

Hunt v 61 Floyds Run, Inc.

2011 NY Slip Op 32387(U)

August 17, 2011

Sup Ct, Suffolk County

Docket Number: 16005-08

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x	CALENDAR DATE: February 23, 2011
MICHAEL HUNT,	MNEMONIC: MG; C/Disp.
Plaintiff,	<u>PLTF'S/PET'S ATTORNEY:</u>
	Certilman, Balin, Adler & Hyman, LLP
-against-	90 Merrick Avenue
	East Meadow, NY 11554
61 FLOYDS RUN, INC.,	<u>DEFT'S/RESP ATTORNEY:</u>
	Hammill, O'Brien, Croutier, Dempsey, Pender &
Defendant.	Koehler, PC
	6851 Jericho Turnpike, Suite 250
	PO Box 1306
-----x	Syosset, NY 11791

Upon the following papers numbered 1 to 24 read on this motion for summary judgment _____;
Notice of Motion/Order to Show Cause and supporting papers 1-12 _____; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 13-21 _____; Replying
Affidavits and supporting papers 22-24 _____; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the defendant, 61 Floyds Run, Inc., for summary judgment and dismissal of the plaintiff Michael Hunt's complaint pursuant to CPLR §3212 is granted as there are no readily identifiable issues of fact which preclude this Court from granting summary disposition as a matter of law. The plaintiff's action is dismissed.

The plaintiff instituted this action for personal injuries allegedly sustained on July 31, 2007 in a fall in a parking lot located at 61 Floyds Run Road in Bohemia, Suffolk County on Long Island, New York (hereinafter 61 Floyds Run Road) which property was owned by the defendant 61 Floyds Run, Inc. The plaintiff was employed as a warehouse clerk by LLP Distributing Co., Inc. d/b/a WSM Distributing (hereinafter LLP) in a building owned by the defendant. The plaintiff, an employee for approximately six (6) weeks, was in the parking lot during a lunch break on a sunny warm day and claims that he injured himself and suffered a left Achilles tendon rupture when he turned and his left foot stuck to the ground on a "sticky tar like substance". The plaintiff alleges that he was showing some of his fellow employees some boxing/sparring moves while wearing boxing gloves when the accident occurred. The plaintiff thereafter instituted this lawsuit against the defendant as the owner of the property.

The defendant now moves for summary judgment pursuant to CPLR §3212 arguing that the defendant is an alter ego corporation of the plaintiff's employer and is merely a real estate holding entity owned by Richard Benanti, the same person who owns LLP. The defendant also argues in support of dismissal that the plaintiff has not established causation because he is unable to identify a cause of his injury and there is no notice, either actual or constructive, of a dangerous defect in the parking lot upon which liability should be imposed.

27

The plaintiff in response claims that a workers compensation defense under Workers Compensation Law (hereinafter WCL) §11 should not apply because there is a fact issue as to the defendant's relationship with and as alter ego of plaintiff's employer, that there are issues of fact raised as to defendant's negligence in maintaining its property in a reasonably safe condition and that Harry Benanti, the father of the owner, Richard Benanti, was aware of the "soft spot" in the pavement and that a tar application as a crack filler had been applied.

For the following reasons, the defendant's motion for summary judgment pursuant to CPLR §3212 seeking dismissal of the plaintiff's complaint is granted and the plaintiff's action for negligence is dismissed.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (**Winegrad v N.Y.U. Medical Center**, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v N.Y.U. Medical Center**, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (**Joseph P. Day Realty Corp. v Aeraxon Prods.**, 148 AD2d 499, 538 NYS2d 843 [1979], **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Courts have repeatedly addressed the issue of corporate liability for employee' injuries and have set forth specific criteria to address whether a parent corporation and subsidiaries are integrated to such an extent that they are truly one corporate entity and an alter ego of the parent corporation or, alternatively, whether the corporate structure is a joint venture or a separate entity from its parent. Generally, business enterprises set up corporate structures to obtain business or legal advantages and to shield themselves from instances of liability. Hence, the structure created by a corporate enterprise should not be routinely or lightly ignored at the behest of the corporate entity in order to shield it or one of its corporate entities from common law tort liability. **Buchner v. Pines Hotel, Inc.**, 87 AD2d 691, 448 NYS2d 870 (3rd Dept. 1982).

“ A business enterprise has a range of choice in controlling its own corporate structure. But, reciprocal obligations arise as a result of the choice it makes. The owners may take advantage of the benefits of dividing the business into separate corporate parts, but principles of reciprocity require the courts also to recognize the separate identities of the enterprise

when sued by an injured employee' (**Buchner v. Pines Hotel, Inc.**, id. quoting **Boggs v. Blue Diamond Coal Co.**, 590 F2d 655, 662, cert den. 444 US 836 (1979)' "

For a subsidiary corporation to be considered the alter ego of the parent corporation, there must be direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored. See, **Broxmeyer v. United Capital Corp.**, 79 AD3d 780, 914 NYS2d 181 (2nd Dept. 2010); **Shelley v. Flow Int'l Corp.**, 283 AD2d 958, 724 NYS2d 244 (4th Dept. 2001).

Here the defendant claims that the plaintiff is relegated to his workers' compensation claim because both the defendant and the plaintiff's employer are alter ego corporations of each other and WCL §11 prevents the plaintiff from pursuing this claim against his employer. In **Constantine v. Premier Cab Corp.**, 295 AD2d 303, 743 NYS2d 516 (2nd Dept. 2002), the Court explained it in this way:

"Generally, the sole remedy of an employee injured in the course of employment against his or her employer is recovery under the Workers' Compensation Law (see Workers Compensation Law §11, 29 (6)); **Billy Consolidated Mach. Tool Corp.**, 51 NY2d 152, 432 NYS2d 879, 412 N.E.2d 934). It is established that "[a] parent corporation may be deemed to be an employer of an employee of a subsidiary corporation for Workers' Compensation purposes if the subsidiary functions as the alter ego of the parent" (**Dennihy v. Episcopal**, 283 AD2d 542, 543, 724 NYS2d 768; see, **Ploszai v. Cooper Tank & Welding Corp.**, 213 AD2d 385, 624 NYS2d 615."

Richard Benanti is the President and sole owner/shareholder of both the defendant and the plaintiff's employer and the corporate offices of both corporations are located at 61 Floyds Run Road and the defendant's position is that it was formed solely to hold title to the real estate in which Richard Benanti operated his marine parts business. At his examination before trial (hereinafter EBT), Harry Benanti, the father of Richard Benanti and the Chief Financial Officer of LLP, stated that the defendant had no employees, no bank accounts, conducted no business, there was no lease between the two corporate entities, all bills associated with the business and the property were paid by the parent organization and Utica National Insurance Company issued a policy of insurance under policy # 3816073 to WSM Distributing Company, Inc.; LLP Distributing Corp., LLP Manufacturing Co. Inc., for the property at 61 Floyds Run Road. However, there is no mention of the defendant/corporate entity within the policy of insurance lending support to the defendant's claim that insurance was always with the parent organization for liability insurance on the premises and it is a mere holding entity of the property for its parent. **Capella v. Suresky at Hatfield Lane, LLC**, 55 AD3d 522, 864 NYS2d 316 (2nd Dept. 2008). The plaintiff has not submitted a contrary position which would raise an issue of fact to warrant a trial before the trier of fact. The tax returns submitted merely reflect that the defendant carries the mortgage payments on the property paid by the parent organization as rent by its subsidiary for tax purposes.

The proof establishes that the defendant was a mere alter ego corporation of the parent organization which was the plaintiff's employer with the ability and right to claim that the plaintiff's injury was subject to the exclusivity provisions of the WCL §11 barring the plaintiff's lawsuit against his employer. The plaintiff has failed to offer proof that the defendant is a separate, viable corporation from its parent organization. Therefore the defendant is granted summary judgment pursuant to CPLR §3212 and the plaintiff's action is dismissed. See, *Ortega v. Noxxen Realty Corp.*, 26 AD3d 361, 809 NYS2d 546 (2nd Dept. 2006). See also, *Anduaga v. AHRC NYC New Projects, Inc.* 57 AD3d 925, 869 NYS2d 801 (2nd Dept. 2008).

Finally, the defendant also moves for summary judgment pursuant to CPLR §3212 seeking dismissal because the plaintiff has failed to establish either actual or constructive notice of a dangerous defect in the parking lot upon which liability can be asserted against the defendant. It is not disputed that the plaintiff's injury occurred in a parking lot on a warm summer day with a mean temperature of 85° F and that the plaintiff's left foot allegedly stuck to the pavement as a result of a sticky surface. The EBT testimony of Harry Bernanti indicated that he checked the area of the plaintiff's fall and determined no sticky surface or hole in the pavement existed, though he did note that there was a soft spot in the area where the plaintiff fell which was the size of a half dollar which he described as soft from a tar filler for a crack in the pavement. He further stated the defendant didn't do anything to the parking lot since its purchase of the premises and did not fill cracks or repave the parking lot. However, the plaintiff was unable to identify the source or the nature of the substance which allegedly caused his foot to stick to the pavement nor did he return to the parking lot for a period of more than two (2) months in an attempt to discover the cause of his fall resulting in the accident. In *Farrar v. Teicholz*, 173 AD2d 674, 570 NYS2d 329 (2nd Dept. 1991), it was stated:

“ To establish a prima facie case of negligence, the plaintiffs must demonstrate (1) that the defendants owed them a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (see, *Boltax v. Joy Day Camp*, 67 NY2d 617, 499 NYS2d 660, 490 NE2d 527; *Soloman v. City of New York*, 66 NY2d 1026, 499 NYS2d 392, 489 NE2d 1294). An owner or tenant in possession of realty owes a duty to maintain the property in a reasonable safe condition (see, *Basso v. Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868).”

While a land owner has a duty to maintain his property in a safe condition, he is not an insurer of the safety of all those present on his property. *Prairie v. Sacandaga Bible Conference Camp*, 252 AD2d 940, 676 NYS2d 352 (3rd Dept. 1998). Also, for a defendant to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon his property, it must be established that a defective condition actually existed and that the land owner either affirmatively created the condition or had actual or constructive notice of its existence. *Fargot v. Pathmark Stores*, 264 AD2d 708, 694 NYS2d 743 (2nd Dept. 1999). To constitute notice, the defendant must be aware of the alleged dangerous condition or be constructively on notice of the condition which resulted in the plaintiff's fall. Here, in the case at bar, the plaintiff is required to establish proof of notice of the condition resulting in the fall.

The Court in **Huth et al. V. Allied Maintenance Corp. et al.**, 143 AD2d 634, 635 NYS2d 1041 (2nd Dept. 19) stated:

“It is well established that proof of notice, either actual or constructive, is essential to recovery by a plaintiff who had fallen as a result of a foreign substance on the floor of a commercial establishment (**Cameron v. H.C.Bohack Co.**, 27 AD2d 362, 364, 280 NYS2d 483). The plaintiff must present evidence tending to show either that the defendant knew of the dangerous condition and did not remedy it, or that the condition existed for a sufficient length of time that, in the exercise of reasonable care, the defendant should have known of it (**Gordon v. American Museum of Natural History**, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774; **Negri v. Stop and Shop**, 65 NY2d 625, 491 NYS2d 151, 480 NE2d 740).” Generally, New York Jur.2d “Premise Liability” §181.

The defendant having established a prima facie case in support of its motion for summary judgment to dismiss the plaintiff's slip and fall cause of action on the basis of an alleged unidentified sticky substance on the pavement, it was incumbent on the plaintiff to rebut the defendant's prima facie showing. **Guarino v. La Shelda Maintenance Corp.**, 252 AD2d 514, 675 NYS2d 374 (2nd Dept.1998). The plaintiff has failed to establish the identity of the sticky substance or its exact location in the parking lot or to dispute Harry Benanti's claim that upon inspection of the area where the plaintiff fell, he found no sticky substance. At most, the plaintiff points to a general area in the parking lot, and having taken pictures much later, asks the Court to draw an unsubstantiated inference that the plaintiff's fall “may” have occurred in an area where he later found black crack filler in the pavement which “may” have softened and become sticky from the heat of the day and which was the substance which caused his left foot to stick to the surface. However, the Court could also conclude on the same evidentiary material that gum on the pavement caused plaintiff's foot to stick to the pavement or that the plaintiff injured himself while sparring in the parking lot. In any of those events, the inferences suggested are without any evidentiary foundation and are mere speculation. See, **Curran v. Esposito**, 308 AD2d 428, 764 NYS2d 209 (2nd Dept. 2003).

Thus, there is no basis to conclude that the defendant negligently maintained the parking lot and absent evidence of the reason for plaintiff's fall, the plaintiff's complaint should be dismissed. See, **DeSantis v. Lessing's Inc.**, 46 AD3d 742, 849 NYS2d 580 (2nd Dept. 2007); **Duffy v. Universal Maintenance Corp.**, 227 AD2d 238, 642 NYS2d 282 (1st Dept.1996). As has been stated so many times in the past, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a party's request for summary disposition. **V. Savino Oil and Heating Co. Inc. v. Rana Management Corp.**, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); **Dabney v. Ayre**, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, **Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.**, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987).

Here there is no suggestion that the defendant, the owner of the property or its parent organization, created a sticky surface on the pavement of the parking lot on the day of the accident. Moreover, there is no proof that the defendant or its parent organization had any notice of any such defective or dangerous condition. Indeed, the record does not even establish that this condition existed on the subject date, and, tellingly, the plaintiff testified at his EBT that he could not nor did he observe a dangerous defective condition before he fell. *DeSantis v. Lessing's Inc.*, *supra*. The most the plaintiff can point to is that he fell when his left foot stuck to an unknown sticky substance on the pavement in the parking lot in the general area where he was showing some fellow employees how to box. See, *Zelenaya v. Rosengarten*, 301 AD2d 519, 753 NYS2d 116 (2nd Dept. 2003). While summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [*VanNoy v. Corinth Central School, District*, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. *DiSabato v. Soffee*, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); *Usefof v. Yamali*, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

As the Court noted in *Andre v. Pomeroy*, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Millerton Agway Co-op v. Briarcliff Farms*, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

Accordingly, for the reasons outlined heretofore, the defendant 61 Floyds Run, Inc.'s motion for summary judgment pursuant to CPLR §3212 is granted and the plaintiff's action for negligence is dismissed.

SETTLE JUDGMENT

The foregoing constitutes the decision of the Court.

Dated: August 17, 2011



J.S.C.