a proximate cause of plaintiff's accident. As stated in Di Ponzio v. Riordan, 89 N.Y.2d 578, 582-583 (1997), a case in which the plaintiff was injured by customer's runaway car while he was on the premises of a self-service filling station:

> The threshold issue in this negligence action is whether defendant URC had a legally cognizable duty to prevent the accident in which plaintiff Di Ponzio was injured (citations omitted). It is beyond dispute that landowners and business proprietors have a duty to maintain their properties in reasonably safe condition (citations omitted). It is also clear that this duty may extend to controlling the conduct of third persons who frequent or use the property, at least under some circumstances (citations omitted). The duty of a landowner or other tort defendant, however, is not

> limitless. It is an elementary tenet of New York law that '[t]he risk reasonably to be perceived defines the duty to be obeyed' (Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339, 344, 162 N.E. 99).

See, also, Sanchez v. State of New York, 99 N.Y.2d 247, 252 (2002)["Although the precise manner in which the harm occurred need not be foreseeable, liability does not attach unless the harm is within the class of reasonably foreseeable hazards that the duty exists to prevent."]. The question thus is whether defendants' breach constituted a substantial cause of the accident and plaintiff's resulting injuries. "In making such a determination, courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was reasonably foreseeable." Lynfatt v. Escobar, 71 A.D.3d 743 (2nd Dept. 2010).

While the "issue of proximate cause is ordinarily for the jury to resolve, it may nevertheless be determined as a matter of law that a defendant's conduct was not the proximate cause of an injury if the evidence conclusively establishes that there was an intervening act which was so extraordinary or far removed from the defendant's conduct as to be unforeseeable." Davidson v. Miele Sanitation Co. NY, Inc., 9 A.D.3d 346 (2nd Dept. 2004); see, Ruiz v. Griffin, 71 A.D.3d 1112 (2nd Dept. 2010); Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 315 (1980). As stated in Maheshwari v. City of New York, 2 N.Y.3d 288 (2004), quoting, Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 315:

> 'Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence' (id.). An intervening act may break the causal nexus when it is 'extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct' (id.).

See, also, Ingrassia v. Lividikos, 54 A.D.3d 721, 724 (2nd Dept. 2008)["An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant."]. However, "[w]hen the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs' (citations omitted). 'Foreseeability includes what the [defendant] actually knew, as well as what it reasonably should have known' (citations omitted)." Ruiz v. Griffin, supra, 71 A.D.3d at 1114-115.

Here, defendants, without addressing the question of the effect of or the role of its placement of wooden bins upon the wooden mallets on the causation of plaintiff's accident, state

in conclusory fashion that co-defendant Belen should be held 100% liable because he was the sole proximate cause of plaintiff's injury. The fact of the matter is that co-defendant Belen's negligent driving was not "so attenuated from the defendants' conduct" that their responsibility for the injury should be completely severed. Gordon v. Eastern Railway Supply, Inc., 82 N.Y.2d 555, 562 (1993). Here, co-defendant's actions were actually an extension of defendants' negligence. Defendants made it a common practice to allow their delivery trucks to back into the parking lot area where customers were present, and elected to guard against an accident by installing two metal poles painted white to protect the bins from being hit by vehicles. Clearly, this action established the foreseeability of an accident if safeguards were not in place. Moreover, the testimony showed that its was defendants' responsibility to supervise all deliveries and all activities within the parking lot. Defendants thus failed to make a prima facie showing that the backing of co-defendant's tractor trailer into a wooden mallet was an intervening act that was so extraordinary or far removed from the defendants' conduct as to be unforeseeable. See, Ruiz v. Griffin, supra; Maheshwari v. City of New York, supra; Davidson v. Miele Sanitation Co. NY, Inc., supra. They therefore failed to demonstrate their prima facie entitlement to summary judgment dismissing plaintiff's cause of action based on common-law negligence on the ground that its conduct was not the proximate cause of plaintiff's accident and resulting injuries. Thus, as defendants failed to satisfy their initial burden on the motion for summary judgment, the sufficiency of the opposition papers need not be considered. See, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Crafa v Marshalls of MA, Inc., 57 A.D.3d 937, 937-938 (2nd Dept. 2008). Based upon the foregoing, defendants' motion for summary judgment is denied.

Dated: August 23, 2010

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J.S.C.