

**Dumpson v Stop & Shop Supermarket Co., LLC.**

2018 NY Slip Op 32368(U)

September 21, 2018

Supreme Court, Suffolk County

Docket Number: 12-33074

Judge: Joseph Farneti

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**ORIGINAL**

SHORT FORM ORDER

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CAL. No. 17-017550T

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 2-22-18

ADJ. DATE 3-29-18

Mot. Seq. # 003 - MG

-----X  
LAJUANA DUMPSON,

Plaintiff,

- against -

THE STOP & SHOP SUPERMARKET  
COMPANY, LLC., and PHOENIX  
REFRIGERATION INC.,

Defendants.  
-----X

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion and supporting papers 1 - 12; Answering Affidavits and supporting papers 13 - 29; 30 - 38; Replying Affidavits and supporting papers 39 - 40; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant Phoenix Refrigeration Inc. for summary judgment dismissing the complaint and cross-claim against it is granted.

This action was commenced by plaintiff Lajuana Dumpson to recover damages for injuries she allegedly sustained on October 6, 2011, when she slipped and fell on a puddle of water in the frozen food aisle of a supermarket owned by defendant The Stop & Shop Supermarket Company, LLC ("Stop & Shop"). Defendant Phoenix Refrigeration Inc. ("Phoenix") is alleged to have negligently maintained the freezer unit that allegedly generated the water in question. Stop & Shop filed a cross claim against Phoenix for contribution and indemnification.

Phoenix now moves for summary judgment in its favor, arguing that as a third-party contractor, it owed plaintiff no duty. Further, it argues that it did not breach any duty it owed to Stop & Shop and was

not negligent in its maintenance of the freezer. In support of its motion, Phoenix submits copies of the pleadings, transcripts of the parties' deposition testimony, multiple photographs, a copy of a "maintenance services agreement" between Phoenix and Stop & Shop, and a copy of a "customer work history" for the month of October 2011.

Lajuana Dumpson testified that on the morning of the date in question, she was shopping in her local supermarket, the Stop & Shop located in Islandia, New York. She stated that she intended to purchase milk, which was located toward the back of the store. She further testified that she heard a freezer case door close as she rounded a corner to enter the frozen food aisle. Ms. Dumpson indicated that upon entering the frozen foods aisle, which would have taken her in the direction of the milk, she witnessed multiple Stop & Shop employees pulling a wheeled cart out of that aisle.

Ms. Dumpson stated that as she pushed her shopping cart past the midway point of the frozen foods aisle, she slipped and fell to the floor. She indicated that when she contacted the floor, she felt water dampen her clothing. Upon attempting to stand, she fell to the floor again and, on this occasion, saw water on the floor. Ms. Dumpson described the water as "a puddle" underneath the glass freezer doors to her left. Asked to describe the condition of the glass freezer doors in the vicinity of her fall, she stated that the inside of the doors were wet, and that it "looked like they had just filled up the freezer department." Ms. Dumpson further indicated that she saw "tracks from the [Stop & Shop employees'] cart" located "a couple of feet from the right side of the frozen food department."

Upon questioning as to whether there were any warning cones nearby, Ms. Dumpson testified that she saw "a little one" near the end of the aisle that was yellow and said "wet floor." However, she denied seeing it before she fell, despite it being approximately nine feet away. In a subsequent deposition, Ms. Dumpson stated that the yellow warning "umbrella" was toward the center of the aisle, and that there were additional small puddles of water on the opposite side of the aisle from where she fell. Finally, she testified that she does not know the source of the water on the floor, how long it had been there, or if anyone had complained about it to Stop & Shop staff.

Howard Harris testified that he was the sole shareholder of Phoenix, which went out of business in 2014. He stated that at the time of plaintiff's alleged incident, Phoenix had approximately 30 employees and was in the business of servicing refrigeration, air conditioning, heating, and "energy management" systems. Mr. Harris indicated that, at some point prior to plaintiff's fall, Phoenix signed a contract with Stop & Shop to perform the aforementioned services at certain of its supermarkets. He testified that Phoenix performed servicing of each supermarket's systems at regularly-scheduled preventative maintenance intervals. Asked if Stop & Shop had contacted Phoenix regarding "refrigeration cases sweating really bad throughout the store," Mr. Harris indicated that he would have told it to "call another vendor" because "that is a different issue" from what Phoenix services. He stated that while there are refrigeration-related pipes that "are supposed to sweat" inside the freezer units, any moisture "goes down the drain" located underneath each unit. Upon questioning, he testified that Phoenix would not be responsible for clearing any of those drains if they became clogged. Rather, he stated that was a job for a plumber. Further, Mr. Harris indicated that any rise in temperature inside a refrigerated case would set off an alarm, alerting Stop & Shop management. Shown documents relating

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to Phoenix's repair history at the subject Stop & Shop supermarket, Mr. Harris denied any of the work affected the freezer in question.

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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (see *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (see *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, "it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (*Lezama v 34-15 Parsons Blvd, LLC*, 16 AD3d 560, 560, 792 NYS2d 123 [2d Dept 2005]). A defendant has constructive notice of a hazardous condition on property "when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (*Mavis v Rexcorp Realty, LLC*, 143 AD3d 678, 678-679, 39 NYS3d 190 [2d Dept 2016]).

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, 138, 746 NYS2d 120 [2002]). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140 [internal quotation marks and citations omitted]).

Phoenix established a *prima facie* case of entitlement to summary judgment in its favor (see *Vaccaro v 5 Towns Refrig.*, 222 AD2d 576, 635 NYS2d 295 [2d Dept 1995]; see generally *Alvarez v Prospect Hosp.*, *supra*). Specifically, Phoenix demonstrated that as a third-party contractor it owed no duty to plaintiff and that none of the *Espinal* exceptions apply (see *Trombetta v G.P. Landscape Design, Inc.*, 160 AD3d 677, 73 NYS3d 230 [2d Dept 2018]; *Santos v Deanco Servs., Inc.*, 142 AD3d 137, 35 NYS3d 686 [2d Dept 2016]). Mr. Harris did not dispute that a maintenance contract between

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Phoenix and Stop & Shop was in effect at the time of plaintiff's incident. However, by his deposition testimony, he demonstrated that no act or omission of Phoenix could be a proximate cause of the alleged accumulation of water at the site of plaintiff's fall. Further, he established that the provisions of the subject contract in no way obligated Phoenix to repair drain systems, or remedy "sweating" freezer doors. The burden, thus, shifted to the opposing parties to raise a triable issue (*see Vega v Restani Constr. Corp., supra*).

Plaintiff opposes Phoenix's motion, submitting, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, a her own affidavit, maintenance records, and a copy of a "maintenance services agreement" between Phoenix and Stop & Shop. Plaintiff argues that Stop & Shop "summoned" Phoenix to its store regarding a problem of "sweating" refrigeration cases approximately one week prior to her alleged fall, and that Phoenix should have remedied that allegedly-dangerous condition. This argument is unavailing. Plaintiff failed to adduce any evidence Phoenix was obligated to repair the aforementioned conditions, that any of its actions created a dangerous condition, or even that the water leaked from the freezer case (*see Ginzburg v Tempco, Inc.*, 260 AD2d 535, 688 NYS2d 230 [2d Dept 1999]; *cf. Bautista v Kysor/Warren*, 96 AD3d 982, 947 NYS2d 162 [2d Dept 2012]). Plaintiff further failed to connect any of repairs undertaken by Phoenix at the subject premises to the specific location and circumstances of the incident. Additionally, even if Phoenix had performed inadequate repairs at some point prior to plaintiff's alleged fall, such omission would not trigger an *Espinal* exception, as it did not "launch" an instrument of harm (*see Trombetta v G.P. Landscape Design, Inc., supra; Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 852 NYS2d 500 [4th Dept 2008]).

Plaintiff's other argument is that Phoenix's motion was untimely, having been served 123 days after the filing of the Note of Issue in this matter. As noted in Phoenix's reply affirmation, the final day of the 120-day period in which it was required to file any motion pursuant to CPLR 3212 fell on the Saturday of the three-day 2018 Martin Luther King, Jr. holiday weekend. Thus, Phoenix's motion was timely, having been served on the next business day, Tuesday, January 16, 2018 (*see General Construction Law* § 25-a [1]).


Stop & Shop also interposed opposition to the instant motion, submitting materials largely identical to those submitted by the other parties, and one photograph. Stop & Shop reiterates plaintiff's timeliness argument, but also argues Phoenix "assumed a duty" to maintain the air conditioning systems in the subject supermarket and, in failing to do so properly, allowed the humidity level to rise. An increase in the store's humidity, Stop & Shop alleges, may have been responsible for condensation on freezer doors, and a resultant accumulation of water on the floor. However, in directing the Court's attention to deposition testimony of Mr. Harris, wherein he stated Phoenix was responsible for the maintenance of the supermarket's air conditioning systems, Stop & Shop's counsel neglects to address the colloquy that followed. Specifically, Mr. Harris testified that the store's temperature and humidity settings were "fixed, non-adjustable" by Phoenix. Thus, absent a malfunction of the air conditioning system, which is not alleged, Stop & Shop had exclusive control of the temperature and humidity settings for the store. Mr. Harris also testified that heated freezer doors, which were not serviced by Phoenix, are designed to eliminate condensation conditions.

Further, neither party in opposition to the instant motion adduced evidence, expert or otherwise, opining on the cause of the alleged puddle of water. There was no testimony that the climate control machines present in the subject supermarket were negligently repaired or serviced by Phoenix, and no testimony that the refrigeration network cooling the subject freezer cases was malfunctioning near in time to plaintiff's incident. Thus, any connection between Phoenix's duties and the alleged dangerous condition is speculative.

Finally, though not expressly raised in Stop & Shop's cross-claim against Phoenix for contribution and indemnification, there is no basis upon which the indemnification provision of the maintenance services agreement between Phoenix and Stop & Shop can be invoked. The right to contractual indemnification "depends upon the specific language of the contract, [and] [t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999-1000, 47 NYS3d 121 [2d Dept 2017] [internal citations and quotations omitted]; see *Castillo v Port Auth. of New York & New Jersey*, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]). Here, the subject maintenance services agreement provides, in relevant part, that Phoenix "agrees to defend, indemnify and hold harmless Stop & Shop . . . from and against any and all claims, losses, injuries, penalties, damages, fines, liabilities, demands, costs and expenses . . . arising out of or relating to . . . any negligent or wrongful act or omission . . . in performance of Services." As no triable issue of fact as to Phoenix's negligence has been raised, there is no basis for it to indemnify Stop & Shop pursuant to contract or common law. Nor, has any factual basis for contribution been raised.

Accordingly, the motion by Phoenix for summary judgment dismissing the complaint and the cross-claim against it is granted.

Dated: September 21, 2018

  
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Hon. Joseph Farneti  
Acting Justice Supreme Court

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION