Sassano v Rockaway Plaza Delicatessen, Inc.
2021 NY Slip Op 33094(U)
December 9, 2021
Supeme Court, Queens County
Docket Number: Index No. 704570/2019
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.: 704570/2019

JAMES SASSANO,

Plaintiff,

Motion
Date: December 8, 2021

-against-

Motion Cal. No.: 13

ROCKAWAY PLAZA DELICATESSEN, INC. and RREEF AMERICA REIT II CORP. MMMM 6 NEW YORK,

Motion Sequence No.: 3

Defendants.

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RREEF AMERICA REIT II CORP. MMMM 6 NEW YORK,

Third-Party Plaintiff

-against-

SOUTH SHORE BUILDING MAINTENANCE CORP.,

Third-Party Defendant.

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The following efile papers numbered EF 49-64 submitted and considered on this motion by defendant ROCKAWAY PLAZA DELICATESSEN, INC. seeking an Order pursuant to Civil Practice Laws and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment dismissing all claims as asserted against them and for such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Aff.-Memo of Law- Exhibits.....	EF 49-60
Affirmation in Opposition-Affidavits.....	EF 61-62
Affirmation in Reply.....	EF 63-64

This litigation arises from a slip and fall accident that allegedly occurred on March 22, 2018. Plaintiff alleges he slipped on ice in the parking lot of the premises located at160-45 Rockaway Boulevard, Jamaica, New York 11434 (hereinafter referred to as the "Premises") at or around 4:00

AM. The Premises is owned by RREEF AMERICA REIT II CORP. MMMM 6 NEW YORK (hereinafter referred to as the "Owner"). ROCKAWAY PLAZA DELICATESSEN, INC. (hereinafter referred to as "Tenant") is a tenant of the Premises.

Now, Tenant seeks an order dismissing the claims and all cross-claims against them.

"[T]he proponent of a summary judgment motion must make 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

"As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property." (*See Calabro v Harbour at Blue Point Home Owners Assn., Inc*., 120 AD3d 462 [2d Dept 2014].)

Tenant claims there is no evidence that they breached a duty; that they were negligent, that they caused or created the condition at issue; that they owned, maintained, supervised or repaired the portion of the Premises where Plaintiff fell; or that the lease imputed any responsibility to maintain that portion of the Premises upon them.

Plaintiff testified as follows:
Q: Where did the accident occur?
A: It happened by Rockaway Plaza Deli.
(Page 21 lines 4-6)

Q:Can you describe the general condition of the parking lot?
A: It was full of snow.
Q: Approximately how much snow?
A: A couple of - - enough that I wouldn't drive my truck in there so it was a couple of inches high.
(Page 36 lines 14-20)

Q: Then what happened?
A: As I was walking I got halfway through the parking lot and I noticed I was on a sheet of ice. Underneath the snow it was all ice so at that point I couldn't do anything. I slipped and I went down at that point.

Q: So you were halfway across the parking lot?
A: I would say probably three quarters of the way through. I was almost to the sidewalk, the last sidewalk.
Q: You said that you noticed you were on a sheet of ice?
A: Yes. As I was walking on the snow all of a sudden it got very slippery and I noticed that there was ice underneath the snow.
(Page 38-39 lines 12-25 and 2-5)

Q: Approximately how far away from the store would you say that you were where you had fallen?
A: About maybe 20 feet from the door.
(Page 45 lines 13-16)

Tenant testified as follows:
Q: Did you or any employee of Rockaway Fine Foods, Inc. have the responsibility to check the condition of the outside premises at the location?
A: No.
Q: Did you ever assign any of your employees to check the condition of the outside premises?
A: No.
Q: Whose responsibility was it, to your recollection, back in March of 2018 to ensure that the property was maintained in an appropriate manner?
A: Landlord.
Q: What about snow removal?
A: The Landlord.
(Page 24 lines 11-21 and 24-25)

Q: I know you said the landlord, did the landlord undertake that work themselves or do you know if they hired some third party contractor or something else?
A: Actually, they have some contractor I guess. When it was snowing, hard snow, the snow removal guys come, the truck and they clean it.
Q: Did you ever have any interaction with the snow removal guys?
A: No.
Q: Did you ever speak with them?
A: No.
Q: Did any of your employees ever have any contact with them to your recollection?
A: No.
Q: Did you ever make any complaints to the snow removal company about the job they were doing?
A: No.
(Page 25-26 lines 11-25 and 2-4)

Q: To your understanding, whose responsibility was it back in March of 2018 to inspect the condition of the premises outside the physical boundaries of the delicatessen, meaning outside the store?
A: Outside is the landlord's responsibility.

(Page 28-29 lines 21-25 and 2)

Q: That sidewalk that is directly in front of your store, if there is snow and ice that has accumulated, did any of your employees put down ice melt or shovel the snow?
A; Right in front of the store side, the side?
Q: Yes.
A: Salt, yes.
(Page 50 lines 18-25)

Tenant further testified that the employees would shovel the portion of the sidewalk directly in front of the store. That, they would place that snow in the parking lot area. However, Tenant clarified it was not their responsibility to shovel that portion of the Premises. That, they would keep shovels and ice melts at the deli "[i]n case" (Page 54 line 13).

Owner testified as follows:
Q: Back in March of 2018, who was responsible, to your understanding, of the leases, with regard to the maintenance of the front parking lot?
A: We would be.
Q: So both parking lots?
A: Right.
Q: Would that also apply to snow removal in the parking lot?
A: Yes.
Q: How did Cushman & Wakefield manage the snow removal back in March of 2018 of the building?
A: We had a snow removal vendor, South Shore Snow Removal, a service contract, whether that be salt every snow occurrence.
Q: Was there any minimum amount that would trigger a salt and plow or was it just any snow occurrence?
A: Any snow occurrence.
(Page 21-22 lines 20-25 and 2-15)

Q: Was there a policy in place back in March of 2018 for Mr. Hennig's inspection of the property when there was a snow event?
A: Not a policy. We did have a routine where George Hennig would go around at every snow event, aside from the weekends, to which I am not sure of the weekends, but during the work week.
(Page 33-34 lines 19-25 and 2)

Tenant has established that they did not own, supervise or maintain the portion of the Premises where Plaintiff fell. In fact, Tenant has also established that Owner was responsible for snow and ice removal at the Premises. However, Tenant has not established that they neither caused nor created the condition that caused Plaintiff's fall. A defendant moving for summary judgment in a premises liability action has the burden of making a prime facie showing that it neither created the alleged hazardous or defective condition nor had actual or constructive notice of its existence

(*see Johnson v NBO Realty, Inc.*, 147 AD3d 743 [2017]; *Beri v Chung Fat Supermarket, Inc.*, 125 AD3d 587 [2015]). The affidavits of the Tenant state that they did not perform snow or ice removal in the front parking lot. However, the Tenants' testimony refers to snow and ice removal performed on the sidewalk directly in front of the demised premises which resulted in snow being placed on the parking lot. There remains issues of fact surrounding whether such actions, if undertaken during the relevant time period, caused or created the alleged hazardous condition that Plaintiff alleges caused his fall. Tenant has failed to establish prima facie entitlement to judgment as a matter of law. Therefore it is,

ORDERED, that the motion for summary judgment pursuant to CPLR 3212 is denied.

This constitutes the decision and order of the Court.

Dated: December 9, 2021

FILED
12/9/2021
COUNTY CLERK
QUEENS COUNTY

Hon. Cheréé A. Buggs, JSC