Russo v Old Westbury Hebrew Congregation
2021 NY Slip Op 33626(U)
September 30, 2021
Supreme Court, Nassau County
Docket Number: Index No. 602682/2017
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 11
Present: Hon. Sharon M.J. Gianelli

_____X

JOHN RUSSO, Index No: 602682/2017

Plaintiff, Motion Seq. 004

-against- Decision and Order

OLD WESTBURY HEBREW CONGREGATION,
CBS CORPORATION and
CBS BROADCASTING, INC.,

Defendants.

_____X

Papers submitted on this motion:
Defendant Old Westbury Hebrew
Congregation's Notice of Motion,
Affirmation, Affidavits and Exhibits
in Support _____X
Plaintiff's Affirmation in Opposition _____X
Defendant Old Westbury Hebrew
Congregation's Reply and Supplemental
Expert Affidavit _____X

This action was commenced by the filing of a Summons and Complaint in New York County on June 28, 2011. An Answer was filed on February 13, 2013. An Order of the Court dated June 16, 2016, granted Defendants CBS CORPORATION and CBS BROADCASTING, INC.'s motion for summary judgment. (Edmead, J.) A further Order of the Court dated January 10, 2017, transferred the venue of this action from New York County to Nassau County (Edmead, J.).

This action arises out of an alleged slip and fall, which occurred on February 1, 2010.

Defendant now moves for an Order granting summary judgment to remaining Defendant OLD WESTBURY HEBREW CONGREGATION, and dismissing Plaintiff's claims against Defendant.

Factual History

Plaintiff allegedly slipped and fell while working as a Production Assistant on the set of the production of "The Good Wife". The set at the time of Plaintiff's fall was located in the parking lot of Defendant Old Westbury Hebrew Congregation, which CBS Broadcasting rented pursuant to a Parking Agreement. Specifically, Plaintiff was fuelling a wardrobe trailer, and slipped on ice as he got out of the truck.

Defendant claims that during Plaintiff's deposition he testified that he fell on a "probably 20 foot by 20 foot" patch of ice "with different ice and wet spots."

Plaintiff's bill of particulars alleges that Defendant was negligent in permitting an ice condition to exist, of which they had notice, and inadequate lighting of subject area.

Defendant argues that Defendant had no notice or knowledge of the condition that Plaintiff claims caused his accident before the time Plaintiff claims his accident.

Further, Defendant claims that Defendant was not aware of any complaints concerning the condition that Plaintiff claims caused his accident prior to the time noted by Plaintiff in the accident reports.

Defendant also claims that Defendant did not cause the condition, as Defendant "did not have any workers or other personnel on the property at the time of this accident on Monday, February 1, 2010."

Defendant further argues that deposition testimony demonstrates that non-party Tim McQuade Snowplowing, Inc. provided snow plowing and ice sanding/salting services for Defendant. Further, that Evereton Simpson, Defendant's maintenance supervisor would "continue to perform inspections in the parking lot after Tim McQuade provided plow and sanding services and if he ever saw any snow and ice accumulate in the parking lot, he would call Tim McQuade to return to OWHC and remedy the snow/ice issue."

Further, Defendant argues, with respect to the claims of inadequate lighting that the deposition testimony of Barbara Badome, synagogue administrator, establishes that the lights were on automatic timers, set to go "on between 4:30 and 5:00 p.m., go off around 2:00 a.m., and come back on at 5:00 a.m. until 6:30 a.m."

Defendant makes arguments with respect to Plaintiff's credibility. Specifically, Defendant argues that Plaintiff filled out two (2) accident reports regarding the incident that have different versions of the events surrounding the slip and fall.

Defendant further argues regarding Plaintiff's credibility by stating that Defendant bears no responsibility for Plaintiff's injuries because the icy condition complained of could

not have existed in the time, location and manner alleged by Plaintiff. Specifically, Defendant states that Climatological Records demonstrate that there was no precipitation (i.e., "0.0 inches") at LaGuardia Airport on the dates January 29, 2010, January 30, 2010, January 31, 2010 and February 1, 2010 (i.e., the date of the accident and the three (3) preceding days).

Additionally, Defendant states that Climatological Records demonstrate that there was "0.0 inches" of precipitation (i.e., snow) on the ground on the same dates.

Defendant offers the expert affidavit of Meteorologist George Wright and certified copies of the NOAA Local Climatological Data for LaGuardia Airport, Kennedy Airport, Farmingdale's Republic Airport, Mineola and Floral Park for the months of January and February 2010.

Defendant argues that this affidavit establishes that “there was no snow present on the ground in the parking lot prior to January 28, 2010.

Finally, Defendant argues that it was an “out-of-possession” landlord, and that therefore Defendant is not liable for injuries caused by a dangerous condition. Specifically, Defendant argues that CBS CORPORATION and CBS BROADCASTING, INC., (hereinafter referred to as Dismissed Defendants CBS) had control over the subject parking lot pursuant to the Parking Agreement. Defendant argues that the Parking

Agreement with dismissed Defendant CBS did not create a duty on the part of the Defendant to repair the property, and that Defendant did not assume that duty.

Defendant concludes by stating that it has met its burden of proof by establishing a prima facie entitlement to summary judgment.

In Opposition, Plaintiff argues that Defendant fails to establish a lack of actual or constructive notice, or the Defendant did not create the condition. Specifically, Plaintiff argues that Defendant failed to meet their burden of proof with respect to a last inspection. Specifically, Plaintiff refers to the testimony and affidavits of Defendant's witnesses that describe general customs and habits for inspections, but fail to produce any documentation evidencing any inspections of the property.

Plaintiff also argues that Defendant fails to establish entitlement to "out-of-possession owner" status. Specifically, Plaintiff argues that the Parking Agreement was for a single day of use, which is insufficient for Defendant to establish that it lacked control over the property, which is required to establish entitlement to the out-of-possession landlord exemption to liability. Plaintiff argues that Defendant never relinquished possession of the property and cannot now claim that it was out of possession.

Plaintiff argues that the expert affidavit of Defendant meteorologist is insufficient to establish a basis for the dismissal of this action as it inappropriately relies on information regarding water coming from a production truck, without addressing the

correction of that statement. In fact, Plaintiff claims that Defendants motion is insufficient, as it does not address Plaintiff's deposition testimony that the water coming from a production vehicle did not cause the subject accident.

Further, Plaintiff claims that there are inconsistencies between the affidavits of the non-party snowplow company and the report of the expert meteorologist.

Plaintiff also argues that the expert meteorologist report establishes that "The temperature remained below freezing on January 29, 2010 (high 24°, low 16°) and January 30, 2010 (high 19°, low 13°).

Plaintiff argues that Defendant has failed to meet its prima facie burden of entitlement to summary judgment.

In Reply, Defendant argues that Plaintiff needs more than conjecture or speculation with respect to causation of the subject accident in order to defeat a motion for summary judgment based on lack of notice. Defendant argues that the record is devoid of any evidence that Defendant caused and/or created the condition that lead to the subject accident.

Defendant further argues that Plaintiff has failed to offer any "counter-climatological data" to rebut Defendant's expert affidavit.

Analysis

Summary judgment is a drastic remedy and is not warranted unless the movant demonstrates that no genuine triable issues of fact exist. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Initially, "the 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." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985) (Emphasis added).

The burden on the movant for summary judgment is a heavy one and where there is any doubt at all as to the existence of a factual issue, summary judgment must be denied. Ratner v. Elovitz, 198 A.D.2d 184 (1st Dept 1993); Elzer v. Nassau County, 111 A.D.2d 212 (2d Dept 1985). It is well established that all competent evidence must be viewed in the light most favorable to Plaintiff. On a motion such as this one, the Court is required to accept the Plaintiff's pleading as true and the Court's decision must be made on the version of the facts most favorable to the Plaintiff. Henderson v. City of New York, 178 A.D.2d 129 (1st Dept 1991); Weiss v. Garfield, 21 A.D.2d 156 (3d Dept 1964).

It has long been established that the mere presence of factual issues defeats summary

judgment and where there is any doubt at all as to the existence of a factual issue, summary judgment must be denied. Ratner v. Elovitz, supra; Elzer v. Nassau County, supra. The existence of conflicting expert opinions in a medical malpractice action creates triable issues of fact. Wallenquest v. Brookhaven Mem. Hosp. Med. Ctr., 28 A.D.3d 538 (2d Dept 2006); See also Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Alicea v. Ligouri, 54 A.D.3d 784 (2d Dept 2008).

A Defendant may be held liable for a slip and fall incident involving snow and ice on property upon a showing that the defendant either created or had actual or constructive notice of the alleged dangerous condition (Burniston v Ranric Enters. Corp, 134 AD3d 973 [2d Dept 2015]). To constitute constructive notice, the defect must be visible and apparent and it must have existed for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (Ferro v 43 Bronx Riv. Rd., 139 A.D.3d 897 92d Dept 2016).

In a premises liability case, a defendant property owner, or party-in-possession or control of real property, who makes a motion for summary judgment dismissing a complaint based upon a lack of notice, is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (Goldman v Waldbaum, Inc., 248 A.D.2d 436, 437 [2d Dept 1998]). To sustain this burden, defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time of plaintiff's fall (Rong Wen Wu v Arniotes, 149 A.D.3d 786, 787 [2d Dept 2017]; Sartori v JPMorgan Chase Bank, 127 A.D.3d 1157 [2d Dept

2015]). Mere reference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of any evidence regarding specific cleaning or inspection of the area in question (Mahoney v AMC Entertainment, Inc., 103 A.D.3d 855, 856 (2d Dept 2013). Only after this threshold burden has been satisfied will the court examine the sufficiency of the plaintiff's opposition (Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Flores v BAJ Holding Corp., 94 A.D.3d 945, 946 (2d Dept 2012).

Generally, an out-of-possession landlord cannot be held liable for injuries sustained by a Plaintiff on its property if the landlord did not retain control over the premises pursuant to contract or statute (see Reddy v. 369 Lexington Avenue Co., LP, 31 A.D.3d 732, (2d Dept. 2006); Hernandez v Seven Fried Food, 292 A.D.2d 343, (2d Dept. 2002)

Here, Defendant as failed to meet its burden of proof with respect to its entitlement to "out-of-possession" landlord based on the single day Parking Agreement with Dismissed Defendants. Further, a review of the deposition transcripts and affidavits offered in support of the motion for summary judgment establish that Defendant retained control over the property.

Further, Defendant has failed to establish a prima facie entitlement to Summary Judgment. In this matter, both sides allege matters of credibility as well as inaccuracies and inconsistencies both within as well as across multiple affidavits, which can only be

resolved by a trier of fact. Accordingly, Summary Judgment in favor of the Defendant must be denied.

Accordingly,

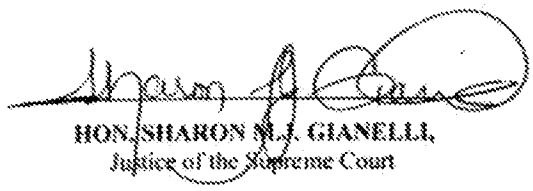
It is

ORDERED, that Plaintiff's motion for Order granting summary judgment to Defendant OLD WESTBURY HEBREW CONGREGATION, and dismissing Plaintiff's claims against Defendant, is Denied.

All applications not specifically addressed herein are denied.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
September 30, 2021



HON. SHARON M.J. GIANELLI,
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.

ENTERED
Oct 04 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE