

Huron v Glen Cove Delicatessen Inc.

2018 NY Slip Op 34306(U)

December 20, 2018

Supreme Court, Nassau County

Docket Number: Index No. 601902/2016

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ROBERT HURON,

Plaintiff,

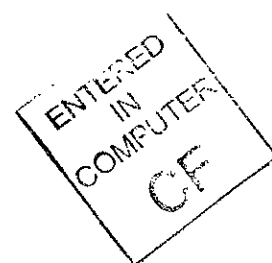
-against-

IAS PART 17
Index No. 601902/2016
Mot. Seq. Nos. 002/003

DECISION AND ORDER

GLEN COVE DELICATESSEN INC., CANARICK
GROUP LLP AND JEAN CANARICK,

Defendants.
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LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Defendant’s (Glen Cove Delicatessen Inc.) Notice of Motion, Affirmation & Exhibits.....	1
Defendant’s (Canarick Group LLP) Notice of Cross-Motion, Affirmation & Exhibit.....	2
Plaintiff’s Affirmation in Opposition, Affidavit & Exhibits.....	3
Defendant’s (Glen Cove Delicatessen Inc.) Reply Affirmation.....	4
Defendant’s (Canarick Group LLP) Reply Affirmation.....	5

Plaintiff commenced this action against defendants to recover damages for injuries suffered as a result of an alleged trip and fall that occurred on September 24, 2015. Defendant Glen Cove Delicatessen, Inc. (“the Deli”) and Canarick Group LLP separately seek summary judgment dismissing the complaint. Plaintiff opposes the applications.¹

¹ In December 2017 a Stipulation of Discontinuance was executed by the parties discontinuing the action as against Jean Canarick, with prejudice.

Background

Plaintiff contends that he sustained injuries when he tripped and fell on the interior step leading to the main floor of the Deli. Plaintiff alleges that he was unable to see the step as a result of inadequate lighting that failed to compensate for a dark shadow that was cast over the step. At his deposition, plaintiff testified that he took two or three steps into the Deli prior to falling. He recalled that it was bright and sunny outside and there was a dark shadow over the step that prevented him from seeing it—as a result, he fell and sustained serious injuries.

LEGAL ANALYSIS

On a motion for summary judgment the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that it is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). It is not enough, in the context of a summary judgment, for a defendant to argue that the plaintiff cannot prove its case at trial. *Gonzalez v. Abreu*, 162 A.D.3d 748 (2d Dept. 2018). Merely pointing to gaps in the plaintiff's proof does not satisfy a defendant's burden. *Vittorio v. U-Haul Co.*, 52 A.D.3d 823 (2d Dept. 2008).

Where the movant fails to meet its initial burden the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfgs., Inc.*, 46 N.Y.2d 1065 (1979); *Werner v. Nelkin*, 206 A.D.2d 422 (2d Dept. 1994).

THE DELI'S MOTION

The Deli contends that plaintiff has failed to identify the unsafe condition that caused him to fall. But this is not accurate. Although plaintiff has not identified a defect in the step itself, he clearly asserts that the darkness in the entryway of the Deli caused by a shadow caused him to fall because he could not see the step in front of him.

Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the facts and circumstances of each case and is generally a question of fact for the jury. *Ress v. Incorporated Vil. of Hempstead*, 276 A.D.2d 681 (2d Dept. 2000). Although the Deli's manager testified at his deposition that the lighting was adequate, this merely raises an issue of fact. Plaintiff asserts that the lighting was inadequate to compensate for the shadow. The Deli has provided no expert analysis in this regard.

The Deli's argument that plaintiff was at fault for his fall because he continued to walk into the Deli notwithstanding that his eyes were still adjusting from the bright sunlight outside merely raises an issue of comparative negligence. Furthermore, it cannot be concluded as a matter of law that the existence of the step was open and obvious. The plaintiff testified that it was hidden by a shadow, and he has submitted photographs reflecting the existence of the shadow.

Chillemi v. National Birchwood Corp., 16 A.D.3d 612 (2d Dept. 2005), relied upon by the Deli, is distinguishable. In *Chillemi*, the court granted summary judgment to the defendant in an action where plaintiff asserted that she tripped and fell on a concrete step. The allegation was that the step was chipped and cast in a shadow. The court reviewed the photographs of the step at issue and concluded that the defect was trivial. *Id.* The court cannot come to the same conclusion from the photographs submitted in this case.

Therefore, the Deli having failed to satisfy its burden, the application is denied regardless of the sufficiency of the opposition papers. *See Smalls v. AJI Industries, Inc.*, 10 NY.3d 733 (2008).

CANARICK'S MOTION

Canarick argues that it was not its responsibility to maintain the subject leased premises, nor did it have actual or constructive notice of any condition which may have caused the alleged trip and fall. Canarick asserts that as an out-of-possession landlord that leased the property to the Deli it cannot be held liable.

An out-of-possession landlord or property owner is not liable for injuries that occur on its property unless the landlord has retained control over the premises and has a duty

imposed by statute, assumed by contract or a course of conduct. *Nieves v. Pennsylvania, LLC*, __ A.D.3d __, 2018 WL 5274152 (2018); *Alnashmi v. Certified Analytical Group, Inc.*, 89 A.D.3d 10 (2d Dept. 2011). Liability may be found where the landlord has agreed to maintain or repair the premises. *See Couloris v. Harbor Boat Realty, Inc.*, 31 A.D.3d 686 (2d Dept. 2006).

Canarick has satisfied its initial burden of its entitlement to summary judgment dismissing the complaint as against it. Canarick offered the deposition testimony of Paul Canarick, who established that Canarick did not bear responsibility to maintain or control the area and the lease does not provide for such responsibility on the part of Canarick. The lease governing the premises provides that the tenant is in control and responsible for the maintenance of the property. *See Quilies v. 200 West 94th Street Corp.*, 262 A.D.2d 169 (1st Dept. 1999). Therefore, there is no basis to deem Canarick liable for plaintiff's injuries. In opposition, plaintiff failed to establish a triable issue of fact regarding Canarick's liability. Accordingly, Canarick's cross-motion is granted.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: December 20, 2018
Mineola, New York

ENTER:


LEONARD D. STEINMAN, J.S.C.

ENTERED

DEC 26 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE