

Lindsey v Remica Prop. Group Corp.

2019 NY Slip Op 34596(U)

April 15, 2019

Supreme Court, Nassau County

Docket Number: Index No. 603834/17

Judge: Anthony L. Parga

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X PART 4
DWAYNE LINDSEY,

Plaintiff,

INDEX NO. 603834/17

-against-

MOTION DATE: 2/25/19
SEQUENCE NO. 001

REMICA PROPERTY GROUP CORP.
and BAEK QUALITY GAS, INC.,

Defendants.

-----X	
Notice of Motion, Affs. & Exs.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Reply Affirmation.....	<u>3</u>

Upon the foregoing papers, the motion brought defendants, Remica Property Group, Corp. (hereinafter as "Remica") and Baek Quality Gas, Inc. (hereinafter as "Baek") for an order, pursuant to CPLR §3212, granting summary judgment dismissing the plaintiff's complaint against them, is determined as follows.

The within action seeks damages for personal injuries allegedly sustained by plaintiff on October 23, 2016 at the BP gas station located at 2120-1 Hillside Avenue, Queens, New York. It is alleged that plaintiff was caused to trip and fall due to defective conditions in the parking area of the BP Gas Station, that was owned and operated by the defendants.

In support of their motion defendants submit, *inter alia*, the pleadings in the action, the deposition transcripts of all parties and a non-party witness and the lease agreements for the premises.

Defendants assert they are entitled to summary judgment dismissing the plaintiff's action against based on the grounds that: Remica the owner of the subject premises was an out of possession landlord and that the tenant, Baek was obligated and responsible to maintain and

repair the premises; that there is no evidence as to what caused the plaintiff's accident that the alleged defect was trivial and did not possess the characteristics of a trap or nuisance.

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 demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

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. (*See, Eilers v. Howitz Family Ltd. Partnership*, 36 AD2d 849 [2d Dept. 2007]; *see also, Carlo v. Town of East Fishkill*, 19 AD3d 442 [2d Dept. 2005]; *Horn v. Town of Clarkson*, 46 AD3d 621 [2d Dept. 2007]). Where none is present, a party cannot be held liable for injuries caused by the allegedly dangerous condition. (*See, Dague v. 1818 New York Management Corp.*, 301 AD2d 561 [2d Dept. 2003]; *see also, Flynn v. Hanken*, 17 AD3d 523 (2d Dept. 2005); *Horvath v. Rose*, 261 AD2d 438 [2d Dept. 1999]).

"An out-of-possession landlord generally will not be responsible for injuries occurring on its premises absent a duty imposed on the landlord by statute or regulation, by contract, or by a course of conduct" (*Brown v. Hampton Bay Fish Co.*, 119 AD3d 883 [2d Dept. 2014]). An out of possession landlord is not liable for injuries occurring on the premises unless it has retained control of the premises or is contractually obligated to perform maintenance and repairs. (*Brewster v. Five Towns Health Care*, 59 AD3d 483 [2d Dept. 2009]).

Based on the parties deposition transcripts, the lease agreements, defendant Remica has established that it was an out of possession landlord of the subject premises, and that tenant Baek performed and was responsible for all maintenance and repairs of the seal coating, asphalt, concrete and curbing under \$5,000 .

As to the defendants contention that the defect at issue is too trivial to be actionable. "Generally, the issue of whether a dangerous or defective condition exists depends on the circumstances of each case, and is properly a question of fact for the jury," "however, a property owner may not be liable for trivial defects not constituting a trap or a nuisance." (*Maxon v.*

Brentwood School Dist., 31 AD3d 506 [2d Dept. 2006]; *Trincere v. County of Suffolk*, 90 NY2d 976 [1997]; *Hagood v. City of New York*, 13 AD3d 413 [2d Dept. 2004]). There is no minimum dimension test or per se rule that a defect must be of a certain size, depth or height to be actionable, instead 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.” (*Portanova v. Kantlis*, 39 AD3d 731 [2d Dept. 2007]); *Trincere v. County of Suffolk*, supra; *Bolloli v. Waldbaum, Inc.*, 71 AD3d 618 [2d Dept. 2010]).

Based upon the evidence submitted by the defendants, which included photographs taken on the day of the accident and also within a short time thereafter, the testimony of the plaintiff and non-party witness Debra Miller, the defendants have failed to establish a prima facie showing that the defect is too trivial to be actionable, and did not constitute a trap, snare, or nuisance. (*Portanova v. Kantlis*, supra; *Mishan v. Tobias*, 32 AD3d 1000 [2d Dept. 2006]). The photographs and testimony raised the existence of a factual question as to whether the alleged defect was trivial (see *Maxon v. Brentwood School Dist.*, 31 AD3d 506 [2d Dept. 2006], (holding that “considering the dimensions and appearance of the subject defect, and taking into account its location and the circumstances of the accident, [the court] cannot conclude, as a matter of law, that it was so trivial in nature that it could not give rise to liability on the part of the defendant)). Whether the condition which allegedly caused plaintiff’s fall is trivial is a question for the jury or trier of fact in this matter.

The defendants have also failed to establish that there was no evidence of the cause of the accident. Plaintiff testified at his deposition that he was at the subject premises and was walking across the parking area from the booth, where he purchased a soda, and was heading to his car, parked on the adjacent roadway, when he felt his right ankle roll causing him to fall to the ground. The plaintiff further testified his ankle rolled because he stepped into a pothole in the pavement on the gas station premises and described the location of his fall and also identified the hole in the asphalt and missing concrete adjacent to the grate. The non-party witness Debra Miller, who was present at the time of the accident, also described the hole and identified the specific location and hole using the photographs that were taken on the day of the accident and shortly thereafter.

Accordingly, it is hereby

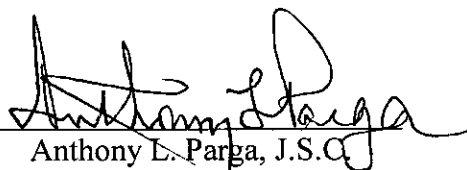
ORDERED, that the branches of the motion for summary judgment dismissing the plaintiff's complaint against the defendants on the grounds that there was no evidence of the cause of the accident and that the alleged defect was trivial, is denied. It is further

ORDERED, that the branch of the motion for summary judgment dismissing the plaintiff's complaint against defendant, Remica Property Group, Inc, as an out of possession landlord, is granted and the plaintiff's complaint is dismissed only as against defendant, Remica Property Group, Inc..

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

This does not conclude this action.

Dated: April 15, 2019



Anthony L. Parga, J.S.C.

ENTERED

APR 18 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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