

Kalendarev v Planet Wings Inc.
2022 NY Slip Op 35096(U)
May 25, 2022
Supreme Court, Queens County
Docket Number: Index No. 706349/2019
Judge: Timothy J. Dufficy
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Short Form Order**NEW YORK SUPREME COURT - QUEENS COUNTY****PRESENT: HON. TIMOTHY J. DUFFICY**
Justice**PART 35****MAYA KALENDAREV,**
Plaintiff,**-against-****Index No.: 706349/19**
Mot. Date: 2/22/22
Mot. Seq. 7**PLANET WINGS INC., PLANET WINGS**
ENTERPRISES, INC., PLANET WINGS
MANAGEMENT, INC., RP 121, LLC, and A AND
E FOOD ENTERPRISE INC.,**FILED & RECORDED**
6/1/2022
10:58 AM
COUNTY CLERK
QUEENS COUNTY**Defendants.**

The following papers read on this motion by defendants Planet Wings, Inc., Planet Wings Management, Inc., and Planet Wings Enterprises, Inc. (Planet Wings) for an order granting summary judgment dismissing the Complaint of the plaintiff Maya Kalendarev, as against them, pursuant to CPLR 3212.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	EF 143-155
Memorandum of Law in Support.....	EF 156
Answering Affidavits - Exhibits.....	EF 171-174
Reply Affidavits.....	EF 175

Upon the foregoing papers, it is ordered that the motion by Planet Wings is granted.

This is a personal injury action, whereby on March 3, 2017, plaintiff Maya Kalendarev allegedly tripped and fell over a hose in front of the premises of a Planet Wings store, located at 95-05 63rd Drive, Queens, New York (subject premises), due to the negligence of the defendants. Plaintiff maintains that she sustained serious personal injuries. It is undisputed that the subject premises were owned by the co-defendant RP 121, LLC (RP 121) and leased by co-defendant A and E Food Enterprise Inc. (A&E).

Defendants Planet Wings, Inc., Planet Wings Management, Inc., and Planet Wings Enterprises, Inc. (Planet Wings) now move for an order granting summary judgment dismissing the plaintiff's Complaint, as against them, pursuant to CPLR 3212.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v Klein*, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (*Newin Corp. v Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v Garrubo*, 141 AD2d 636 [2d Dept 1988]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*See Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v Tallman*, 278 AD2d 811 [4th Dept 2000]).

As a general rule, "[l]iability for a dangerous or defective condition on property is . . . predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, [generally] a party cannot be held liable for injuries caused by the dangerous or defective condition of the property." (*Ruffino v New York City Transit Authority*, 55 AD3d 819 [2d Dept 2008][internal citations omitted]).

For defendants to be liable, the plaintiff must prove that the defendants either created or had actual or constructive notice of a dangerous condition (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). The fact that there may have been a general awareness that a

dangerous condition was present is insufficient to establish a triable issue of fact. ‘To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.’” (*Chianese v Meier*, 98 NY2d 270 [2002]).

To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (*see, Gordon v Muchnick*, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability (*Id.*; *see also, Marasco v C.D.R. Electronics Security & Surveillance Systems Co., et.al.*, 1 AD3d 578 [2d Dept 2003]).

Moving defendants presented a *prima facie* case that there are no triable issues of fact. Moving defendants established that they did not own, operate, control, or maintain the subject premises; and that they neither created an unsafe condition nor had actual or constructive notice thereof (*see Rajgopaul, et. al. v Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). In support of the motion, moving defendants presented, *inter alia*, a very detailed affidavit of Paula Fidanza, an owner and Vice President of defendants Planet Wings, Inc. (PWI), Planet Wings Management, Inc. (PWM), and Planet Wings Enterprises (PWE), who avers, *inter alia*, that: “none of the Moving Defendants owned, occupied, or used the Premises, and no person or vehicle from Moving Defendants was present at the Premises on March 3, 2017, and none of the Moving Defendants would have had any knowledge of what A&E was doing at the Premises on that day.”

The Planet Wings defendants have established a *prima facie* case that there are no triable issues of fact. They have presented sufficient evidence to establish that they breached no duty owed to plaintiff.

The burden then shifted to the plaintiff to present triable issues of fact. Plaintiff failed to present any evidentiary, non-conclusory proof sufficient to establish the existence of material issues of fact. In opposition, the plaintiff merely submits her own very brief affidavit, wherein she avers that: after she fell, she looked to see where the hose came from and she saw a truck with the words “Planet Wings” written on the side, and “[t]he hose ran from the truck across the sidewalk through the front door of the Planet wings store which was propped open.” Plaintiff’s attorney argues that an issue of fact is

thus created that the subject truck was “the franchisor” visiting the store. The Court finds such contention is insufficient to create a triable issue of fact., especially in light of the testimony of Paula Fidanza that Planet Wings Enterprises did not own any vehicles on the date of the accident, and that Planet Wings Enterprises would not send a vehicle to a store to run a hose inside. The Court notes that the plaintiff presents no pictures or video of the subject truck.

As there remains no issues of fact in dispute, a trial is unnecessary as to said defendants and moving defendants’ motion for summary judgment is granted.

Accordingly, it is

ORDERED that the motion by defendants Planet Wings Inc., Planet Wings Enterprises, Inc., and Planet Wings Management, Inc. (Planet Wings) for an order granting summary judgment in their favor, pursuant to CPLR 3212, is granted; and it is further

ORDERED that plaintiff’s Complaint is dismissed ONLY as against defendants Planet Wings Inc., Planet Wings Enterprises, Inc., and Planet Wings Management, Inc.

The foregoing constitutes the decision and order and judgment of this Court.

Dated: May 25, 2022



TIMOTHY J. DUFFICY, J.S.C.

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