

**Molnoski v Target Corp.**

2011 NY Slip Op 32653(U)

September 30, 2011

Sup Ct, Nassau County

Docket Number: 3909/09

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**MICHELLE MOLNOSKI and JEROME MOLNOSKI,**

**TRIAL/IAS, PART 4  
NASSAU COUNTY**

**Plaintiffs,**

**-against-**

**MOTION SEQ. NO.: 004**

**TARGET CORPORATION, VORNADO REALTY LP  
and BROADWAY MALL EAT II, LLC,**

**MOTION DATE: 7/7/11**

**Defendants.**

**INDEX NO.: 3909/09**

**VORNADO REALTY LP and BROADWAY MALL  
EAT II, LLC,**

**Third-Party Plaintiffs,**

**-against-**

**QUINTAL CONTRACTING CORPORATION**

**Third-Party Defendant.**

**The following papers having been read on the motion (numbered 1-3):**

Notice of Motion.....1  
**Affirmation in Opposition to Plaintiffs Motion**  
**for Summary Judgment.....2**  
**Reply Affirmation in Support of Motion**  
**for Summary Judgment.....3**

Motion (seq. No. 4) by the plaintiffs for an order amending the caption to reflect the true name of the defendant which is Vornado Broadway Mall, LLC in place of Broadway Mall Eat II, LLC and for an Order and Judgment pursuant to CPLR §3212 granting summary judgment in favor of plaintiffs on the issues of liability against defendant Vornado Broadway Mall, LLC, s/h/a Broadway Mall Eat II, LLC is determined as follows. Motion (seq. No. 3) by defendants Vornado Realty LP and Vornado Broadway Mall, LLC s/h/a Broadway Mall Eat II, LLC for an order pursuant to CPLR §2221 to reargue Target Corporation's (Target) motion for summary judgment pursuant

to CPLR §3212 dismissing the complaint and any cross-claims and counter-claims against Vornado, has been withdrawn.

Plaintiff alleges that on December 21, 2008, at approximately 10:15 PM while walking in the parking lot at 2003 Broadway Mall, Hicksville, New York (the Mall), she slipped and fell on ice sustaining serious injuries. It is not disputed that the plaintiff's accident occurred in the 100 foot area of the parking lot located in front of the entrance to Target known as the "inner ring road" (or "location of the subject accident"). Defendant Vornado Mall, LLC sued herein as Broadway Mall Eat II, LLC, (Vornado) admitted ownership of the premises where the accident occurred in its Verified Answer (¶ Sixth). Target leased space at the shopping Mall owned by Vornado. Third-party defendant Quintal entered into a written contract with Vornado to perform snow clearing and related services at the Broadway Mall. Target occupied its space pursuant to an Operation and Easement Agreement with Vornado. The lease specifically provides that Vornado was solely responsible for daily maintenance of the parking lot and roads on Vornado's property including removal of snow and ice. Target was not a party to the contract between Vornado and Quintal. Vornado charged Target a substantial fee for maintaining the parking lot including "inner ring road" where the plaintiff alleged the accident occurred. Plaintiff's complaint against defendants Vornado, the owner of the Mall and the tenant, Target, alleges that the defendants failed to maintain the subject area in a safe condition. Vornado commenced a third-party action against Quintal alleging breach of the agreement to clear the snow in a safe manner, failure to name Vornado as a named insured and indemnification.

The general manager of the Mall, Joseph DeGiorgio, testified that it was the responsibility of Vornado to remove the snow and ice from the parking areas and roadways within the Mall, including the roadway where the plaintiff fell. Target did not own, rent, or control any part of Vornado's parking lot.

Target requested that Vornado use a de-icer other than sand. Vornado may have believed that the only de-icing agent used by Quintal was a mixture of sand and salt. This was a mistake on Vornado's part, since contrary to Vornado's opinion, the de-icing agent used by Quintal was pure salt to which Target raised no objection. Mr. Quintal testified that Mr. Rossi of Vornado told Quintal to spread no de-icer of any kind on the inner ring road within 100 feet of Target's entrances.

In response to directives from Vornado, snow removal services began at the Broadway Mall on December 19, 2008 at about noon and continued through midnight and up to noon on December 20, 2008. During this time, two or three inches of snow was removed and 48 yards of de-icing material, rock salt, was spread. On December 20,

2008, Quintal Contracting applied an additional 55 yards of rock salt. This quantity of material is indicative of more than one application throughout the Mall. These multiple applications of de-icer on December 19 and 20, 2008 did not include any of the roadway within 100 feet of the entrance to Target. The record is clear that the final decision not to de-ice within 100 feet of Target's entrances was made by and the responsibility of Vornado, against the advice of Quintal.

Plaintiffs' Motion for Summary Judgment

As has been previously considered by the Court, in order to establish a *prima facie* case of negligence in a premises liability action, a plaintiff must demonstrate that a defendant created the condition which caused the accident or had actual or constructive notice of said condition. *Hartley v Waldbaum, Inc.*, 69 AD3d 902; *Kramer v K-Mart Corp.*, 226 AD2d 590. Actual notice by definition, requires proof that defendant was aware of the presence of the alleged condition prior to the happening of plaintiff's incident. *See, Cameron v Bohack*, 27 AD2d 362. "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 defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836. The plaintiffs have made an adequate *prima facie* showing of entitlement to summary judgment. *Stillman v Twentieth Century Fox Films corp.*, 3 NY2d 395; *Zuckerman v City of New York*, 49 NY2d 557.

Vornado as well as its agent Quintal had actual notice that the entire parking area was in need of de-icing material as a result of the ice accumulation. Quintal acted to rectify the ice conditions except the area where the plaintiff fell. That the entire parking lot was dangerous, including the area where the plaintiff fell is demonstrated by the fact that Quintal made multiple applications of the de-icing material in the entire parking lot except where the plaintiff fell.

In opposition to the plaintiffs' motion for summary judgment, Vornado relies on *Baumgartner v Prudential Insurance Company of America*, 251 AD2d 358. In *Baumgartner* after the plaintiff entered the mall, the lot had been salted and the temperatures rose above freezing. As the temperature fell below freezing only after 4:00 PM and continued to drop until 7:00 PM, the court found that the defendants did not have constructive notice or a reasonable time to remedy the condition. The facts in *Baumgartner, supra* can be distinguished. In the within action, based on the condition that existed at the time of the accident and the evidence of what existed throughout the parking lot on the day of and the day preceding the accident, the condition that allegedly caused the plaintiff to fall existed for a sufficient period of time so that it should have been discovered. There was sufficient time to rectify the condition, just as Vornado was

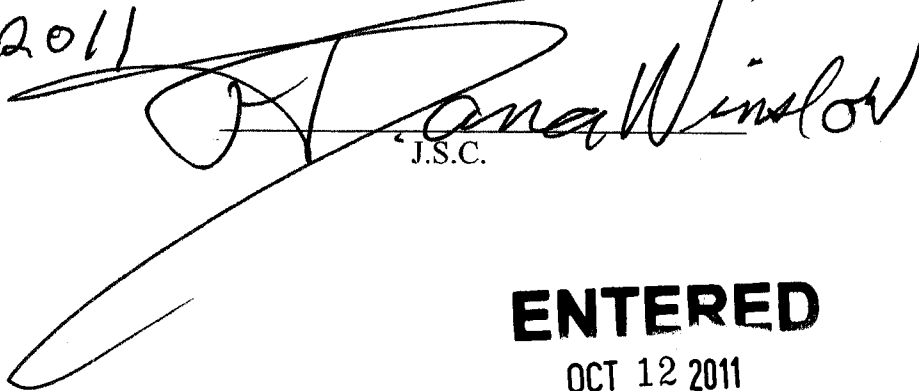
able to make certain that the rest of the parking area was treated with de-icing material. Vornado's reliance on *Richter v State of New York*, 31 AD3d 943 is also misplaced. In *Richter, supra*, at p. 944 the plaintiff's proof did not establish "to any extent that the icy condition had existed for a sufficient length of time to permit defendant to become aware of and remedy the situation." In the within action, the documentary evidence established that all parties understood and were on notice for over 24 hours that the area outside of Target where the accident occurred had to be de-iced. Although summary judgment is a drastic remedy, where there is nothing left to be resolved at trial on the issue of liability, as in the within action, the case should be summarily decided. *Andre v Pomeroy*, 35 NY2d 361. Plaintiff's motion for summary judgment against the Vornado defendants on the issue of liability is **granted**.

Plaintiffs Motion to Amend the Caption

The Court hereby **grants** the plaintiffs' unopposed motion for an Order amending the caption to reflect the true name of defendant to be Vornado Broadway Mall, LLC in place and stead of Broadway Mall Eat II, LLC and to delete Target Corporation, from the caption. By Order, dated January 3, 2011, the Court granted Target's motion for summary judgment dismissing the complaint and any cross claims and counter claims asserted against it.

This constitutes the Order of the Court.

Dated: Sept 30, 2011

  
 J.S.C.

**ENTERED**  
 OCT 12 2011  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE