Bush v Hess Corp.
2019 NY Slip Op 32821(U)
September 19, 2019
Supreme Court, Suffolk County
Docket Number: 15-14963
Judge: Sanford Neil Berland
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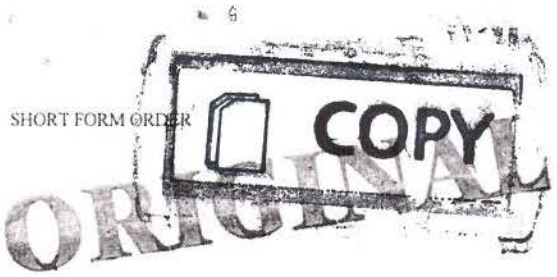

SHORT FORM ORDER

INDEX No. 15-14963
CAL. No. 18-01376OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 12-18-18
ADJ. DATE 2-19-19
Mot. Seq. # 002 - MD

DAWN A. BUSH,

Plaintiff,

- against -

HESS CORPORATION, HESS EXPRESS, SPEEDWAY LLC, MARATHON PETROLEUM COMPANY LP, MARATHON CORPORATION and KARIN, L.P.,

Defendants.

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment: Notice of Motion and supporting papers 1-15; Answering Affidavits and supporting papers 16-25 ; and Replying Affidavits and supporting papers 26-27, it is,

ORDERED that the motion by defendants Speedway, LLC, and Karin, L.P., for summary judgment dismissing the complaint against them is denied.

Plaintiff Dawn Bush commenced this action to recover damages for injuries resulting from a slip and fall accident that allegedly occurred on September 4, 2012, inside a Hess convenience store at a gas station located at 1173 Jericho Turnpike, Commack, New York. The complaint, as amplified by the bill of particulars, alleges that plaintiff was injured after she entered the store and slipped and fell on a wet and slippery surface. Plaintiff alleges that defendants were negligent in failing to maintain the premises in a reasonably safe condition by permitting the floor to be "slippery and wet," in failing to inspect the store, in failing to warn plaintiff of the slippery condition and in failing to properly train its employees regarding safety procedures.

Defendant Speedway, LLC, now moves for summary judgment dismissing the complaint on the grounds that it did not create the alleged dangerous condition nor did it have notice of such condition. Speedway argues further that the "storm in progress" rule precludes liability for the allegedly dangerous condition. Defendant Karin, L.P., moves for summary judgment dismissing the complaint against it on the grounds that it is an out-of-possession landlord that did not owe plaintiff a duty of care. According to counsel for defendants, Hess Corporation owned the subject convenience store at the time of the subject incident, and Speedway purchased the company's retail business and assumed its liabilities.

In support of the motion, defendants submit copies of the pleadings; the bill of particulars; transcripts of the depositions of the parties deposition and of nonparty Orhan Bayram; an incident report; correspondence from Samantha Borisoff, a climatologist; records from the Northeast Regional Climate Center; and a DVD disk containing interior and exterior multi-camera surveillance video footage of the convenience store before, during and after the subject incident. At her deposition, plaintiff testified that the video footage was not sufficiently clear to depict the wetness of the floor or the slippery substance that she felt on it. Likewise, in opposition to the motion, plaintiff's counsel affirms that he also viewed the video footage and that it is not clear enough to determine "the condition of the floor and any wetness."

Plaintiff testified that on the date of the incident, she and her boyfriend drove to the gas station to use the ATM machine that was located inside of the convenience store. She testified that they arrived at the subject premises at approximately 2:00 p.m. It had rained earlier in the day and the weather was cloudy. She testified that she entered the store, took a step or two over a mat constructed of carpet and then slipped on the tile floor, which was "soaking wet." She testified that while she was on the ground, she observed a female employee in the store pick up a caution sign, which she had not seen until after she fell, and move it outside the store.

Plaintiff testified that she used the ATM machine and filled out an incident report at the request of a store employee. She was shown a copy of the incident report and testified that it contains her handwriting and signature. "Rainy" is handwritten in a box under "Weather Conditions." In the section of report entitled "Describe how the accident/incident occurred," plaintiff states, in the first person, that when she walked into the store, she passed the carpet and wiped her feet it. She did not see a "low sign of wet floor," and she "slipped and fell." At her deposition, plaintiff was shown photographs printed from the still-video surveillance recording footage and identified herself in one of them, inside the store at the entrance doors. In that photograph, a small yellow caution sign is seen resting on the floor at the foot of what appears to a tallish cold beverage case, a seemingly short distance in front of the figure plaintiff identified as herself Plaintiff testified that she is 5'11" and did not observe the sign before she slipped and fell.

Non-party Orhan Bayram testified at his deposition that he worked for Hess from 2004 until 2013, and that he was working in the subject store as a manager in September 2012. He testified that his responsibilities included managing employees, operating the cash register, cleaning the store and the like. Bayram testified that he was not aware of the subject incident and does not recall the events of the day, though he was shown a copy of the incident report and testified that it contained his handwriting. He was shown photographs of the store that depict a floor mat at the entrance doors and a yellow sign.

He testified that the yellow sign, which is approximately two feet by three feet, was used to warn patrons that the floor may be slippery and that it was utilized after the floors were mopped or when it was raining outside. He testified that he did not position the sign in any specific manner or area and that he did not receive any training or learn any rules regarding the sign's placement. He testified further that he did not instruct employees as to where the sign should be placed.

Bayram was asked several questions about the store, including the type of material that the floor tiles were constructed of, the characteristics of the entrance mat, and cleaning and inspection procedures. He testified that he did not maintain a schedule for cleaning, mopping or inspecting the store, but that he cleaned the store and the floors when they were dirty. Based upon pictures that he was shown, he guessed that the entrance mat was between seven and eight feet in length and its depth three and four feet, but he did not recall the type of material from which entrance mat was constructed. Bayram testified that he does not remember if he ever inspected or cleaned the mat, or if it was ever changed.

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, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

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 (*see* ***Knight v 177 West 26 Realty, LLC*** , NY Slip Op 04685, 173 AD3d 846 [2d Dept 2019]; ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***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]). Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (***Gallagher v St. Raymond's Roman Catholic Church***, 821 NY2d 554, 289 NYS2d 401 [1968]; ***Conneally v Diocese of Rockville Centre***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; ***Blatt v L'Pogee, Inc.***, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]), and have a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]).

An out-of-possession landlord or owner that relinquishes control over the premises generally will not be responsible for injuries occurring on its premises unless it has a duty imposed by statute or assumed by contract or arising from a course of conduct (***Crosby v Southport, LLC***, 169 AD3d 637, 94 NYS3d 109 [2d Dept 2019]; ***Casson v McConnell***, 148 AD3d 863, 49 NYS3d 711 [2d Dept 2017];

Mendoza v Manila Bar & Rest. Corp., 140 AD3d 934, 33 NYS3d 448 [2d Dept 2016]; ***Alnashmi v Certified Analytical Group, Inc.***, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]). Here, Karin, L.P., failed to establish prima facie that it was an out-of-possession landlord that had no contractual obligation to maintain the premises, as triable issues of fact have not been eliminated regarding the derivation of the alleged slippery substance that caused plaintiff to slip and fall. More importantly, defendant has not submitted a copy of its lease agreement to enable the court to make a determination regarding its obligations and duties with respect to the subject property.

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Mercedes v City of New York***, 107 AD3d 767, 968 NYS2d 519 [2d Dept 2013]; ***Dylan v CEJ Props., LLC***, 148 AD3d 1115, 50 NYS3d 483 [2d Dept 2017]; ***Ryan v Taconic Realty Assocs.***, 122 AD3d 708, 997 NYS2d 143[2d Dept 2014]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Chudinova v Kleyner***, 130 AD3d 859, 14 NYS3d 126 [2d Dept 2015]). To sustain its burden on the issue of lack of constructive notice defense in a case such as this, a defendant must offer some evidence as to when the area in question was last inspected relative to the accident (*see* ***Osbourne v 80-90 Maiden Lane Del, LLC***, 112 AD3d 898, 978 NYS2d 87 [2d Dept 2013]; ***Arzola v Boston Props. Ltd. Partnership***, 63 AD3d 655, 656, 880 NYS2d 352 [2d Dept 2009]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]).

Here, defendants failed to establish that they did not have constructive notice of the alleged dangerous condition, as Bayram's testimony merely refers to maintenance and clean-up procedures in a general fashion, and he fails to describe any particularized or specific inspection in the area of plaintiff's fall on the date of the accident (*see* ***Butts v SJF, LLC***, 171 AD3d 688, 97 NYS3d 219 [2d Dept 2019]). The surveillance video, even as interpreted by the defendants, shows that approximately twenty customers entered the small store from what defendants describe as a wet parking lot over the 45-minute period between the last recorded inspection of the entryway by a store employee and plaintiff's accident. No competent proof is submitted establishing that the subject area was in fact again inspected or cleaned during that period of time leading up to the plaintiff's accident (*see* ***Baptiste v Ditmas Park, LLC***, 171 AD3d 1001, 98 NYS3d 280 [2d Dept 2019]; ***Maria De Los Angeles Baez v Willow Wood Assoc., LP***, 159 AD3d 785 [2d Dept 2018]; ***Rogers v Bloomingdale's, Inc.***, 117 AD3d 933, 985 NYS2d 731[2d Dept 2014]).

Defendants also failed to establish prima facie that they did not create the slippery condition. While defendants were not required to cover the entire floor area with mats, or "to continuously mop up all moisture resulting from tracked-in rain" (***Negron v St. Patrick's Nursing Home***, 248 AD2d 687, 687, 671, NYS2d 275 [2d Dept 1998]), here, it has not been established that the alleged wet and slippery condition on the floor was created by tracked in rain water. In any event, defendants did not establish that they lacked actual or constructive notice of the condition and did not have the opportunity to undertake remedial action (***Yarosh v Oceana Holding Corp.***, 172 AD3d 1142, 101 NYS3d 72 [2d Dept 2019]).

Regarding defendants' argument that the storm in progress rule precludes liability, defendants failed to establish their prima facie entitlement to summary judgment, as no competent evidence is submitted to establish that there was an ongoing rain storm on the date of the incident or that they did not have an adequate amount of time after it ceased to take remedial measures (*see* ***Valentine v City of New York***, 57 NY2d 932, 457 NYS2d 240 [1982]; ***Casey-Bernstein v Leach & Powers, LLC***, 170 AD3d 651, 95 NYS3d 314 [2d Dept 2019]). The records of the Northeast Regional Climate Center submitted by defendants are not authenticated (*see* CPLR 4518), and the report by Samantha Borisoff is unsworn and therefore is not in admissible form.

Viewing the facts in the light most favorable to plaintiff, it is evident that defendants' submissions fail to eliminate triable issues of fact (***Valente v Lend Lease (US) Constr. LMB, Inc.***, 29 NY3d 1104, 60 NYS3d 107 [2017]; ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Among other things, the conflicting testimony regarding the weather conditions at the time of the incident prevent defendants from establishing their prima facie burden with respect to their attempted invocation of the the storm-in-progress rule (*see* ***Schumacher v Pucciarelli***, 161 AD3d 1205, 78 NYS3d 217 [2d Dept 2018]; ***Moore v Great Atl. & Pac. Tea Co., Inc.***, 117 AD3d 695, 985 NYS2d 605 [2d Dept 2014]).

It is well settled that summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1979]; ***Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP***, 164 AD3d 864, 82 NYS3d 127 [2d Dept 2018]). Here, defendants' proof does not warrant such drastic relief. "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" (***Gradwohl v Stop & Shop Supermarket Co., LLC***, 70AD3d634, 896 NYS 2d 85 [2d Dept 2010]). As defendants failed to establish as a matter of law that the premises was maintained in a reasonably safe condition, their motion for summary judgment is denied.

Dated: 9/19/2019
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**