Devito v Kimco Realty Corp.
2019 NY Slip Op 31374(U)
May 10, 2019
Supreme Court, Suffolk County
Docket Number: 15-5788
Judge: Thomas F. Whelan

SHORT FORM ORDER

COPY

INDEX No. 15-5788
CAL. No. 18-01265OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-7-18 (001 & 002)
ADJ. DATE 12-10-18
Mot. Seq. # 002 - MG
003 - MD

---X

JOAN DEVITO,

Plaintiff,

- against -

KIMCO REALTY CORPORATION and PIER 1 IMPORTS, INC.

Defendants.

---X

KIMCO REALTY CORPORATION,

Third-Party Plaintiff,

- against -

O&M MAINTENANCE of LONG ISLAND, INC,

Third-Party Defendant.

---X

PIER 1 IMPORTS (U.S.), INC,

Second Third-Party Plaintiff,

- against -

SMITHTOWN VENTURE LIMITED LIABILITY COMPANY,

Second Third-Party Defendant.

---X

RALPH A. HUMMEL, ESQ.
Attorney for Plaintiff
137 Woodbury Road
Woodbury, New York 11797

MCGIVNEY, KLUGER & COOK, P.C.
Attorney for Defendant Pier 1 Imports
18 Columbia Turnpike, 3rd Floor
Florham Park, New Jersey 07934

KONSTANTINOS & KAPATOS, ESQ.
Attorney for Defendants Kimco Realty and Smithtown Venture Limited Liability Company
200 Old Country Road, Suite 2 South
Mineola, New York 11501

Upon the following papers numbered 1 to 66 read on these motions for summary judgment : Notice of Motion and supporting papers 1 - 15; 16 - 35 ; Answering Affidavits and supporting papers 36 - 54 ; Replying Affidavits and supporting papers 55 - 60; 61 - 66 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 002) by defendant/second third-party plaintiff Pier 1 Imports (U.S.), Inc., and the motion (seq. 003) by defendant/third-party plaintiff Kimco Realty Corporation and second third-party defendant Smithtown Venture Limited Liability Company, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant/second third-party plaintiff Pier 1 Imports (U.S.), Inc., for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion by defendant/third-party plaintiff Kimco Realty Corporation and second third-party defendant Smithtown Venture Limited Liability Company for summary judgment dismissing the complaint, the second third-party complaint, and any cross claims against them is denied.

This action was commenced by plaintiff Joan DeVito to recover damages for injuries she allegedly sustained on March 6, 2015, when she slipped and fell on ice on a sidewalk located at the premises known as 118 Veterans Memorial Highway in Commack, New York. It is undisputed that the subject premises was owned by second third-party defendant Smithtown Venture Limited Liability Company (Smithtown Venture), and was managed by defendant/third-party plaintiff Kimco Realty Corporation (Kimco). It is further undisputed that defendant/second third-party plaintiff Pier 1 Imports (U.S.), Inc., was a lessee of a portion of that premises.

Pier 1 Imports (U.S.), Inc. (Pier 1), now moves for summary judgment in its favor, arguing that it did not own the subject premises, that it did not create the icy condition, and that it did not owe plaintiff any duty with regard to the subject sidewalk. In support of its motion, Pier 1 submits copies of the pleadings, transcripts of the parties' deposition testimony, and a copy of a lease agreement between Smithtown Venture and Pier 1.

Kimco and Smithtown Venture (collectively, the Kimco defendants) also move for summary judgment in their favor, arguing that since plaintiff described the alleged icy condition as "black ice" and as difficult to differentiate from the surrounding concrete, they did not have constructive notice thereof. In support of their motion, the Kimco defendants submit copies of the pleadings, transcripts of the parties' deposition testimony, and a copy of a snow removal contract between Smithtown Venture and O&M Maintenance of Long Island, Inc.

Plaintiff testified that at approximately 3:30 p.m. on the date in question, she was walking on a sidewalk in front of the Pier 1 Imports store located in the King Kullen Plaza shopping center. She stated that the weather that day was sunny and cold, with snow on the ground from precipitation "a couple of days" earlier. She further described "[i]cy snow" piled on the walkways, stating "[t]hey really did not clean it well enough." Plaintiff indicated that as she walked toward the entrance to Pier 1, her "leg just slipped" on "thick black ice" which caused her to fall to the ground. She testified that she did not recall what direction she was

looking as she walked, but stated that she "did not see the ice at all," and that the ice in question "looked like the cement."

Gregory Essopos testified that he is employed by Kimco as a property manager. He stated that Kimco is a real estate investment trust that owns and manages commercial buildings, primarily shopping centers, including the subject premises. Mr. Essopos stated that he believes Smithtown Venture is the subject premises' owner, and that Pier 1 was a tenant thereof pursuant to a written lease agreement. He further stated that, by the terms of the lease agreement, "Kimco or Smithtown Ventures is responsible for maintaining the common areas" of the subject premises, including snow removal. Mr. Essopos testified that Smithtown Venture contracted with O&M Maintenance of Long Island, Inc., to provide snow and ice removal services, and that he was the signatory of such contract as the owner's authorized agent. He indicated that the snow removal contract was in effect on the date in question.

Catherine Gerien testified that she is employed by Pier 1 as a sales leader. She stated that she was present at the Commack Pier 1 store on the date of plaintiff's incident, having arrived at 9:00 a.m. to prepare the store for its 10:00 a.m. opening. Ms. Gerien indicated that at approximately 3:00 p.m. she was informed by another Pier 1 employee that a woman had fallen down outside the store. She stated that she immediately went outside to render aid to the woman and observed "ice on the sidewalk" directly underneath an overhang that was dripping water. Upon questioning, Ms. Gerien testified that she did not receive any complaints of snow or ice at the premises prior to plaintiff's fall.

Paragraph 9.5 of the lease agreement dated April 24, 2012 between Smithtown Venture, as landlord, and Pier 1, as tenant, provides in relevant part that:

> LANDLORD shall keep and maintain, or cause to be kept and maintained, the Common Areas . . . in good condition and repair . . . includ[ing] but not be[ing] limited to repairing paving, keeping the Common Areas properly policed, drained, free of snow, ice, water, rubbish and other obstructions, and in a near, clean, orderly and sanitary condition, including graffiti removal.

Paragraph 9.1 of the same agreement defines "Common Areas" to include "all parking areas, driveways, entrances, exits, walkways, sidewalks, [and] roadways."

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]). A real property owner "will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" (***Yeung v Selfhelp (KIV) Assoc., L.P.***, 170 AD3d 653, 653, 95 NYS3d 312 [2d Dept 2019], quoting ***Cuillo v Fairfield Prop. Servs., L.P.***, 112 AD3d 777, 778, 977 NYS2d 353 [2d Dept 2013]). 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" (***Torre v Aspen Knolls Estates Home Owners Assn., Inc.***, 150 AD3d 789, 790, 54 NYS3d 84 [2d Dept 2017]). On a motion for summary judgment, "the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case" (***Riviere v City of New York***, 127 AD3d 720, 720-721, 7 NYS3d 219 [2d Dept 2015]). To meet its prima facie burden on the issue of lack of constructive notice, "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" (***Rong Wen Wu v Arniotes***, 149 AD3d 786, 787, 50 NYS3d 563 [2d Dept 2017]).

Pier 1 established a prima facie case of entitlement to summary judgment in its favor (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property (***Cullings v Goetz***, 256 NY 287, 176 NE 397 [1931]; ***Guzman v Jamaica Hosp. Med. Ctr.***, 163 AD3d 636, 637, 79 NYS3d 653 [2d Dept 2018]). By the evidence adduced, namely the deposition testimony of the parties and the lease agreement, it demonstrated that it did not own the subject premises, had no duty to maintain the sidewalks exterior to its leased portion thereof, and did not create the alleged icy condition (*see* ***Celestin v 40 Empire Blvd., Inc.***, 168 AD3d 805, 92 NYS3d 319 [2d Dept 2019]; ***Ellers v Horwitz Family LP***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Pier 1 further demonstrated that Smithtown Venture was responsible for all snow and ice remediation at the subject premises. The burden, thus, shifted to any opposing parties to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*). Plaintiff's opposition papers fail to address the arguments raised in Pier 1's motion. The Kimco defendants do not oppose Pier 1's motion. Accordingly, the motion by defendant/second third-party plaintiff Pier 1 Imports (U.S.), Inc., for summary judgment dismissing the complaint and any cross claims against it is granted.

