

McDonald v M&D Auto Inc.

2021 NY Slip Op 31168(U)

April 7, 2021

Supreme Court, Kings County

Docket Number: 503171/2020

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 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 7th day of APRIL 7, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

-----X
DEBORAH MCDONALD,

Plaintiff,

-against-

Index No.: 503171/2020
Decision and Order

M&D AUTO INC., SUNOCO INC., SUNOCO LLC, SUNOCO #5304027 and SNJ ATLANTIC AUTO REPAIR INC.

Defendants,

-----X
SUNOCO LLC, LLC (i/s/h/a SUNOCO INC., SUNOCO LLC, and SUNOCO #5304027

Third-Party Plaintiff,

-against-

S.T. YASSINE CORP.

Third-Party Defendants,

-----X

The following papers NYSCEF Doc #'s 46 to 91 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	46-63;87-89
Opposing Affidavits (Affirmations) _____	74-76; 81-84
Reply Affidavits _____	90-91

After having heard Oral Argument on APRIL 7, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Defendant, SNJ ATLANTIC AUTO REPAIR INC. moves pursuant to CPLR 3212 for an order granting them summary judgment and dismissing the above entitled action

against defendant SNJ ATLANTIC AUTO REPAIR INC., contending SNJ ATLANTIC AUTO REPAIR INC. had no duty to the plaintiff or any control over the walkway where plaintiff allegedly tripped. (MS#1). Plaintiff and defendant/third-party plaintiff's SUNOCO LLC, LLC (i/s/h/a SUNOCO INC., SUNOCO LLC, and SUNOCO #5304027 oppose the same.

This matter arises from a trip and fall that allegedly occurred on February 11, 2019 at the premises located at 941 Atlantic Avenue, Brooklyn, NY when plaintiff was caused to trip and fall over a defective and hazardous unlevel condition on the ground.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a *prima facie* showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). **However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.** A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* "[A]verments merely

stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the non-moving party and accord that party the benefit of every favorable inference (see *Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2019]).

Summary judgment is a drastic remedy that “should not be granted where there is any doubt as to the existence of such issues or where the issue is ‘arguable’; issue-finding, rather than issue-determination, is the key to the procedure” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). “The court’s function on a motion for summary judgment is ‘to determine whether material factual issues exist, not resolve such issues’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2009]).

Defendant, SNJ ATLANTIC AUTO REPAIR INC. contend that they have submitted sufficient evidence to establish that they had no duty to the plaintiff as they are not responsible for alleged location of the Plaintiff’s accident. However, at this time before any discovery has been conducted it is unclear as to the exact location the plaintiff fell, and if said location where the accident took place is included within the defendant’s lease, or if the location is included in defendant/third-party plaintiff’s SUNOCO LLC, LLC (i/s/h/a SUNOCO INC., SUNOCO LLC, and SUNOCO #5304027 lease. Specifically paragraph 7 of the lease submitted by Defendant, SNJ ATLANTIC AUTO REPAIR INC. states “Tenant agrees to maintain said premises in good, clean and tidy condition at all times inside the repair shop and **the additional parking**

section which is leased to the tenant. The tenant must correct any violations on the sidewalk of the leased property and must pay any fines levied for such violations.” See NYSCEF Doc No.48). It is unclear whether the area where plaintiff allegedly fell is within the area described in the lease as the “the additional parking section” or not. It is also unclear exactly where the plaintiff fell as there has been no depositions in this matter to date. Moreover, it is unclear exactly what area each of the respective defendants are responsible for pursuant to their leases. As such issues of fact exist.

Accordingly, Defendant, SNJ ATLANTIC AUTO REPAIR INC. motion for summary judgment is hereby denied, with leave to renew upon the completion of discovery, for the reasons stated above. (MS#1).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
APRIL 7, 2021

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