

**Reape v Mercedes-Benz of Brooklyn**

2023 NY Slip Op 34375(U)

December 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 515594/2020

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of December 2023

HONORABLE FRANCOIS A. RIVERA  
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ELEANOR REAPE,

Plaintiff,

**DECISION & ORDER**  
Index No.515594/2020

-against-

MERCEDES-BENZ OF BROOKLYN, MERCEDES BENZ OF NORTH AMERICA, INC., MERCEDES-BENZ US. INC., and MERCEDES-BENZ USA, LLC,

Defendants.  
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By notice of motion filed on September 7, 2023, under motion sequence number three, MBB Auto, LLC d/b/a Mercedes-Benz of Brooklyn (hereinafter MBB) sought an order pursuant to CPLR 3404 restoring this case to the active motion calendar and setting a date for oral argument on its prior motion, under motion sequence number two, for summary judgment dismissing the complaint of plaintiff Eleanor Reape, which had been marked off. This motion is opposed by plaintiff Eleanor Reape.

**BACKGROUND**

By notice of motion filed on February 23, 2023, MBB sought an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability and dismissing the complaint of the plaintiff. The plaintiff filed opposition to the motion and MBB filed a reply to the opposition.

On September 6, 2023, the date set for the oral argument of motion sequence number two, MBB failed to appear, and the motion was marked off the calendar. By the instant motion MBB seeks to have motion sequence number two restored and decided.

On August 24, 2020, the plaintiff commenced this action by filing of a summons and

complaint with the Kings County Clerk's Office (KCCO). The complaint alleged, among other things, that on March 3, 2020, the plaintiff was caused to slip and fall on a wet floor at a Mercedes-Benz dealership located at 1800 Shore Parkway, Brooklyn, New York.

On October 12, 2020, MBB timely filed its verified answer.

## LAW AND APPLICATION

### *MBB's Motion to Vacate the Default*

In order to vacate its default in appearing at a call of the compliance conference calendar, a plaintiff is required to demonstrate both a reasonable excuse for the default and a potentially meritorious cause of action (*555 Prospect Associates, LLC v Greenwich Design & Development Group Corp.*, 154 AD3d 909 [2d Dept 2017], citing CPLR 5015[a][1]; 22 NYCRR 202.27[a]; *Polsky v Simon*, 145 AD3d 693, 693 [2d Dept 2016]; *Foley Inc. v Metropolis Superstructures, Inc.*, 130 AD3d 680, 680 [2d Dept 2015]). Whether an excuse is reasonable is a determination within the sound discretion of the Supreme Court (*555 Prospect Associates, LLC*, 154 AD3d at 909, citing *Walker v Mohammed*, 90 AD3d 1034, 1034 [2d Dept 2011], see *GMAC Mtge., LLC v Guccione*, 127 AD3d 1136 [2d Dept 2015]).

The Court finds that MMB had a reasonable excuse for missing the September 6, 2023, date for oral argument on motion sequence number two. The Court further finds that the motion has merit. Therefore, the application to restore motion sequence number two to the active calendar is granted.

Inasmuch as motion sequence number two was fully briefed and both sides were prepared to argue the motion, the Court heard the oral argument of MBB and the plaintiff on November 28, 2023.

***MBB CPLR 3212 Motion***

MBB contends that the plaintiff's claims must be dismissed because MBB had no actual or constructive notice of the slippery condition and performed remedial measures to dry the floor of water tracked in by rain.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

The plaintiff seeks damages for personal injuries allegedly sustained on March 3, 2020, when the plaintiff slipped and fell on a dangerous and wet condition at MBB's auto dealership. To demonstrate entitlement to summary judgment, an owner of real property must establish that it maintained the premises in a reasonably safe condition, and that it did not create a dangerous or defective condition on the property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it (*Reed v 64 JWB, LLC*, 171 AD3d 1228, 1228 [2d Dept 2020]). A property owner has a duty to maintain his or her property in a reasonably safe condition (*Mongelli v EMart Dep't Stores, Inc.*, 174 AD3d 703 [2d Dept 2019], citing *Basso v Miller*, 40 NY2d 233, 241 [1976]).

A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected (*Larsen v Congregation B'Nai Jeshurum of Staten Island*, 29 AD3d 643 [2nd Dept., 2006]). To meet its burden on the issue of lack of constructive notice, on motion for summary judgment in a slip-and-fall case, the defendant must offer some evidence as to when accident site was last cleaned or inspected prior to plaintiff's fall (*Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610 [2d Dept 2011]).

In the case at bar, MBB offered no evidence as to when the site of the accident was last cleaned or inspected prior to the plaintiff's fall. MBB, therefore, could not demonstrate that it lacked constructive notice of the allegedly wet and slippery condition which caused the plaintiff's fall. Accordingly, the motion must be denied without regard to the sufficiency of the plaintiff's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

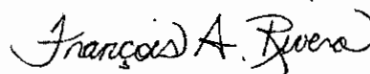
#### CONCLUSION

The branch of the motion by MBB Auto, LLC d/b/a Mercedes-Benz of Brooklyn for an order pursuant to CPLR 3404 restoring motion sequence number two to the active motion calendar and deciding same is granted.

The branch of the motion by MBB Auto, LLC d/b/a Mercedes-Benz of Brooklyn for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability and dismissing the complaint of plaintiff Eleanor Reape is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.