

Myles v Spring Valley Marketplace, LLC

2015 NY Slip Op 31432(U)

July 30, 2015

Supreme Court, New York County

Docket Number: 156118/2012

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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GERALDINE MYLES,

Plaintiff,

- against -

Index Number: 156118/2012

Motion Seq. No.: 006

Decision and Order

SPRING VALLEY MARKETPLACE, LLC
And CHRISTMAS TREE SHOPS, INC.,

Defendants.

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CHRISTMAS TREE SHOPS, INC.,

Third-Party Plaintiff,

- against -

MCCUE CORPORATION,

Third-Party Defendant.

-----X
Arthur F. Engoron, Justice

The following papers, numbered 1 to 6, were read on defendant McCue Corporation’s motion, pursuant to CPLR 3212, to dismiss the third party complaint and the plaintiff’s complaint:

PAPERS NUMBERED

Motion to Dismiss

Notice of Motion – Affirmation – Exhibits	1
Affidavit in Opposition – Exhibits	2
Affirmation in Partial Opposition – Exhibits	3
Affirmation in Reply	4

Upon the foregoing papers, the motion is denied.

Background

In this action, plaintiff alleges that on June 7, 2012, she tripped and fell over a metal bar that formed part of a shopping cart corral in the parking lot of the Christmas Tree Shops (“CTS”) store in a shopping center owned by Spring Valley Marketplace (“SVM”). Plaintiff’s complaint against CTS and SVM alleges that the defendants were negligent in “causing, allowing, and permitting said premises at the place above mentioned to be, become and remain for a period of time after notice, either actual or constructive, in a dangerous, slippery, and/or hazardous condition.”

CTS filed a third-party complaint against McCue Corporation (“McCue”), alleging that as the corral in question was “designed, manufactured, inspected, distributed, marketed and sold by the Third-Party Defendant,” then “if the plaintiff was caused to sustain injury/damage” as claimed, it “arose out of the negligence and/or breach of warranty and/or strict product liability by Third-Party Defendant... without any acts or omissions of Defendant/Third-Party Plaintiff causing or contributing thereto.”

CTS moved for summary judgment dismissing the complaint. This Court denied the motion, finding that “a question of fact exists as to whether or not the height of the metal bar over which plaintiff allegedly tripped is *de minimis*, especially given the placement of the bar vis-à-vis the entrance to the cart corral.” The court further found that “questions exist as to what, if any, responsibility for the lighting conditions, placement, etc. that landlord Spring Valley Marketplace has for the area, particularly given that defendants’ EBT’s have not been held...”

McCue now moves for summary judgment dismissing the third party complaint, arguing that because it did not “own, occupy, control or make special use of the subject property,” it is not liable to plaintiff for injuries caused by any alleged “dangerous or defective condition of the property.” McCue argues that there was no breach of warranty, and that because plaintiff does not allege a defect “in the design or manufacture of the product” it is not strictly liable. McCue further argues that the court ought to apply the rule that “a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party.” Espinal v Melville Snow Contrs., 98 NY2d 136 (2002). McCue argues that its contract was with CTS, not with plaintiff, and that therefore it does not owe duty of care to plaintiff and is not liable for her injury. McCue acknowledges the three exceptions to the non-contracting third-party rule, as outlined in Espinal and Fairclough v All Serv. Equip. Corp., 2008 NY Slip Op (1st Dept. 2008), but argues that the instant case does not fall within any of the exceptions.

Discussion

A party generally does not owe a duty of care to a non-contracting third party. However, as noted in Espinal v Melville Snow Contrs., *supra* and Fairclough v All Serv. Equip. Corp., *supra*, there are three exceptions to this general rule, which may open a party to tort liability, to wit: (1) where “the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm,” or, in the words of McCue’s counsel, “creates an unreasonable risk of harm to others, or increases that risk,” H.R. Moch Co. v Rensselaer Water Co., 247 NY 160 (1928); (2) where “performance of contractual obligations has induced detrimental reliance on continued performance,” Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220, 226–227 (1990); and (3) where “the contracting party has entirely displaced the other party’s duty to maintain the premises safely,” Palka v Servicemaster Mgt. Servs. Corp., 83 NY2d 579, 585–586 (1994).

McCue is not liable under the second and third exceptions. McCue did not, and could not have, induced any customer to detrimentally rely on its performance of its contractual obligation to provide CTS with a shopping cart corral. McCue also had not “entirely displaced the other party’s duty to maintain the premises safely.” McCue was not responsible for maintaining the shopping cart corral or the area immediately surrounding it. Moreover, the depositions in the instant case do not give any reason to believe that the premises was improperly maintained, or that improper maintenance of the premises had caused plaintiff’s fall. In fact, the bar and the

shopping cart corral as a whole seem to have been in their original, intended working condition at the time of the alleged accident. Thus, the question of the alleged “defect” as it applies to McCue is really one of whether or not the corral was designed in such a way as to minimize the risk of harm or injury, not whether or not it was maintained properly.

And so we arrive back at the first exception. This Court finds that, based on the proof submitted on the instant motion, it is possible that – and there is a question of fact as to whether – McCue has “launched a force or instrument of harm” that caused plaintiff’s injuries. In Church v Callanan Indus., 99 N.Y.2d 104, 111, (2002), this phrase is interpreted as referring to a situation “where the promisor, while engaged affirmatively in discharging a contractual obligation [as McCue did in selling and delivering a shopping cart corral, which it designed for the purpose of sale, to Christmas Tree Shops], creates an unreasonable risk of harm to others, or increases that risk.” Thus, if the height of the subject bar is found not to be *de minimis*, as this court previously pointed out may be the case, McCue may have created an unreasonable risk of harm to others, and therefore may be liable under the first exception to the rule.

There is also a question as to whether or not McCue can be held strictly liable. McCue may be subject to strict liability if it did not ensure that the shopping cart corrals were manufactured and designed so as to minimize risk of harm or injury to consumers. McCue acknowledges that “the plaintiff claims that she tripped... because of a height differential.” While plaintiff may not expressly claim that the defect was due to the product’s design and/or manufacturing, it is evident that the height of the bar is a result of its design and/or manufacturing. If it cannot be shown that the height of the bar is *de minimis*, and that all possible safety precautions were taken in both design and manufacture, then in fact the defect in question – the height of the bar – is a result of design and/or manufacturing. Ultimately this is a question of fact. Because the height of the bar is a result of the design and manufacturing process, McCue may be liable if the height is found to be excessive. If the defect is thus “built in” to the product, due to lack of sufficient care on the part of McCue, then actual or constructive notice is not required for the designer/manufacturer of the product to be liable. A defendant that “causes or creates” a defect cannot hide behind a lack of notice to avoid liability.

McCue claims that it “did not manufacture, design, or install the metal bar over which the plaintiff fell in the shopping [cart] corral.” However, Peter Whittenmore (spelled alternately as “Whittemore” and “Whittenmore”), McCue’s witness at deposition, testified that the shopping cart corrals are “designed at McCue, by McCue employees.” The height of the bar in question is part of the design of the cart corral, and therefore is McCue’s responsibility.

McCue argues that because it has not been notified of any defects in or problems with the cart corrals in the past, it stands to reason that it is not at fault in the instant case. McCue cites the “thousands of assembled cart corrals [it sold] without incident or complaints” as proof that the products it manufactures are without fault, and that consequently the fault for the alleged accident, if it occurred, lies with plaintiff. Moreover, McCue extrapolates from this argument to claim that defendants CTS and SVM are also not liable for plaintiff’s injury. However, the fact that no complaints were previously filed does not indicate that the product is free of defects. First, not every defect leads to an injury or accident; second, not every injury or accident is reported. It is very possible that the bar is not of a *de minimis* height, and that the instant case simply happens to have been the first time that the height of the bar caused an injury, and

consequently a complaint was filed. The fact that "an inspection of the subject cart coral [sic] revealed no abnormalities" also does not absolve McCue of liability. If the height of the bar, as it was originally designed and manufactured, was considered to be acceptable by McCue, then an inspection of the corral in its original condition would not reveal abnormalities. Yet this does not rule out a defect in the original design.

Conclusion

Third-party defendant's motion to dismiss the third-party complaint and main complaint is denied.

Dated: July 30, 2015



Arthur F. Engoron, J.S.C.