Miller v Giaquinto Bros., LLC
2019 NY Slip Op 34358(U)
March 11, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 617492/2016
Judge: Joseph A. Santorelli
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SHORT FORM ORDER **ORIGINAL** INDEX No. 617492/2016
CAL No. ____________

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:
Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 1-23-19
SUBMIT DATE 2-28-19
Mot. Seq. # 01 - MG

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LORI MILLER,

Plaintiff,

- against -

GIAQUINTO BROTHERS, LLC,

Defendant.

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Upon the following papers numbered 1 to 57 read on this motion for summary judgment; Amended Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; ~~Notice of Cross Motion and supporting papers __~~; Answering Affidavits and supporting papers 18 - 42 ; Replying Affidavits and supporting papers 43 - 57 ; ~~Other __; (and after hearing counsel in support and opposed to the motion~~) it is,

Defendant, Giaquinto Brothers, LLC, moves for an order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiff's claims. The plaintiff opposes this application.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained on January 7, 2014, when she purportedly slipped and fell on black ice in the parking lot of the premises located at 303 Marcus Boulevard, Deer Park, New York. The premises was occupied at the time by Salesmaster Associates, the plaintiff's employer, and owned by Giaquinto Brothers, LLC, the defendant. The plaintiff claims that it had snowed 24 to 48 hours prior to the accident and she had walked for approximately 1.5 minutes before she slipped. She indicated that she did not see any ice before she fell but only saw it once she was on the ground since it was the same color as the blacktop. The defendant argues that under the lease the tenant was responsible for maintenance of the parking lot, including snow and ice removal. Defendant claims that it is an out-of-possession landlord/owner.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (***Olan v. Farrell Lines, Inc.***, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); ***Spearman v. Times***

Square Stores Corp., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, ***New York Civil Practice*** Sec. 3212.09)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v. Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v. Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR3212 [b]; ***Gilbert Frank Corp. v. Federal Insurance Co.,*** 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; ***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v. Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (***Robinson v. Strong Memorial Hospital,*** 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see* ***S.J. Capelin Associates v. Globe Mfg. Corp.,*** 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v. Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v. Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v. Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v. Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In ***Scott v Bergstol***, 11 AD3d 525, 525-526 [2d Dept 2004], the Court held that

> Generally, an out-of-possession owner or lessor is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions (see ***Vijayan v Bally's Total Fitness***, 289 A.D.2d 224, 733 N.Y.S.2d 703 [2001]; ***Berado v City of Mount Vernon***, 262 A.D.2d 513, 694 N.Y.S.2d 403 [1999]). Here, Bergstol established her entitlement to judgment as a matter of law by demonstrating that she was an out-of-possession landlord with no duty to remove snow and ice from the premises (see ***Jackson v United States Tennis Assn.***, 294 A.D.2d 470, 742 N.Y.S.2d 374 [2002]; ***Shrenkel v New York State Dormitory Auth.***, 266 A.D.2d 369, 698 N.Y.S.2d 299 [1999]; ***Carvano v Morgan***, 270 A.D.2d 222, 703 N.Y.S.2d 534 [2000]). In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact. The plaintiff's contention that the roof of the building was improperly designed, constructed, and

> maintained was purely speculative. Accordingly, the Supreme Court properly granted Bergstol's motion for summary judgment dismissing the complaint insofar as asserted against her.

In ***Yadegar v Intl. Food Mkt.***, 37 AD3d 595, 596-597 [2d Dept 2007], the Court held that

> Stein satisfied his burden on his motion for summary judgment dismissing the complaint insofar as asserted against him by demonstrating that he was an out-of-possession landlord who was not obligated to maintain or repair the parking lot (see ***Salgado v Ring***, 21 AD3d 362, 363, 798 NYS2d 920 [2005]; ***Knipfing v V & J, Inc.***, 8 AD3d 628, 629, 779 NYS2d 244 [2004]; ***Ahmad v City of New York***, 298 AD2d 473, 474, 748 NYS2d 777 [2002])... In opposition, the plaintiffs failed to raise a triable issue of fact. "Reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only when 'a specific statutory violation exists and there is a significant structural or design defect'" (***Lowe-Barrett v City of New York***, 28 AD3d 721, 722, 815 NYS2d 630 [2006], quoting ***Stark v Port Auth. of N.Y. & N.J.***, 224 AD2d 681, 682, 639 NYS2d 57 [1996]). Here, however, although Stein retained a right to re-enter the premises, the plaintiffs did not allege the violation of a statutory provision and presented no evidence demonstrating that the raised and broken asphalt in the parking lot constituted a significant structural or design defect (see ***Schwegler v City of Niagara Falls***, 21 AD3d 1268, 801 NYS2d 873 [2005]; ***Salgado v Ring***, *supra* 21 AD3d at 363 [2005]; ***Seney v Kee Assoc.***, 15 AD3d 383, 384-385, 790 NYS2d 170 [2005]; ***Sangiorgio v Ace Towing & Recovery***, 13 AD3d 433, 787 NYS2d 51 [2004]). Accordingly, Stein's cross motion should have been granted.

Similarly, in ***Lindquist v C & C Landscape Contrs., Inc.***, 38 AD3d 616, 617 [2d Dept 2007], the defendant argued that under the provisions of the lease it was an out-of-possession landlord not responsible for repairs or maintenance, and the Court held that

> The provisions of the lease were sufficient to establish GSL's prima facie entitlement to judgment as a matter of law, because it established that GSL was an out-of-possession landlord with no duty to remove snow or ice (see ***Scott v Bergstol***, *supra* at 526). In opposition, the plaintiff argued that, because GSL had a right under the lease to re-enter for the purpose of inspection and repair, it retained sufficient control to be subject to liability for Lindquist's injuries. "The reservation of the right to enter the premises for inspection and repair may constitute sufficient control to permit a finding that the owner or lessor had constructive notice of a defective condition provided a specific statutory violation exists and there is a significant structural or design defect" (***Thompson v Port Auth. of N.Y. & N.J.***, 305 AD2d 581, 582, 761

> NYS2d 75 [2003]). The plaintiff here, however, failed to identify any specific statutory violation and failed to allege that her injury was caused by a significant structural or design defect (see ***Thompson v Port Auth. of N.Y. & N.J.***, *supra*). Consequently, the plaintiff failed to raise a triable issue of fact in opposition to GSL's prima facie showing, and the Supreme Court properly granted GSL's motion.

Defendant argues that it was not responsible for the maintenance of the parking lot where the plaintiff slipped, specifically it was not responsible for the removal of snow, ice or debris in the parking lot. The defendant purchased the premises in November 2007. Salesmaster Associates had been a tenant at the premises since 1996. The defendant assumed the prior lease and that lease has been extended multiple times. The original lease contained a provision that required Salesmaster to keep the parking lot clear of debris, snow and ice. The defendant indicated that no one from Giaquinto went to the property with any regularity but that they would go if called to look at a problem or approve a requested interior alteration.

In opposition the plaintiff claims that the copy of the transcript of her examination before trial that the defendant attached to its moving papers was unsigned and therefore not admissible. The plaintiff also argues that the original lease can not be authenticated since no member of Giaquinto Brothers signed the original lease or was a party to it. Finally, the plaintiff argues that there were unlevel areas of the parking lot that allowed water to pool and freeze into ice.

In reply, the defendant attaches a copy of the signed transcript for the plaintiff's examination before trial which is dated December 4, 2018, over a month before the defendant filed this motion. The defendant claims that there is no breach of contract cause of action related to the lease that would require its authentification since Salesmaster is not alleging that it was not responsible for clearing snow and ice from the parking lot. Finally, the defendant claims that the plaintiff's own affidavit and testimony show that she was moving carefully through the parking lot due to the accumulation of snow and ice after the storm and her inability to see the black ice before she slipped does not "sync" with her argument that the unlevel parking lot caused pooling of water to freeze and become a dangerous condition.

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to her by the defendant (***Pulka v. Edelman***, 40 NY2d 781, 390 NYS2d 393 (1976); ***Palsgraf v. LIRR Co.***, 248 NY 339 (1928); Prosser, "***Torts***" 4th Edition §30, 41-42 and 53)). She must further demonstrate that defendant's acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (***Sheehan v. City of New York***, 40 NY2d 496, 387 NYS2d 92 (1976)).

In support of its motion, defendant established, prima facie, that it was not responsible for the maintenance of the parking lot at issue. Viewing the evidence in the light most favorable to the plaintiff (***Robinson v. Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]), it is the conclusion of this Court that she failed to raise a triable issue of fact as to whether the defendant was responsible for the maintenance of the parking lot or the area where the plaintiff allegedly fell.

The Court concludes that the defendant has made a prima facie showing of its entitlement to judgment as a matter of law. As the plaintiff has failed to raise a triable issue of fact, summary judgment is warranted and the complaint is hereby dismissed (see ***Borra v. Walden Books, Inc.***, 298 AD2d 542, 748 NYS2d 670 [2d Dept 2002]).

The foregoing constitutes the decision and Order of this Court.

Dated: March 11, 2019

HON. JOSEPH A. SANTORELLI
J.S.C.