

Muckle v Fast Gasoline Sta., Inc.
2020 NY Slip Op 35798(U)
February 3, 2020
Supreme Court, Nassau County
Docket Number: Index No. 614196/18
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice_____
X

SALLY MUCKLE,

Plaintiff(s),

-against-

FAST GASOLINE STATION, INC. and
VENUS BUKEY REALTY, INC,

Defendant(s).

XTRIAL/IAS, PART 18
NASSAU COUNTY

Index No.: 614196/18

Motion Seq. No.: 001 & 002
Motion Submitted: 11/25/19

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
 Notice of Cross Motion/Opposition/Supporting Exhibits.....X
 Affirmation in Opposition and Reply.....X
 Reply to Cross Motion.....X
 Affirmation in Further Reply.....X1

Defendants, Fast Gasoline Station, Inc. (Fast) and Venus Bukey Realty, Inc.

(Venus), moves this court for an order, pursuant to CPLR §3212, dismissing the
 complaint against them. Plaintiff, Sally Muckle, opposes the motion and cross moves for
 summary judgment. However, the cross motion was untimely and Muckle offered no

1 This Part's rule clearly state that prior approval is required to submit a sur-reply. Defendants did not seek such approval, thus the court will not consider the "further" reply. The court notes that the further reply contains allegedly vital proof that would support Defendants' motion, however, Defendants do not offer any explanation why this proof could not have been submitted with the original papers.

excuse for the late filing. As such, the papers will only be considered to the extent that they address opposition to Defendants' motion.

This matter involves allegations by Muckle that she tripped and fell in a pothole on Defendants' property, causing her an injury. She commenced this action by summons and complaint dated October 18, 2018. An amended complaint changing one Defendant was e-filed June 28, 2019. Issue was joined by service of an answer to the amended complaint dated July 18, 2019. The matter was certified ready for trial on August 6, 2019 and a note of issue was filed on August 7, 2019.

Initially, the court notes that, contrary to Plaintiff's assertion, Defendants' motion is timely. The note of issue was filed on August 7, 2019, and the motion was due 60 days thereafter. General Construction Law §20 indicates that when a deadline is to be determined from a certain date, the computation of days is to be made "exclusive of the calendar day from which the reckoning is made." Herein, the computation should begin from August 8, which makes an October 7 filing timely. Regardless, even if the computation began on August 7, 60 days later was a Sunday, meaning the deadline was the next business day, which was October 7. (General Construction Law §25-a).

Fast is a gas station and convenience store on Austin Blvd in Island Park, Nassau County. Muckle lived half a block to a block away, and would go to the convenience store as often as three to four times a week. On December 9, 2016, Muckle alleges she was walking on the property of the gas station, heading to a bus stop, when she tripped and fell in a pothole on the premises. She acknowledges having seen the pothole

numerous times prior to the day she tripped in it. Defendants now move for summary judgment, alleging the dangerous condition did not exist on the date of the accident, if it did exist they had no notice of it, and that it was open and obvious.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*).

In support of their motion, Defendants submit, *inter alia*, the deposition transcripts of Ahmed Ozgur, the manager of Fast on the date of the alleged incident, Rachel Wahlig, owner of Fast and Venus, and Muckle. While Mr. Ozgur and Ms. Wahlig both acknowledge the pothole in question existed at one time, they deny that the pothole

existed on the date of the accident. To be sure, the pictures offered during the depositions were taken by Muckle two years after the accident. Mr. Ozgur and Ms. Wahlig express confidence that the pothole was not there based upon how often they would check the premises by waking around, and how when other potholes formed on the other side of the property, Mr. Ozgur fixed them himself. Ms. Wahlig's memory of when the alleged pothole formed was based upon her memories around the birth of her son. However, Muckle testified at her deposition that the pothole was there on the date of her accident and before. For the court to rule for Defendants, a credibility determination would have to be made, and that is not appropriate on a motion for summary judgment (*French v. Cliff's Place Ltd.*, 125 AD2d 292 [2d Dept 1986]). Further, if the pothole was in existence for as long as she claimed, Muckle's testimony raises an issue of fact regarding actual and constructive notice. Finally, while Defendants' argument that the pothole was open and obvious is, in essence, confirmed by Muckle, proof of an open of obvious condition does not preclude a finding of liability, but can be raised to argue the plaintiff was comparatively negligent. (*Karpel v National Grid Generation, LLC*, 174 AD3d 695 [2d Dept 2019]). In light of the foregoing, the court finds that Defendants have failed to establish entitlement to summary judgment as a matter of law. The motion will be denied regardless of the sufficiency of the opposition papers.

Muckle brings a cross motion that, unlike Defendants' motion, is untimely. The cross motion was brought more than two weeks after the deadline for summary judgment motions. Muckle argues the court should consider the cross motion, citing to case law

that finds that a late cross motion can be considered when it is nearly identical to the original motion. (*Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496 [2d Dept 2005])). While this is an accurate recitation of the law, it does not apply herein. The motions are not nearly identical. Further, Muckle offers no excuse as to why the motion was late. Regardless, even if the court had considered the cross motion, it would have been denied for the same reasons the court denied Defendants' motion. The parties have sworn to vastly different version of events, and the court cannot choose one version over the other without making a credibility determination, which would be inappropriate in a motion for summary judgment (*French v. Cliff's Place Ltd., supra*).

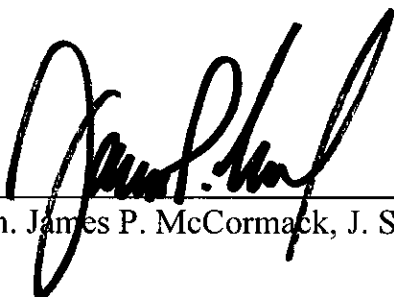
Accordingly, it is hereby

ORDERED, that Defendants' motion (Motion Seq. 001) for summary judgment is DENIED; and it is further

ORDERED, that Plaintiff's motion (Motion Seq. 002) for summary judgment is DENIED.

This foregoing constitutes the Decision and Order of the Court.

Dated: February 3, 2020
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE