

Ackereizen v Stop & Shop Supermarket Co., LLC

2020 NY Slip Op 32577(U)

May 14, 2020

Supreme Court, Nassau County

Docket Number: 606242/17

Judge: Roy S. Mahon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

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MARK ACKEREIZEN,

Plaintiff(s)

-against-

THE STOP & SHOP SUPERMARKET COMPANY, LLC AND HEMPSTEAD
TURNPIKE, LLC,

Defendant(s)

-----X

THE STOP & SHOP SUPERMARKET COMPANY, LLC

Third-Party Plaintiff,

-against-

S & S LEVITTOWN, LLC,

Third-Party Defendants.

-----X

The foregoing papers are submitted on Motion (Sequence 1) and Cross Motion (Sequence 2):

Notice of Motion (Sequence 1)X

Notice of Cross Motion (Sequence 2)X

Affidavit in OppositionX X

Reply AffirmationX X

Motion by defendant/third party plaintiff The Stop & Shop Supermarket LLC ("Stop & Shop") for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's complaint and/or in the alternative having third party defendant S & S Levittown ("S & S") indemnify and assume its defense is granted as to the former relief. Cross-motion by defendant Hempstead Turnpike LLC ("Hempstead") and third party defendant S & S for an order pursuant to CPLR 3212 dismissing plaintiff's complaint and

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any and all cross-claims against them; and granting Hempstead and S & S summary judgment on their cross-claims against defendant/third party plaintiff Stop & Shop for contractual indemnity, common-law indemnity and contribution is granted to the extent hereinafter provided.

This is an action to recover damages in a slip and fall accident that occurred on December 17, 2015 at approximately 8:45 a.m. at the Stop & Shop located at 3750 Hempstead Turnpike, Levittown, New York.

In his Verified Bill of Particulars, dated October 31, 2017, plaintiff initially claimed to have tripped and fallen on the entrance ramp to the Levittown Stop & Shop supermarket (see exhibit E of Stop & Shop’s moving papers). He alleged that his accident occurred “directly in front of the entrance to the premises”. (id.). As part of his response to defendant’s combined demand, dated October 31, 2017, plaintiff provided six (6) photographs (see exhibit F of Stop & Shop’s moving papers). These photographs do not depict the area where plaintiff testified he fell during his sworn deposition testimony. Instead, they depict the eastern entrance ramp to the Stop & Shop supermarket as described in the Stop & Shop incident report and plaintiff’s verified Bill of Particulars.

Further, in his Verified Bill of Particulars, plaintiff states “The dangerous and defective condition was found entering the Stop & Shop at 3750 Hempstead Tpk., Levittown, NY 11756. Plaintiff was walking towards the entrance when he tripped and fell over the raised sidewalk threshold to the side. The sidewalk was raised but not painted so plaintiff could not see it (see exhibit E of Stop & Shop’s moving papers at ¶19).

At his examination before trial, plaintiff claimed for the first time that he was stepping up onto the curb area approximately 15 feet west of the left/eastern entrance ramp when he was caused to slip and fall on ice.

Plaintiff thereafter served an Amended Verified Bill of Particulars, dated September 12, 2018 alleging that defendants were negligent in the “ownership, operation, maintenance, supervision, and control of the premises” and “causing, allowing and permitting the pavement of the vicinity, walkway, curb, parking lot and/or sidewalk to be and remain in an icy, snowy, slippery, hazardous and dangerous condition....” (see exhibit G of Stop & Shop’s moving papers).

On January 18, 2019, plaintiff served a second Amended Verified Bill of Particulars, alleging that defendants were negligent in “carelessly, recklessly and negligently allowing and permitting defective roof draining and allowing water to pool on the entrance ramp and/or sidewalk area”. (see exhibit H of Stop & Shop’s moving papers).

Although plaintiff pleads in his multiple Verified Bills of Particulars multiple locations where he fell and multiple conditions that caused him to fall, plaintiff testified under oath that he slipped on an allegedly icy curb approximately fifteen (15) feet west of the eastern entrance ramp of the Stop & Shop supermarket located at 3750 Hempstead Turnpike, Levittown, New York

Stop & Shop seeks summary judgment dismissing the plaintiff’s complaint on the grounds that (i) plaintiff, who slipped and fell on either a wet entrance ramp or a wet curb/sidewalk while entering the store, cannot establish the existence of a hazardous or dangerous condition; (ii) that in the unlikely event that the court were to find a material issue of fact as to whether a hazardous or dangerous condition existed, that Stop & Shop had no notice, either actual or constructive, of any alleged

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hazardous or dangerous condition; (iii), that the plaintiff, through his own incautious actions, was the sole proximate cause of this accident; and (iv) that the third party defendant S & S owing Stop & Shop duty of defense and indemnification as the plaintiff's accident occurred in an area which landlord/operator is required to maintain and for which it agrees to defend and indemnify defendant and third party plaintiff Stop & Shop under the terms of the controlling lease documents.

In support thereof, Stop & Shop relies upon, inter alia, the pleadings; the Bill and two Amended Bills of Particular; the deposition testimony of plaintiff (exhibit H); the deposition testimony and affidavit of Guy Rugolo, an Assistant Manager at Stop & Shop (exhibits K & L); various photographs; Accuweather Certified Weather Records from 12/10/15- 12/17/15 (see exhibit N); Operation and Easement Agreement between Dayton Hudson Corporation and Starwood Ceruzzi Bethpage, LLC (exhibit O); Memorandum of Lease between Starwood Ceruzzi Bethpage, LLC (landlord") and Mayfair Supermarkets, Inc. (tenants") (exhibit P); First Amendment to Operation and Easement Agreement (exhibit Q); Assignment and Assumption Agreement (exhibit R); and deposition testimony of Sergio Filho, Director of Property Management for Ceruzzi (exhibit S).

On a motion for summary judgment, "the movant bears the heavy burden of establishing 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" (Deleon v. New York City Sanitation Dept., 25 NY3d 1102 [2015], quoting Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). If the moving party meets this burden, the burden then shifts to the non-moving party to "establish the existence of material issues of fact which require a trial of the action" (Vega v. Restani Construction Corp., 18 NY3d 499, 503 [2012]).

Where the moving party fail to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (Lee v. Second Ave. Vil. Partners, 100 AD3d 601 [2d Dept], citing Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 [1985]). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (Giraldo v. Twins Ambulette Serv., Inc., 96 AD3d (903 [2d Dept. 2012]). Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)' "(Ruiz v Griffin, 71 AD3d 1112, 1115 [2d Dept 2010], quoting Lopez v. Beltre, 59 AD3d 683, 685 [2d Dept 2009]).

"A landowner has a duty to maintain his or her premises in a reasonably safe manner" Saporito-Elliot v. United Skates of Am., Inc., 180 AD3d 830 [2d Dept 2020] (see Basso v. Miller, 40 NY2d 233 [1976]) it must exist for a sufficient length of time prior to the accident to permit defendant's employees to remedy it" (Gordon v. American Museum of National Hist., 67 NY2d 836, 837 [1986]; Crawford v. AMF Bowling Ctrs., Inc., 18 AD3d 798 [2d Dept 2005]).

On this record, Stop & Shop met its initial burden that it did not create the alleged hazardous condition or have actual or constructive of its existence for a sufficient length of time to discover and remedy it (see Gordon v. American Museum of Natural History, supra at 837 [1986]; see Valetin v. Shoprite of Chester, 105 AD3d 1036 [2d Dept 2013]).

"[A] 'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall" (Pracquadro v. Recine Realty Corp., 84 NY3d 967 [1994]; see Solazzo v. New York City Tr. Auth., 6 NY3d 734 [2005]).

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In opposition, plaintiff failed to raise an issue of fact. Plaintiff is unable to identify the exact cause of his fall without engaging in speculation (Ash v. City of New York, 109 AD3d 854 [2d Dept 2013]). Plaintiff offers various locations and conditions regarding the cause of his fall.

In view of the foregoing, Stop & Shop's motion is granted to the extent that the complaint is hereby dismissed. The cross-motion by Hempstead and S & S is granted to the extent that plaintiff's complaint and all cross-claims against them are dismissed. Since the negligence claims against Stop & Shop, Hempstead and S & S have been dismissed, the remaining items of relief are denied (see generally Hedges v. East River Plaza, LLC, 58 Misc3d 1211 (A) [N.Y. Sup. 2019]).

All matters not specifically addressed are denied.

This constitutes the order and judgment of this court.

Dated: May 14, 2020

/s/ _____

Hon. Roy S. Mahon
Supreme Court Justice

ENTERED

May 18 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE