

Levy v WVR Real Estate II, LLC
2011 NY Slip Op 32855(U)
October 20, 2011
Supreme Court, New York County
Docket Number: 116152/09
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JOAN M. KENNEY

PRESENT. J.S.C.

PART 8

Index Number : 116152/2009

LEVY, TINA

vs

WVR REAL ESTATE

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 116152/09

MOTION DATE 8/3/11

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 22 were read on this motion to/for summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION FILED

OCT 25 2011.

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/21/11

Joan M. Kenney
JOAN M. KENNEY J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

10/25
10/27/2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
TINA LEVY,

Plaintiff,

- against -

WVR REAL ESTATE II, LLC, WVR REAL ESTATE
MANAGEMENT, LLC, SHOP RITE SUPERMARKETS
INC., and PEPSI COLA OF NEWBURGH BOTTLING
COMPANY, INC.

Defendants.
-----X

KENNEY, JOAN M., J.

DECISION AND ORDER

Index Number: 116152/09

Cal.: 8/3/2011

Motion Seq. No.: 002

FILED

OCT 25 2011

Appearances

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NEW YORK
COUNTY CLERK'S OFFICE
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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment:

Papers

Notice of Motion, Affirmation, Affidavits & Exhibits
Affirmation in Opposition & Exhibits
Affirmation in Partial Opposition
Reply Affirmation

Numbered

1-17
18-20
21
22

In this slip and fall action, defendants WVR Real Estate II, LLC, WVR Real Estate Management, LLC, and Shop Rite Supermarkets, Inc.¹ seek an Order, pursuant to CPLR 3212, for conditional summary judgment on their cross-claim for common law indemnification against defendant Pepsi Cola of Newburgh Bottling Company, Inc. (Pepsi).

FACTUAL AND PROCEDURAL BACKGROUND

¹ Although the Affirmation in Support of the instant motion by Alan R. Lewis, Esq. states that he is the "attorney for WVR Real Estate II, LLC, WVR Real Estate Management, LLC, and Shop Rite Supermarkets, Inc.", this Court notes that, prior to the third party action commenced against Pepsi, Shop Rite brought a cross-complaint against "Co-Defendants" WVR in its answer dated December 17, 2009 (*see Ex. "B"* attached to notice of motion). The verified answer plead on behalf of WVR, dated February 5, 2010, was interposed by Michael L. Boulhosa, Esq. of Wilson Elser Moskowitz Edelman & Dicker LLP.

Plaintiff Tina Levy (Levy) alleges that, while shopping at a Shop Rite located in Vails Gate, New York (the store), owned by defendant Shop Right Supermarkets, Inc. (Shop Rite), she tripped on the corner of a floor-level pallet on which Pepsi products (Pepsi pallet) were displayed in the store (the accident). According to Levy, she did not see the Pepsi pallet as she was approaching it at the end of one of the store's aisles (Deposition Transcript of Tina Levy at 24:22-25). After she fell, Levy was approached by a Pepsi and Shop Rite employee who tried to help Levy back up (Levy Tr. at 40:16-19, 43:4-9).

Levy commenced this personal injury action against Shop Rite, WVR Real Estate II, LLC (WVR Real Estate), which is the owner of the land where the store is situated and defendant WVR Real Estate Management, LLC (WVR Management, collectively, WVR), which performs "certain managerial tasks" on behalf of WVR Real Estate (*see* Affidavit of Diane Dross attached to notice of motion, ¶ 2). In their answer, Shop Rite and WVR (collectively, the moving defendants) cross-claimed for common law indemnification against Pepsi in a third-party action and now seek summary judgment on that claim. In support of the instant motion, the moving defendants annex the affidavit of the Shop Rite assistant manager, Raymundo Berrios (Berrios), to whom Levy reported her accident (*see* Affidavit of Raymundo Berrios, Ex. "A" attached to opposition papers). Berrios states that Shop Rite did not control or supervise the manner of the work by Pepsi merchandiser in building the Pepsi pallet (Berrios Aff., ¶ 4) and that a Shop Rite employee would, at most, do a general inspection of the work. (*Id.*)

In opposition to the instant motion, Pepsi cites to the deposition of Berrios on behalf of Shop Rite in which he testified that the location of any pallets were determined pursuant to an "end plan" formulated by Shop Rite (Deposition Transcript of Raymundo Berrios, Ex. "F" attached to notice of motion at 20:13-16, 51:11-20) and that the Pepsi merchandiser was escorted for "safety reasons" by a Shop Rite employee to the location in the store where the Pepsi pallet was to be built (*id.* at 68:16-69:4). Berrios confirmed that an "end plan" was made up for the week during the accident (Berrios Tr. at 25:17-21), but it is undisputed in the motion papers that this specific "end plan" was never produced during discovery (*see* Opposition Affirmation of Mr. Gregory D. V. Holmes, ¶ 16).

Although Pepsi concedes that a Pepsi merchandiser would construct a portion of the Pepsi pallet at the store, Berrios testified on behalf of Shop Rite that Shop Rite employees would ordinarily inspect the pallet and check for tripping hazards and, if needed, direct the Pepsi merchandiser to change the set up of the Pepsi pallet (Berrios Tr. at 73:7-23). Berrios also testified that he did not view the accident (Berrios Tr. at 48:5-16), and did not recall inspecting the Pepsi pallet after the accident occurred (*id.*, at 32:19-22).

ARGUMENTS

The moving defendants contend that their instant motion for summary judgment should be granted as against Pepsi because: 1) Shop Rite did not control or direct the construction of the Pepsi pallet; 2) Shop Rite only held “general supervisory authority” over the location of the Pepsi pallet and therefore is not subject to liability; and 3) Pepsi’s failure to produce a witness with personal knowledge of the accident is insufficient to rebut the moving defendants’ *prima facie* showing.

Pepsi argues that the instant motion should be denied since triable issues of fact exist as to: 1) the extent of Shop Rite’s control of the Pepsi pallet based on Berrios’ testimony; and 2) the moving defendants have not demonstrated that Shop Rite was free from negligence in maintaining the condition and location of the Pepsi pallet.

DISCUSSION

In setting forth the standards for granting, or denying, a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hosp.* (68 NY2d 320, 324 [1986]), the following:

“As we have stated frequently, 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 demonstrate the absence of any material issues of fact. Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].”

It is well-settled that summary judgment is rarely granted in negligence cases (*Ugarriza v*

Schmieder, 46 NY2d 471, 475 [1979]), for “even when the facts are conceded, there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances, [a question which] can rarely be decided as a matter of law” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Moreover, this “drastic remedy” should not be granted where there is any doubt as to the existence of such issues, or where the issue is arguable; issue-finding, rather than issue-determination, is the key to the procedure (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

“Generally, [common-law indemnification] is available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer” (*see Mas v Two Bridges Assoc. by Nat. Kinney Corp.*, 75 NY2d 680, 690 [1990]). “A party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part” (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-78 [2011]; *see e.g. Mejia v Levenbaum*, 57 AD3d 216, 216 [1st Dept 2008]).

Here, in failing to conclusively eliminate all triable issues of fact, the moving defendants have failed to make their *prima facie* showing of entitlement to judgment as a matter of law. Namely, the moving defendants failed to demonstrate that Shop Rite exercised control over the condition and location of the Pepsi pallet insufficient to preclude liability on its part. Berrios, the only person called on behalf of Shop Rite who did not witness the accident, testified that Shop Rite’s “end plan” determined the placement of the Pepsi pallet, that the Pepsi merchandiser was escorted by a Shop Rite employee to the location where the Pepsi pallet was placed, and that Shop Rite inspected the Pepsi pallet for tripping hazards. Shop Rite’s contention that it conclusively eliminated all triable issues of fact regarding the extent of supervision, if any, over the Pepsi pallet is further belied by the fact that the “end plan” was never produced during discovery.

The moving defendants argue that the extent of Shop Rite’s supervision over of the Pepsi pallet amounts to “general supervisory authority” and is therefore insufficient to constitute control. This argument fails as, contrary to the facts in the Fourth Department decision in *DePillo v Great*

*Auburn land Company, Inc.*² cited by the moving defendants in support of their argument, this Court finds that the record readily reflects evidence in the form of deposition testimony by Berrios that Shop Rite escorted, inspected, and directed the Pepsi pallet sufficient to find possible negligence on the part of Shop Rite. In relying on the fact that the Pepsi pallet is wholly constructed and manufactured by Pepsi, Shop Rite confuses the issue of negligent construction with negligent maintenance.


As the moving defendants have failed to make their *prima facie* showing, this Court need not address the moving defendants' contention as to the inadequacy of Pepsi's failure to produce someone with personal knowledge of the accident.

Similarly, this Court cannot grant the relief sought herein with respect to WVR's cross-claims for common law indemnification. This Court notes that the existence of a lease, if any, between WVR and Shop Rite may contain an indemnification provision; however, said lease was not produced. Accordingly, it is:

ORDERED that defendants WVR Real Estate II, LLC, WVR Real Estate Management, LLC, and Shop Rite Supermarkets, Inc.'s motion for summary judgment is denied, in its entirety; and it is further

ORDERED that the remaining parties are directed to proceed to their scheduled mediation.

Dated: October 20, 2011

E N T E R


Hon. Joan M. Kenney
J.S.C.

FILED
OCT 25 2011
NEW YORK
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² 236 AD2d 863, 864 [4th Dept 1997]