

Hernandez v Hermany Farms, Inc.

2011 NY Slip Op 33918(U)

April 15, 2011

Sup Ct, Bronx County

Docket Number: 6164/06

Judge: Jr. Hunter

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA23A**

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Jayson Hernandez,

Index No.: 6164/06

Plaintiff,

Decision/Order

-against-

Hermany Farms, Inc., CNR Refrigeration Co., and
Frank Calca,

Defendants.

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HON. ALEXANDER W. HUNTER, JR.

The motion by defendant, Hermany Farms, Inc., (hereinafter "Hermany") for an order granting summary judgment dismissing plaintiff's amended complaint against it is denied.

The cause of action is for personal injuries allegedly sustained by plaintiff on March 29, 2005, when he fell after the collapse of a metal plates/ramps/platform that served as a bridge between a loading dock and a storage trailer. It is alleged that the accident took place during the course of plaintiff's employment as a warehouse foreman for Swede Farms, a milk processing and bottling plant located at 2338 Hermany Avenue in Bronx County.

Hermany moves for summary judgment on the ground that it did not create the condition which caused plaintiff to fall. In support of its motion, Hermany submits a copy of plaintiff's deposition testimony and the deposition testimony of co-defendant, Frank Calca. At his deposition, plaintiff testified that co-defendant Calca was responsible for welding on the platform. Co-defendant Calca then testified that after he installed the ramps, he returned to put a cover over them at the request of an individual named Vincent from Swede Farms. (Exhibits G and H). Hermany contends that the deposition testimony clearly shows that co-defendant Calca not only installed the ramps but he also installed the cover that ultimately gave way and caused plaintiff to fall. Moreover, Calca was retained by Swede Farms to install the ramps.

Hermany then makes reference to an affidavit signed by Robert Marrow, President of Hermany, wherein Mr. Marrow swore that Hermany had no involvement in the construction and/or installation of the metal plate which plaintiff testified was involved in his accident. However, no such affidavit is annexed to Hermany's moving papers and, instead, a transcript of Mr. Marrow's deposition testimony is annexed to the moving papers.

Hermany next argues that it had no actual or constructive notice of a defective condition. In order to be liable in damages for failure to warn of a dangerous condition, a property owner must have notice of the condition itself as well as the unreasonable risks it creates. In addition, hearsay is insufficient to defeat a motion for summary judgment. At his deposition, plaintiff testified that he never complained of the defective condition but the men he worked with did. However, he did not witness anyone complaining about the defective condition. Additionally, the fact that Hermany's employees may have been in the vicinity of the accident, is by itself, insufficient to establish constructive notice.

Finally, Hermany argues that it entered into a verbal lease with Swede which stated that Hermany was not responsible for repairs or maintenance of the subject platform. Accordingly, summary judgment should be granted in Hermany's favor.

Plaintiff opposes the motion and argues that Hermany, as the owner, is responsible for the safe maintenance of the building and its facilities. In support of his opposition, plaintiff annexes an affidavit from Herbert W. Braunstein, a professional engineer, who opined that Hermany was responsible for the conditions that led to plaintiff's accident. In his affidavit, Mr. Braunstein states that there was "deferred maintenance" as the platform should have been maintained so that it is capable of supporting a person without it falling. (Exhibit A). Mr. Braunstein cites to Occupational Safety and Health Standards for the Construction Industry (OSHA) regulations which he claims are applicable to the case at bar.

Moreover, Mr. Braunstein cites to certain New York City Building Codes which he opines are also applicable. Plaintiff contends that the owner of a building has a non-delegable duty to keep the building and parts thereof in reasonably safe condition and the metal plates served as a bridge which was inherently unsafe so the subject accident was foreseeable.

Plaintiff argues that there is a question of fact as to whether or not Hermany created the defective condition. Even though Hermany claims that it did not create the condition because Frank Calca did the welding and Frank Calca's appearance was arranged by Swede Farms, plaintiff testified that other workers at the milk company informed him that Mr. Calca was the in-house welder. In addition, plaintiff testified that his bosses mentioned to him that Hermany contracted Mr. Calca to do the welding for them. Therefore, since Mr. Calca was the in-house welder for Hermany, there is a triable issue of fact as to whether Hermany created the condition.

Furthermore, plaintiff argues that there is a question of fact as to whether Hermany had actual notice of the dangerous condition. Plaintiff testified at his deposition that the men he worked with complained about the defective condition. Mr. Marrow's claim that he was never made aware of the defective condition prior to the accident only raises a further issue of fact. Plaintiff also refers to Mr. Marrow's deposition wherein he testified that he observed the use of heavy machinery on the platform which caused damage to the platform.

Plaintiff also contends that there is a question of fact as to whether or not defendant had constructive notice of the condition. Plaintiff refers to certain parts of his deposition which reveals that a Hermany employee came out to the loading dock for the specific purpose of moving the trailers to better align them with the metal plates. Therefore, Hermany was fully aware of the presence of the metal plates and the length of time the plates were present raises an issue of fact as to constructive notice.

Finally, plaintiff opposes the motion on the ground that Hermany is vicariously responsible for the acts of its independent contractor, Frank Calca. Plaintiff cites to the Pattern Jury Instruction which states that one who hires an independent contractor is liable for injuries sustained when danger to others is inherent and the one who hires reasonably should have anticipated from the nature of the work that it would be dangerous to others. Accordingly, the motion should be denied.

Defendant Frank Calca opposes the motion by Hermany and argues that Robert Marrow's deposition testimony raises numerous issues of fact. Calca argues that Marrow's testimony proves

the following: that Hermany was on site daily at the subject premises and was aware of dangerous conditions on the platform where plaintiff was working before the accident occurred; that Hermany was aware of the collection of debris on the subject platform during the workday by Swede Farms, Inc., employees which could have contributed to plaintiff's injuries; that Hermany had personal knowledge of improper use of heavy machinery on its platform by Swede employees which likely caused portions of the welded metal plate to become dislodged; that Hermany's representative not only retained Calca to perform welding in the area where plaintiff was injured, but also directed, supervised and controlled the manner in which the metal platform was designed and constructed.

Defendant Calca testified at his deposition that he was retained by Hermany to install two diamond plate covered ramps connecting the existing metal platform with permanent storage trailers. While he was installing the ramps, he testified that there was always someone around from Hermany. Moreover, Calca testified that Hermany was aware the purpose of the ramp was to allow Swede employees to maneuver pallet jacks on and off the trailers. Moreover, the cover that was put in place to fill the gap connecting the two metal ramps was necessitated because Hermany refused to allow Calca to install the platform as he believed it should have been performed in the first instance. Accordingly, Hermany cannot argue that it had no control over the design and installation of the ramps attaching the storage trailers to the platform.

Moreover, even though Hermany claims that it did not retain Calca to install the ramps where plaintiff was injured nor was it aware of any dangerous condition on the premises, Calca testified that he was retained by Hermany to install the ramps and Hermany directed the manner in which Calca was to install the ramp. Hermany also inspected the ramp after it was installed. Accordingly, the motion for summary judgment should be denied.

It is well established that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. **Rotuba Extruders v. Ceppos**, 46 N.Y.2d 223 (1978). "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor...and he must do so by tender of evidentiary proof in admissible form." **Friends of Animals, Inc. v. Associated Fur Manuf., Inc.**, 46 N.Y.2d 1065 (1979). The court's function on a motion for summary judgment is issue finding rather than issue determination. **Sillman v. Twentieth Century Fox Film Corp.**, 3 N.Y.2d 395 (1957). Once the movant has made this showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." **Alvarez v. Prospect Hospital**, 68 N.Y.2d 320 (1986).

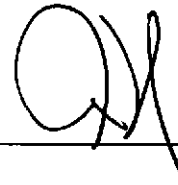
In a "slip and fall" case, a plaintiff must establish that defendant created the condition that caused the accident or had actual or constructive notice of the condition. **Gordon v. American Museum of Natural History**, 67 N.Y.2d 836 (1986); **see also**, **Mullin v. 100 Church LLC**, 12 A.D.3d 263 (1st Dept. 2004). In a summary judgment motion, the burden is on the movant to establish the "...absence of creation of the dangerous condition or notice thereof as a matter of law..." **Buckle v. Buhre Avenue Foods, Inc.**, 232 A.D.2d 269 (1st Dept. 1996); **Colt v. Great Atlantic & Pacific Tea Co., Inc.**, 209 A.D.2d 294 (1st Dept. 1994).

This court finds that defendant Hermany has not demonstrated its entitlement to judgment as a matter of law. Pursuant to C.P.L.R. § 3212, there are issues of fact which will require a trial

for fact-finding resolution with respect to whether or not Hermany created the defective condition at issue or had actual or constructive notice of the defective condition.

This constitutes the decision and order of the court.

Dated: April 15, 2011



J.S.C.

ALEXANDER W. HUNTER, JR.
J.S.C.