

Jenkins v 7 Matkids LLC

2024 NY Slip Op 34791(U)

August 1, 2024

Supreme Court, Queens County

Docket Number: Index No. 713522/20

Judge: Timothy J. Dufficy

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFFICY
Justice

PART 35

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DAIQUWAIN JENKINS,

Plaintiff,

-against-

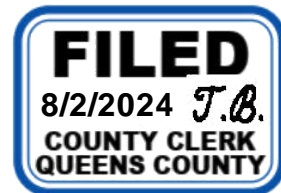
Index No.: 713522/20

Mot. Date: 6/4/24

Mot. Seq.: 8

**7 MATKIDS LLC, THE STOP & SHOP
SUPERMARKET COMPANY LLC, STOP &
SHOP and MATTONE GROUP SPRINGNEX
LLC,**

Defendants.



-----X
The following papers were read on this motion by defendants 7 Matkids LLC (7 Matkids) and Mattone Group Springnex LLC (Mattone Group) for an order (1) granting summary judgment to 7 Matkids and dismissing plaintiff’s complaint as against 7 Matkids, pursuant to CPLR 3212(a); (2) granting summary judgment to Mattone Group and dismissing plaintiff’s complaint as against Mattone Group; (3) granting summary judgment to 7 Matkids and dismissing the cross-claims of The Stop & Shop Supermarket Company LLC s/h/a as The Stop & Shop Supermarket Company and i/s/h/a as Stop & Shop (Stop and Shop) for contribution, common law indemnification and contractual indemnification, pursuant to CPLR 3212(a) and; (4) pursuant to CPLR 3212(a), granting summary judgment to Mattone Group dismissing the cross-claims of Stop & Shop for contribution, common law indemnification and contractual indemnification, including reimbursement of attorneys’ fees.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 206-210
Answering Affidavits-Exhibits.....	EF 215-218
Replying Affidavit-Exhibits.....	EF 219-220

Upon the foregoing papers, it is ordered that the motion by defendants 7 Matkids LLC (7 Matkids) and Mattone Group Springnex LLC (Mattone Group) are decided, as follows (moving defendants are represented by the same counsel.

In the instant action, the plaintiff alleges that he was injured, on April 15, 2019, in

the parking lot of an outdoor shopping mall. Plaintiff alleges that he was he was leaving a Stop & Shop, carrying two cases of water, when he tripped over a pothole in the parking lot and and sustained injuries. In his complaint and verified bill of particulars, the plaintiff alleges common law negligence and does not assert any statutory violation. Plaintiff does not attempt to rely on the theory of *res ipsa loquitur*.

In regards to the shopping center, 7 Matkids is the ground owner and lessor; and, Mattone Group is the ground lessee of the premises. There was a ground lease between 7 Matkids and Mattone Group. The record reflects that Mattone Group then entered into a lease agreement with Stop & Shop, a tenant of the shopping center, pursuant to which, Mattone Group was responsible for the maintenance of the parking lot.

In a previous decision, dated January 25, 2024 and entered January 26, 2024, (NYSCEF Doc. No. 212), this Court granted a motion by Stop & Shop for summary judgment dismissing the plaintiff's complaint against it on the grounds that it, *inter alia*, owed no duty to the plaintiff in that it neither owned nor controlled the area of the parking lot where the plaintiff fell and was not under any contractual obligation to maintain the parking lot. That part of the motion was only opposed by the plaintiff.

Additionally, in that same decision, the branch of Stop & Shop's motion seeking an order granting summary judgment in its favor on its claims for contractual indemnification, including reimbursement of attorneys' fees against Mattone Group, was granted, without opposition. The previous decision was served with Notice of Entry, on January 30, 2024, and to date, no motion to renew or reargue has been made, and no notice of appeal has been filed.

In the instant motion, defendants 7 Matkids and Mattone Group Springnex LLC (Mattone Group) move for an order (1) granting summary judgment to 7 Matkids and dismissing plaintiff's complaint as against 7 Matkids, pursuant to CPLR 3212(a); (2) granting summary judgment to Mattone Group and dismissing plaintiff's complaint as against Mattone Group; (3) granting summary judgment to 7 Matkids and dismissing the cross-claims of The Stop & Shop Supermarket Company LLC s/h/a as The Stop & Shop Supermarket Company and i/s/h/a as Stop & Shop (Stop and Shop) for contribution, common law indemnification and contractual indemnification, pursuant to CPLR 3212(a) and; (4) pursuant to CPLR 3212(a), granting summary judgment to Mattone Group

dismissing the cross-claims of Stop & Shop for contribution, common law indemnification and contractual indemnification, including reimbursement of attorneys' fees.

As to the branch of motion, wherein 7 Matkids is seeking summary judgment and dismissing plaintiff's complaint as against it, Matkids argues that it is not liable to the plaintiff, because it owes no duty as it is out-of-possession grounds lessor that it neither owned nor controlled the area of the parking lot where the plaintiff fell and was not under any contractual obligation to maintain the parking lot.

"An owner or tenant in possession of [real property] owes a duty to maintain the property in a reasonably safe condition" (*Patterson v H.E.H., LLC*, 217 AD3d 879, 880, [2d Dept 2023] [internal quotation marks omitted]). However, an out-of-possession landlord is not liable for injuries caused by a dangerous condition on leased premises in the absence of a duty imposed by statute or assumed by contract or a course of conduct" (*Achee v Merrick Vil., Inc.*, 208 AD3d at 543-544 [2d Dept 2022]; see *Sweeney v Hoey*, 211 AD3d 1071, 1071-1072 [2d Dept 2022]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2d Dept 2011]).

Here, 7 Matkids has established that it did not owe the plaintiff a duty. 7 Matkids demonstrated that, pursuant to the lease, Mattone Group, and not 7 Matkids, was responsible for maintaining the parking lot and that 7 Matkids did not assume a duty by course of conduct. Plaintiff fails to raise an issue of fact in opposition. The mere fact that 7 Matkids may have had a right to reentry is insufficient to raise an issue of fact, as the allegedly defective condition did not violate a specific statutory provision and was not a significant structural or design defect (see *Tragale v. 485 Kings Corp.*, 39 AD3d 626 [2d Dept. 2007]).

Accordingly, the branch of the motion by 7 Matkids to dismiss the plaintiff's complaint against it is granted.

As to the branch of motion, wherein Mattone Group moves for summary judgment and dismissing the complaint as against it, it argues that it did not create the condition and it did not have actual or constructive notice of the condition. However, Mattone Group does not offer any affirmative evidence that it did not create the pothole.

As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*L & D Service Sta., Inc. v Utica First Ins. Co.*, 103 AD3d 782, 783, [2d Dept 2013]).

'A defendant who moves for summary judgment in a trip -and-fall case has the initial burden of making a prima facie showing that it neither created the allegedly hazardous condition nor had actual or constructive notice of its existence (*see Griffin v PMV Realty, LLC*, 181 AD3d 912, 912-913 [2d Dept 2020], *Steele v Samaritan Found., Inc.*, 176 AD3d 998, 999 [2d Dept 2019]). "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" (*Toussaint v Ocean Ave. Apt. Assoc., LLC*, 144 AD3d 664, 664-665 [1st Dept 2016]; *see Stevens v St. Charles Hosp. & Rehabilitation Ctr.*, 165 AD3d 729 [2d Dept 2018]). To meet its initial burden on the issue of lack of constructive notice, the moving defendant must offer evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see Rodriguez v New York City Hous. Auth.*, 169 AD3d 947, 948 [2d Dept 2019]; *Quinones v Starret City, Inc.*, 163 AD3d 1020, 1021 [2d Dept 2018]; *Hanney v White Plains Galleria, LP*, 157 AD3d 660, 661 [2d Dept 2018]).

Here, Mattone Group has not met its burden, because it fails to present any evidence regarding when the area of the parking lot was last inspected prior to the accident. Thus, this branch of the motion is denied regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

The argument by Mattone Group that summary judgment should be granted since the plaintiff cannot identify the cause of his fall is also unavailing. While a defendant in a trip and-fall case may also establish its *prima facie* entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation (*see Rodriguez v New York City Hous. Auth.*, 169 AD3d at 948-949), here, Mattone Group failed to establish its *prima facie* entitlement to judgment as a matter of law based upon this ground. Plaintiff testified at his deposition that he did not see the pothole before he fell. However, he also testified that as he was

carrying the water from the Stop & Shop to his car, he “tripped over a pothole” and that he “stepped in a pothole”, causing him to trip and fall. He also testified “[m]y foot hit the pothole and it was struck in a pothole” Finally, he testified that after he fell, he was on the ground and saw he was “in the pothole.” Contrary to Mattone Group’s contention, this testimony does not establish that the cause of the plaintiff’s fall cannot be identified without engaging in speculation (*see Steele v Samaritan Found., Inc*, 176 AD3d 998, 1000 [2d Dept 2019]; *Matadin v Bank of Am. Corp.*, 163 AD3d 799, 800 [2d Dept 2000]).

Accordingly, the branch of the motion by Mattone Group to dismiss plaintiff’s complaint against it is denied.

The branch of the motion by 7 Matkids for summary judgment dismissing the cross-claims by Stop and Shop for contribution, common law indemnification and contractual indemnification is granted. 7 Matkids has established a *prima facie* entitlement to summary judgment on the cross-claims, and Stop & Shop fails to raise a triable issue of fact in opposition, as the motion is unopposed.

Finally, the branch of the motion by the Mattone Group for summary judgment dismissing the cross-claims of Stop & Shop for contribution, common law indemnification and contractual indemnification, including reimbursement of attorneys’ fees is denied, despite the lack of opposition.

The contention that the cross-claims by Stop & Shop are untimely and served without leave of court is unsupported by any legal authority, and, in any event, should have been raised in opposition to the previous motion by Stop & Shop, in which the Court granted, *without opposition*, the motion by Stop & Shop for summary judgment in its favor on its claims for contractual indemnification, including reimbursement of attorneys’ fees against Mattone Group. The claim that the indemnification provision is void and unenforceable also should have been raised in opposition to the prior motion, and, in any event, this Court has determined that Stop & Shop was not negligent.

Accordingly, it is

ORDERED that the motion by defendants 7 Matkids LLC and Mattone Group Springnex LLC for summary judgment are **granted, in part and denied, in part**, in that: it is

ORDERED that the branch of the motion by 7 Matkids LLC for summary judgment dismissing the plaintiff's complaint against it is **granted**; and it is further

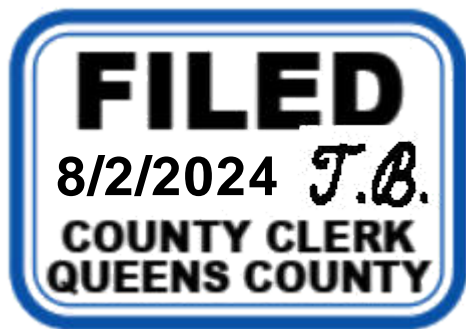
ORDERED that the branch of the motion by Mattone Group Springnex LLC for summary judgment dismissing the plaintiff's complaint against it is **denied**; and it is further

ORDERED that the branch of the motion by 7 Matkids LLC for summary judgment dismissing the cross-claims by Stop and Shop for contribution, common law indemnification and contractual indemnification is granted, without opposition; and it is further

ORDERED that the branch of the motion by Mattone Group Springnex LLC for summary judgment dismissing the cross-claims of Stop & Shop for contribution, common law indemnification and contractual indemnification, including reimbursement of attorneys' fees is **denied**; and it is further

ORDERED that any arguments or requests for relief not addressed herein have nonetheless been considered by the Court and are **denied**.

Dated: August 1, 2024



A handwritten signature in black ink, appearing to read "T. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.