Conversely, the Kimco defendants failed to establish a prima facie case of entitlement to summary judgment in their favor (*see* ***Stevens v Charles Hosp. & Rehabilitation Ctr.***, 165 AD3d 729, 85 NYS3d 90 [2d Dept 2018]). They argue that plaintiff's testimony demonstrates the alleged icy condition was invisible and, therefore, they could not have constructive notice of such condition. They rely on cases such as ***Robinson v Trade Link Am.***, 39 AD3d 616, 833 NYS2d 243 (2d Dept 2007), which support summary judgment in defendants' favor when an alleged icy condition is not "visible and apparent" pursuant to, among others, ***Gordon v Am. Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 (1986). While it is true that plaintiff testified that she did not see the ice prior to her fall, she nonetheless stated that she observed "thick black ice" subsequent thereto. In addition, Ms. Gerien testified that she saw ice on the

walkway when attempting to aid plaintiff immediately thereafter (*see* ***Walters v Costco Wholesale Corp.***, 51 AD3d 785, 858 NYS2d 269 [2d Dept 2008]).

Further, the Kimco defendants did not submit evidence that they did not create the alleged dangerous condition (*see* ***Gushin v Whispering Hills Condominium I***, 96 AD3d 721, 946 NYS2d 202 [2d Dept 2012]). They also did not offer evidence demonstrating when snow removal had last occurred at the subject premises, and did not "present proof as to the adequacy of the ice removal efforts actually undertaken prior to plaintiff's fall" (***D'Ariano v SL Green Realty Corp.***, ___AD3d___, 96 NYS3d 533 [1st Dept 2019]). Thus, they "failed to show what the accident site actually looked like within a reasonable time after the cessation of the prior snowstorm and what the accident site actually looked like within a reasonable time prior to the incident" (***Bronstein v Benderson Dev. Co., LLC***, 167 AD3d 837, 840, 91 NYS3d 142 [2d Dept 2018]). Ms. Gerien's testimony that she did not recall seeing ice in the subject location at the time she entered the Pier 1 store at 9:00 a.m., approximately six hours prior to plaintiff's alleged fall is insufficient to demonstrate that ice was not present for a "sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (*see generally* ***Gordon v American Museum of Natural History***, *supra*; *compare* ***Bombino-Munroe v Church of St. Bernard***, 163 AD3d 616, 80 NYS3d 429 [2d Dept 2018] [defendant inspected the subject area 90 minutes prior to plaintiff's alleged fall and saw no ice]; ***Bader v River Edge at Hastings Owners Corp.***, 159 AD3d 780, 72 NYS3d 145 [2d Dept 2018] [nonparty witness traversed subject area 30 minutes prior to plaintiff's alleged fall and saw no ice]).

Often, in cases where a plaintiff testifies that he or she did not see ice on the ground prior to slipping on it, and the deciding court finds the defendant demonstrated that it had no constructive notice of the alleged icy condition, there are additional, separate factors inuring in the defendant's favor (*see* ***Elassad v Nastasi***, 165 AD3d 1040, 86 NYS3d 606 [2d Dept 2018] [plaintiff testified that her path was clear of snow, and defendants submitted certified weather data demonstrating that the temperature on the date of plaintiff's alleged fall remained above freezing]; ***Ferro v 43 Bronx Riv. Rd.***, 139 AD3d 897, 32 NYS3d 581 [2d Dept 2016] [defendant spread salt at the subject location 3 ½ hours prior to plaintiff's fall, inspected the subject location 1 ½ hours prior to the fall, and plaintiff testified that she had safely traversed the subject area safely only minutes earlier]; ***Hall v Staples the Off. Superstore E., Inc.***, 135 AD3d 706, 22 NYS3d 568 [2d Dept 2016] [plaintiff had traversed the subject area successfully only minutes prior to her fall]; ***Silva-Carpanzano v Schecter***, 105 AD3d 1030, 963 NYS2d 389 [2d Dept 2013] [defendant used subject walkway within 30 minutes of plaintiff's fall]). The instant action is devoid of such additional factors. Even assuming, arguendo, that the Court found the Kimco defendants established a prima facie case, plaintiff's submissions in opposition would raise triable issues (*see* ***Ahmetaj v Mountainview Condominium***, ___AD3d ___, 2019 NY Slip Op 02489 [2d Dept 2019]). The multiple photographs allegedly depicting an icy condition, authenticated by plaintiff in her affidavit, call into question whether the condition was truly invisible, or was simply not observed by plaintiff immediately prior to her fall. Accordingly, the Kimco defendants' motion for summary judgment dismissing the complaint and any cross claims against them is denied.

Dated: 5/10/19

THOMAS F. WHELAN, J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION