

Dawkins v Mastrangelo
2014 NY Slip Op 31389(U)
May 22, 2014
Supreme Court, Suffolk County
Docket Number: 10-26524
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 12-19-13 (#003)
MOTION DATE 12-24-13 (#004)
ADJ. DATE 02/25/14
Mot. Seq. # 003 - MG
004 - MG

-----X
KATHLEEN DAWKINS and HARRY
DAWKINS,

Plaintiffs,

KEVIN M. FOX, PLLC
Attorney for Plaintiffs
33 West Second Avenue, P.O. Box 570
Riverhead, New York 11901

- against -

SCHONDEBARE & KORCZ, LLP
Attorney for Defendant Mastrangelo
3555 Veterans Memorial Highway
Ronkonkoma, New York 11779

AHMUTY, DEMERS & MCMANUS, ESQS.
Attorney for Defendant Stop & Shop
200 I.U. Willets Road
Albertson, New York 11507

IRIS MASTRANGELO, THE STOP & SHOP
SUPERMARKET COMPANY LLC, and
RIDGEWAY PLAZA, LLC,

Defendants.

LAWRENCE, WORDEN, RAINIS & BARD, PC
Attorney for Defendant Ridgeway Plaza
225 Broad Hollow Road, Suite 105E
Melville, New York 11747
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Upon the following papers numbered 1 to 48 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause (003) and supporting papers 1 - 17; Notice of Motion/ Order to Show Cause (004) and supporting papers 18 - 31; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 32 - 42; Replying Affidavits and supporting papers 43 - 48; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (003) by defendant Ridgeway Plaza, LLC for an order pursuant to CPLR 3212 granting summary judgement and the motion (004) by defendant The Stop & Shop Supermarket Company LLC for an order pursuant to CPLR 3212 granting summary judgment are consolidated for the purposes of this determination; and, it is further

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ORDERED that the motion by defendant Ridgeway Plaza, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted; and, it is further

ORDERED that the motion by defendant The Stop & Shop Supermarket, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted.

This action arises out of a motor vehicle accident which occurred on May 20, 2010 at a parking lot within the Ridgeway Plaza Shopping Center on Route 25A in Setauket. Plaintiff, Kathleen Dawkins, was returning cans and bottles within the bottle return room of defendant The Stop & Shop Supermarket LLC (“defendant Stop & Shop”) when she was hit by an automobile leased and operated by defendant Iris Mastrangelo. Defendant Ridgeway Plaza, LLC (“defendant Ridgeway”) is the owner of the Ridgeway Plaza Shopping Center. Plaintiffs allege that defendants Stop & Shop and Ridgeway were negligent in the ownership, operation, maintenance, control, design, and supervision of the store/parking lot. Specifically, plaintiffs allege that defendants Stop & Shop and Ridgeway were negligent in failing to install a barrier, such as bollards, in front of the bottle return room entrance, that they created a dangerous condition by locating the bottle return room entrance directly in line with the main travel aisle, and that they failed to provide plaintiff, Kathleen Dawkins, with reasonable protection from the known risk that an out of control car could drive unimpeded from the store parking lot and crash into the bottle return room.

Defendant Ridgeway now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that the parking lot was properly designed, in accordance with all proper engineering standards and relevant building codes, and that the sole proximate cause of the injuries sustained by plaintiffs was the inability of defendant Iris Mastrangelo to control her car. Defendant Stop & Shop also moves for summary judgment dismissing the complaint and all cross claims against it on the ground that it had no duty to protect plaintiffs from the unforeseeable negligent conduct of defendant Iris Mastrangelo in crashing her vehicle into the bottle return room. In support of their motions, defendants include, *inter alia*, copies of the pleadings, deposition transcripts of plaintiff, Kathleen Dawkins, and defendants Ridgeway and Iris Mastrangelo, and an affidavit of Alan J. King, a professional engineer.

Plaintiffs oppose the motions claiming that defendants breached their duty to protect customers by putting the bottle return room at a dangerous location in the shopping center and by failing to protect customers from cars crashing into the bottle return room. Additionally, plaintiffs assert that the motion by defendant Stop & Shop should be dismissed as untimely. In opposing the motions, plaintiffs include, *inter alia*, various photographs of shopping centers with and without bollards, a copy of the deposition transcript of defendant Stop & Shop, and an affidavit of James C. Shultz, P.E.

The Court notes that the motion by defendant Stop & Shop for summary judgment is untimely as it was not served within 120 days of the filing of the note of issue, that is, November 29, 2013, as the note of issue was filed on August 1, 2013 (*see* CPLR 3212 [a]). However, considering the fact that the attorney handling the matter was involved in an automobile accident on November 29, 2013, the Friday

after Thanksgiving, and that she filed the motion on Monday December 2, 2013, defendant Stop & Shop established good cause for the delay in making its motion three days beyond the 120-day filing period (see *Nisimova v Starbucks Corp.*, 108 AD3d 513, 967 NYS2d 838 [2d Dept 2013]; *Adika v Dramitinos*, 74 AD3d 848, 904 NYS2d 461 [2d Dept 2010]). Additionally, an untimely motion or cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds (see *Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; *Boehme v A.P.P.L.E.*, 298 AD2d 540, 749 NYS2d 49 [2d Dept 2002]). Under said circumstances, the issues raised by the untimely motion or cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (see CPLR 3212 [a]) to review the untimely motion or cross motion on the merits (see *Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615). It is to be noted that the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (see CPLR 3212 [b]; *Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615). Therefore, the Court will consider the late motion of defendant Stop & Shop.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). “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” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Plaintiff’s testimony indicated that she was within a completely enclosed room in the process of recycling cans and bottles when she was struck by the car driven by defendant Iris Mastrangelo. She testified that she heard a loud noise, looked up, and the car was coming at her. Plaintiff stated that the car was traveling “very fast” and that it crashed through a glass door and the wall to the side of the door. Defendant Iris Mastrangelo maintained that she was in her idling car for at least 6 to 7 minutes and possibly 12 minutes, with the car in “park” and the hand brake engaged in an area marked by “Fire Zone” “No Parking” signs, when she decided to move the car to “allow sufficient room for a woman to get to the door of the Stop & Shop store and for a car “to pass [her vehicle] with ease.” She admitted that she released the hand brake, put her foot on the brake and moved the transmission out of park and into drive when “at that very instant the car, with great force and unexpected velocity, took off straight ahead” and into the bottle return room. Defendant Iris Mastrangelo claimed that her vehicle traveled 40 to 45 feet from the point where it had been stopped to the place where it came to rest at the site of the

accident. Additionally, she indicated that to her knowledge, the accelerator did not stick and that no defect or malfunction was found by the police or insurance company after a post accident inspection of the vehicle. The testimony of Todd Mendik for defendant Ridgeway revealed that it became the owner of the shopping center in 2001 and that defendant Stop & Shop was already a tenant thereat. In May 2005 their lease was amended as defendant Stop & Shop took over a card store, which was basically perpendicular to its supermarket store, and turned most of it into a bottle return room. He indicated that defendant Ridgeway maintained the parking lots, but that the sidewalk in front of defendant Stop & Shop bottle return room is part of the leased area. Mr. Mendik contended that defendant Stop & Shop never requested that bollards be installed in front of the store or bottle return room, that there had been no changes made to the traffic pattern of the parking lot after they bought the shopping center, and that in the 20 years that he had been “involved in” real estate he was aware of no vehicle crashing into a store.

Here, defendants Ridgeway and Stop & Shop have established *prima facie* that the condition and design of the parking area were not the proximate cause of plaintiffs’ injuries. “Evidence of negligence is not enough by itself to establish liability. It must be proved that the negligence was the cause of the event which produced the harm.” (*Sheehan v City of New York*, 40 NY2d 496, 501, 387 NYS2d 92 [1976]). Moreover, “there will ordinarily be no duty imposed on a defendant to prevent a third-party from causing harm to another unless the intervening act which caused the plaintiff’s injuries was a normal or foreseeable consequence of the situation created by the defendant’s negligence (*Rivera v Goldstein*, 152 AD2d 556, 557, 543 NYS2d 159 [2d Dept 1989]; see *Comolli v 81 & 13 Cortland Assocs. L.P.*, 285 AD2d 863, 727 NYS2d 795 [3d Dept 2001]). Under the circumstances, the accident occurred as a result of defendant Iris Mastrangelo’s failure to control her vehicle, and the parking area “merely furnished the condition or occasion for the occurrence of the event rather than one of its causes” (*Margolin v Friedman*, 43 NY2d 982, 983, 404 NYS2d 553 [1978]; see *Castillo v Amjack Leasing Corp.*, 84 AD3d 1298, 924 NYS2d 156 [2d Dept 2011]; *Vayser v Waldbaum, Inc.*, 225 AD2d 761, 640 NYS2d 177 [2d Dept 1996]). Thus, there are no questions of fact as to any negligence of the moving defendants.

In opposition, plaintiffs failed to raise a triable issue of fact. They have failed to demonstrate that defendants Ridgeway and Stop & Shop could have reasonably foreseen that an out-of-control automobile would strike a customer in the bottle return room (*Rodriquez v Gutierrez*, 217 AD2d 692, 630 NYS2d 531 [2d Dept 1995]). Significantly, the expert affidavit submitted by plaintiffs consisted of mere speculative and conclusory assertions unsupported by adequate foundational facts and accepted industry standards (see *Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d 1007, 905 NYS2d 190 [2d Dept 2010]; *Pappas v Cherry Cr., Inc.*, 66 AD3d 658, 888 NYS2d 511 [2d Dept 2009]; *DeLeon v State of New York*, 22 AD3d 786, 803 NYS2d 692 [2d Dept 2005]). Although plaintiffs’ expert indicates that defendants Ridgeway and Stop & Shop “departed from accepted engineering and safety standards, customs and practices in the design, construction, location, operation, maintenance, supervision and/or control of the parking lot, adjacent structures, buildings and vehicular traffic at the shopping center ..., and the parking lot, drive aisle and walkways adjacent to the Stop & Shop store and ‘Bottle Room,’” he fails to site a single code, ordinance, safety standard, engineering guideline, regulation, or rule which was violated. His affidavit consists of conclusory statements regarding “well known” practices or risks, while citing to no publication or evidence of same. “Where the expert’s ultimate assertions are

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speculative or unsupported by any evidentiary foundation, ... the opinion should be given no probative force and is insufficient to withstand summary judgment” and no triable issue of fact is created (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544, 754 NYS2d 195 [2002]; see also *Canales v Hustler Mfg. Co.*, 12 AD3d 392, 786 NYS2d 539 [2d Dept 2004]).

Accordingly, the motions by defendants Ridgeway and Stop & Shop dismissing the complaint and all cross claims against them are granted. The action is severed and continued against the remaining defendant, Iris Mastrangelo.

Dated: May 22, 2014

W. Gerard Asher
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION