

Seitz v Mira Light. & Elec. Serv., Inc.

2011 NY Slip Op 33631(U)

June 13, 2011

Sup Ct, Suffolk County

Docket Number: 33025/2009

Judge: William B. Rebolini

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Katherine Seitz,

Plaintiff,

-against-

Mira Lighting & Electrical Service, Inc.

Defendant.

Motion Sequence No.: 001; MOT:D
Motion Date: 2/2/11
Submitted: 4/13/11

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Upon the following papers numbered 1 to 41 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 19; Answering Affidavits and supporting papers, 20 - 31; Replying Affidavits and supporting papers, 32 - 41.

This is an action sounding in negligence and premises liability to recover damages for personal injury allegedly suffered by the plaintiff while at a Marshalls store owned and operated by TJX Companies, Inc. d/b/a Marshalls ("TJX") located in Stony Brook, New York. Pursuant to a written contract with TJX, the defendant Mira Lighting & Electrical Service, Inc. ("Mira") was responsible for the replacement of worn out elements of the lighting system at the subject store at the time the plaintiff was injured. The plaintiff commenced an action against TJX in July, 2007. The plaintiff commenced the instant action against Mira in August, 2009. By order of this Court, dated February 16, 2010 (Rebolini, J.), the two actions were consolidated for joint discovery and joint trial only.

On August 19, 2006, the plaintiff arrived at the Marshalls, intending to purchase, among other things, a summer comforter for her bed. She was in the store for approximately one-half hour, when she proceeded to the rear of the store where a display of comforters was located. The display

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consisted of shelves with comforters arranged in a “library”, or “book,” fashion, that is standing on edge. The plaintiff moved one of the comforter packages on the top-most shelf and a four foot fluorescent light bulb fell, striking her left arm and injuring her. The complaint herein sets forth three causes of action. The first cause of action sounds in premises liability, the second in common-law negligence and the third is based upon the doctrine of *res ipsa loquitur*.

Mira now moves for summary judgment dismissing the complaint against it on the grounds that it neither owed a duty of care to plaintiff stemming from its lighting service contract with TJX nor created a dangerous condition which caused the plaintiff’s injury. In support, Mira submits, *inter alia*, the pleadings, the deposition testimony given by the plaintiff, the deposition testimony given by Mario Carbone, the manager of the Marshalls and the deposition testimony of James Healey, Mira’s vice-president.

The plaintiff was deposed on May 8, 2009 in the TJX action, and on March 16, 2010 in this action. Her testimony was essentially the same at both proceedings and can be summarized as follows. She arrived at the Marshalls store in the evening, intending to buy a lightweight summer comforter. The comforter display was located against the rear wall of the store. The display consisted of three shelves with the top shelf just below a soffit, or “overhang,” which contained fluorescent lighting. Comforters were displayed in plastic bags and arranged on their narrow sides “like a book on a shelf.” She saw a comforter with a pattern that she liked and “moved it to the side, tilted it to see the price,” and a fluorescent bulb fell hitting her in the arm and shattering. A second fluorescent bulb was left hanging with one end still in the lighting fixture and the other resting on a comforter on the top shelf of the display. The plaintiff indicated that she did not remember if she removed any comforters from the display before her accident and that a customer would have to lay down a comforter package to remove it from the display or it would hit the soffit. She stated that “just shifting one or the other [comforter] caused that bulb to fall.”

At his deposition, Mario Carbone, the store manager at the subject store, testified that he did not recall if he was at work on the night of the plaintiff’s accident. He did not know how the accident happened and he claimed that he did not complete the accident report relating to the incident. He stated that comforters were displayed “library style,” on their narrow edge. He indicated that TJX “had an outside company that takes care of the lighting” and changes light bulbs at the store and that Marshalls’ employees also changed light bulbs when needed.

James Healey, vice president for sales and development at Mira, was deposed on March 16, 2010. He testified that Mira entered into a lighting services agreement (agreement) with TJX which requires it to visit stores owned by TJX every other month and to replace any bulbs or ballasts which were not working or which needed replacement. The agreement required Mira employees to check in with the relevant store manager or assistant manager, who would join in a walk-through to determine the work needed and who was required to sign off on the completed work as satisfactory to TJX. He indicated that Mira’s inventory of the lighting at the subject Marshalls revealed that there were 2,285 light bulbs at the store, of which 2,281 were of the type that fell onto the plaintiff. Mr. Healey further testified that Mira’s records revealed that it visited the Marshalls store on June 15,

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2006 to replace 12 fluorescent bulbs and that it visited on July 28, 2006 to replace 21 fluorescent bulbs. In both cases, the records do not reveal the specific locations of the bulbs that were replaced. He stated that the agreement provides that TJX can do its own lighting maintenance and replace bulbs on their own, that Mira did not train or instruct TJX employees how to perform bulb replacements and that Mira had not received any complaints about lighting fixtures at the Stony Brook store.

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 (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (see, Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 [2002]; Darby v. Compagnie Natl. Air France, 96 NY2d 343, [2001]; Pulka v. Edelman, 40 NY2d 781 [1976]). The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations (see, Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 [2002]). As a general rule, a party who enters into a contract to render services does not assume a duty of care to third parties outside the contract (see, Church v. Callanan Indus., 99 NY2d 104 [2002]; Espinal v. Melville Snow Contractors, 98 NY2d 136 [2002]).

Here, defendant, a company retained, albeit non-exclusively, to replace fluorescent bulbs in the lighting fixtures at the subject store, failed to establish its entitlement to summary judgment regarding the plaintiff's first and second causes of action. The Court finds an issue of fact exists as to whether Mira's employees negligently created a dangerous condition – thereby “launch[ing] a force or instrument of harm” – when they were present at the site replacing light bulbs in June 2006 and July 2006 (see, George v. Marshalls of MA, Inc., 61 AD3d 925 [2nd Dept., 2009]; Ragone v. Spring Scaffolding, Inc., 46 AD3d 652 [2nd Dept., 2007]; Bienaime v. Reyer, 41 AD3d 400 [2nd Dept., 2007]).

However, Mira established, *prima facie*, that the doctrine of *res ipsa loquitur* does not apply to the facts of this case. In order to rely on the doctrine of *res ipsa loquitur*, a plaintiff must demonstrate that (1) the injury is of a kind that does not ordinarily occur in the absence of someone's negligence, (2) the injury is caused by an agency or instrumentality within the exclusive control of the defendants, and (3) the injury is not due to any voluntary action on the part of the injured plaintiff (see, Morejon v. Rais Constr. Co., 7 NY3d 203 [2006]; Gaspard v. Barkly Coverage Corp., 65 AD3d 1188 [2nd Dept., 2009]). The evidence submitted by the defendant established, as a matter of law, that the light fixture and bulbs within the soffit were not within its exclusive control (see, Dermatossian v. New York City Transit Auth., 67 NY2d 219 [1986]; McMahon v. Gold, 78 AD3d 908 [2nd Dept., 2010]; Miles v. Hicksville U.F.S.D., 56 AD3d 625 [2nd Dept., 2008]; McDonald v. Sunstone Assocs.,

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39 AD3d 603 [2nd Dept., 2007]). Moreover, the plaintiff testified that the voluntary action of her moving the comforter package, at least in part, caused the fluorescent bulb to fall from its fixture.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment dismissing the complaint is granted to the extent that the plaintiff's third cause of action is dismissed and is otherwise denied; and it is further

ORDERED that the Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (see, CPLR §3212 [e] [1]).

Dated: June 13, 2011


HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** **NON-FINAL DISPOSITION**