

Graham v Wheatley Hills Discount Liq. Inc.

2011 NY Slip Op 31074(U)

April 12, 2011

Supreme Court, Nassau County

Docket Number: 8249/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

MARY ELLEN GRAHAM,

Plaintiff(s),

Index No. 8249/09

-against-

**Motion Submitted: 3/8/11
Motion Sequence: 001, 002**

**WHEATLEY HILLS DISCOUNT LIQUOR INC.,
TEC REALTY CORP., and DOES 1 THROUGH
XX, INCLUSIVE,**

Defendant(s).

_____ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....XXX
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Motion brought by defendant, Wheatley Hills Discount Liquor Inc., ("Wheatley Hills") in the above captioned negligence action for an Order of this Court, pursuant to CPLR §3212, awarding summary judgment and dismissing the Complaint of the plaintiff, Mary Ellen Graham alleging injuries sustained resulting from a slip and fall on ice in its parking lot, is denied.

Cross motion by co-defendant, TEC Realty Corp. ("TEC") for an Order of this Court, pursuant to CPLR §3212, awarding summary judgment and dismissing all claims and cross

claims against it is granted, and the branch of its cross motion for an Order of this Court granting indemnification from Wheatley Hills is rendered moot.

Plaintiffs commenced this action by filing a summons and complaint in April, 2009 alleging, inter alia, that defendants, TEC and Wheatley Hills, landlord and tenant of the subject premises respectively, were negligent in that they maintained their premises in a careless and reckless manner by failing to properly remove snow and ice from their parking lot and that the manner in which they removed the snow and ice, created and/or exacerbated a hazardous condition.

On or about January 17, 2009 at 6:30 p.m., the plaintiff and her husband drove to the Wheatley Hills Liquor store, owned and operated by Wheatley Hills and located at 193 Post Ave, Westbury, New York, to make a purchase. Plaintiff's husband was driving a Ford Econoline van and he parked the vehicle in one of the designated and demarcated parking stalls in the store's rear parking lot. The particular parking stall abutted a dumpster on the immediate right. The plaintiff, seated in the front passenger side, attempted to exit the van on side closest to the dumpster when she slipped and fell on an alleged "black ice" condition. Plaintiff sustained a fracture to her ankle which required medical treatment and surgery.

Wheatley Hills was, at all times referenced herein, a tenant pursuant to a lease agreement with TEC, the property owner and landlord. The relevant provisions of the lease are as follows:

"...13. Owner . . . shall have the right (but shall not be obligated) . . . to enter the demised premises . . . at . . . reasonable times . . . to examine the same and to make repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in this premises . . ."

...

...49.2 All cleaning, ice or snow removal . . . shall be Tenant's responsibility . . ."

Wheatley Hills filed the instant motion, arguing that it lacked actual and/or constructive knowledge of the condition that caused the injury. Further, it had not received any prior complaints regarding any dangerous snow and ice condition on its premises nor did the plaintiff inform it of such a condition until she served her Summons and Complaint. In support of its motion, it submits as evidence, inter alia, copies of the lease agreement between TEC and Wheatley Hills, and the transcripts of examinations before trial from: plaintiff, Mary Ellen Graham; Rosa Kalb, sole owner and president of Wheatley Hills; and Eugene Moramarco, officer and director of TEC Realty.

3] TEC crossed moved, on the grounds that it is not liable for plaintiff's injuries on the same bases as its co-defendant, Wheatley Hills. TEC, if it were to be found liable, is seeking indemnification by Wheatley Hills for costs as TEC is an out of possession landlord pursuant to the above referenced lease agreement.

In support of her opposition to the instant motion and cross motion, plaintiff submits evidence, which includes undated pictures of the snow and ice condition in the parking lot. As to TEC's cross motion, Wheatley Hills, in opposition, argues that the lease provides the owner and landlord a right to reentry for the purposes of making repairs, which is sufficient for liability to attach regarding plaintiff's injuries.

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v. Gervasio*, 81 N.Y.2d 1062, 619 N.E.2d 400, 601 N.Y.S.2d 463 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); *Miceli v. Purex*, 84 A.D.2d 562, 443 N.Y.S.2d 269 [2d Dept., 1981]).

Once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]) even if alleged by an expert (*Alvarez v. Prospect Hospital, supra; Aghabi v. Serbo*, 256 A.D.2d 287, 681 N.Y.S.2d 333 [2d Dept., 1998]).

It is well settled that a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 492 N.E.2d 774, 501 N.Y.S.2d 646 (1986), *Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522, 855 N.Y.S.2d 155 [2d Dept., 2008]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (see *Gordon v. American Museum of Natural History, supra; Nelson v. Cunningham Associates, L.P.*, 77 A.D.3d 638, 908 N.Y.S.2d 713 [2d Dept., 2010]). In light of the foregoing, Wheatley Hills has established that it possessed neither actual or constructive knowledge of the purported dangerous or defective condition.

However, Wheatley Hills did not address the issue as to whether they created or exacerbated the hazardous condition, alleged to have existed by the plaintiff. The only

[* 4]

reference was in its Reply Affirmation, stating only “. . . the assertion by the plaintiff that the defendant created the offending piece of black ice is also speculative”. Further, as per the testimony of Ms. Kalb, she could not recall the snow and ice removal efforts on the day of the accident as she “away for [that] weekend” and she did not make any inquiries when she returned. As Wheatley Hills failed to adequately address this issue, it did not establish a prima facie entitlement to summary judgment and there is no need to address the plaintiff’s arguments in opposition.

Regarding TEC’s cross motion, generally, an out-of-possession landlord may not be held liable for injuries occurring on its premises unless it is contractually obligated to perform maintenance and repairs or it has retained control over the premises (see *Scott v. Bergstol*, 11 A.D.3d 525, 782 N.Y.S.2d 793 (2d Dept., 2004), *Knipping v. V & J, Inc.*, 8 A.D.3d 628, 779 N.Y.S.2d 244 [2d Dept., 2004]). Here, there is no evidence, specifically any lease provision, indicating that TEC retained control over the premises.

Moreover, Mr. Moramarco’s testimony, on behalf of TEC, indicated that he did not make routine inspections of the snow and ice removal procedures and efforts by his tenant. When he did frequent the premises, it would be for the purposes of parking his car, making purchases at the liquor store, or frequenting the businesses at the adjoining properties. He did not even conduct any investigation regarding plaintiff’s claims when he learned about the underlying litigation giving rise to the instant motion. This further supports that TEC relinquished the management and control of the premises to its tenant.

Further, an out-of-possession landlord that has assumed the obligation to make repairs to its property cannot be held liable for injuries caused by a defective condition at the property unless it either created the condition or had actual or constructive notice of it (see *Nelson v. Cunningham Assoc., L.P.*, *supra*. There is no evidence in the record to support that TEC had actual or constructive notice of and/or created the alleged hazardous condition. In addition, Mr. Moramarco’s uncontroverted testimony that he did not have the “faintest recollection” as to whether he was in the Wheatley Hills liquor store during the weeks preceding plaintiff’s accident undermines any possibility of actual or constructive notice.

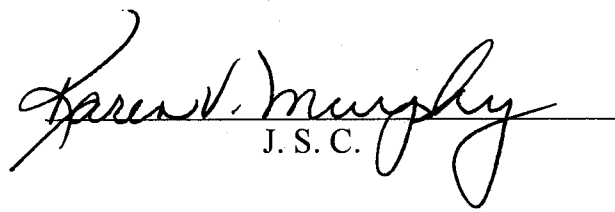
Wheatley Hills’ assertion that the owner’s right of reentry created a triable issue of fact as to liability, is without merit given that the leases’ re-entry provision, cited in ¶ 13, refers only to the owner making repairs, replacements and improvements to the premises. Further ¶ 49.2 of the lease specifically sets forth the tenant’s responsibility of removing snow and ice from the demised premises and it is a responsibility and duty specifically ascribed to the tenant (see *Quiles v. 200 West 94th Street Corp.*, 262 A.D.2d 169, 692 N.Y.S.2d 59 (1st Dept., 1999), *Elbadawi v. Myrna & Mark Pizzeria, Inc.*, 70 A.D.3d 627, 894 N.Y.S.2d 495 [2d Dept., 2010]). Wheatley Height’s own testimony indicated that it routinely undertook snow removal efforts at the liquor store.

In consideration of the foregoing, as TEC has demonstrated that it was an out-of-possession landlord of the liquor store premises and the plaintiff and Wheatley Hills failed to raise a triable issue of fact in opposition, TEC's cross motion is granted in its entirety.

Wheatley Hill's motion for summary judgment dismissing Plaintiff's complaint and for an order denying TEC's cross motion for defense costs and indemnification is denied in its entirety.

The foregoing constitutes the Order of this Court.

Dated: April 12, 2011
Mineola, N.Y.


J. S. C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE