Pena v Pep Boys- Manny, Moe & Jack of Delaware, Inc.
2020 NY Slip Op 31383(U)
April 25, 2020
Supreme Court, Kings County
Docket Number: 500404/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 25th day of April, 2020.

PRESENT:

CARL J. LANDICINO, J.S.C.

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HEROFILO PENA,

Plaintiff,

Index No.: 500404/2018

DECISION AND ORDER

-against-

PEP BOYS- MANNY, MOE & JACK OF DELAWARE, INC.,

Defendant.

Motion Sequence #1

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2
Opposing Affidavits (Affirmations)	3,
Reply Affidavits (Affirmations)	
Memorandum of Law	4, 5,

JSC

After a review of the papers and oral argument the Court finds as follows:

This lawsuit arises out of an alleged accident which occurred on December 8, 2016. The Plaintiff, Herofilo Pena (hereinafter "the Plaintiff") alleges in his Complaint that on that day he suffered personal injuries after a metal gate fell on his foot at a store owned by Defendant Pep Boys Manny, Moe & Jack of Delaware, Inc. (hereinafter "the Defendant"), located at 4th Avenue and 3rd Street in Brooklyn, N.Y.

The Defendant now moves for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Complaint of the Plaintiff. The Defendant contends that summary judgment should be granted as it did not create the condition at issue, nor did it have actual or constructive knowledge of the alleged condition at issue. Specifically, the Defendant contends that the testimony of Abdul Azim, who was the Store Manager at the time of the alleged incident, and the affidavit of Francisco Lorenzo, the Maintenance and Environmental Technician of Defendant, provides sufficient evidence for the Defendant to meet its *prima facie* burden. The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that the Defendant has failed to show when the gate at issue was inspected prior to the alleged incident.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

In general, "[t]o demonstrate prima facie entitlement to judgment as a matter of law in a premises liability case, a defendant must establish that it did not create the condition that allegedly caused the fall or have actual or constructive notice of that condition." *Gauzza v. GBR Two Crosfield Ave. Liab. Co.*, 133 A.D.3d 710, 710–11, 20 N.Y.S.3d 147, 148 [2nd Dept 2015]. "A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected." *Rubin v. Cryder House*, 39 A.D.3d 840, 840, 834 N.Y.S.2d 316, 317 [2nd Dept 2007]; *see also Penn v. Fleet Bank*, 12 A.D.3d 584, 785 N.Y.S.2d 107 [2nd Dept 2004].

Turning to the merits of the instant motion, the Court finds that the Defendant has provided sufficient evidence to meet its *prima facie* burden. In support of its application, the Defendant relies primarily on the Deposition of Abdool Azim and an Affidavit from Francisco Lorenzo. At the time of the alleged incident, Abdool Azim was purportedly employed by the Defendant and was working at the location at issue. In his depostion he testified that he would "check that gate on a regular basis." (See Defendant's Motion, Exhibit H, Page 35) Mr. Azim also testified that "I periodically check that area, because sometimes people go and sleep in the tire room." (See Defendant's Motion, Exhibit H, Page 41) When asked how often he inspected the area where the gate was located, he stated "[t]wo to three times a day." (See Defendant's Motion, Exhibit H, Page 42) When asked if this was every day, he stated "[e]very day." (See Defendant's Motion, Exhibit H, Page 41). Francisco Lorenzo was also employed by the Defendant at the time of the alleged incident. In his affidavit he states that he "personally used the gate at issue to access the tires storage room on a daily basis which would have included December 8, 2016." (See Defendant's Motion, Exhibit J, Paragraph 6). Mr. Lorenzo then states that "I did not know of any problems with the gate on December 8, 2016 nor on any days and weeks immediately proceeding this date." (See Defendant's Motion, Exhibit J, Paragraph 6). In the instant proceeding, the Defendant established its *prima facie* burden by providing testimony that the area, at which the gate was located, had been inspected prior to the alleged incident and that the Defendant did not have actual or constructive notice of the defective gate at issue. *See Stile v. Jen Marine Dev., LLC*, 69 A.D.3d 707, 707, 891 N.Y.S.2d 667, 668 [2nd Dept 2010]; *Dennehy-Murphy v. Nor-Topia Serv. Ctr., Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512, 513 [2nd Dept 2009].

In opposition, the Plaintiff has failed to raise a material issue of fact that would prevent this Court from granting summary judgment. Mere speculation regarding a defective condition "is insufficient to defeat the defendants' entitlement to summary judgment." *Dennehy-Murphy v. Nor-Topia Serv. Ctr., Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512, 513 [2nd Dept 2009]; *see also Leary v. Leisure Glen Home Owners Ass'n, Inc.*, 82 A.D.3d 1169, 1170, 920 N.Y.S.2d 193, 195 [2nd Dept, 2011]. Moreover,

the Plaintiff's theory of recovery based on the doctrine of *res ipsa loquitor* is unsupported. There is no indication that the Defendant had exclusive control of the outdoor gate at issue. See *Duri v. The City of New York*, 95 A.D.3d 1273, 944 N.Y.S. 2d 755 [2nd Dept 2012] Accordingly, the Defendant's motion is granted and the complaint is dismissed.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant's motion (motion sequence #1) is granted. The complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.