

Washington v Autumn Prop. II, LLC

2014 NY Slip Op 32680(U)

September 9, 2014

Supreme Court, Bronx County

Docket Number: 305612/10

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Briganti-
_____ X

JERRY WASHINGTON and KEILA
WASHINGTON,

DECISION/ORDER

Plaintiffs,

-against-

Index No.: 305612/10

AUTUMN PROPERTIES II, LLC., and NATIONAL
DISTRIBUTION ALLIANCE,
Defendants.

_____ X

The following papers numbered 1 to 6 read on the below motion noticed on May 21, 2014 and
duly submitted on the Part IA15 Motion calendar of **July 9, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs.' Aff. In Support, Exhibits	1,2
Pls.' Aff. In Opposition, exhibits	3,4
Defs.' Aff. In reply, Exhibits	5,6

Upon the foregoing papers, the defendants Autumn Properties II, LLC. ("Autumn") and
National Distribution Alliance ("NDA")(collectively "Defendants") move for summary
judgment, dismissing the complaint of the plaintiffs Jerry Washington (individually "Plaintiff")
and Keila Washington (collectively with Jerry Washington, "Plaintiffs"), pursuant to CPLR
3212. Plaintiffs oppose the motion.

I. Background

This matter arises out of an alleged trip and fall accident that occurred on February 13,
2010, at approximately 8:30PM, within a commercial warehouse owned by defendant Autumn
and leased to commercial tenant NDA. At relevant times, Plaintiff was an independent

contractor of NDA, a newspaper delivery company. On the date of this incident, Plaintiff had arrived at the premises in order to take the delivery route of another independent contractor.

Plaintiff testified that on the night of the incident, he went inside of the warehouse to get papers and things together for his route. Upon entering the warehouse, there are power jacks and other equipment parked on its right side. When you walk further in, there are contractor's tables on the right and left, and a "clear walkway" between the tables. He described his work area as "tables on the left, tables on the right, and you have a walking passage in the middle." It was well-lit inside of the warehouse. He walked less than fifty feet from the door of the warehouse to the table on the right hand side of the warehouse. The open space between the tables was approximately 25 feet wide. Plaintiff noted that the space was left clear to permit vehicles to go through the warehouse and pick up papers for their route. There was nothing obstructing Plaintiff as he walked through this wide open space to his table.

Once at the table, Plaintiff began to prepare papers for his route. He was at the table for two to three minutes. Suddenly, a power failure occurred and all of the lights in the building went out and it became "pitch black" inside of the warehouse. Prior to the power outage, he had only seen one other person working in the warehouse. After waiting a few seconds, Plaintiff turned from the table towards the entrance where he walked into the building. He took a few steps forward and then tripped over the fork of a "power jack," that was in the 25-foot open space between the tables. Plaintiff testified that the warehouse's generator lights came back on less than ten seconds after his accident, and less than thirty seconds after the power failure occurred. He described the power jack, also referred to as a "pallet jack," as an "L-shaped" device operated with a motorcycle-type handle. He did not see the power jack in this particular location before his accident.

Prior to the accident, Plaintiff had noticed another person working in the warehouse. On prior occasions, he had noticed workers using the power jacks and other equipment. He testified that he had not seen the jack before he tripped, but heard a noise and believed that someone had been using it. When the jacks were not in use, they were kept in the area to the right of the warehouse near its entrance.

Michael Presto, CEO of defendant NDA, appeared for an examination before trial. Presto

testified that NDA used between 100-200 independent contractors to work at the premises. He testified that NDA also worked through a perpetual employment organization, and all of the employees were performing work on behalf of NDA and instructed by NDA. Importantly, he testified that NDA owned all of the forklifts and jacks in the warehouse. The only people authorized to use this equipment were the warehouse's general foreman and assistant foreman. Independent contractors, such as Plaintiff, were not authorized to use the equipment. He didn't know how many power jacks were at the warehouse or who was working at the warehouse on the date of this incident.

Jacqueline Monaco testified on behalf of Autumn. She had no knowledge as to the use of equipment inside of the premises, and testified that Autumn had no offices or operations within the warehouse. Defendants have also provided a copy of the commercial lease agreement between Autumn and NDA.

Defendants proffer various arguments in support of their motion for summary judgment. Defendants argue that there is no evidence to support Plaintiffs' claims that the building's power supply were inadequate or improperly maintained, or that Defendants were in any way responsible for the blackout. Defendants have provided, among other things, an affidavit from a Con Edison representative who confirms that there was a power outage throughout Mount Vernon on the date of the accident which was not caused by Defendants. Defendants argue that the power outage only lasted for approximately 30 seconds, and therefore they had no time to remedy the condition before this trip-and-fall. Even if they had actual notice of the location of the power jack, Defendants contend that they had no reasonable amount of time to address the darkness in the warehouse in the matter of seconds between the outage and the fall, citing *Solan v. Great Neck Union Free School Distr.*, 43 A.D.3d 1035 (2nd Dept. 2007). But for the power outage, the power jack would have been an open and obvious hazard that Plaintiff could have reasonably avoided. Defendants contend that it was not reasonably foreseeable that a power outage would occur, or that Plaintiff would attempt to exit the building during the brief period when the lights were out. Moreover, Defendants assert that Plaintiff was not supposed to work on the night of the accident, should not have been inside of the premises, and therefore there is no duty of care flowing from Defendants to Plaintiff. They add that Plaintiff voluntarily exposed

himself to danger by attempting to leave the building during the blackout and walking blindly in the darkness. The blackout constituted a superceding cause of this accident that served to relieve Defendants from any liability for this accident.

In opposition, Plaintiff argues that Defendants have not addressed whether they can be charged with negligence for allowing the jack to be left unattended in a place where persons would walk. Their only arguments to support dismissal relates to allegations with reference to the lack of light. Plaintiff asserts that this case is distinguishable from *Solan*, since in that case, there was no claim of negligence in the placement or maintenance of a concrete parking divider. The only claim related to the cause of the darkness and an alleged breach of duty to provide a backup generator. Plaintiff argues that any open and obvious nature of the hazard did not eliminate Defendants' duty to keep the property reasonably safe. Plaintiffs argue that any finding that the jack was open and obvious would only relate to comparative negligence – but the blackout removed any potential comparative negligence on the part of the plaintiff. It was foreseeable for Plaintiff to leave the building during the blackout. Plaintiffs contend that the blackout was not an intervening or superceding action that severed any nexus between Defendants' negligence and the injury.

II. Standard of Review

To be entitled to the “drastic” remedy of summary judgment, the moving party “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 from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then

produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

It is well established that those exercising control over land must keep the premises in a “reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Peralta v. Henriquez*, 100 N.Y.2d 139, 144 [2003] [citation and internal quotation marks omitted]). At the outset, Plaintiff has offered no evidence to demonstrate that defendant Autumn, was in any way negligent. The submitted lease confirms that Autumn was an out-of-possession landlord who was not responsible for the equipment located within the warehouse, or the power outage that occurred on the premises (*Chapman v. Silber*, 97 N.Y.2d 9 [2001]). There is no evidence that the accident was caused by a significant structural or design defect at the premises (*see Johnson v. Urena Service Center*, 227 A.D.2d 325 [1st Dept. 1996]; *Heim v. Trustees of Columbia Univ.*, 81 A.D.3d 507 [1st Dept. 2011]). In opposition, Plaintiffs made no argument to support the contention found in their Bill of Particulars that either Defendant was responsible for the power outage. Accordingly, there is no basis to impose any liability on Autumn and the complaint must be dismissed as to that defendant. The Court therefore turns to Defendants’ arguments as they related to the commercial tenant, NDA.

To impose liability upon a land occupier in a trip and fall action, there must be evidence that a dangerous or defective condition existed and that the defendant either created or had actual or constructive notice of the condition (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]). A defendant is charged with having constructive notice of a defective condition when

said condition is visible, apparent, and exists for a sufficient length of time (*Gordon v American Museum of Natural History*, 67 N.Y.2d 836 [1986]). The notice required must be more than general notice of any defective condition (*Id.*). The law requires notice of the specific condition alleged at the specific location alleged (*Id.*). However, where there is evidence that a defendant created the hazardous condition, proof of “notice” to the alleged tortfeasor of the existence of the condition is not necessary and may be imputed (*Lederer v. Samuel Broadway Food Corp.*, 33 A.D.2d 553 [1st Dept. 1969]; see *Briones v. BSC Securities Corp.*, 224 A.D.2d 200 [1st Dept. 1996]). Notice may be imputed where a hazard or defect is created by the act of the owner or occupant, their servants or agents, or others for whom the owner or occupant is responsible (*Lederer*; see also *Giardina v. Lee*, 202 A.D.2d 278 [1st Dept. 1994]).

The first issue to be addressed is Plaintiffs’ claim that NDA was negligent in permitting a power jack to be left unattended in the Plaintiff’s vicinity shortly before the accident. There is an added layer of complexity to this claim, since a power outage occurred between the instance of Defendants’ alleged negligence and the Plaintiff’s trip-and-fall. If there were no power failure, there would be an issue of fact as to whether Defendant NDA created a hazardous condition, that was inherently dangerous by virtue of the location of the power jack and its physical characteristics.

First, there is evidence that allegedly hazardous condition – the power jack located behind Plaintiff – was created by agents of the Defendants. Plaintiff testified that the power jacks were usually stored to the right side of the warehouse, he did not see the power jack near his work area before his trip and fall, yet he saw someone else working in the warehouse and heard someone using the jack upon his arrival. The only people authorized to use the power jacks were employees of Defendants. Contrary to NDA’s arguments in reply, the question of whether this hazardous condition existed for a reasonable length of time is irrelevant where, as here, the evidence suggests that Defendants or their agents created the condition (*Ohanessian v. Chase Manhattan Realty Leasing Co.*, 193 A.D.2d 567 [1st Dept. 1993][where defendants may be liable where they created the condition, inquiry into “the usual questions of notice” are irrelevant]).

Defendant next argues that even if they owed a duty to Plaintiff, the power jack constituted an open and obvious condition that Plaintiff should have observed and thus prevented

the accident. NDA, however, has not established this contention as a matter of law. To be considered “open and obvious,” a hazard must be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open, making a posted warning of the presence of the hazard superfluous (*Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69 [1st Dept. 2004])[internal citations omitted]. The fact that a defect or hazard is capable of being detected by a careful observer does not end the analysis (*Id.*) Rather, “[t]he nature or location of some hazards, while they are technically visible, make them likely to be overlooked.” (*Id.*) Moreover, whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion, where the basis is clear and undisputed evidence (*Westbrook, supra*, citing *Tagle v. Jakob*, 97 N.Y.2d 165, 169 [2001]). Even so, that would only determine the issue of breach of duty to warn, and not dispose of a landowner’s duty to maintain the premises in a safe condition (*Cohen v. Shopwell, Inc.*, 309 A.D.2d 560 [1st Dept. 2003]).

Here, NDA has not established that the power jack, a motorized device with extended forks, used to lift pallets of materials, and left unattended behind the Plaintiff, was not an inherently dangerous condition. Plaintiff testified at deposition that he took around five steps from his table when he tripped over the power jack fork. Improperly stored equipment left unattended in walkways has been found to be a tripping hazard and thus a breach of a landowner’s duty of care (*see Gradwohl v. Stop & Shop Supermarket Co., LLC.*, 70 A.D.3d 634 [2nd Dept. 2010]; *Russo v. Home Goods, Inc.*, 119 A.D.3d 924 [2nd Dept. 2014]).

Defendants next argue that the power failure, and Plaintiff’s actions after the power failure, constituted intervening and superceding acts that relieved Defendants from liability in this matter. Defendants contend that the blackout, and Plaintiff’s negligence in attempting to leave the darkened warehouse during the blackout, and not their own negligence, were the proximate causes of this accident. As previously noted, New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition (*Tagle v. Jakob*, 97 N.Y.2d 165 [2001]). The scope of this duty, however, is defined by the harm reasonably to be perceived (*Di Ponzio v. Riordan*, 89 N.Y.2d 578 [1997]). “[A]lthough virtually every untoward consequence can theoretically be foreseen ‘with the

wisdom born of the event,' the law draws a line between remote possibilities and those that are reasonably foreseeable." (*Id.*, at 585). Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed (*Derdiarian v. Felix Constr. Corp.*, 51 N.Y.2d 308 [1980]). In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence (*Id.*, citing *Parvi v. City of New York*, 41 N.Y.2d 553, 560 [1977], Restatement of Torts, 2d, §§443, 449.) "If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus." (*Id.* [internal citations omitted]). Two inquiries are generally made in order to make this assessment. First, if the new cause is set in operation by a defendant's original wrongful conduct, and is not independent of it, the defendant is not relieved of responsibility (*see Jackson v. New York City Housing Auth.*, 214 A.D.2d 605 [2nd Dept. 1995]). Second, even if the intervening act is independent, a defendant will not be relieved of liability if the intervening act is one that naturally flows from the original, wrongful act, *or could reasonably have been foreseen* (*see Gordon v. Eastern Ry. Supply, Inc.*, 82 N.Y.2d 555[1993]). Liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its legal causes (*see D'Avilar v. Folks Elec. Inc.*, 67 A.D.3d 472 [1st Dept. 2009]).

In this matter, considering the totality of the circumstances, it cannot be said as a matter of law that this accident would not have occurred but for the power failure, or that this accident was not a reasonably foreseeable consequence of the improper placement of the power jack. There is an issue of fact as to whether NDA failed to maintain their property in a reasonably safe condition. A hazard associated with this failure is that someone could trip and fall within the premises. That a power failure and subsequent blackout occurred, although independent from NDA's conduct, is not so extraordinary or unforeseeable so as to relieve Defendant from liability for its negligence (*see Derdiarian v. Felix, supra.*; *Lynch v. Bay Ridge Obstetrical & Gynecological Assoc., P.C.*, 72 N.Y.2d 632 [1988]). It could be reasonably expected that someone would trip as a result of the negligent placement of a piece of equipment with four-foot extending forks.

NDA contends that Plaintiff was the sole proximate cause of this accident since he elected to leave his work station and attempted to navigate the building in darkness after the lights went out. The basic rule is that one who proceeds in the dark, in unfamiliar surroundings, is not justified in proceeding without first ascertaining where he or she is going and what obstructions may impede safe progress (*see Bragg v. Smilowitz*, 16 A.D.2d 181 [3rd Dept. 1962], *aff'd*, 12 N.Y.2d 769 [1962]). A question of fact arises as to whether a plaintiff is contributorily negligent where, as here, he moves in the dark in familiar surroundings (*see Friedman v. Neufeld*, 246 A.D. 545 [2nd Dept. 1935]). Here, Plaintiff's alleged negligence in leaving his work station after the lights extinguished was not the sole proximate cause of the accident, and rather presents an issue of fact for the jury to resolve.

Defendants have cited *Solan v. Great Neck Union Free School Distr.*, 43 A.D.3d 1035 [2nd Dept. 2007]), in support of their motion. Defendants argue that here, like in *Solan*, even if Defendants had actual notice "of the location of the power jack prior to the accident," there is no line of valid reasoning nor permissible inferences to be drawn from the evidence which could lead a rational person to conclude that defendant had a reasonable amount of time to "address the darkness in the warehouse in the matter of seconds between the power outage and the plaintiff's fall." Unlike in *Solan*, this is not a case where the Plaintiffs only claim that darkness caused the accident. Rather, there is evidence that the Defendants created a hazardous condition – the power jack located near the Plaintiff. Where a defendant creates a hazardous condition, the amount of time it existed before the accident is of no moment (*see Ohanessian v. Chase Manhattan Realty Leasing Co.*, 193 A.D.2d 567.) In *Solan*, the hazardous condition alleged by the plaintiff was the darkened parking lot which obscured a concrete parking divider. Unlike here, there was no evidence that a hazardous condition existed on the premises before the power failure. The Court reasoned that defendant had a duty to address the darkened lot and had actual notice of this condition, but could not be liable because an insufficient amount of time passed between the power failure and the trip-and-fall.

Here, there is a triable issue of fact as to whether Defendant maintained its property in a reasonably safe condition before the accident, and as noted above, the darkened condition caused by the power failure did not constitute a superceding cause that severed any liability on the part

of NDA as a matter of law. It should also be noted that *Solan* involved a post trial motion to set aside the verdict pursuant to CPLR 4404(a), not a motion for summary judgment.

IV. Conclusion

Accordingly, it is hereby

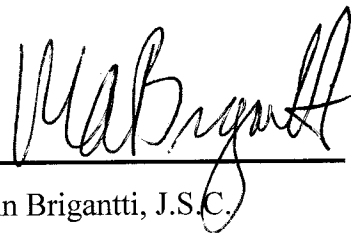
ORDERED, that the branch of Defendants' motion for summary judgment, dismissing the complaint as to defendant Autumn is granted, and it is further,

ORDERED, that the branch of Defendants' motion for summary judgment, dismissing the complaint as to defendant NDA is denied.

This constitutes the Decision and Order of this Court.

Dated:

9/9/14



Hon. Mary Ann Brigantti, J.S.C.