Kadan v National Liquidator, Inc.
2018 NY Slip Op 34194(U)
July 16, 2018
Supreme Court, Rockland County
Docket Number: Index No. 031897/2016
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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STEVEN KADAN,

Plaintiff,

DECISION AND ORDER (Motion # 3)

-against-

Index No.: 031897/2016

NATIONAL LIQUIDATOR, INC. and ABB MIDDLETOWN, LLC,

Defendants.

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STEVEN KADAN,

Plaintiff,

-against-

NSC WHOLESALE HOLDING, LLC

Defendant.

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Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 4, were considered in connection with Defendants NATIONAL LIQUIDATOR, INC., ABB MIDDLETOWN, LLC, and NSC WHOLESALE HOLDINGS, LLC's (collectively referred to as "Defendants") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in their favor, dismissing the action, along with such other and further relief as this Court shall deem proper:

PAPERS	**NUMBERED**
AMENDED NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS (A-F)	1-2
AFFIRMATION IN OPPOSITION/EXHIBITS "1-2"	3
AFFIRMATION IN REPLY	4

Upon the foregoing papers, the Court now rules as follows:

Plaintiff alleges that this premises liability action arose from a trip and fall incident on November 17, 2013, at approximately 6:30 p.m. Plaintiff was a vendor who rented

space for booths inside a "flea market" held each weekend within the premises, for a period of several years prior to the subject incident. He testified that all vendors parked in the back and would use a set of rear double doors when transporting their goods into and out of the flea market. Plaintiff alleges that a vendor who had to use the double doors to fit large items or a large volume of merchandise was required to hold both doors open while simultaneously passing through the double doors. Plaintiff claimed that since the devices at the top of the doors were broken, the vendors would place stone doorstops in front of the doors to keep them open. It is alleged that while he was pulling a luggage carrier with wheels, which contained merchandise, and was in the process of going through the subject doors, Plaintiff took three steps outside the building when his left foot struck a rectangular stone door stop, which caused him to fall onto his hands and sustain an injury. Plaintiff described the rectangular stone as being 7-8 inches in height and 12 inches long.

Defendants produced Robert Pidgeon for an examination before trial, who testified that he is the Director of Personnel for NSC Wholesale Holdings LLC, the entity that owns National Wholesale Liquidators ("National"). National leases the building at the premises which is owned by defendant ABB Middletown LLC. National operates a flea market at the subject location. The flea market has a front and rear entrance which are utilized by the vendors. The flea market was open on Fridays from 2 pm to 8 p.m. and on Saturdays and Sundays from 9 a.m. to 6 pm. Mr. Pigeon testified that he would go to the building once a week, usually on Saturday when the flea market was in session. He testified that he never saw the stones as depicted in Plaintiff's photographs during his routine weekly visits to the building, and was not aware that they were utilized to prop open the rear doors to assist vendors in bringing in or taking out merchandise. Mr. Pidgeon further testified that the rear doors were working properly and were designed to close automatically. He was not aware of any prior complaints regarding rocks or stones being utilized in the manner alleged.

Defendants filed the instant Notice of Motion seeking an Order granting summary

judgment, arguing that (i) a dangerous and defective condition did not exist in that the rock constituted a "trivial defect"; (ii) they did not have actual or constructive notice of a defective or dangerous condition; (iii) that the condition was open and obvious and should have been readily observable by Plaintiff; and (iv) Plaintiff was the sole proximate cause of his incident.

In opposition, Plaintiff argues that the Defendants have failed to meet their *prima facie* burden to demonstrate that the defect is "trivial" as a matter of law, and in any event, the testimony and photographs demonstrate that the subject stone was not "trivial.". With respect to the issue of constructive notice, he asserts that the stones used as doorstops were plainly visible and apparent, that they had been used for years and that there is no evidence that an inspection of the doors was made a reasonable time prior to the accident. Plaintiff further argues that the issue of sole proximate cause is a question of fact and that it is foreseeable that a vendor using the doors would be distracted by their merchandise or other persons, thus rending the stones a trap for the unwary.

Legal Discussion

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a

triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

It is a well-established principle that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. Basso v. Miller, 40 NY2d 233, 224, 366 N.Y.S.2d 564 (1976); Taub v. JMDH Real Estate of Garden City Warehouse, LLC, 150 A.D.3d 1301, 1302, 56 N.Y.S.3d 220 (2d Dept. 2017). "To be entitled to summary judgment, the defendant was required to show, *prima facie*, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises." Russo v. Home Goods, Inc., 119 A.D.3d 924, 990 N.Y.S.2d 95 (2d Dept. 2014).

"Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury." Perez v. 655 Montauk, LLC, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011). "However, some defects are so trivial as to be not actionable as a matter of law." Fontana v. Winery, 84 A.D.3d 863, 923 N.Y.S.2d 594, 596 (2d Dept. 2011). A property owner may not be held liable for damages resulting from trivial defects that do not constitute a trap or nuisance over which a pedestrian might merely stumble, stub his or her toe, or trip. Richardson v. JAL Diversified Management, 73 A.D.3d 1012, 1013, 901 N.Y.S.2d 676 (2d Dept. 2010); Aguayo v. New York City Housing Authority, 71 A.D.3d 926, 927, 897 N.Y.S.2d 239 (2d Dept. 2010). In determining whether a defect is trivial, the inquiry must look to the width, depth, elevation, irregularity and appearance of the defect, as well as the time, place, and circumstances of the injury. Bolloli v. Walbaum, Inc., 71 A.D.3d 618, 618-19, 896 N.Y.S.2d 400 (2d Dept. 2010); Sabino v. 745 64th Realty Associates, LLC, 77 A.D.3d 722, 723, 909 N.Y.S.2d 482 (2d Dept. 2010). There are no minimal dimensions or per se rule that a defect must be

of a certain height or depth in order to be actionable. Bolloli, 71 A.D.3d at 619.

"A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristic of the defect or the surrounding circumstances do not increase the risks it poses." Maldonado v. 2121 Shore Condominium, 138 A.D.3d 789, 790, 30 N.Y.S.3d 185 (2d Dept. 2016)." Only once the defendant meets its burden, will the burden shift to the plaintiff to establish an issue of fact. Id. Photographs of a defect which fairly and accurately reflect how it appeared on the date of the accident may be used to demonstrate whether it is trivial. Das v. Sun Wah Restaurant, 99 A.D.3d 752, 754, 952 N.Y.S.2d 232 (2d Dept. 2012); Schenpanski v. Promise Deli, Inc., 88 A.D.3d 982, 984, 931 N.Y.S.2d 650 (2d Dept. 2011).

In the instant matter, Defendants have failed to sustain their burden that the subject stone constituted a "trivial defect" as a matter of law. It must be noted that Defendants did not submit photographs of the defect but instead rely solely upon Plaintiff's testimony that the rectangular stone was 7-8 inches in height and 12 inches long. Based upon this description, which is the sole evidence submitted in support of the motion, it cannot be said to be trivial as a matter of law. See Adsmond v. City of Poughkeepise, 283 A.D.2d 598, 725 N.Y.S.2d 80 (2d Dept. 2001)(triable issue of fact as to whether crack in sidewalk which was nine inches long, five and two inches deep was trivial); Gutierrez v. Riverbay Corp., 262 A.D.2d 64, 691 N.Y.S.2d 452 (1st Dept. 1999)(genuine issue of fact as to whether two-inch depression in walkway as a trivial defect.); Rosario v. City of New York, 289 A.D.2d 133, 735 N.Y.S.2d 50 (1st Dept. 2001)(three to five inch wide and three to five inch deep hole was not trivial as a matter of law.) Moreover, the photographs of the defect submitted by Plaintiff demonstrate a triable issue of fact sufficient to deny summary judgment on this ground.

