

**Sorrentini v Netta Realty Corp.**

2012 NY Slip Op 33558(U)

January 12, 2012

Supreme Court, Bronx County

Docket Number: 301784/2009

Judge: Betty Owen Stinson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

1-17-12 2nd Disp  
C

NEW YORK SUPREME COURT - COUNTY OF BRONX  
IAS PART 08

-----X  
VILMA SORRENTINI,

Plaintiff,

INDEX No. 301784/2009

-against-

NETTA REALTY CORP. and DA & JA DELI &  
GROCERY CORP.,

Defendants.

Present:

HON. BETTY OWEN STINSON

J.S.C.

-----X  
The following papers numbered 1 to 4 and 1A to 5A read on these 2 motions for summary judgment, Noticed on 01-19-2011 and submitted as No.14 and --- on the Calendars of 02-02-2011 and 12-15-2010

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1, 1A
Order to Show Cause.....	
Answering Affidavits and Exhibits.....	2, 2A; 3, 3A
Reply Affidavits and Exhibits.....	4; 4A, 5A
Stipulations.....	
Memorandum of Law.....	

Upon the foregoing papers these two motions are consolidated for disposition and decided per annexed memorandum decision.

Dated: January 12, 2012  
Bronx, New York

Betty Owen Stinson  
BETTY OWEN STINSON, J. S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IAS PART 8

-----X  
VILMA SORRENTINI,

Plaintiff,

INDEX No 301784/2009

-against-

DECISION/ORDER

NETTA REALTY CORP. and DA & JA DELI &  
GROCERY CORP.,

Defendants.

-----X

HON. BETTY OWEN STINSON:

This motion by defendant DA & JA Deli Corp. ("Deli") and another motion by defendant Netta Realty Corp. ("Netta") are consolidated for disposition and decided as follows. The motion by Deli for summary judgment dismissing the complaint and cross-claims against it is granted to the extent the entire complaint is dismissed. The motion by Netta for summary judgment dismissing the complaint against it, and granting its cross-claims against Deli for contractual and common law indemnification, is granted only to the extent that the complaint against Netta is also dismissed.

On January 29, 2008, one of the owners of Deli, Domingo Amezquita ("Amezquita"), arrived with an employee to open the delicatessen and grocery store between 7:00 and 8:00 A.M. (Deposition of Domingo Amezquita, March 29, 2010 at 17-18). Amezquita pulled up the metal gate covering the glass entry doors and was able to see a disarray on the floor through the glass, indicating there had been a break-in during the night (*id* at 18-19). There were broken ceiling tiles on the floor and his cash register had been thrown onto the floor one or two feet in front of the

door (*id.* at 19). Before going into the store, Amezquita called the police (*id.* at 23, 26, 35). He then unlocked the door and entered the store by pulling the door open and stepping around the cash register (*id.* at 11, 25). Amezquita ascertained that burglars had gained entry through the roof just inside the entrance doors (*id.* at 22). Police arrived in under an hour (*id.* at 24). They instructed Amezquita to leave everything as he found it, to touch nothing, and place a notice outside showing that the store was closed (*id.* at 27). They told him to wait for more police to return with finger-printing equipment and then left (*id.* at 28).

Amezquita found an 8-1/2" by 11" piece of white paper and wrote on it with a marker that the store was closed (*id.* at 30-33). He scotch-taped it to the outside of the right-hand entrance door near the door's handle (*id.* at 30-33, 72). Amezquita placed a red cone outside in front of the door, went back inside the store and locked the door (*id.* at 39-42). Around mid-day, he decided to go up to the roof and view from above the hole the burglars had made. He retrieved a ladder from the rear of the store, unlocked the entrance door, moved the cone to one side, and went outside and up onto the roof without re-locking the door (*id.* at 43-44, 69-70).

While Amezquita was still up on the roof, plaintiff came down the street wearing a hooded sweatshirt with the hood up because it was lightly drizzling outside and carrying a bag with lunch she had just picked up from a nearby restaurant (Deposition of Vilma Sorrentini, December 16, 2009 at 14-15, 18-19, 21). She decided to buy a drink in Amezquita's store to accompany her lunch (*id.* at 14). She opened the store's door, while removing her hood at the same time, and tripped over a "cabinet" on the floor after taking two steps inside (*id.* at 25-26). She testified that she was looking straight ahead, not at the floor, and saw no sign of any kind before entering (*id.* at 23, 26-27). After she fell, she noticed the cabinet and the "mess", consisting of ceiling tiles on the

floor and “stuff thrown around” (*id.* at 43). The lighting was good in the store, nothing obstructed her view as she walked in and the cabinet was “pretty big” (*id.* at 46). Two people in the store helped her to her feet and she took a picture of the cabinet with her cell phone (*id.* at 38-39). She then called her place of work to say she was going to a hospital and telephoned for an ambulance to take her there (*id.* at 50).

Amezquita heard some noise from below and, looking down through the ceiling hole, saw plaintiff upright and brushing dust off her clothing (Amezquita deposition at 45). He came down from the roof, went into the store and locked the door again, unlocking it for ambulance attendants who came later to take plaintiff to the hospital (*id.* at 58-59). There was no cabinet on the floor (*id.* at 22). The two people in the store who helped plaintiff to her feet were Amezquita’s employee and a frequent customer of the store who lived nearby (*id.* at 12-13, 15). Amezquita did not speak to the plaintiff; she was walking around talking on her phone (*id.* at 48-49). A woman who identified herself as a co-worker of the plaintiff appeared taking photographs before plaintiff left for the hospital (*id.* at 34, 56). Amezquita testified that he asked the woman to take a picture of the sign outside as well (*id.* at 34). He took photographs himself with his cell phone after plaintiff had left (*id.* at 54-56). When the paramedics came, plaintiff gave one of them a camera and asked them to take photographs of her, but the paramedics declined (*id.* at 35). The building’s managing agent, a repairman and more police all arrived later that afternoon (*id.* at 29-30, 68-69).

Plaintiff commenced this lawsuit against the Deli and the managing agent alleging injuries to her knee and elbow. At the close of discovery, Deli made the instant motion for summary judgment dismissing the complaint and cross-claims against it. The managing agent, Netta, made a second motion for summary judgment dismissing the complaint for plaintiff’s

failure to demonstrate negligence on its part and for contractual and common law indemnification against Deli.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A landowner has a duty to maintain the premises in a reasonably safe manner ((*Espinoza v Hemar Supermarket*, 43 AD3d 855 [2<sup>nd</sup> Dept 2007])). To establish a *prima facie* case of negligence in a trip and fall case, a plaintiff must prove the landowner or lessee of land had actual or constructive notice of the danger or defective condition and sufficient time within the exercise of reasonable care to correct or warn about its existence (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). A landowner has no duty, however, to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous (*Espinoza*, 43 AD3d 855; *Cupo v Karfunkel*, 1 AD3d 48 [2<sup>nd</sup> Dept 2003])).

It is for the court to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally (*Cupo*, 1 AD3d 48). Although the question of whether a condition is open and obvious is generally for the finder of fact, a court may determine that a risk is open and obvious as a matter of law where clear and undisputed evidence compels such a conclusion (*Capasso v Village of Goshen*, 84 AD3d 998 [2<sup>nd</sup> Dept 2011]).

Landowners are not obligated to warn against a condition that could be readily observed by the reasonable use of one's senses (*Tagle v Jakob*, 97 NY2d 165 [2001])[electric wires passing

into tree, leaving tree and exiting property]; *see also Cottone v C&C Spirits*, 306 AD2d 370 [2<sup>nd</sup> Dept 2003][case of wine on floor of store]; *Espinoza*, 43 AD3d 855 [stack of empty milk crates in store aisle]; *Gibbons v Lido & Point Lookout Fire Dist.*, 293 AD2d 646 [2<sup>nd</sup> Dept 2002][cement parking block on floor of firehouse]; *Maravilli v Home Dept.*, 266 AD2d 437 [2<sup>nd</sup> Dept 1999][sink vanity on floor of store aisle]). Unless a hazard is latent, a person entering the property is just as aware as the landowner of an open and obvious condition and the risks associated with it (*Cupo*, 1 AD3d 48). A plaintiff cannot defeat summary judgment by claiming she did not see the condition because she was “looking straight ahead” (*see Capasso*, 84 AD3d 998 [10-1/2" height differential between paved curb and lawn below]).

In support of its motion, Deli offered a copy of the pleadings, the plaintiff's bills of particulars, the police complaint of a burglary and the deposition testimony of plaintiff and of Amezquita. The bills of particulars allege plaintiff's injuries are due to defendants' floors “littered with debris” that were not removed “prior to opening the store to the public”. Both plaintiff's and Amezquita's deposition accounts are set forth above.

In opposition to the motion, plaintiff argued that plaintiff did not see a sign outside the store and there was no “physical evidence” to show Amezquita put up a sign giving notice the store was closed. Furthermore, Amezquita created a dangerous condition by leaving the door unlocked. The lights were on in the store, the “cash register/cabinet” was close to the door in plaintiff's path and a jury could find that the condition was not open and obvious. Even if the condition was open and obvious, defendants may still have had a duty to maintain the premises in a safe condition, citing *Cupo* (1 AD3d 48 [condition of sidewalk was readily observable but still left jury question as to whether defendants fulfilled their duty to maintain it in reasonably safe

condition)).

Defendant Deli pointed out in its reply that Amezquita was directed by the police to leave everything as he found it until they returned, leaving him temporarily unable to remedy the “debris” condition on the floor before plaintiff came in. Deli also offered a photograph of the floor from the inside of the store showing the ceiling tiles, pieces of bent metal frames and the cash register, all near the door where the burglars had left them, illustrating how difficult to ignore the condition would have been for anyone opening the door with eyes open. Also offered were three photographs of the store entrance from the outside, with the hand-lettered sign on the door reading, “Close [*sic*] for today”. Several commercial signs in the photographs appear to be attached from behind the glass and, in front of the glass, the white paper with the hand-lettered message is conspicuous by its placement, color and dissimilarity to any of the other signs. Part of the shoulder and head of a person seen from the back in the same photographs demonstrates that the sign was taped to the glass at a height somewhere between the shoulders and eye-level of that person. The broken ceiling tiles are visible through the bottom of the left-hand glass door. The area of the floor where the cash register was found, as shown in the interior view, cannot be seen due to the angle of the photographs.

Defendant Deli has demonstrated its entitlement to summary judgment which plaintiff has not refuted with admissible evidence. Deli’s witness offered testimony to show that he was unable to remedy the condition of the floor before plaintiff entered the store as he had been affirmatively directed by police officers not to touch it pending their return. He testified that he posted a notice outside indicating the store was closed. Plaintiff’s testimony that she did not see any kind of sign before entering is not sufficient to create an issue of fact for trial. She did not

testify there was *no* sign, only that she did not see it. Even if there were a question of fact as to whether the sign itself was sufficiently visible, the condition of the floor inside was open and obvious as a matter of law, obviating the need to warn about it apart from closing the store. Any observer reasonably using his or her senses would have seen a "pretty big" cash register upside down on the floor once the door was pulled opened. Deli did not have an affirmative duty to keep the door continuously locked against those persons who might ignore the sign and then fail to make use of their senses. The obligations of landowners or lessees do not include absolutely guaranteeing the impossibility of injury to persons on their premises, only the use of reasonable care in the maintenance of those premises in light of all the circumstances (*see Cupo*, 1 AD3d 48).

The case against Deli is, therefore, dismissed. Since the liability of Netta would only be vicarious and dependent upon the liability of Deli, that portion of Netta's motion for dismissal of the complaint against it is also granted and its request for indemnification is denied as moot given the above disposition.

Movants are directed to serve a copy of this order on the Clerk of Court who shall enter judgment dismissing the complaint in its entirety.

This constitutes the decision and order of the court.

Dated: January 12, 2012  
Bronx, New York

  
BETTY OWEN STINSON, J. S.C..