Greenidge v BBZZ Equities, Inc.
2024 NY Slip Op 34678(U)
July 15, 2024
Supreme Court, Bronx County
Docket Number: Index No. 27115/2019E
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 2

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ALEXANDER GREENIDGE,

Plaintiff,

-against-

BBZZ EQUITIES, INC., POKER ACES DIESEL, INC., ATLANTIS FUEL DISTRIBUTION LLC, FUEL INNOVATIONS, INC. and DELAND MOVING & STORAGE INC.,

Defendants.

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Index №. 27115/2019E

Hon. ELIZABETH A. TAYLOR
Justice of the Supreme Court

The following papers were read on the motion (Seq. No. 8) for **Summary Judgment**

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 124 - 140
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 141 - 147
Affirmation in Reply	NYSCEF Doc. # 148

Upon the foregoing papers, the defendants BBZZ Equities, Inc. ("BBZZ") and Fuel Innovations, Inc. ("Fuel") (collectively "Defendants") move for an order awarding summary judgment pursuant to CPLR 3212, dismissing the complaint of plaintiff Alexander Greenidge ("Greenidge") and any cross-claims asserted against them. Plaintiff opposes the motion.

Background

This is an action to recover damages for personal injuries allegedly arising arises from a slip and fall accident that occurred on March 5, 2019, as Plaintiff exited a Dunkin' Donuts ("Dunkin") at a gas station located at 880 Garrison Avenue, Bronx County (the "subject premises").

In support of their motion, Defendants submit, *inter alia*, the deposition transcripts of Plaintiff, Richard Finkelstein ("Finkelstein") the owner of BBZZ and Fuel, and George Venetos ("Venetos"), the manager of the gas station.

Plaintiff testified that on the morning of the incident, he was walking to a Dunkin which was connected to a gas station with his girlfriend, Gwendolyn (Plaintiff deposition tr at 15). It had snowed all day and night the day before (*id.* at 17), but there were paths without snow or ice leading to the Dunkin (*id.* at 19). Plaintiff walked on the icy condition (*id.* at 26) despite there being an area under an overhang

which was not covered in ice (*id.* at 30). Once inside the subject premises, Plaintiff did not notify the clerk of the icy condition outside (*id.* at 19-20). Upon leaving the building, Plaintiff walked straight out the door where there was a clear and car-free path (*id.* at 18). He tried to step around the ice (id. at 19) but slipped and fell (*id.* at 15). As Plaintiff slipped, he twisted his body, tried to catch himself, and fell backward, landing on his right arm and back (*id.* at 27). Immediately he felt pain in his arm, back, and right knee (*id.* at 31). After Plaintiff fell, he went inside to notify the clerk of his fall (*id.* at 33). Upon leaving Plaintiff walked on a path that was free of ice (*id.* at 33).

Finkelstein testified that in 2019 BBZZ owned a gas station business located at the subject premises, which it leased to Fuel, a gasoline and convenience store, and Shilby Inc., a Dunkin franchisee (Finkelstein deposition tr at 17-18, 20). The lease between BBZZ and Fuel contained a provision in which Fuel was responsible for ice and snow remediation (*id.* at 27-28), not BBZZ (*id.* at 29-30). BBZZ is currently owned by Finkelstein's son David and the day-to-day operations are overseen by his other son Eric (*id.* at 17). In 2019, Finkelstein was an unpaid consultant for BBZZ (*id.* at 14-15) and would report anything at the subject premises that was not "done up to standard" to Venetos, the manager of Fuel (*id.* at 25-26). At the time of the accident, Fuel had a contract with Deland Moving and Storage ("Deland") for snow plowing and ice remediation (*id.* at 36). Fuel employees had access to shovels and ice melt to remediate conditions not cleared by the plow (*id.* at 36-37) and were trained on the job in ice and snow removal (*id.* at 28-29). Finkelstein regularly visited the subject premises but was not sure when he was last there or if he was at the subject premises on or before March 5, 2019, the date of the accident (*id.* at 23, 30). Despite 13 security cameras on premises, there is no footage from the day of the incident because the footage is only preserved for approximately one month (*id.* at 34).

Venetos testified that he had been working at the subject premises for about seven years as a manager (Venetos deposition tr at 12-13). There were surveillance cameras which allowed him to see the operations outside his office (*id.* at 15). The cashier and pump attendants were responsible for shoveling and salting the gas station and had access to shovels and salt kept in a shed on the subject premises (*id* at 17-18). Venetos did not recall whether there was any snow or ice on the subject nor the last time he observed the gas station grounds premises on or before the date of the accident (*id.* at 20). Further, Venetos did not remember if Deland performed remediation on or prior to March 5, 2019 (*id.* at 26) or whether he had inspected Deland's work on the date of the accident (*id.* at 20). Venetos testified that no one requested remediation of a slipping or tripping hazard (*id.* at 17) and no one reported a slip and fall (*id.* at 13). Venetos became aware of slip and fall accident in the summer of 2020 (*id.* at 7-8).

By order dated November 1, 2022, and entered on NYSCEF on November 3, 2022, this court denied Defendants' prior summary judgment motion for failure to comply with paragraph 2(d) of this court's part rules. The order provided leave to renew within 15 days of entry of this order. On November 21, 2022, moving defendants filed the instant motion.

Applicable Law and Analysis

Pursuant to CPLR 3212 (a), "[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue." CPLR 2004 permits the Court, in the exercise of its discretion, to grant an extension of time fixed by statute, rule or court order, upon a showing of good cause. Before the court may consider an untimely motion, the moving party must demonstrate good cause for the delay, or "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). "No excuse at all, or a perfunctory excuse, cannot be good cause," and the motion's merit or absence of prejudice resulting from the delay is immaterial (*id.*).

Here, moving defendants do not provide a satisfactory explanation for failing to timely file the instant motion, Seq. No 8. Moving defendants filed the instant motion 18 days after the prior order was entered and electronically served on all parties via NYSCEF. Moving defendants argue that they timely mailed the court working copies of the instant motion. In support of this assertion, moving defendants direct the court to exhibit N, a letter from moving defendants' counsel dated November 8, 2022, which references Motion Seq. No. 7 and the NYSCEF documents associated therewith. No mention was made of the delay regarding the instant motion.

Even if the motion was timely, it must be denied because Defendants did not meet their *prima facie* burden. Defendants failed to establish their lack of constructive notice as a matter of law, as they did not submit any evidence establishing when the accident location was last inspected prior to Plaintiff's alleged fall (*Gomez v Samaritan Daytop Vil., Inc.*, 216 AD3d 456, 457 [1st Dept 2023]). Venetos only testified as to the typical snow and ice remediation practices, but not as to the specific condition immediately prior to the date of the accident or on the date of the accident itself (Venetos deposition tr at 20, 26; *see Castillo-Sayre v Citarella Operating LLC*, 195 AD3d 513 [1st Dept 2021]). Further, Defendants' argument that the hazard was open and obvious does not obviate their duty to maintain the premises in a safe condition (see *Cohen v Shopwell, Inc.*, 309 AD2d 560 [1st Dept 2003]). Whether Plaintiff was solely at fault for choosing to walk on snow and ice, "or whether the parties were

comparatively negligent, is to be determined at trial" (*Martinez v Contreras*, 216 AD3d 532, 533 [1st Dept 2023]).

Accordingly, it is hereby,

ORDERED, that Defendants' for summary judgment, dismissing Plaintiff's complaint and all cross-claims against them is denied and it is further,

ORDERED, that Defendants shall serve a copy of this Order with Notice of Entry upon all parties within 20 days of entry of this order.

Dated: JUL 15 2024

Hon.____________________
ELIZABETH A. TAYLOR, J.S.C.

1. CHECK ONE............ ☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS............ ☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE............ ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT