

Grunfeld v Burger Heaven

2014 NY Slip Op 30895(U)

April 4, 2014

Supreme Court, New York County

Docket Number: 104750/09

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

fact" as to liability. Alvarez v Prospoect Hosp., 68 NY2d 320, 324 [1986].

Contrary to the Owner's contention, the Owner defendant, as the movant for summary judgment, not the plaintiff, the opponent, bears the burden to "tender[] sufficient evidence to demonstrate the absence of any material issues of fact" Vega v Restani Construction Corp., 18 NY3d 499 [2012].

For that reason Early v Hilton Hotels Corp., 73 AD3d 559 (1st Dept 2010) does not support the Owner's position. In Early, the plaintiff tripped and fell on a yellow plastic strap while traversing the sidewalk adjacent to a loading dock of defendant's premises. The appellate panel reversed the trial judge's denial of summary judgment to the dock owner based upon the deposition of the loading dock worker who testified that defendant never removed straps on the loading dock, there was no custom and practice of staff to do so, and that he had never seen these kind of straps on the sidewalk abutting the defendants' property or received complaints regarding accidents caused by such straps. Notably, the defendant's witness in Early, unlike the owner's witness here, was a worker whose duties included being present on the Owner's loading dock while deliveries were made. Based upon such evidence, the First Department found that defendant had demonstrated that it did create the condition since "any straps

within the loading dock on the abutting sidewalk would not have been the result of the owner's acts or omissions".

Unlike the loading dock worker in Early, here the Owner's witness in this case had no personal knowledge of the condition of the sidewalk and conceded that his porter did use the same type of black plastic garbage bags to remove garbage from the building as the one plaintiff slipped on the day of the accident. In addition, while the Owner's witness testified that the porter was not responsible for the sidewalk, he had no personal knowledge of how the garbage was actually brought to the sidewalk, which testimony was also in contrast with that of the dock worker in Early.

In order to demonstrate lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law. Baines v G&D Ventures, Inc. 64 AD3d 528 [2d Dept 2009] is instructive, where the appellate court reversed the trial court's grant of summary judgment, finding that the defendant failed to make a prima facie showing of the absence of notice. In Baines, the defendant submitted the deposition transcript of its president, who failed to provide any testimony as to when he last inspected sidewalk prior to the accident or what it looked like on the day of the accident. The Baines court ruled that defendant could not satisfy its burden by merely by pointing out gaps in the

plaintiff's case concerning how long the garbage bags were on the sidewalk, as the Owner is trying to do herein. id. Viewing the evidence in the light most favorable to plaintiff, as the court must on this motion, defendant is not entitled to summary judgment as defendant has failed to establish lack of actual creation of the defect or lack of notice thereof.

Additionally, the Owner proffers an unauthenticated copy of the Lease between the Owner and an individual named Evan Cyrus, without foundation, to support the proposition that the Lease required only the Tenant "to remove all garbage from the premises" and onto the sidewalk. A "bare affirmation of ... [an] attorney who demonstrated no personal knowledge ... is without evidentiary value and thus unavailing" Zuckerman v City of New York, 49 NY2d 557, 563 [1980]. See also Di Falco, Field & Lomenzo v Newburgh Dyeing Corp., 81 AD2d 560 [1st Dept 1981, aff'd 54 NY2d 715 [1981] (an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value).

Thus, the Owner has failed to establish that its porter, who was responsible for garbage removal for the Building, did not create the defect on the sidewalk or have notice of it on the date of the accident. As the Owner failed to establish entitlement to summary judgment as a matter of law, regardless of the sufficiency of plaintiffs' opposing papers, the Owner's

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motion for summary judgment must be denied. Winegrad v New York University Medical Center, 64 NY2d 851 [1985]. Moreover, even if the Owner met its prima facie burden, the evidence set forth by Plaintiff as to the Porter's use and access to the same type of black plastic garbage bags as used by the Tenant and slipped on by the Plaintiff, creates a sufficient triable issue of fact as to whether the Owner created or had notice of the dangerous condition of the sidewalk, sufficient to deny summary judgment.

As such, it is

ORDERED that the Defendant's motion for summary judgment is DENIED.

This is the decision and order of the court.

Dated: April 4, 2014

ENTER:

~~Richard A. James~~
DEBRA A. JAMES J.S.C.

FILED

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