

Schmidlin v Next Gas Corp.

2016 NY Slip Op 32520(U)

October 6, 2016

Supreme Court, Suffolk County

Docket Number: 13-17742

Judge: W. Gerald 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 1-26-16 (003)
MOTION DATE 2-1-16 (004, 005, 006)
ADJ. DATE 4-5-16
Mot. Seq. # 003 -MD # 005 -MD
004 -MD # 006 - XMD

-----X
WILLIAM SCHMIDLIN,

Plaintiff,

-against-

NEXT GAS CORP., EMPIRE GAS STATION,
ISLAND PUMP & TANK CORP., and ALICE
DIANDREA,

Defendants.
-----X

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Upon the following papers numbered 1 to 99 read on these motions and this cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-33; 37- 57; 60-76A; Notice of Cross Motion and supporting papers 80- 89;; Answering Affidavits and supporting papers 34- 36; 36a-36b; 36c-36d; 36e-36f; 58- 59; 77-79; 90-91; 92-93; 94-96; Replying Affidavits and supporting papers 36g-36h; 36i-36j; 59a- 59d; 79a-79b; 97-99; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 003) of defendant Next Gas Corp, the motion (seq. 004) of defendant Island Pump & Tank Corp, the motion (seq. 005) of defendant Alice DiAndrea, and the cross

motion (seq. 006) of plaintiff William Schmidlin are consolidated for the purposes of this determination; and it is further

ORDERED that the motion of defendant Next Gas Corp. for summary judgment dismissing the complaint and cross claims against it is denied; and it is further

ORDERED that the motion of Island Pump & Tank Corp. for summary judgment dismissing the complaint and cross claims against it is denied; and it is further

ORDERED that the motion of defendant Alice DiAndrea for summary judgment dismissing the complaint and cross claims against her is denied; and it is further

ORDERED that the cross motion of plaintiff William Schmidlin for summary judgment in his favor on the issue of liability is denied.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained while delivering gasoline to a gas station known as Empire Gas Station and located at 211 North Broadway, Huntington, New York. The complaint alleges that plaintiff tripped in the fill hole, which was covered by an allegedly defective grate. Plaintiff alleges that defendants breached the duty of care owed to him by failing to maintain their premises in a reasonably safe condition and permitting a dangerous condition to exist.

Defendant Next Gas Corp. now moves for summary judgment dismissing the complaint and cross claims against it on the ground that it did not create the alleged dangerous condition and did not have notice of it. In support of the motion, Next Gas submits copies of the pleadings, a verified bill of particulars, and transcripts of the parties' deposition testimony.

Plaintiff testified that on April 5, 2013, he was working for Consolidated Bulk Carriers (CBC) as a tractor trailer driver, and was making a gasoline delivery to Empire Gas Station at approximately 2:45 a.m. He testified that the gas station was closed at the time he arrived and the lighting was poor. Plaintiff testified that he filled the tank containing regular gasoline without a problem, but when he attempted to fill the tank which contains diesel fuel, he fell into the fill hole. He testified that the accident happened after he removed the cover to the fill tank and stepped down onto a grate cover with his left foot to place the measuring stick into the tank. He testified that when his foot reached the grate, it flipped open and he fell into the hole. According to plaintiff's testimony, he delivered diesel fuel to the subject station on prior occasions and stood on the grate without a problem. He testified that he felt severe pain in his body and that he was able to pull himself out of the hole in ten minutes. Plaintiff testified that he phoned the dispatcher at CBC to inform him of the accident, and that he was able to complete his job of filling the tanks.

Eray Cufadar testified that he is the president and sole shareholder of Next Gas Corp., a retailer of gasoline, doing business as Empire Gas Station at 211 Broadway in Huntington. He testified that he rents the property from Alice DiAandrea and has been operating a gas station at the subject location since 2005, under various corporations, and that Next Gas was formed in 2011. He testified that he does

not have a written lease and rents the property on a month-to-month basis. Cufadar testified that Alice's son, Frank DiAndrea, owns Island Pump & Tank Corp., and that in 2007 Island Pump renovated the gas station to comply with mandatory regulations. He testified that the steel tanks were removed and replaced with fiber glass tanks, that the fuel pumps were "redone," and that a new asphalt surface was installed on the property. He testified that Empire Gas Station was closed for four months due to the renovations, and that he did not contribute any money to the cost of such renovations. Cufadar testified that in 2013 he purchased petroleum products from T & T Petroleum which were generally delivered by CBC. He testified that he receives 15 deliveries of gasoline per month and that each day, in the morning and the evening, one of his employee measures the level of gasoline contained in the tanks. Cufadar testified that he did not have any written maintenance agreements with Island Pump or Alice DiAndrea, but that he maintained the premises for cleanliness and snow removal and contacted Island Pump for certain repairs.

Frank DiAndrea testified that he has worked for Island Pump for 42 years as a manager and is secretary of the corporation. He testified that Island Pump is in the business of constructing and maintaining gasoline service stations, and that Next Gas is one of its customers. DiAndrea testified that his mother, defendant Alice DiAndrea, owns the property where Empire Gas Station is situated and rents it to Next Gas Corp. He testified that Island Pump installed new tanks and pumps at the station in 2007 to comply with new regulations issued by the Suffolk County Department of Health. He testified that he did not have a contract with any entity to do the renovations and that Island Pump paid for the renovations. Further, he testified that his mother did not supervise the work and did not make any decisions with regard to the day-day operations of the gas station. He testified that the subject station has three tanks, one for regular gasoline, one for premium, and one for diesel fuel. He testified that each tank has three covers. The first cover is the manhole cover that is flush with the ground and is made of composite material; underneath the manhole cover is a sump cover that prevents debris and water from entering the tank; and underneath the sump cover is a fill grate that is made of steel. DiAndrea testified that the grate sits on a lip and is secured by a bracket. He testified that it serves as a safety device to prevent someone from falling into the hole and is intended to be stood on. DiAndrea testified that the grate does not have to be removed to fill the tank and is only removed when debris must be cleaned out from underneath the tank. He testified that his employees periodically conduct environmental inspections at the property, and that if any repairs are necessary, they would perform them and fill out a work ticket. He testified that Island Pump does not have a written maintenance agreement with Gas Next; rather, it works on an "as needed" basis. DiAndrea testified that after the accident occurred, he sent his employee, Ed Bisso, to the subject station to inspect the fill tank and grate, and that Mr. Bisso told him that the grate was not secured by a bracket.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make 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]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New*

York, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (see *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; *Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Generally, a landlord has a duty to maintain the premises in a reasonably safe condition (*Kellman v 25 Tiemann Assoc*, 87 NY2d 871, 638 NYS2d 937 [1995]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]). However, an out-of-possession landlord who relinquishes control over the leased premises generally will not be responsible for injuries occurring on its premises unless the landlord has a duty imposed by statute, or assumed by contract or a course of conduct (*Mendoza v Manila Bar & Restaurant Corp* 140 AD3d 934, 33 NYS3d 448 [2d Dept 2016]; (*Madry v Heritage Holding Corp.*, 96 AD3d 1022, 1023, 947 NYS2d 588 [2d Dept 2012]).

In a trip-and-fall case, a defendant moving for summary judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see *Arzola v Boston Props. Ltd. Partnership*, 63 AD3d 655, 656, 880 NYS2d 352 [2d Dept 2009]). In order to charge a defendant with constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to afford the defendant a reasonable opportunity to discover and remedy it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; *Perez v New York City Hous. Auth.*, 75 AD3d 629, 906 NYS2d 299 [2d Dept 2010]).

Next Gas argues that it did not have a duty to maintain the fill tank or the grate and, therefore, did not breach its duty of care. It argues the fill tank and grate were exclusively maintained by Island Pump and Alice DiAndrea, and that they were responsible for repairing the fill tank and the grate. Further, Next Gas argues that it did not have notice of the alleged defect, as it was not readily apparent, and it did not receive any prior complaints about its condition.

For a defendant to be held liable in tort, it must have owed the injured party a duty of care (see *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 611 NYS2d 817 [1994]), the existence of which is a question of law (*Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 13, 929 NYS2d 620 [2d Dept 2011]). "Control is the test which measures generally the responsibility in tort of the owner of real property" (*Ritto v Goldberg*, 27 NY2d 887, 889, 317 NYS2d 361 [1970]). The duty of care is premised on the landowner's exercise of control over the property, as "the person in possession and control of property is best able to identify and prevent any harm to others" (*Gronski v County of Monroe*, 18 NY3d 374, 379, 940 NYS2d 518 [2011], quoting *Butler v Rafferty*, 100 NY2d 265, 270,

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762 NYS2d 567 [2003]).

Next Gas failed to establish it did not owe a duty of care to plaintiff, as it was in exclusive possession of the property and controlled the fill tanks on a daily basis (*Richardson v Brooklake Assoc., L.P.*, 131 AD3d 1153, 16 NYS3d 603 [2d Dept 2015]). However, this court cannot conclude as a matter of law that Next Gas breached their duty of care, as the deposition testimony of Frank DiAndrea and Eray Cufadar contain conflicting testimony regarding the method of mounting the grate in the tank, whether it was secured properly at the time of installation or became unsecured, who was responsible for the maintenance of the fill tank and the grate, and the intended purpose of the grate. Therefore, Next Gas failed to meet its burden on the motion. Accordingly, the motion of Next Gas Corp. for summary judgment in its favor is denied.

Island Pump moves for summary judgment dismissing the complaint and cross claims against it and submits an affidavit by Frank DiAndrea. In his affidavit, DiAndrea states that during the renovations in 2007, Island Pump “secured the fill grate associated with the diesel tank with brackets and/or bolts,” and has not received any complaints regarding the grates prior to the subject incident. He also states that Island Pump, on behalf of Alice DiAndrea, performed environmental inspections to ensure the sumps were not filled with debris or water. Island Pump argues, therefore, that it did not create the alleged dangerous condition and did not have a duty to maintain the tanks in a safe manner for the benefit of injured plaintiff.

Frank DiAndrea’s affidavit is insufficient to establish, prima facie, Island Pump’s entitlement to summary judgment, as it is based upon self-serving conclusions, unsupported by facts or sources of information to form the basis of his conclusion that the fill grate was installed with brackets and/or bolts. An affidavit in support of a motion for summary judgment must be by a person having knowledge of the facts or must state relevant facts from which personal knowledge can be inferred, and must indicate the source of the affiant’s knowledge of the facts (*see Great Am. Ins. Co. v Auto Mkt. of Jamaica, N.Y.*, 133 AD3d 631, 19 NYS3d 329 [2d Dept 2015]; *Currie v Wilhouski*, 93 AD3d 816, 941 NYS2d 218 [2d Dept 2012]; *Barraillier v City of New York*, 12 AD3d 168, 784 NYS2d 55 [1st Dept 2004]). Here, DiAndrea does not state that he installed the fill grates himself nor does he indicate which, if any employees at Island Pump installed it. The affidavit, therefore, lacks probative value and is insufficient to establish Island Pump’s entitlement to summary judgment. Accordingly, the motion of Island Pump & Tank Corp. for summary judgment in its favor is denied.

As for the motion of Alice DiAndrea for summary judgment in her favor, Ms. DiAndrea submits her own affidavit and argues that she does not owe a duty of care to plaintiff, “as she is not involved in the ownership or operation of Island Pump, and is not responsible for the maintenance of the equipment.” Alice DiAndrea claims that Next Gas was solely responsible for the maintenance of the premises. She states that she owns the subject property and rents it to Next Gas Corp. on a monthly basis, but that she does not visit the property, and her son collects the rent checks for her. Counsel argues, further, that Island Pump is an independent contractor and, therefore, Alice DiAndrea is not vicariously liable for its conduct.

Mrs. DiAndrea’s affidavit lacks probative value, as it is self-serving, lacks relevant facts and is

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insufficient to establish, prima facie, her entitlement to summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Barraillier v City of New York*, 12 AD3d 168, 784 NYS2d 55). Namely, Ms. DiAndrea does not explain which entity or individual was charged with the responsibility of replacing the steel tanks with the fiberglass ones, as allegedly required by Suffolk County Department of Health. Further, she states that her son, whom she refers to as owner of Island Pump, installed the new tanks and pumps at the subject property, but she does not state who hired Island Pump to complete such renovations and whether or not she compensated Island Pump for these services. As there is no written lease and no written maintenance agreement, and the testimony of the parties varies with respect to the legal relationships and responsibilities of the parties, among other things, Alice DiAndrea has failed to eliminate triable issues of fact. Furthermore, even assuming Island Pump is an independent contractor, Ms. DiAndrea may still be liable for its conduct, as an owner of property may be held vicariously liable for the negligence of its independent contractor if such negligence violated the owner's nondelegable duty to maintain the premises in a safe condition (see *Pesante v Vertical Indus. Dev. Corp.*, 2016 NY Slip Op 5854 [2d Dept 2016]; *Olivieri v GM Realty Co., LLC*, 37 AD3d 569, 830 NYS2d 284 [2d Dept 2007]). Accordingly, the motion of defendant Alice DiAndrea for summary judgment in her favor is denied.

Finally, plaintiff's cross motion for summary judgment in his favor on the issue of liability against all defendants is denied, as plaintiff failed to submit evidence establishing a prima facie case that defendants were a proximate cause of his injuries and that he was free from comparative negligence (*Thoma v Ronai*, 82 NY2d 736, 602 NYS2d 323 [1993]; *Lesaldo v Dabas*, 140 AD3d 708, 32 NYS3d 321 [2d Dept 2016]). The only submission offered on the cross motion is an affirmation of his counsel. It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (see *Cullin v Spiess*, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). There is no support for counsel's argument that the grate was installed by Island Pump and that it was intended to be stood on. Accordingly, plaintiff's cross motion for summary judgment in his favor is denied.

Dated: Oct. 6, 2017

W. Gerard Asher

J.S.C.

HON. W. GERARD ASHER

 FINAL DISPOSITION X NON-FINAL DISPOSITION