Shatku v EFG & P, LLC
2020 NY Slip Op 32864(U)
July 23, 2020
Supreme Court, Richmond County
Docket Number: 151107/2017
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

_____x **IAS PART 6**

ORDER

GEZIM SHATKU,

Plaintiffs,

- against – Index Number: 151107/2017

Hon. Justice
Judith N. McMahon

EFG & P, LLC AND BARNES AND NOBLE BOOKSELLERS, INC.,

Defendants.

_____x

Defendants', EFG & P, LLC and Barnes & Noble, Inc., motion (002) for summary judgment is granted and the case is dismissed. Plaintiff did not oppose the motion of Defendant EFG & P, LLC, so that portion of Defendants' motion is granted without opposition.

This action arises out of allegations that on March 17, 2017, at approximately 12:45 a.m., Plaintiff, Gezim Shatku, fell in the parking lot of the Barnes & Noble Bookstore located at 2245 Richmond Ave, Staten Island, New York 10314.

Defendants seek summary judgment to dismiss Plaintiff's claims because there is no genuine issue of material fact requiring a trial.

Plaintiff alleges Defendants were negligent for allowing the aforesaid premises to become and remain in an unsafe, dangerous and defective condition in that an ice patch was on subject parking lot rendering the parking lot dangerous and defective.

Defendants argue that there is no evidence that it created the dangerous condition which caused the accident and that Defendants lacked actual or constructive notice that the condition existed.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

"To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time." *Morrison v. Apostolic Faith Mission of Portland*, 111 A.D.3d 684, 974 N.Y.S.2d 568 (N.Y.A.D. 2nd Dept. 2013).

In support of their motion, Defendants submitted an Affidavit from Meteorologist, Thomas Downs, the Director of Forensic Meteorology at WeatherBell Analytics, LLC. It is Mr. Downs' opinion and to a reasonable degree of meteorological certainty that the subject premises, on March 16, 2017, saw a high temperature in the lower 40s. The temperature gradually cooled to 36 degrees by the time the store closed at 10 p.m. Thus, on March 16, 2017, the temperature was never cold enough for ice to form on the asphalt in the Barnes & Noble Parking lot while the store was open. Additionally, Mr. Downs' stated that from the time the store closed at 10 p.m. until approximately 1:30 a.m. the temperature was still above freezing. Thus, if any ice formed at all prior to Plaintiff's alleged slip and fall, it would have only formed a few minutes prior to the alleged accident.

Plaintiff opposes the motion, arguing there is no dispute that there was heavy snow two (2) days prior to the accident and that the parking lot had been plowed and that piles of snow remained in the parking lot at the time of the subject accident.

Plaintiff's own testimony in this case establishes that he left the sidewalk and crossed over a tree-belt separating the sidewalk from Defendants' parking lot. Plaintiff testified that as he was steeping over a curb separating the tree-belt from the parking lot, he slipped as his foot hit the asphalt of the parking lot.

Plaintiff argues that Defendants' reference to general inspection practices, without evidence as to when the area at issue was inspected relative to the plaintiffs slip-and-fall, will not suffice to establish the lack of constructive notice of the existence of a dangerous condition.

In support of its motion, Defendants submitted an Affidavit from Barnes & Noble Merchandise Manager, Rodothea Karagiannis and the snow removal records from National Maintenance Systems. In her affidavit, Ms. Karagiannis stated that, "based upon the snow removal records from National Maintenance Systems on March 14, 2017 and March 15, 2017 that I reviewed, I was the store manager on duty on these dates, and I signed and inspected the work done by the snow removal company. The snow removal company plowed the parking lot and deiced the parking lot and sidewalks on March 14, 2017 at 2:45 a.m. They returned at 9:53 a.m. on March 14, 2017 to plow and deice the parking lot, and shovel and deice the sidewalks. The snow removal company again returned on March 15, 2017 at 7:00 a.m. to deice the parking lot and sidewalks. They then returned for the last time at 2:40 p.m.-4:00 p.m. to plow and deice the parking lot, and shovel and deice the sidewalks."

Contrary to Plaintiff's assertions, Defendants have not made reference to general inspection practices, but rather have documented specific actions.

"The Plaintiff's claim that the defendants' efforts to remove the ice and snow may have created the condition was speculative and unsupported by the evidence in the record. Moreover, there was no proof to support the Plaintiff's claim that the Defendants had actual or constructive

notice of the ice patch. General awareness that snow or ice may be present is legally insufficient to constitute notice of the particular condition that caused the Plaintiff's fall. Both the Plaintiff and the Defendant testified that they did not see the patch of ice at any time before the accident. Based on this evidence, any finding as to when the ice patch developed could only be based on speculation." *Kaplan v. DePetro*, 51 A.D.3d 730, 858 N.Y.S.2d 304 (N.Y.A.D. 2nd Dept. 2008).

Plaintiff has failed to rebut Defendants' prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact.

ORDERED Defendants' motion for summary judgment is granted; and it is further

ORDERED that the Complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated:July 23, 2020

So Ordered.

/S/

ENTER: _____

Hon. Judith N. McMahon, J.S.C.