Miller v 366 Pelham Food Corp.
2019 NY Slip Op 34547(U)
January 10, 2019
Supreme Court, Westchester County
Docket Number: Index No. 68703/2016
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MARSHA MILLER,

Plaintiff,

-against-

366 PELHAM FOOD CORP., BROAD AVENUE REALTY COMPANY, INC., RETAIL GROCERS GROUP, INC. and CASSARA ENTERPRISE, II LLC,

Defendants.

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DECISION & ORDER
Index No. 68703/2016
Sequence Nos. 4,5,6

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 57 through 138, were read in connection with summary judgment motions of Cassara Enterprise, II,LLC ("Cassara") (Seq 4); Broad Avenue Realty Co. Inc. ("Broad Avenue") (Seq 5); 366 Pelham Food Corp. ("Pelham Food"), and Retail Grocers Group, Inc (Seq 6):

In this personal injury action, plaintiff alleges that on January 8, 2015, she tripped on a cracked and uneven area of blacktop and/or a loose rock or concrete at or near the parking lot entrance of Fine Fare Supermarket at 366 Pelham Road in New Rochelle, causing her to sustain personal injuries.

Based upon the foregoing, the motions are decided as follows:

It is well-settled that a 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp. 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte 37 AD3d 684, 686-687 [2d Dept

2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol 128 AD2d 492 [2d Dept 1987]). A party opposing a summary judgment motion may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly 254 AD2d 463 [2d Dept 1998]). In deciding a summary judgment motion, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp. 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist. 205 AD2d 652, 661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (68 NY2d 320, 32). CPLR 3212(b) specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact". The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]).

The elements of common law negligence, are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). A

threshold question is whether the alleged tortfeasor owed a duty of care to the injured party (Darby v Compagnie Natl. Air France, 96 NY2d 343 [2001]). The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]). 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 (Heck v Regula, 123 AD3d 665, 666, [2d Dept 2014]).This holds true in a scenario with an icy condition that allegedly caused the plaintiff to fall (D'Esposito v Manetto Hill Auto Serv., Inc., 150 AD3d 817, 817–18, [2d Dept 2017]). To meet its initial 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 (Heck v Regula, 123 AD3d 665, 666 [2d Dept 2014]).

The following persons gave deposition testimony in this matter:

Plaintiff testified that January 8, 2015 was a clear day, and it was not snowing, and no snow was on the ground in the subject area. She claims to have fallen on cracked and loose pieces of concrete or rock. She was looking straight ahead but did not see anything on the ground before she fell.

On behalf of Retail Grocers, Patrick Doody testified that Retail Grocers is a subsidiary of General Trading Company. Retail Grocers merely supplied advertising sales and marketing tools to 366 Pelham, and that it had no involvement with the parking lot or sidewalk at 366 Pelham.

Pedro Riezgo testified on behalf of 366 Pelham. The grocery store was the only business at the subject location at the time of the accident and he was the store manager in January 2015. He

testified that as the manager he would walk the lot on a weekly basis, and make sure that the parking lot was clean and free of debris. During the course of his weekly inspection he would inspect the area where plaintiff claims to have fallen. He never saw any defect in the area where plaintiff allegedly fell, and other employees were in the area daily, and none reported any issues, and no one ever complained about the area where plaintiff fell.

Jefferson D. Meighan testified on behalf of Broad Avenue Realty Company, Inc ("Broad Avenue"), that he is an officer, president and shareholder of Broad Avenue, and Broad Avenue owns the property known as 366 Pelham. Broad Avenue had a lease with Uncle Giuseppe of New Rochelle, Inc. for that property. Uncle Giuseppe was a tenant that had control over the property which consisted of a supermarket and parking lot. Uncle Giuseppe was responsible for the maintenance of the parking lot, including repairs. Meighan testified that he had no recollection of seeing any cracks in the parking lot, and was not aware of any complaints to the parking lot or sidewalk.

