

Noto v Whitestone Distrib., Inc.

2014 NY Slip Op 33099(U)

April 11, 2014

Supreme Court, Queens County

Docket Number: 2418/09

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

JERYL ANN NOTO,

Index No. 2418/09

Plaintiff,

Motion

Date October 10, 2013

- against-

WHITESTONE DISTRIBUTOR, INC., WHITESTONE
DISTRIBUTORS, INC., WHITESTONE DISTRIBUTOR,
APW SUPERMARKETS, INC. d/b/a WALDBAUMS
and PEPSI-COLA BOTTLING COMPANY OF NEW
YORK, INC.,

Motion

Cal. No. 98

Motion

Seq. No. 3

Defendants.

The following papers numbered 1 to 16 read on this motion by defendants, Whitestone Distributor, Inc., Whitestone Distributors, Inc., Whitestone Distributor (collectively referred to as the Whitestone defendants), and non-party Whitestone Sales, Inc., to vacate a stay of the proceedings, to consolidate this action with a separate action commenced against Whitestone Sales, Inc., under Index No. 13815/10, and for summary judgment dismissing plaintiff's complaint and all cross claims; and the cross motion by defendant, APW Supermarkets, Inc., d/b/a Waldbaums, for summary judgment.

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Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

This is an action to recover for personal injuries plaintiff, Jeryl Ann Noto, allegedly sustained to her right foot on June 9, 2007, at premises located at 213-15 26 Avenue, in the County of Queens. Plaintiff alleged that while shopping at the Waldbaums grocery store, a 12-pack of soda fell on her right foot. Defendant, Pepsi-Cola Bottling Company of New York, Inc. (Pepsi-Cola), manufactured the soda that allegedly injured plaintiff

and APW Supermarkets, Inc., d/b/a Waldbaums was operating the store at the time of plaintiff's accident. The Whitestone defendants allege they were not in business on the date of plaintiff's accident. Non-party, Whitestone Sales, Inc., was a Pepsi-Cola product distributor at the time of plaintiff's accident and delivered products to the subject store. Following commencement of this action in 2009 against APW Supermarkets, Inc., d/b/a Waldbaums and Pepsi-Cola and the commencement of an action and a third-party action against the Whitestone defendants, those actions were consolidated by order of this court. In 2010, plaintiff commenced a separate action against Whitestone Sales, Inc., under Index No. 13815/10.

On December 12, 2010, the parent company of APW Supermarkets, Inc., d/b/a Waldbaums, non-party Great Atlantic & Pacific Tea Company, Inc., filed a Voluntary Petition in Bankruptcy in the United States Bankruptcy Court (annexed at Exhibit N to the Whitestone defendants' and Whitestone Sales, Inc.'s motion papers). The United States Bankruptcy Code provides for an immediate and automatic stay of all non-bankruptcy actions and proceedings upon filing of a bankruptcy petition (11 USC § 362 [a]; see *Manufacturers & Traders Trust Co. v Foy*, 43 AD3d 1005 [2d Dept 2007]; *Carr v McGriff*, 8 AD3d 420, 422 [2d Dept 2004]). Accordingly, Great Atlantic & Pacific Tea Company, Inc.'s filing for bankruptcy on December 12, 2010, resulted in an automatic stay of any and all litigation naming its subsidiaries, including APW Supermarkets, Inc., d/b/a Waldbaums, as party defendants.

The Whitestone defendants and Whitestone Sales, Inc., move to vacate the stay of the proceedings in the instant action, alleging that plaintiff has obtained an order from United States Bankruptcy Court (annexed as Exhibit O to the Whitestone defendants' and Whitestone Sales, Inc.'s motion papers), allowing plaintiff to restore the instant action to the calendar for the sole and limited purpose of allowing plaintiff to liquidate her claim against APW Supermarkets, Inc., d/b/a Waldbaums, "and their co-defendants", subject to certain conditions set forth in the order. No opposition has been filed to this branch of the Whitestone defendants and Whitestone Sales, Inc.'s motion. In light of the evidence presented, and without opposition, the stay previously imposed herein is hereby lifted and the matter may proceed against APW Supermarkets, Inc., d/b/a Waldbaums as well as the remaining defendants. The matter shall be restored to the active trial calendar.

The Whitestone defendants and Whitestone Sales, Inc., have further moved to consolidate the separate action commenced against Whitestone Sales, Inc., under Index No. 13815/10, with this action. "A motion to consolidate two or more actions rests within the sound discretion of the trial court" (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d 620, 622 [2d Dept 2012]; see *Mattia v Food Emporium*, 259 AD2d 527 [2d Dept 1999]). "Where common questions of law or fact exist, consolidation is warranted unless the opposing party demonstrates prejudice to a substantial right" (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d at 622; CPLR 602 [a]; see *DeSilva v Plot Realty, LLC*, 85 AD3d 422, 423 [1st Dept 2011]; *Fay Estates v Toys "R" Us, Inc.*, 22 AD3d 712, 714 [2d Dept 2005]).

Whitestone defendants and Whitestone Sales, Inc., have satisfied their burden on this

motion by demonstrating that these two actions involve common questions of law or fact, and no opposition has been filed as to this branch of their motion.

Accordingly, the two cases are hereby consolidated under Index No. 2418/09 (CPLR 602). The caption of the consolidated action shall be as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JERYL ANN NOTO

Plaintiff,

Index No. 2418/09

- against -

WHITESTONE DISTRIBUTOR, INC.,
WHITESTONE DISTRIBUTORS, INC.,
WHITESTONE DISTRIBUTOR,
WHITESTONE SALES, INC., APW
SUPERMARKETS, INC. d/b/a WALDBAUMS,
and PEPSI-COLA BOTTLING COMPANY OF
NEW YORK, INC.,

Defendants.

The Whitestone defendants and Whitestone Sales, Inc., are directed to serve a copy of this order with notice of entry on all parties to the actions combined and on the Clerk of the Supreme Court, Queens County, who shall transfer all papers filed under Index No. 13815/10 to the file under Index No. 2418/09.

The Whitestone defendants and Whitestone Sales, Inc., have also moved for summary judgment dismissing the complaint and cross claims and have argued that Whitestone Distributor, Inc., Whitestone Distributors, Inc., and Whitestone Distributor were not in business at the time of plaintiff's accident. In support of this branch of their motion, they have the initial burden of demonstrating the absence of any material issues of fact (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). They have relied upon, among other things, the deposition testimony and affidavit of Anthony Fasano, president of Whitestone Sales, Inc., and the affidavit of Edward Fasano, an employee of Whitestone Sales, Inc.

Anthony and Edward Fasano both stated that Whitestone Sales, Inc., a successor in interest to Whitestone Distributor, Inc., also sued herein as Whitestone Distributors, Inc., and Whitestone Distributor, was no longer in business at the time of plaintiff's accident. No triable

issue of fact has been raised in opposition. Therefore, the Whitestone defendants and Whitestone Sales, Inc., have satisfied their burden on this branch of their motion and they are entitled to the dismissal of the complaint and any cross claims only against Whitestone Distributor, Inc., Whitestone Distributors, Inc., and Whitestone Distributor.

Whitestone Sales, Inc., contended that the complaint and all cross claims should be dismissed on the ground that no dangerous condition existed. However, based upon the evidence submitted, it has failed to satisfy its initial burden. Whitestone Sales, Inc., has failed to present sufficient evidence to demonstrate that the alleged condition was not dangerous in light of the circumstances of this case and it may not satisfy its burden by pointing to the gaps in plaintiff's case (*see Flores v BAJ Holding Corp.*, 94 AD3d at 946; *Davranov v 470 Realty Assoc., LLC*, 79 AD3d at 697-698; *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d at 598-599; *Falah v Stop & Shop Cos., Inc.*, 41 AD3d at 639). Thus, the opposition papers need not be considered.

Whitestone Sales, Inc., has further contended that it did not create the alleged condition and that it did not have actual or constructive notice of it. However, the evidence it relied upon in support of its motion has demonstrated that triable issues of fact exist. It is undisputed that Whitestone Sales, Inc., delivered Pepsi-Cola products to the subject store, was responsible for separating the tape that joined two 12-packs and stocking the product on the shelves. The deposition testimony of Anthony Fasano reflected that it was somewhat common for the tape between two 12-packs of beverages to break apart when the cases were picked up. In light of this evidence, issues of fact remain as to whether Whitestone Sales, Inc., created the alleged condition and whether it had notice of it. Therefore, Whitestone Sales, Inc., is not entitled to judgment as a matter of law on this branch of its motion.

APW Supermarkets, Inc., d/b/a Waldbaums, has cross-moved for summary judgment dismissing the complaint and has adopted the arguments and evidence of the Whitestone defendants and Whitestone Sales, Inc., to show that there was no dangerous condition, that it did not create the alleged condition and did not have actual or constructive notice of it. In light of the above decision, APW Supermarkets, Inc., d/b/a Waldbaums, has failed to satisfy its burden of demonstrating that no dangerous condition existed. Anthony Fasano's testimony demonstrated that Waldbaums' employees were also responsible for placing the Pepsi-Cola 12-packs on the shelves and separating the tape joining two 12-packs together. APW Supermarkets, Inc., d/b/a Waldbaums, also relied upon the testimony of Rocco Mileo (Mileo), an employee of Waldbaums, who testified that he observed 12-packs of Pepsi-Cola products stocked on the shelves taped together and that he had observed the packs separate from each other while they were being moved. In light of this evidence, issues of fact remain that preclude summary relief, at least, as to who was responsible for placing the Pepsi-Cola products that allegedly caused plaintiff's injury on the shelf of the subject store and whether APW Supermarkets, Inc., d/b/a Waldbaums, created the alleged condition or had actual or constructive notice of it (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Accordingly, the branch of the motion by the Whitestone defendants and Whitestone Sales, Inc., to lift the stay of the proceedings in the instant action is granted and the matter is restored to the active trial calendar. The branch of their motion to consolidate the action commenced under Index No. 13815/10 with this action is granted. The branch of the Whitestone defendants' and Whitestone Sales, Inc.'s motion for summary judgment dismissing the complaint and cross claims is granted only as to Whitestone Distributor, Inc., Whitestone Distributors, Inc., and Whitestone Distributor, and denied in all other respects. The cross motion by APW Supermarkets, Inc., d/b/a Waldbaums, for summary judgment is denied in its entirety.

Dated: April 11, 2014

DARRELL L. GAVRIN, J.S.C.