Defendants have also failed to meet their *prima facie* burden on summary judgment with respect to the issue of lack of constructive notice. "A defendant who moves for

summary judgment in a trip-and-fall case has the initial burden of making a prima facie showing that it neither crated the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discovery and remedy it." Arzola v. Boston Properties Ltd. Partnership, 63 A.D.3d 655, 880 N.Y.S.2d 352 (2d Dept. 2009). "To sustain this burden, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." Birnbaum v. New York Racing Ass'n Inc., 57 A.D.3d 598, 869 N.Y.S.2d 222, 223 (2d Dept. 2009). Testimony regarding general inspection practices is insufficient to sustain this burden. Levine v. Amverserve Ass'n, Inc., 92 A.D.3d 728, 529, 936 N.Y.S.2d 593 (2d Dept. 2012).; Barris v. One Beard Street, LLC, 126 A.D.3d 831, 6 N.Y.S.2d 262 (2d Dept. 2015).

In the instant matter, Defendants have failed to offer admissible evidence as to when the area was last inspected in proximity to Plaintiff's accident and their reliance upon Mr. Pidgeon's routine practice of coming to the premises once a week, usually on Saturdays, is insufficient to meet their burden with respect to lack of constructive notice.

There is also no merit to the Defendants' argument that the action should be dismissed because the stone was not inherently dangerous and should have been readily observable by plaintiff employing reasonable use of his senses. The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case. Clark v. AMF Bowling Centers, Inc., 83 A.D.3d 761, 921 N.Y.S.2d 273 (2d Dept. 2011). Since the "open and obvious" test incorporates a reasonableness standard, it is fact-specific and usually presents a question for resolution by the trier of the fact. Centeno v. Regine's Originals, Inc., 5 A.D.3d 210, 773 N.Y.S.2d 62 (1st Dept. 2004).

Moreover, "[i]f a hazard or dangerous condition is open and obvious, the owner of the property has no duty to warn a visitor of the danger." Westbrook v. WR Activities-Cabrera

Markets, 5 A.D.3d 69, 71, 773 N.Y.S.2d 38 (1st Dept. 2004). However, "apart from the duty to warn of dangerous condition on the property, a landowner also has a concomitant duty to keep the property in a reasonably safe condition for those who use it. DiVietro v. Gould Palisades Corp., 4 A.D.3d 324, 325, 771 N.Y.S.2d 527 (2d Dept. 2004). "Where a dangerous condition exists on property, the fact that the condition was open and obvious, while relieving the landowner of the duty to warn, will not relieve the landowner of its burden of demonstrating that 'he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based upon such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk.'" Id.

In the matter at bar, Defendants have failed to establish as a matter of law that the alleged defective condition was open and obvious as a matter of law. Moreover, even if they had, Plaintiff has raised a triable issue of fact as to whether the property was maintained in a reasonably safe condition. Although Mr. Pidgeon testified that it was his belief that the subject doors were functioning, Plaintiff testified that the hinges on the top of the door were broken for some time, which is why the doors had to be propped open. Defendants produced no records with respect to the maintenance and inspection of the subject doors to support their contention that the subject doors were functioning and in good working order.

Lastly, Defendants have failed to establish, as a matter of law, that Plaintiff was the sole proximate cause of the subject occurrence. More specifically, Defendants failed to establish that Plaintiff's fall was unrelated to the alleged defect, and while Plaintiff may have been comparatively negligent in failing to observe the stone, or to remember that the stone was there, any such comparative negligence would not serve to negate the liability of the landowner who has a duty to keep the premises safe. See Powers v. St. Bernadette's R.C. Church, 309 A.D.2d 1219, 765 N.Y.S.2s 102 (4th Dept. 2003); Baron v. 305-323 East Shore Road Corp., 121 A.D.3d 826, 828, 994 N.Y.S.2d 651 (2d Dept. 2014).

Accordingly, it is hereby

ORDERED the Notice of Motion filed by Defendants National Liquidator, Inc., ABB Middletown, LLC and NSC Wholesale Holdings, LLC's motion for summary judgment and dismissal of the Complaint is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear in the **Trial Readiness Part** on **WEDNESDAY, SEPTEMBER 12, 2018, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
July 16, 2018

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO: (via- NYSCEF-)

Sobo & Sobo, LLP
Attorneys for Plaintiff

Burke, Conway & Dillon
Attorney for Defendants