

Albright v Thrifty Beverage

2020 NY Slip Op 34677(U)

May 4, 2020

Supreme Court, Dutchess County

Docket Number: Index No. 2018-52899

Judge: Hal B. Greenwald

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. HAL B. GREENWALD

Justice.

SUPREME COURT: DUTCHESS COUNTY

LYNN ALBRIGHT,

Plaintiff,

-against-

THRIFTY BEVERAGE,
BEVERAGE CENTER ASSOCIATES, INC,
GERLACH BEVERAGE, INC and
URBAN/GERLACH REALTY, LLC,
Defendant(s).

DECISION AND ORDER
ON TWO MOTIONS
Index No. 2018-52899
Motion Seq. Nos. 1 & 2

The Court has reviewed the following documents in reaching the within Decision and Order.

NYSCEF Doc Nos. 1, 6, 8, 18-32, 36-37, 39, 41-45

This is a slip and fall in a parking lot of a beverage store. Plaintiff is an individual, LYNN ALBRIGHT (ALBRIGHT). The Defendants, THRIFTY BEVERAGE, BEVERAGE CENTER ASSOCIATES, INC. and GERLACH BEVERAGE, admittedly are one (1) Defendant namely, GERLACH BEVERAGE INC., d/b/a THRIFTY BEVERAGE i/s/h/a GERLACH BEVERAGE INC and i/s/h/a THRIFY BEVERAGE (THRIFTY). The cross claimed defendant is URBAN/GERLACH REALTY, LLC. (URBAN). Defendant BEVERAGE CENTER ASSOCIATES, INC. has not appeared and is identified as (CENTER). The Court will not enumerate the prior procedural history.

THRIFTY moves by Notice of Motion, filed November 20, 2019 with supporting papers, memorandum of law and exhibits (NYSCEF Doc. Nos. 18-33) for summary judgment pursuant to CPLR 3212 dismissing the action as against THRIFTY as asserted by ALBRIGHT, as well as the cross claim asserted by URBAN. Opposition (NYSCEF Doc. No. 36) was filed by ALBRIGHT on January 7, 2020, and a Reply (NYSCEF Doc. No. 39) by THRIFTY was filed on January 13, 2020.

Defendant URBAN filed its Cross Motion (NYSCEF Doc. Nos. 41-42) on January 17, 2020 seeking dismissal of ALBRIGHT's Complaint and dismissal of the Cross Claim by

THRIFTY. Plaintiff filed Opposition (NYSCEF Doc. No. 43) to the Cross Motion on January 29, 2020.

SUMMARY JUDGMENT

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957), summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of triable issues of fact. (See *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 [1978]; *Di Menna & Sons v. City of New York*, 301 N. Y. 118 [1950]; *Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210 [1968]; *Barrett v. Jacobs*, 255 N. Y. 520 [1931]).

When a court decides a motion for summary judgment: "...issue-finding not issue-determination is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." (*Esteve v. Abad*, 271 A.D. 725. [1st Dept, 1947]).

Generally, the basis for determining summary judgment is that: "[T]he proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material fact." (*Pullman v. Silverman*, 28 N.Y.3d 1060 [2016], quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Further as stated in *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985), "bare conclusory assertions... " are insufficient to cause the court to grant summary judgment.

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue. (See e.g. *Piedmont Hotel Co. v. A.E. Nettleton Co.*, 263 N.Y. 25 [1933]). If the opposition can show there are questionable issues of fact that require a trial of the action, than summary judgment must be denied. (*Cattonar v. Edward Ermold Co.*, 277 A.D. 564 [1st Dept. 1951]). In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is: "... even arguably any doubt as to the existence of a triable issue" (*Baker v. Briarcliff School Dist.*, 205 A.D.2d 652 [2d Dept., 1994]).

ISSUES RAISED

For a plaintiff to demonstrate negligence, the plaintiff must establish there is a duty, a breach of that duty and injury as a result of that breach. (*Bernstein v Starrett City*, 303 A.D.2d 530 [2nd Dep't, 2003]; *Pulka v Edelman*, 40 N.Y.2d 781 [1976]). There's no question that the parking lot was owned and or operated by THRIFTY and URBAN.

