

Kelley v Madonna Holdings, LLC

2014 NY Slip Op 33748(U)

July 11, 2014

Supreme Court, Nassau County

Docket Number: 005612/12

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 13

X

ADELA KELLEY,

Plaintiff,

Index No. 005612/12

Motion Sequence...04, 05

-against-

Motion Date... 06/20/14

XXX

MADONNA HOLDINGS, LLC, 7-11, INC.,
SOUTHLAND CORPORATION and BHUPINDAR
SINGH SAINI,

Defendants.

X

MADONNA HOLDINGS, LLC.,

Third-Party Plaintiff,

-against-

BHUPINDAR SINGH SAINI,

Third-Party Defendant.

X

Papers Submitted:

- Notice of Motion (Mot. Seq. 04).....x
- Notice of Motion (Mot. Seq. 05).....x
- Memorandum of Law.....x
- Affirmation in Opposition.....x
- Affirmation in Opposition.....x
- Reply Affirmation.....x
- Reply Affirmation.....x

Upon the foregoing papers, the motion (Mot. Seq. 04) by the Defendants, 7-11, INC., SOUTHLAND CORPORATION and the Defendant/Third-Party Defendant BHUPINDAR SINGH SAINI ("Singh") (hereinafter collectively referred to as "7-11"), and the motion (Mot. Seq. 05) by the Defendant, MADONNA HOLDINGS, LLC. (hereinafter "Madonna"), seeking an order pursuant to CPLR § 3212 granting them summary judgment and dismissing the Plaintiff's complaint and all cross-claims, are determined as hereinafter provided.

In the instant matter, the Plaintiff, ADELA KELLY, seeks damages stemming from an accident that occurred on April 4, 2011. The Plaintiff alleges that she was caused to trip and fall on a stop sign stump as she attempted to cross California Avenue at its intersection with Fulton Avenue in the Village of Hempstead. The Plaintiff commenced this action by filing a summons and complaint in the Office of the Nassau County Clerk on May 2, 2012. The Defendant, Madonna, served its answer and asserted cross-claims against the Defendant, 7-11. The Defendant, 7-11, served its answer denying all of the cross-claims. The Defendant, Madonna, commenced a third-party action against the Defendant/Third-Party Defendant, Singh. The Plaintiff then amended its complaint to add the Defendant, Singh, as a direct defendant. The Co-Defendants, Town of Hempstead, County of Nassau and Village of Hempstead have all been dismissed from this action by prior motions for summary judgment.

The Plaintiff testified at her Examination Before Trial (EBT) that she had an accident on April 4, 2011 at the corner of Fulton Avenue and California Avenue in

Hempstead. (See EBT transcript annexed to the Notice of Motion (Mot. Seq. 05) as Exhibit "I" at p. 14, l. 8-15) She testified that when she was about to cross California Avenue, she tripped on a piece of metal and fell on the street. (*Id.* at p. 15, l. 2-5) The Plaintiff testified that there is a two to three foot section of grass and dirt between the sidewalk and the street where the piece of metal was. (*Id.* at p. 26, l. 22-25, p. 27, l. 2-3) She described the piece of metal that she tripped on as dark in color and two and a half inches higher than the surface of grass and dirt. (*Id.* at p. 79, l. 22-25, p. 80, l. 2-9)

In support of its motion (Mot. Seq. 04) for summary judgment, the Defendant, 7-11, argues that it is entitled to summary judgment because, pursuant to Village of Hempstead Code and the New York Vehicle and Traffic Law, only the Village may modify, maintain, repair, replace or manage any signage. The Defendant, 7-11, further argues that even if liability is imposed on the owner of the property, liability does not extend to the Defendant, 7-11, as the lessee.

The Defendant, 7-11, submitted, *inter alia*, the deposition transcript of Brian O'Keefe, the former Supervisor of the Paint and Sign Department for the Village of Hempstead. (See EBT transcript annexed to the Notice of Motion (Mot. Seq. 05) as Exhibit "O") Mr. O'Keefe retired on June 22, 2012, but was employed by the Village of Hempstead for 30 years. (*Id.* at p. 7, l. 9-13) He testified that as part of his job, when he received notice of a problem with a sign he'd go inspect and see how to remedy it. (*Id.* at p. 19, l. 12-18) He did not have any records regarding the incident on April 4, 2011 and he was not required to keep such records. (*Id.* at p. 22, l. 12-23)

Mr. O'Keefe testified that he was notified by Lieutenant Michaelski that something happened with a street sign stump sticking up on the corner of Fulton and California Avenue and to go take a look. (*Id.* at p. 33, l. 1-14) In 2009, Mr. O'Keefe noticed the stop sign at the corner of Fulton Avenue and California Avenue was missing and that there was a stump sticking out of the ground. (*Id.* at p. 37, l. 8-22, p. 38, l. 2-5) There was a broken piece sticking three to four inches out of the ground. (*Id.* at p. 39, l. 1-5) Mr. O'Keefe testified that he put the broken stop sign in his truck, put a cone over the stump then went back to the sign shop to get a tool to lift the stump out of the dirt. (*Id.* at p. 45, l. 6-12) Mr. O'Keefe testified that he tried to pull the stump out using a tripod device, but it did not come out. (*Id.* at p. 57, l. 20-25) He testified that the mechanics torched the stump off to ground level and he went back with a sledgehammer and hammered it down the rest of the way. (*Id.* at p. 64, l. 1-8) Mr. O'Keefe testified that no other entity, other than the Village and the MTA, would have authority to remove any signs at the particular location. (*Id.* at p. 161, l. 15-25) He testified that he did not speak to anyone at 7-11 about the street signs or stumps at any time. (*Id.* at p. 170, l. 8-13)

The Defendant, Singh, was deposed as a non-party on June 28, 2013, before he was added as a direct defendant in this action. Mr. Singh testified that he owns a 7-Eleven franchise at 531 Fulton Avenue, Hempstead, which he has owned since approximately 2005. (*See* EBT transcript annexed to the Notice of Motion (Mot. Seq. 04) as Exhibit "R" at p. 7, l. 9-23) He first became aware of the incident involving the Plaintiff when he was served with the deposition subpoena. (*Id.* at p. 9, l. 1-25, p. 10, l. 1-18) Mr. Singh testified that he was never made aware of a stump sticking out of the

ground at the subject location. (*Id.* at p. 11, l. 15-24) He testified that any lease for the land would be between 7-Eleven and the landlord, Madonna. (*Id.* at p. 13, l. 15-25, p. 14, l. 1-18)

Nick Suthar, a non-party, appeared for a deposition on June 28, 2013. He has worked for Mr. Singh for ten years as the manager of the 7-Eleven franchise. (*See* EBT transcript annexed to the Notice of Motion (Mot. Seq. 04) at p. 7, l. 1-16) He testified that he hired someone named Frank to do the landscaping on the property. (*Id.* at p. 7, l. 22-25, p. 8, l. 1-25, p. 9, l. 1-7) Mr. Suthar testified that he never noticed if Frank cut the grass between the sidewalk and the street. (*Id.* at p. 19, l. 18-23) He also testified that he did not know who was responsible for maintaining that grass strip. (*Id.* at p. 22, l. 6-10) Mr. Suthar testified that he was not aware of a street sign being damaged or bent on the corner of California and Fulton. (*Id.* at p. 25, l. 11-15) He was aware of a sign stump for about a year before the Plaintiff fell. (*Id.* at p. 30, l. 2-25) Mr. Suthar testified that he showed Mr. Madonna the stump because he is the landlord and he takes care of problems around the building. (*Id.* at p. 33, l. 8-25, p. 34, l. 2-21)

On June 4, 2013, Paul Madonna was deposed on behalf of the Defendant, Madonna. He testified that his company owns the building where the Defendant, 7-11, is located. (*See* EBT transcript annexed to the Notice of Motion (Mot. Seq. 04) as Exhibit "U" at p. 9, l. 2-6) Mr. Madonna testified that according to the lease between his company, the Defendant, Madonna, and 7-Eleven, 7-Eleven is responsible for cutting the grass strip next to the sidewalk running along California Avenue. (*Id.* at p. 28, l. 19-23) He testified that he doesn't believe that he was responsible for repairs to the sidewalk

because he never did any maintenance work or repairs to the sidewalk. (*Id.* at p. 32, l. 9-21) When Mr. Madonna was made aware of the stump by Nick Suthar, he looked at the stump and decided to remove it. (*Id.* at p. 41, l. 13-19, p. 61, l. 8-20)

The Defendant, 7-11, argues that it is entitled to summary judgment based on two theories. First, that the Village of Hempstead is solely responsible for street signs. Therefore, it cannot be liable for the injuries caused by the sign stump. Second, the Defendant, 7-11, argues that any liability imposed on the owner does not extend to the lessee, 7-11, nor does it extend to the franchisee, Mr. Singh.

On its first theory, the Defendant, 7-11, contends that based on the Village of Hempstead Code § 131-7, there is nothing that allows for adjacent landowners to modify, maintain, repair or manage any signage nor to report any issues to the municipality. The Defendant, 7-11, argues that although the Village of Hempstead imposed liability on the abutting landowner for the sidewalk, the sidewalk does not include the street sign. Further, the Defendant, 7-11, argues that alternatively, if the Village of Hempstead Code does not apply and the stop sign is considered part of the sidewalk, the Defendant, 7-11, is prohibited from removing the sign by the Vehicle and Traffic Law § 115, which states that it is unlawful for any person to remove a traffic control device or any part thereof on a highway or right of way.

With regard to its second theory in support of summary judgment, the Defendant, 7-11, argues that neither 7-11 nor Mr. Singh can be held liable because there was nothing in the lease mentioning the maintenance of sidewalks.

In support of its motion, the Defendant, Madonna, argues that pursuant to Vehicle and Traffic Law § 131-7 and the Village of Hempstead Code, it had no authority to alter, remove or otherwise interfere with the metal stop sign protruding from the ground at the subject scene. The Defendant, Madonna, argues that the Village of Hempstead is solely responsible for their traffic signs in its jurisdiction. Further, the Defendant, Madonna, argues that it was an off-site landlord that had no contractual responsibility and never maintained, controlled, repaired or created the dangerous condition prior to or during the time of the accident. The Defendant, Madonna, argues that pursuant to Paragraph 9 of the lease agreement, 7-Eleven was responsible to keep both the interior and exterior of the building in good repair. Further, the Defendant, Madonna, contends that it cannot be held liable under a negligence theory because it did not create the defective condition nor did it have actual or constructive notice of the allegedly hazardous condition.

In opposition to the motions (Mot. Seq. 04 and 05), the Plaintiff contends that because all of the Defendants deny ownership, operation, maintenance, management and control over the subject sidewalk area and sign stump, there is a question of fact which defeats summary judgment. Further, the Plaintiff contends that the Defendant, Madonna, was not an out-of-possession landlord, but was in fact at the premises every week and owned, operated and maintained the property. Specifically, the Plaintiff contends that the Defendant, Madonna, actually removed the sign stump, which raises a question of fact regarding who exercised maintenance and control over the subject area.

The Plaintiff further contends that the Village of Hempstead Code places liability upon the adjoining owner or occupant of a sidewalk, and because the sign stump was located in the sidewalk area described in the Village of Hempstead Code § 116-1, the Defendants, Madonna and 7-11, had a duty to remove the dangerous obstruction that existed.

In partial opposition to the Defendant, 7-11's motion (Mot. Seq. 04), the Defendant, Madonna, contends that if its motion for summary judgment is not granted it requests that its Third-Party claim against the Defendant, Singh, remain in place. Specifically, the Defendant, Madonna, contends that because the Defendant, Singh, was the occupant of the property abutting the subject sidewalk he had a duty to maintain such area.

In reply to the Defendant, Madonna's partial opposition, the Defendant, 7-11, contends that it is clear from the testimony that the Defendant, Madonna, was not an out-of-possession landlord. The Defendant, 7-11, argues that there was nothing in the lease stating that 7-11 was responsible for maintaining the public sidewalks. The Defendant, 7-11, further argues that there is no evidence to show that the landscapers it hired took care of the grass median where the sign stump was located, nor is there any evidence to show that it created the alleged defect. Further, the Defendant, 7-11, points out that it was the Defendant, Madonna, that removed the stump when made aware of it, which shows that the ultimate responsibility for the sidewalk remained with the Defendant, Madonna.

With regard to the Plaintiff's opposition, the Defendant, 7-11, contends that

the Plaintiff failed to oppose its argument that a street sign is not considered part of the sidewalk pursuant to the Village of Hempstead Code or the argument that it may not remove the sign pursuant to the Vehicle and Traffic Law. Further, the Defendant, 7-11, argues that the Plaintiff failed to explain how the fact that Mr. Madonna removed the sign stump, or part thereof, would impose liability upon the Defendant, 7-11.

In reply to the Plaintiff's opposition, the Defendant, Madonna, argues that Mr. Madonna's testimony clearly states that the Defendant, 7-11, was responsible for the subject sidewalk pursuant to the lease agreement. Further, the Defendant, Madonna, argues that it removed the sign stump to "mitigate any further injuries" despite the fact that it had no authority or obligation to do so. The Defendant, Madonna, contends that the fact that it removed the sign stump is irrelevant because there is no question of fact as to the ownership of the sign. The Village is the owner of the sign. Therefore, any subsequent remediation by the Defendant, Madonna, is irrelevant.

Summary judgment standards are well settled. The movant must establish the cause of action or defense by submitting evidentiary proof in admissible form "sufficiently to warrant the court as a matter of law in directing judgment". (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]) Failure to do so "requires denial of the motion, regardless of the sufficiency of the opposing papers". (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985])

When such a showing has been made by the movant, then to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact". CPLR § 3212, subd [b]; (*Zuckerman v. City of New York*, *supra* at 562) On

a summary judgment motion, the evidence must be viewed in a light most favorable to the nonmoving party. (*Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931 [2007]) Conclusory statements are insufficient. (*Sofsky v. Rosenberg*, 163 A.D.2d 240 [1st Dept. 1990], *aff'd* 76 N.Y.2d 927; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *see Indig v. Finkelstein*, 23 N.Y.2d 728 [1968]; *Werner v. Nelkin*, 206 A.D.2d 422 [2d Dept. 1994]; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides*, 80 A.D.2d 781 [1st Dept. 1981], *app dismissed*. 53 N.Y.2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 A.D.2d 868 [3d Dept. 1993], *lv app denied*. 82 N.Y.2d 660)

Applying the above well settled legal principles to the facts herein, the Defendants, 7-11 and Madonna, have established their *prima facie* entitlement to judgment as a matter of law.

The Village of Hempstead Code § 131-7 states:

“It shall be the duty of the Superintendent of the Department of Public Works of the Village to erect signs indicating the speed limit of the Village and “End of Speed Zone” signs and such other signs as may be required by the Vehicle and Traffic Law. The certificate of the Superintendent of Public Works of the Village, duly signed by him or by the Deputy Superintendent of Public Works, shall be deemed presumptive evidence that such signs as required by the Vehicle and Traffic Law have been duly erected and are maintained pursuant to the provisions of the Vehicle and Traffic Law.”

The Vehicle and Traffic Law § 115 (a) states:

“No person shall without lawful authority attempt to or in fact alter, deface, injure, knock down, cover, remove, or otherwise interfere with any official traffic-control device

or any railroad sign or signal, or any inscription, shield, or insignia thereon, or any other part thereof; any bridge or similar structure; any monument, lamppost, telephone pole, fence, walk, curb, tree, rock cut or other appurtenance on a highway right of way.”

Based on the aforementioned sections of the Village of Hempstead Code and the Vehicle and Traffic Law, the Defendants had no authority or obligation to maintain or remove the sign stump. Although the Village of Hempstead Code imposes liability on the abutting property owner to maintain the sidewalk, this duty does not extend to signs, which are under the exclusive authority of the Village of Hempstead. (See *Holmes v. Town of Oyster Bay*, 82 A.D.3d 1047 [2d Dept. 2011]; *Vucetovic v. Epsom Downs*, 10 N.Y.3d 517 [2008]) Further, in a case evaluating a similar section of the New York City Administrative Code, the Court held that while the abutting landowner may have an obligation to maintain the sidewalk leading up to a signpost, there is no consequent obligation to maintain the signpost itself. (See *King v. Alltom Properties, Inc.*, 16 Misc.3d 1125(A) [N.Y. Sup. Ct. 2007]; *Fermin v. City of New York*, 28 Misc.3d 1235 (A) [Kings Co. Sup. Ct. 2010]) Accordingly, the Defendants cannot be held liable for injuries that result from a defective street sign or sign stump.

The Plaintiff fails to raise an issue of fact to rebut the Defendants’ *prima facie* entitlement to summary judgment dismissal.

Accordingly, it is hereby

ORDERED, that the motions (Mot. Seq. 04 and 05) by the Defendants, 7-11 and Madonna, seeking an order pursuant to CPLR § 3212, granting them summary

judgment and dismissing the Plaintiff's complaint and all cross-claims against them, is

GRANTED.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
July 11, 2014



Hon. Randy Sue Marber, J.S.C.
XXX

ENTERED

JUL 14 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE