Arslan v City of Glen Cove
2010 NY Slip Op 32763(U)
September 29, 2010
Sup Ct, Nassau County
Docket Number: 6745/09
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

RAHMI ARSLAN and FILOMENA ARSLAN,

Plaintiffs,

- against -

THE CITY OF GLEN COVE, HAIR EAST, INC., and NICOLETTA CONGERO,

Defendants.

NICOLETTA CONGERO,

Third-Party Plaintiff,

- against -

PETER LIZZA and PETER LIZZA MATERIALS, INC.,

Third-Party Defendants.

Index No.: 6745/09
Motion Seq. No.: 01
Motion Date: 08/30/10

The following papers have been read on the motion:	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Motion by defendant Hair East, Inc. ("Hair East") for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint as against it is denied.

[* 2]

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Rahmi Arslan ("R. Arslan") on December 23, 2008 at approximately 10:45 A.M.

Plaintiff alleges that he was caused to slip and fall on ice in the parking lot owned by defendant Nicoletta Congero[1] and used by defendant Hair East. Cynthia Thorman is the owner of defendant Hair East[2] and Griagal Barr is a non-party residential tenant at the property.

Since 2005, plaintiff has been employed as a postal carrier by the United States Postal Service, working out of the Glen Cove, New York Post Office. At the time of the accident, plaintiff was delivering mail to Hair East at the rear entrance.

Defendant Hair East moves for summary judgment dismissing the complaint on the grounds that it had no ownership interest in the property, including the parking lot area where plaintiff fell and had no contractual obligation to maintain it in any respect, including snow and ice maintenance and, in fact, did not maintain it. In support thereof, defendant Hair East relies upon the affidavit of Cynthia Thorman, the President of Hair East. In her affidavit, she states in pertinent part, as follows:

> "I have been President of a New York State corporation named Hair East, Inc. Hair East, Inc. operates a hair salon known as 'Hair East' at a building at 172B Forest Avenue, Glen Cove., N.Y.; and has been operating at those premises since

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[1]During his deposition, Phil Congero noted that he is the son of property owner Nicoletta Congero. He testified that Nicoletta Congero is 83 years old, suffers from Parkinson's Disease and dementia, and does not speak as a result. He further testified that he is Nicoletta Congero's attorney-in-fact pursuant to a durable power of attorney executed by Nicoletta Congero and was responsible for the property at the time of the accident. *See* Exhibit E (Congero Transcript), at pgs. 9, 11, 16.

[2]Ms. Thorman is the daughter of property owner Nicoletta Congero and sister of Phil Congero. Ms. Thorman alleges Hair East has an oral lease for use of the subject property. Affidavit of Cynthia Thorman, sworn to on July 19, 2010.

> approximately 1975, and continuing to date. The building from which Hair East, Inc. operated the hair salon is part of a larger property owned by my mother Nicoletta Congero. The property owned by Nicoletta Congero includes other buildings, including a garage and a small apartment house, and a parking lot. Hair East, Inc. has no ownership, lease, interest, or other interest or control over those properties. Hair East, Inc. occupied the premises at 172B Forest Avenue, Glen Cove, N.Y. pursuant to an oral lease with Nicoletta Congero. Pursuant to that lease, Hair East, Inc. pays monthly rent and also pays its own utilities. At the rear of the building, 172B Forest Avenue, there is a parking lot which is available for the use of Hair East, Inc.'s customers. The residents of the apartments also make use of that same parking lot. The owner of the property maintains the parking lot, including particularly, snow removal, which is contracted to an individual named Peter Lizza. Hair East, Inc. is not involved in any way with the maintenance of the parking lot, the snow removal of the parking lot or the contractual relationship with Peter Lizza."

In opposition to the motion, plaintiff R. Arslan submits his own affidavit, an affidavit of William Marletta, Certified Safety Professional and plaintiff R. Arslan's expert and transcripts of deposition testimony of Phil Congero, Cynthia Thorman and Griagal Barr.

In his affidavit, plaintiff R. Arslan notes that "December 23rd was a cold winter morning but there was no precipitation at the time of [his] fall. Although it had snowed at some prior time, any substantial accumulation of snow had already been removed. However, the parking lot was still covered with ice and snow in several areas." Plaintiff R. Arslan further states that defendant Hair East has entrances in both the front and rear. The front entrance is located on a busy street where parking is prohibited and the parking lot is directly outside of the rear entrance. Both Phil Congero and Cynthia Thorman acknowledged that customers of defendant Hair East use the parking lot. Cynthia Thorman testified that she also parks her car in the parking lot.

Plaintiff R. Arslan further avers that "the parking lot is sloped and there is an incline from the street going up toward the lot. The asphalt was cracked, uneven, broken, and missing chunks of pavement . . ." Plaintiff R. Arslan states that while he was making his way up the slope, he suddenly hit a patch of black ice.

In his affidavit, Dr. Marletta notes, inter alia, that the asphalt in the parking lot was broken, cracked and not maintained in accordance with the Property Maintenance Code of New York State. Dr. Marletta further notes that the broken, raised asphalt condition was readily visible and has been present for many years; and that the property owner and tenant defendant Hair East knew or should have known of the parking lot's improper and dangerous condition, but failed to rectify it. Dr. Marletta also states that the parking lot's broken, uneven condition causes accumulation of water that may freeze as ice creating dangerous conditions.

On a motion for summary judgment, it is incumbent upon the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers. *See Mastrangelo v. Manning*, 17 A.D.3d 326, 793 N.Y.S.2d 94 (2d Dept. 2005); *Roberts v. Carl Fenichel Community Services, Inc.*, 13 A.D.3d 511, 786 N.Y.S.2d 823 (2d Dept. 2004). Issue finding, as opposed to issue determination is the key to summary judgment. *See Kriz v. Schum*, 75 N.Y.2d 25, 550 N.Y.S.2d 584 (1989). Indeed, "[e]ven the color of a triable issue forecloses the remedy." *See Rudnitsky v. Robbins*, 191 A.D.2d 488, 594

N.Y.S.2d 354 (2d Dept. 1993).

"A property owner or a party in possession or control will be held liable for a slip-and-fall involving snow and ice on its property only when it created the alleged dangerous condition or had actual or constructive notice of it." *See Crosthwaite v. Acadia Realty Trust*, 62 A.D.3d 823, 879 N.Y.S.2d 554 (2d Dept. 2009). *See also Nielson v. Metro-North Commuter R.R. Co.*, 30 A.D.3d 497, 817 N.Y.S.2d 110 (2d Dept. 2006); *Zabbia v. Westwood, LLC,* 18 A.D.3d 542, 795 N.Y.S.2d 319 (2d Dept. 2005; *Voss v. D & C Parking*, 299 A.D.2d 346, 749 N.Y.S.2d 76 (2d Dept.2002).

Defendant Hair East, however, has a common-law duty to remove dangerous defects from commercial premises it occupied (*Elbadawi v. Myrna & Mark Pizzeria, Inc.*, 70 A.D.3d 627, 894 N.Y.S.2d 495 (2d Dept. 2010) notwithstanding its contention that "[t]he owner of the property maintains the parking lot, including snow removal which is contracted to an individual named Peter Lizza." *See Cohen v. Central Parking Systems, Inc.*, 303 A.D.2d 353, 756 N.Y.S.2d 266 (2d Dept. 2003).

Viewing the evidence in light most favorable to plaintiff (*Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000); *Robinson v. Strong Memorial Hosp.*, 98 A.D.2d 976, 470 N.Y.S.2d 239 (4th Dept. 1983), defendant Hair East has not made a *prima facie* showing of entitlement to judgment as a matter of law dismissing the complaint. An issue of fact exists as to defendant Hair East's responsibility and duty with respect to the maintenance of the parking lot, particularly in light of the claim that the lease between defendant Hair East and defendant Nicoletta Cangero is oral and, notably, an intra-family lease. Hence, defendant Hair East has not established its entitlement to summary judgment based upon Cynthia Thorman's self-serving claim that the purported oral lease between defendant Hair East's owner and her

mother did not obligate defendant Hair East to maintain the parking lot.

In view of the foregoing, the motion is denied.

This constitutes the Decision and Order of this Court.

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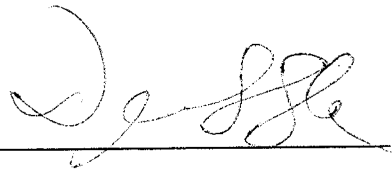

DENISE L. SHER, A.J.S.C.

ENTERED

OCT 01 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
September 29, 2010