Defendant claims that Plaintiff cannot identify what it is she tripped over, and therefore ALBRIGHT's claim must be dismissed, as any determination by the Plaintiff would be speculative. (*Hahn v Go Go Bus Tours, Inc.*, 144 A.D.3d 748 [2nd Dep't, 2016]; *Ash v City of New York*, 109 A.D.3d 85 [2nd Dep't, 2013]). In both *Hahn*, and *Ash*, neither plaintiff could identify what he or she fell on. In the instant proceeding, ALBRIGHT testified multiple times as her deposition that she fell on a curb stop that was misaligned and grey in color, like the color of the

area around it. (NYSCEF Doc. No. 24, pages 57, 60, 135) Further that she had been to this beverage center many times before, (page 51) had seen the yellow colored curb stops, but not the grey, cement colored ones, that the photos showing white curb stops was not the color of the curb stop when she fell (pages 69-70). Lastly, ALBRIGHT stated her toes were under the curb stop that caused her to fall. (page 81). Consequently, the Court does not find Defendant's position on this issue persuasive, as it appears Plaintiff can identify what she tripped over.

A property owner has a duty to maintain its property in a reasonably safe manner for its customers. (*Basso v Miller*, 40 N.Y.2d 233 [1976]). Courts have also held that there is no duty to protect or warn against an open and notorious condition which is not inherently dangerous. (*Cupo v. Karfunkel*, 1 A.D.3d 48 [2nd Dep't, 2003]). Whether a dangerous condition exists that could lead to liability is generally a question for the jury. (*Dudnik v. 1055 Hylan Offices, LLC*, 164 A.D.3d 870 [2nd Dep't, 2018]. The fact whether a condition is open and obvious, "...cannot be divorced from the surrounding circumstances." (*Clark v. AMF Bowling Centers, Inc.*, 83 A.D.3d 761 [2nd Dep't, 2011]; citing *Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008 [2nd Dep't, 2008]).

Cupo, Supra. takes a look at prior decisions where the factor that a condition is open and notorious would typically not preclude a finding against the property owner. The holding was that the open and notorious feature can be relevant to the plaintiff's comparative negligence. Further, that this possibility of comparative negligence would apply where the dangerous condition on the defendant's property was such for the property owner to have a duty to remedy.

In certain cases cited by THRIFTY the holdings have generally been that a concrete parking divider or curb stop is not inherently dangerous (*Plessias v Scalia Home for Funerals*, 271 A.D.2d 423 [2nd Dep't, 2000]). Thus, Defendant's position is for the Court to believe that if the injury was due to a trip and fall over a curbstop there is no triable issue of fact. However, the Court does not accept that position. There are assertions made by Plaintiff as to the location and coloring of the curb stop, that are not in agreement with the assertions made by Defendants. The following cases can be distinguished from ALBRIGHT's testimony in that in *Bellini v. Gypsy Magic Enters, Inc.*, 112 A.D.3d 867 (2nd Dep't, 2013) the curbstop was cement colored and parking lot blacktop; *Miller v. Costco Wholesale Corp.*, 125 A.D.3d 828 (2nd Dep't, 2015) the curbstop was cement colored in contrast to the parking lot; *Gallo v. Hempstead Turnpike, LLC*, 97 A.D.3d 723 (2nd Dep't 2012) curb stop was yellow in contrast to the sidewalk, *Gallub v. Popei's Clam Bar Ltd., of Deer Park*, 98 A.D.3d 559 (2nd Dep't, 2012) the curbstop was black with reflective tape. ALBRIGHT testified that the curbstop in question was the same grey color as the area where she was walking into the beverage center, and further more it was "cocky" [cockeyed, crooked], (NYSCEF Doc. No. 24, pages 64, line 22; page 65 line 3, page 68, line 14, and what not there before (page 75 lines 5-6). Accordingly there are triable issue of fact raised by Plaintiff as to the color and misaligned location of the curb stop.

Plaintiff cites several cases which appear to be more on point with the allegations contained herein. (NYSCEF Doc. No.43). These cases include the following: *Troina v. Canyon Donuts Jericho Turnpike*, 166 A.D.3d 706 (2nd Dep't, 2018), Defendants did not establish when the curb stop was last inspected; *Rivera v. Queens Ballpark Co., LLC.*, 134 A.D.3d 796 (2nd Dep't, 2015) the curb stop extended into a pedestrian walkway; *Greblewski v. Strong Health MCO, LLC*, 161 A.D.3d 1336 (3rd Dep't, 2018). Plaintiff did not have a distinguishing color from the parking lot.

According to the Plaintiff, the curb stop was not where it should be located, at the end of a parking spot. The self-serving testimony of the absentee owner and operator of the property, plus the introduction of outdated photos only serves to emphasize the necessity of determining these issues at trial. The testimony of Jonathan Urban merely states that: "The curb stops existed on the day of Plaintiff's accident in September 2015 as they are shown in the Google Maps photographs attached hereto as Exhibits "1" and "2"." (NYSCEF Doc. Nos. 28-30) The photos each show only a portion of one curb stop, nothing more, neither on the walking area in front of the vehicles, nor the remainder of that side of the building, again raising the same issue of fact.

Additional issues of fact have been raised concerning actual and/or constructive notice of the misaligned curb stop. Defendant did not offer the onsite store manager as a deposition witness, and offered the absentee owner/operator, who was unable to attest to when the parking lot was last inspected, and by whom. Defendant must make a prima facie case that they "neither created the condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it". (*Jackson v Jamaica First Parking, LLC*, 91 A.D.3d 602 [2nd Dep't, 2012]). The movant must detail when it last inspected the area on the property where the accident occurred in order to establish it did not have notice. (*Arzola v Boston Properties, Ltd. Partnership*, 63 A.D.3d 655 [2nd Dep't, 2009]). Here the Defendant failed to prove when it had made an inspection of the subject area. This failure did not demonstrate that Defendant did not have constructive notice of the alleged hazardous condition of the misaligned curb stop. Both the photos and testimony were insufficient to support Defendant's position.

As stated above, issue finding not issue determination is what a summary judgment is based upon. A review of the papers submitted by the Defendant THRIFTY and Plaintiff ALBRIGHT demonstrate to the Court that there are triable issues of fact that preclude the Court from granting Defendant's Motion for Summary Judgment.

THE CROSS MOTION

Defendant URBAN/GERLACH REALTY seeks an Order dismissing the Complaint, presumably against that entity for the same reasons as set forth by Defendant THRIFTY in its Motion for Summary Judgment to dismiss the Complaint. Accordingly, the Court has determined there are issues of fact that preclude the granting of Summary Judgment to Defendant URBAN as well.

Regarding the indemnification issue, Courts in New York have held that an out of possession lessor who has not contracted with the tenant to maintain or inspect the subject property has no duty to a tenant's business patron who tripped and fell in on the subject property. (*Mejia v ERA Realty Co.*, 69 A.D.3d 816 [2nd Dep't. 2010]).

As stated recently in *Castillo v Port Authority of New York and New Jersey*, 159 A.D.3d 792 (2nd Dep't, 2018), quoting, *Mas v Two Bridges Assoc.*, 76 N.Y.2d 680, "A party's right to indemnification may arise from a contract or may be implied 'based upon the law's notion of what is fair and proper as between the parties'". The Affidavit of John Urban the owner of both defendants, the property owner and the tenant establish that there was no written lease between the

parties, so indemnification does not arise from a contractual obligation. There is also no implied indemnification, as both defendants are one, there was no differentiation of responsibilities offered by URBAN. There was no clear delineation of actions undertaken by either defendant to inspect and/or maintain the property.

The Court has considered Defendants' remaining arguments and finds them to be unavailing.

By reason of all the foregoing it is hereby

ORDERED, that Defendant GERLACH BEVERAGE INC d/b/a THRIFTY BEVERAGES's Motion for Summary Judgment dismissing Plaintiff LYNN ALBRIGHT's Verified Complaint is denied; and it is further

ORDERED that Defendant GERLACH BEVERAGE INC d/b/a THRIFTY BEVERAGES's Motion for Summary Judgment dismissing all Cross Claims by Co-Defendant URBAN/GERLACH REALTY, LLC is denied; and it is further

ORDERED, that Defendant URBAN'GERLACH, LLC's Cross Motion for Summary Judgment dismissing Plaintiff LYNN ALBRIGHT's Verified Complaint is denied; and it is further

ORDERED that all parties and counsel shall appear before the Court for a status conference on **June 24, 2020 at 10:30 a.m.** at the Dutchess County Courthouse, 10 Market Street, Poughkeepsie, New York or appear electronically as determined by the Court.

The foregoing constitutes the decision and order of this Court.

Dated: May 4, 2020
Poughkeepsie, NY

ENTER:



Hon. Hal B. Greenwald, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Greenwald's Chambers, please do not submit any copies. Submit only the original papers.