

Wettreich-Atlas v Shoprite of Commack, LLC

2021 NY Slip Op 33475(U)

September 13, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 603785/2019

Judge: Carmen Victoria St. George

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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

X

ROSE WETTREICH-ATLAS,

**Index No.
603785/2019**

Plaintiff,

**Motion Seq:
004 MG
Decision/Order**

-against-

**SHOPRITE OF COMMACK, LLC, STANLEY
SECURITY SOLUTIONS, INC., STANLEY
ACCESS TECHNOLOGIES, LLC, MACKENZIE
AUTOMATIC DOORS, INC., CHASE
INDUSTRIES, INC., MELITO CONSTRUCTION
CORP., OVERHEAD COMMERCIAL DOOR CO.,
INC. and OVERHEAD COMMERCIAL DOOR &
SON, INC.,**

Defendants.

X

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	104-122
Answering Papers.....	201-202; 218-222
Reply.....	236
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

On January 22, 2019, at approximately 4:30 p.m., the plaintiff was injured when the automatic sliding doors in the vestibule of Shoprite of Commack, LLC (Shoprite) closed on her as she was exiting the supermarket using an assistive device. The plaintiff has been granted a trial preference, and she has discontinued her claims against defendants Chase Industries, Inc. and Overhead Commercial Door & Son, Inc. Defendant Overhead Commercial Door Co., Inc. has not appeared in this action.¹ It is undisputed that Melito Construction Corp. (Melito) was the

¹ By Decision and Order dated February 3, 2020, this Court denied plaintiff's motion for a default motion against Overhead Commercial Door, Inc., without prejudice to renewal upon the submission of proper papers; however, the motion has not been renewed.

general contractor who subcontracted with Mackenzie Automatic Doors, Inc. (Mackenzie) for installation of the automatic doors at the Shoprite supermarket in 2010, nine years prior to the subject incident, and that the subject door came with a one-year warranty. It is further undisputed that Stanley Access Technologies LLC manufactured and sold the door to defendant Melito more than nine years before the subject incident. Prior to January 22, 2019, and perhaps in 2014, Mackenzie entered into a contract with Shoprite to perform periodic maintenance services to the subject door.

Defendant Melito now moves this Court for an order granting summary judgment dismissal of the complaint and any and all cross-claims asserted against it. Plaintiff does not oppose Melito's motion seeking dismissal of the claims and cross-claims, but plaintiff requests only that any such Order not assess costs or disbursements. Melito agrees that, since plaintiff was willing to discontinue the action against it, Melito has no objection to plaintiff's request that costs and/or disbursements not be assessed. Plaintiff previously sent a stipulation of discontinuance to Melito in April 2021, but Melito's counsel was not successful in obtaining the consent of its co-defendants.

The only co-defendant opposing Melito's motion for summary judgment is Shoprite, and that opposition is characterized as "conditional or partial," and that "[t]he actual question is whether Melito provides to Shoprite the information and literature which is alleged to have been provided with the door to Shoprite and which plaintiff aver (sic) was needed to conduct the inspection of the door at issue."

Melito contends that it is entitled to summary judgment dismissal of the cause of action sounding in common law negligence because it fulfilled its contractual duty ten years prior to the subject incident, leaving the work without defects; it had no duty to continue to inspect or repair the doors after it left the site, and because it cannot be held responsible for a condition that it did not create or exacerbate. Melito also maintains that the claim sounding in *res ipsa loquitor* must also be dismissed because the area where plaintiff was injured was not in the exclusive possession or control of Melito; rather, it was a publicly accessible area. The cross-claim asserted by Shoprite in its verified answer dated June 4, 2019 sounds in contribution and indemnification.

The Court is aware that that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff and co-defendant Shoprite (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*) "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” (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In support of its motion, Melito submits, *inter alia*, the pleadings and the deposition transcripts of the parties and witnesses to this matter, plus its statement of material facts with which co-defendant Shoprite agrees is true and accurate as to each of the four statements set forth therein.

Based upon the submitted evidence and plaintiff’s clear intent to discontinue her claims against Melito, this Court determines not only that Melito was not in privity of contract with the plaintiff and therefore did not owe her a duty (*Espinal v. Melville Snow Contractors*, 283 AD2d 546 [2d Dept 2001], *aff’d* 98 NY2d 136 [2002]), but also that none of the *Espinal* exceptions applies: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches an instrument of harm or creates or exacerbates a hazardous condition, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties, and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely (*Id.* at 140; *see also Koslosky v. Malmut*, 149 AD3d 925 [2d Dept 2017]; *Gushin v. Whispering Hills Condominium I*, 96 AD3d 721, 722 [2d Dept 2012]).

Melito subcontracted with Mackenzie to install the subject doors, which were operational as of November 2010. Furthermore, there is no evidence that Melito received any complaints about the doors during the one-year warranty period, or at any time after the installation of the doors up until the date of plaintiff’s accident. Melito did not manufacture or install the doors, nor did it enter into any contract to maintain them, either on a regular or periodic basis. Accordingly, there is no evidence that plaintiff could have relied upon Melito’s continuing performance, or that Melito entirely displaced Shoprite’s and/or Mackenzie’s duty to maintain the premises/doors. Moreover, there is no evidence that Melito caused or created a defective condition related to the doors when Melito completed its work, without complaint, nearly one decade earlier (*see Zaslow v. City of New York*, 124 AD3d 642 [2d Dept 2015]; *Fernandez v. 707, Inc.*, 85 AD3d 539 [1st Dept 2011]).

In addition, Melito has established that neither the doors and/or the area where plaintiff’s accident occurred were in its exclusive control, which is a necessary element of the doctrine of *res ipsa loquitur* (*Montalvo v. Mumpus Restorations, Inc.*, 76 AD3d 516 [2d Dept 2010]).

Accordingly, and without opposition by plaintiff, Melito has established its entitlement to summary judgment dismissal of plaintiff’s claims as a matter of law.

As to Shoprite’s cross-claim, Melito has established its *prima facie* entitlement to dismissal thereof based not only upon the foregoing, but also on its submission of Robert Melito’s deposition transcript establishing that Melito’s super, Frank Butera, provided Shoprite with the operation manual for the sliding doors, along with other operation manuals for items in the store that Melito had installed/contracted to install, which were all assembled in a single binder. Thus, Shoprite’s opposition claiming that there is an “actual question” as to whether Melito provided the information related to the doors, and that Melito “is culpable for not

providing said materials” is flatly contradicted. Shoprite does not submit any evidence aside from Robert Melito’s deposition transcript and a response to Melito’s statement of material facts with which Shoprite agrees. Shoprite’s assertion that, “if there was any defective condition that existed or that the inspection of the door was done improperly that a material of issue exists with respect to Melito’s role as the entity that ordered the doors at issue and had the duty to provide to Shoprite any information concerning the methodology by which a daily inspection was to be done. In the event that the court determines that a ‘question of fact exists’ concerning the manner in which Shoprite inspected the door once installed, which inspection Shoprite contends was done correctly - then the court should find that a question of fact existed as to whether Melito properly provided instruction to Shoprite as to the care and inspection of the door at issue” amounts to nothing more than sheer speculation, unsubstantiated and bald conclusions, and expressions of hope that are insufficient to defeat a summary judgment motion (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

Melito’s motion for summary judgment dismissal of plaintiff’s claims and any and all cross-claims, including Shoprite’s, are hereby dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 13, 2021
Riverhead, NY



CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]