Charles Cassara was deposed on behalf of Cassara. He attested that he has a Westchester County license for home improvements, as Cassara is his company. He did work for 366 Pelham, but never performed any repair to the sidewalk or parking lot at 366 Pelham Road in or around January 2015.

William Prezioso is an investigator hired by 366 Pelham and Retail Grocers. His affidavit reflects that upon his visit on May 25, 2018, and again on August 22, 2018, to 366 Pelham, the "crack" is completely flat and barely separated. There was no loose rock or gravel in between the crack and the crack was readily visible and apparent to anyone walking in this area.

In opposition to the summary judgment motions, plaintiff offers the Engineer's report of Harold Krongelb, P.E. Notably, the expert inspected the blacktop parking lot entrance on November 12, 2018. (The subject accident occurred on January 8, 2015). The expert measures that the defect is at least 1/4 inch deep, and disputes defendants contentions' and the affidavit of Mr. Prezioso that the defect was physically insignificant. The physical conditions found during Mr.Krongelb's site found that it was approximately 1/4 inch deep between approximately 2 inches wide and approximately 12 inches long. The trap is inherently dangerous because a pedestrian cannot identify and avoid the hazard with sufficient time and/or space to avoid the incident. He continues that an uneven blacktop surface causes a pedestrian's foot to pivot forward or backward while stepping down. This pushes the pedestrian forward or backward and causes a pedestrian to fall. The engineer concludes that it was reasonably foreseeable that a pedestrian will trip and fall because of this concealed hazard.

Turning to Cassara's motion, Cassara argues that the Bill of Particulars lists plaintiff's fall as occurring on the sidewalk, not in the parking lot of 366 Pelham; plaintiff offers no photos of the alleged defect, and as such, how it looked or where it was located is speculative; plaintiff alleges she tripped because she fell on a rock; plaintiff offers no evidence of the size of the rock, how it got there or how long it was there; the fall was unwitnessed and unreported; even if plaintiff tripped on a rock, same is de minimus; Cassara's contract was for snow removal; the case does not involve snow or ice and further there was snow or ice involved; and Cassara first plowed the parking lot days after plaintiff's fall.

Moreover, Cassara contends that plaintiff has failed to correctly identify the area of her fall. In any event, Cassara's only job relating to its services to 366 Pelham was to trim the bushes when

requested by 366 Pelham or plow snow. Mr. Cassara testified that he never plowed that parking lot until after plaintiff's fall. He also had no responsibility/duties to pave and/or repair the parking lot.

Significantly, a party who enters into a contract to render services may have assumed a duty of care and thus be potentially liable in tort to third persons in the following circumstances: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (Espinal, supra, 98 NY2d at 140) (collectively, "the Espinal Exceptions"). Thus, a limited contractual undertaking to provide services does not make the contractor liable in tort for personal injuries of third parties (Lubell v Stonegate at Ardsley Home Owners Ass'n, Inc., 79 AD3d 1102, 1103 [2d Dept 2010]). In other words, a contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (Romano v Village of Mamaroneck, 100 AD3d 854 [2d Dept 2012]). Before an injured party may recover as a third-party beneficiary for failure to perform a duty imposed by contract, it must clearly appear from the provisions of the contract that the parties thereto intended to confer a direct benefit on the alleged third-party beneficiary to protect him or her from physical injury (Ramirez v Genovese, 117 AD3d 930, 931 [2d Dept 2014]).

Here, the evidence shows that defendant Cassara is a snow plow operator, and snow was not involved with plaintiff's accident. Plaintiff cannot demonstrate that Cassara launched an instrument of harm as it did not plow the lot until after plaintiff's fall, or perform other work in the subject area. In opposition, plaintiff failed to raise a triable issue of fact as to defendant Cassara. Accordingly, plaintiff's complaint as against Cassara is dismissed, as well as any and all cross-claims.

In the Retail Grocer's motion (Seq 6), it showed prima facie that it had nothing to do with the maintenance of the subject property, and their only involvement with the subject property was to supply advertising and sales and marketing tools to 366 Pelham. And as plaintiff has not raised a triable issue of fact to rebut this, summary judgment is granted to Retail Grocer.

As to 366 Pelham's motion (also Seq 6), it claims that it maintained the subject property in a reasonably safe condition, and had no notice of any dangerous or defective condition where plaintiff allegedly fell. Further, any defect in the area where plaintiff fell was too trivial to be actionable. It also adopts the arguments made by Casarra in its motion for summary judgment.

A property owner "may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (Sturm v Myrtle Catalpa, LLC, 149 AD3d 1130, 1131 [2d. Dept. 2017]). " 'In determining whether a defect is trivial, the court must examine all of the facts presented, 'including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury' (Cobham v 330 W. 34th SPE, LLC, 164 AD3d 644, 645 [2d. Dept. 2018]). There is no "minimal dimension test or per se rule" that the condition must be of a certain height or depth to be actionable (Fasone v Northside Properties Mgmt. Corp., 149 AD3d 905, 906 [2d Dept 2017]).

Here, many of the photographs were taken years after the accident, and there is some question as to whether they fairly and accurately represent the accident site to be used to establish that a defect is trivial and not actionable (Fasone v Northside Properties Mgmt. Corp., 149 AD3d 905, 906 [2d Dept 2017]). Also, 366 Pelham failed to demonstrate, as a matter of law, that they lacked constructive notice of the alleged defect. In light of the defendants' failure to meet its prima facie

burden, it is unnecessary to determine whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 324).

In conclusion, fact issues as to whether the alleged defect in the parking lot was trivial precluded summary judgment. At this stage, evidence submitted by 366 Pelham was insufficient to establish that defect was trivial as a matter of law and thus not actionable. Upon reviewing photographs of the "crack"and considering all other relevant factors, including plaintiff's deposition testimony, the court concludes that 366 Pelham failed to establish, prima facie, that the alleged defect was not actionable as it was trivial and did not possess the characteristics of a trap or nuisance.

As for Broad Avenue's motion for summary judgment (Seq 5), Broad Avenue is the owner of the real property located at 366 Pelham Road. The premises is improved by a commercial building and parking lot that has been used as a Super Market for more than 20 years. Broad Avenue does not operate the premises, but is an out of possession land owner. Pursuant to a Master Lease Agreement the tenant had complete control of the subject property, and responsible for the repair and the maintenance of the parking lot (*see Master Lease, Ex D of Broad Avenue Motion)*.

An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct" (Washington-Fraser v. Indus. Home for the Blind, 164 AD3d 543, 544 [2d Dept 2018]).

Based upon the record, including the Master Lease Agreement, Broad Avenue established its entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord that had no duty to maintain or repair the parking lot (Valenti v 400 Carlls Path Realty

Corp., 52 AD3d 696 [2d Dept 2008]). In opposition, plaintiff failed to raise a triable issue of fact to preclude summary judgment. Accordingly, summary judgment is awarded to Broad Avenue.

All matters not specifically addressed are denied. This constitutes the decision and order of the court. Therefore, it is hereby

ORDERED, that Cassara Enterprise II, LLC's motion for summary judgment (Seq 4) dismissing plaintiff's complaint and all cross claims against it is **granted**; and it is further

ORDERED, that the branch of Seq 6 motion regarding 366 Pelham Food Corp. motion for summary judgment is **denied** (Seq 6); and Retail Grocers Group, Inc. motion for summary judgment dismissing plaintiff's complaints and all cross claims as against it is **granted**; and it is further

ORDERED, that Broad Avenue Realty Company, Inc., motion for summary judgment (Seq 5) dismissing plaintiff's complaint and all cross claims against is **granted**; and it is further

ORDERED, that the remaining parties are directed to appear on February 26, **2019**, at 9:15 A.M., in Courtroom 1600, the Settlement Conference Part, Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

The Clerk shall mark his records accordingly.

Dated: January 10 , 2019
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF