SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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OZEN GOKALAN PLANTE AND MICHAEL PLANTE,

Plaintiff,

-against-

DAVID LUBRANO, JOHN S. LUBRANO, JOHN V. LUBRANO, CHRISTINE SCHEIL, DENNIS SCHEIL, STEPHANIE LUBRANO and GARY R. PALOLILLO

Defendants.

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Mot. Seq. #s 12, 13 and 14

Index # 501250/2017

Decision

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of these Notice of Motions for Summary Judgment submitted on November 29, 2023.

Papers	Numbered
Notice of Motions and Affirmation	1&2 [Exh. A-F]; 5&6 [Exh. A-O]; 10&11[Exh. A-E]
Affirmation/Affidavit in Opposition	4, 8, 12
Reply Affirmations	9
Memoranda of Law	3 and 7

Plaintiffs, Ozen Gokalan Plante and Michael Plante, commenced this action due to a slip and fall, which occurred in the vestibule of a cooperative apartment building located at 9615 Shore Road, Brooklyn, New York on or about February 1, 2014. Defendants, Christine Scheil, Dennis Scheil, Stephanie Lubrano and Garry R. Palolillo, move pursuant to CPLR 3211(a)(1) for leave to renew and reargue their prior motions for summary judgment and pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint and all cross-claims. Plaintiffs oppose defendants' motion on the grounds that defendants have failed to make a *prima facie* showing entitling them to summary judgment; the defendants' negligence was a substantial factor in causing plaintiff's injuries; and the defendants are liable under the doctrine of alternative liability.

The motions before this court are defendants' individual motions for leave to renew and reargue their prior motions for summary judgment which were denied by the Hon. Edgar G. Walker, with leave to renew and reargue upon completion of discovery. The court issued three separate orders as it relates to the defendants' motions for summary judgment. On July 13, 2018,

the Hon. Edgar G. Walker, after oral argument granted defendant, Gary R. Paolillo's motion for summary judgment, dismissing the complaint and all claims assert against him on the grounds that the plaintiff's opposition to the motion failed to raise a triable question of fact. On December 18, 2018, the Hon. Lawrence Knipel, issued an order denying the motion to renew and reargue; and on June 17, 2019, the Hon. Edgar G. Walker, issued a decision and order on plaintiff's motion to reargue the court's decision and order dated July 13, 2018, which granted Paolillo's motion dismissing the complaint and upon re-argument vacating the dismissal. In addition, defendant, Stephanie Lubrano moved for summary judgment dismissing the complaint as asserted against her. Justice Walker held as follows:

> Considering Justice Knipel's order holding, in effect, that the motions for summary judgment were premature, and in order to prevent inconsistent rulings, plaintiffs' motion to reargue is granted and upon re-argument, defendant Paolillo's summary judgment motion is denied with leave to renew upon completion of discovery. Likewise, defendant Stephanie Lubrano's motion for summary judgment is denied with leave to renew upon completion of discovery.

A motion for leave to renew or re-argue is addressed to the sound discretion of the Supreme Court. *See*, *Central Mortg. Co. v. McClelland*, 119 A.D.3d 885, 991 N.Y.S.2d 87 (2nd Dept., 2014).

Based upon the court's prior orders in this case, to wit, the order dated June 17, 2019, which granted leave to reargue, and upon re-argument vacated the dismissal of the complaint against Paolillo and denied the motions for summary judgment with leave to renew upon competition of discovery, this court hereby grants the defendants' motions for leave to renew their motions for summary judgment since discovery is completed.

Discussion

In the case at bar, the plaintiff, Ozen Gokalan Plante, hereinafter "Ozen," alleges that she slipped and fell on a brown liquid glaze because of a dangerous condition created by the defendants while moving items from non-party decedent, Michael Lubrano's apartment. At her deposition, Ozen testified that she did not know the source of the liquid or who was responsible for spilling it.

Defendant, Stephanie Lubrano, argues that she bears no liability to the plaintiffs, as she had no ownership, duty, or other interest in the subject premises; she was not at the location on the date of the alleged incident, and there are no triable issues of fact. In support of her motion for summary judgment, Stephanie Lubrano relies on her examination before trial testimony, whereby she testified that she was not at the apartment on the day of the alleged accident but had participated with the move-out prior to the day of accident. In opposition, plaintiffs have offered the deposition testimony of Christine Scheil and David Lubrano, in which they claim they do not know or recall whether Stephanie Lubrano participated in the move-out on the day of the

alleged accident. Plaintiffs also offered the deposition testimony of Gary Paolillo and John V. Lubrano, in which they testified that they do not believe or think Stephanie Lubrano was present but also could not be sure as she might have been there.

Defendants, Christine Scheil and Dennis Scheil, argue that they did not own, lease, rent, reside, or enter into a contract to perform work at the premises known as 9615 Shore Road, Apt. 6D, Brooklyn, New York. They further argue that they did not owe a duty of care to the plaintiff, and the doctrine of alternative liability is not applicable. Defendants argue that there is absolutely no evidence that the defendants caused or created the alleged dangerous condition based on the deposition testimony of John V. Lubrano and David Lubrano, who testified that David Lubrano was in front of John V. Lubrano while John V. Lubrano was pushing the cart, when the bottle of liquor fell onto the vestibule floor. Furthermore, John and David cleaned up the broken glass and spilled liquor. Defendants, Christine Scheil and Dennis Scheil, argue that they did not pack any items in the grocery cart, did not transport the grocery cart, and did not participate in the cleanup of the broken liquor bottle, glass, or liquid in the vestibule. Defendants, Christine Scheil and Dennis Scheil argue that the doctrine of alternative liability is not applicable because there exists videotape evidence depicting John V. Lubrano pushing the grocery cart when the bottle fell; and them cleaning up the broken glass and spilled liquor. Defendants, Christine Scheil and Dennis Scheil, further argue that all possible tortfeasors are not before the court, therefore, the doctrine of alternative liability does not apply. To support this argument, the deposition of Gary Paolillo is offered in which he states that the decedent's sister, Regina Tokoluk, was also present and assisted with the move-out.

Defendant, Gary R. Paolillo, argues that there are no material issues of fact, and he owed no duty of care to the plaintiff because he was not involved in the alleged incident, packing of the subject liquor bottle, clean-up of the spill, or ownership of the subject premises. Defendant argues that he did not cause or create the condition that is alleged to have caused plaintiff to fall and was not responsible for its existence. In opposition to defendant, Paolillo's motion for summary judgment, plaintiffs, argue that defendant Paolillo was an active participant in the move-out of the apartment contents of his deceased friend, Michael Lubrano. Plaintiff contends that the move-out was done in a haphazard and unsafe manner whereby the apartment items were not packed away properly or safely transferred through the common areas of the subject property, which resulted in an unsecured bottle of liquor falling from the top of the grocery cart. Plaintiffs have offered defendant Paolillo's deposition testimony where he testified that he observed the unsecured bottle of liquor had been improperly placed on top of the grocery cart prior to transport. Defendant Paolillo also testified that he was walking behind the person pushing the cart and witnessed the bottle falling and breaking, but never looked to see whether the area encompassing the breakage had been cleaned up.

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See, Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." *See also,*

Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The papers submitted in the context of the summary judgment motion are viewed in the light most favorable to the party opposing the motion. *See, Marine Midland Bank, N.A. v. Dino v. Artie's Automatic Transmission Co.*, 168 A.D.2d 610, 563 N.Y.S.2d 449 (2nd Dept., 1990). If the *prima facie* showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. *See, CPLR 3212[b]; Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986].*

All named defendants have denied having improperly placed the unsecured bottle of liquor on top of the grocery cart. Each defendant similarly claims no knowledge as to the identity of the individual who placed the bottle into the cart that fell and caused liquid to spill in the vestibule of the subject premises. While there were several persons involved in the move-out of the decedent's belongings from the subject premises, no one is taking responsibility for the condition that was created when the bottle broke causing the liquor to spill, that caused the plaintiff, Ozen to slip and fall, and each named defendant is moving for summary judgment.

The defendants bear the initial burden of making a *prima facie* showing that it neither created nor possessed actual or constructive notice of the alleged hazardous condition. *See, Spano v. Apogee Retail N.Y, LLC*, 164 A.D.3d 1495, 84 N.Y.S.3d 203 (2nd Dept., 2018). The defendants have not met their initial burden. In a case where the defendants cannot meet the burden to prove that they did not cause the harm, where the conduct of two or more defendants is tortious, and it is proved that the harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one, they are jointly and severally liable. Under the doctrine of alternative liability, the burden is placed on those defendants to prove that they did not cause the harm. See, *Silver, et. al. v. Sportsstuff, Inc., et. al.*, 130 A.D.3d 907, 14 N.Y.S.3d 421 (2nd Dept., 2015).

Plaintiffs argue that defendants are not insulated from liability because they did not own, lease, rent, reside, or have a contract to perform work within the premises. They are also not insulated from liability based on John V. Lubrano and David Lubrano being identified as tortfeasors in the subject videotape. It is plaintiff's argument that the Scheil defendants' negligence lies in the placement of the unsecured bottle on the grocery cart, thereby creating or exacerbating a dangerous condition upon the premises. The court finds that deposition testimony demonstrates that the Scheil defendants participated in the move-out effort on the day of the subject incident. While the videotape evidence establishes the Scheil defendants did not push the grocery cart or participate in the clean-up, a material issue of fact exists as to which defendant negligently placed the unsecured liquor bottle on top of the grocery cart.

In *Silver, et. al. v. Sportsstuff, Inc., et. al.*, 130 A.D.3d 907, 14 N.Y.S.3d 421 (2nd Dept., 2015), the court held that the doctrine of alternative liability is "available in some personal injury cases to permit recovery where the precise identification of a wrongdoer is impossible," citing *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d at 505, 541 N.Y.S.2d 941; *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580 n. 5, 450 N.Y.S.2d 776; *Restatement [Second] of Torts: Negligence* 433B.

Based on the conflicting testimony, the Court finds that there are issues of fact that preclude summary judgment from being granted. Moreover, the plaintiff has made a showing that the conduct of two or more defendants is tortious, that the harm has been caused to the Plaintiff by only one of them, and that there is uncertainty as to which one. The burden is then placed upon those defendants to prove that they did not cause the harm. The defendants have not proven that they did not cause the harm and a material issue of fact exists as to who placed the unsecured liquor bottle on top of the grocery cart. In addition, whether Regina Tokoluk was present raises a question of fact as to the presence of another potential tortfeasor.

As to the issue raised concerning defendant, Gary R. Paolillo's motion being procedurally defective, regarding Uniform Rule 202.8-g. The Uniform Civil Rules for the Supreme Court and the County Court provide that "upon any motion for summary judgment, other than a motion made pursuant to 3213, the court may direct that there shall be annexed to the motion a separate, short and concise statement, in numbered paragraphs, of the material fact as to which the moving party contends there is no genuine issue to be tried." The court therefore has discretion relative to whether a Statement of Facts is necessary. *See, 22 NYCRR 202.8g(a)*.

Accordingly, defendants' motions for summary judgment are hereby denied in the entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
March 4, 2024

HON. LISA S. OTTLEY, J.S.C.

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