SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 6

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Susana Tinsay,

Index No. 30493/2020E

-against-

Hon. LAURA G. DOUGLAS Justice Supreme Court

Justice Supreme Court

Emerald Sea Food Co., Inc., et al

---X

The following papers numbered 1 to (3) were read on this motion (Seq. No. 6) for Summary Judgment noticed on February 10, 2023

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). (1)
Answering Affidavit and Exhibits	No(s). (2), (3)
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is by defendant Blue Ribbon Fish Co., Inc. is decided in accordance with the attached Memorandum Decision/Order.

Dated: 9-4-24

Hon. LAURA G. DOUGLAS Justice Supreme Court LAURA G. DOUGLAS Justice Supreme Court , J.S.C.

CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☑ CASE STILL ACTIVE

MOTION IS..... ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 30493/2020E

SUSANA TINSAY,

Plaintiff,

-against-

EMERALD SEA FOOD COMPANY, INC., THE NEW FULTON FISH MARKET COOPERATIVE AT HUNTS POINT, INC., NEW FULTON FISH MARKET STORAGE, LLC, THE NEW FULTON FISH MARKET, THE CITY OF NEW YORK, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, and BLUE RIBBON FISH CO., INC.,

Defendants.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J. S. C.

Part 6

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment (seq. no. 6):

Papers	**Numbered**
Notice of Motion by Defendant Blue Ribbon Fish Co., Inc., Affirmation of Kevin M. Ryan, Esq. dated January 4, 2023 in Support of Motion, Statement of Material Facts by Kevin M. Ryan, Esq. dated January 4, 2022, and and Exhibits ("1" through "23")	**1**
Affirmation of Joseph M. Cerra, Esq. dated January 18, 2023 in Opposition to Motion, Response to Statement of Material Facts by James S. Lynch, Esq. dated January 18, 2023, Plaintiff's Counter-Statement of Material Facts by James S. Lynch, Esq. dated January 18, 2023, and Exhibits ("A" through "E")	**2**
Affirmation of Laura A. Martin, Esq. dated January 18, 2023 in Opposition to Motion, Response to Statement of Material Facts by Laura A. Martin, Esq. dated January 18, 2023, and Exhibits ("A" through "E")	**3**

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Defendant Blue Ribbon Fish Co., Inc. ("Blue Ribbon") seeks summary judgment pursuant to CPLR 3212 dismissing the plaintiff's complaint in its entirety. The motion is denied.

The plaintiff ("Tinsay") seeks monetary damages for personal injuries allegedly sustained on June 11, 2020 when she was struck by a forklift while shopping at the New Fulton Fish Market in Bronx, New York. The forklift was operated by Carlos Chi ("Chi"), an employee of defendant Emerald Sea Food Company, Inc. ("Emerald"). Tinsay was struck while walking within a designated pedestrian walkway. Chi was operating the forklift through a designated entranceway.

Blue Ribbon operated an open-air fish stand with the pedestrian walkway running along the front side of its stall and the forklift path running perpendicularly alongside. The pedestrian walkway and the forklift pathway intersected at about a right angle at one corner of Blue Ribbon's stand. Tinsay had been looking at the products offered for sale at the nearby fish stand operated by Emerald, which abutted the same pedestrian walkway. The layout requires forklifts to cross the pedestrian walkway at some point. Tinsay claims that Blue Ribbon stored certain boxes within that corner of its stall at a height of between five to seven feet, creating an obstruction that restricted her sight line of the forklift's path. Video footage of the accident shows the forklift entering the fish market's shopping area without stopping prior to striking Tinsay. Tinsay was adjacent to Emerald's stand, not Blue Ribbon's stand, when she was struck by the forklift.

Tinsay alleges that Blue Ribbon's stacking of boxes violated the fish market's House Rules and Regulations in that it created an "obstacle" under Section 7.1(a) of Article VII – Cleanliness and Sanitation, which states as follows:

> "Each tenant shall provide approved containers for the collection of garbage, dirt, rubbish and refuse, and shall not obstruct any common areas."

Tinsay maintains that there were no visual or audible warning devices to alert pedestrians in the walkway that a forklift was approaching. She does not claim that Blue Ribbon displayed any items beyond the area of its demised premises; that is, no items intruded into the pathways or other common areas.

In support of its motion for summary judgment, Blue Ribbon makes the following contentions:

1. that Tinsay has no standing to rely on any purported violation of the fish market's rules binding upon Blue Ribbon pursuant to its lease with New Fulton Fish Market to create a duty of care or tort liability in her favor;
2. that Blue Ribbon did not violate any such rules, since they do address the storage of boxes, do not contain any height restrictions, and Blue Ribbon was never cited for any violation;
3. that Blue Ribbon had no control of or obligation with respect to the area where Tinsay's

accident occurred;

4. that Tinsay offers only speculation that Blue Ribbon's stacking of boxes constituted a dangerous condition; and
5. that even if its stacking of boxes did create a dangerous condition, Blue Ribbon lacked notice of same.

To obtain summary judgment, the proponent of a such a motion must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). The moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corporation.*, 18 NY3d 499, 503 [Ct App 2012]). To defeat such a showing, an adversary must present facts in admissible form demonstrating that a genuine, triable issue(s) of fact exists which precludes summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). Conclusory or speculative assertions are insufficient (*see LoBianco v. Lake*, 62 AD3d 590 [1st Dept 2009]).

Tinsay's Reliance upon Blue Ribbon's Alleged Violation(s) of House Rules

Even if Tinsay cannot benefit from a violation of Blue Ribbon's obligations under the House Rules, she has also made allegations of negligence and fault directly against Blue Ribbon without relying on any such violations. In addition to alleging that the manner in which Blue Ribbon stacked boxes and obscured the view of both Tinsay and Chi violated the fish market's rules, Tinsay's bill of particulars alleges as follows:

> "In addition (a) negligently, carelessly and/or recklessly stacked boxes at a height and manner so to obstruct the views of pedestrians and forklift drivers at a known conflict point (intersection of crosswalk and forklift entry passage); (b) See a; (c) In the stall area BLUE RIBBON FISH CO., INC. at the Fulton Fish Market, 800 Food Center Drive, Bronx, New York, adjacent to the Intersection of the pedestrian walkway and the forklift entry/exit pathway"

(*see* Tinsay's Bill of Particulars dated January 28, 2022, ¶ 3). In fact, Blue Ribbon itself acknowledges

that a tenant in possession of real property has a common-law duty to maintain areas that it occupies and controls in a reasonably safe condition (*see* Ryan Aff., ¶ 44 and *Knight v. 177 West 26th Realty LLC*, 173 AD3d 846 [2nd Dept 2019]).

Tinsay may demonstrate Blue Ribbon's liability under common-law principles, even in the absence of any statutory or regulatory violations (*see Perry v. Pelersi*, 261 AD2d 780 [3rd Dept 1999] (common-law liability not limited to statutory violations, but also applies to circumstances revealing ordinary negligence to be determined by the trier of fact considering issues of foreseeability and proximate cause in the particular case)). Both Tinsay and Chi have testified that the stacked boxes in Blue Ribbon's unit obstructed their views of one another. At his deposition, David Samuels ("Samuels"), Blue Ribbon's president, denied that boxes were ever stacked five to seven feet high at that spot for any reason. He did state that Blue Ribbon would sometimes stack boxes in that fashion, just not in the area alleged. Samuels also noted that certain boxes would be displayed alongside the perimeter where the forklifts traveled. He did not know or consider whether stacking boxes five to seven feet high in that spot would obstruct a customer's view of oncoming forklifts.

Given these claims, Blue Ribbon has not eliminated all material issues of fact and has failed to satisfy its initial burden of proof to show that the placement of boxes in the subject location was not an act of negligence, regardless of whether it also constituted a violation of the house rules (*see Costen v. Cohen*, 124 AD3d 819 [2nd Dept 2015] ("[T]he defendants failed to establish their *prima facie* entitlement to judgment as a matter of law because they did not address specific claims in the plaintiff's supplemental bill of particulars")). At best, Blue Ribbon's denial that the boxes were stacked in the manner alleged by Tinsay and Chi creates an issue of fact for a jury to decide.

Whether Blue Ribbon Had Any Control or Obligation Related to the Accident Location

While Blue Ribbon might be correct that it had no obligation to maintain the pedestrian walkway or the forklift entranceway, since they were common areas and not part of its demised premises, as a commercial tenant Blue Ribbon was required to keep its own unit safe for customers independent of any lease obligations (*see Davoe v. Nostrand II Meat Corporation*, 216 AD3d 738 [2nd Dept 2023] and *Giannattasio v. Han Suk Kang*, 57 AD3d 728 [2nd Dept 2008]). Here, there is no allegation that Blue Ribbon controlled the pedestrian walkway and/or the forklift's pathway. However, there is no requirement that a defendant's negligence precipitate an injury on grounds actually owned or controlled

by the defendant; liability may be predicated on its negligence having launched a force or instrument of harm that caused injury elsewhere (*see Hyland v. MFM Contracting Corporation*, 225 AD3d 424 [1st Dept 2024] and *Cornell v. 360 West 51st Street Realty, LLC*, 51 AD3d 469 [1st Dept 2008]).

Whether Tinsay Offers More than Speculation to Establish a Dangerous Condition

Tinsay clearly identifies what she believes caused her accident. It was then Blue Ribbon's burden on this motion to establish that a dangerous condition did not exist in its stall; that is, that the stacked boxes did not constitute a hazard (*see Dilorenzo v. Nunziatto*, 209 AD3d 838 [2nd Dept 2022]). A defendant seeking summary judgment dismissing a complaint cannot meet its initial burden of proof simply by identifying gaps in the plaintiff's case, but must submit affirmative evidence in support of its position (*see Torres v. Industrial Container*, 305 AD2d 136 [1st Dept 2003]). This may include expert testimony establishing that the condition of which the plaintiff complains was not unsafe (*see Thomas v. Albany Housing Authority*, 216 AD3d 1381 [3rd Dept 2023] (summary judgment granted where expert concluded that lack of a window screen did not present a dangerous condition)). Here, Blue Ribbon offers no such affirmative evidence.

While there might be no evidence that the boxes were haphazardly stacked so as to extend into the pedestrian walkway or other common area, liability may be based upon the creation of a visual obstruction (*see Hyland v. MFM Contracting Corporation*, 225 AD3d 424 [1st Dept 2024] and *Perry v. Pelersi*, 261 AD2d 780 [3rd Dept 1999]). In *Hyland*, the court found that a triable issue of fact existed as to whether a defendant had launched a force or instrument of harm by stretching a certain opaque fabric across the length and height of a chain link fence which enclosed a construction site. Since the enclosure extended halfway into the street and ran parallel to the crosswalk, the fabric-covered fencing obstructed the line-of-sight of both pedestrians and motorists. Summary judgment was denied, since a jury would have to determine whether the enclosure created or exacerbated a foreseeable and unreasonable risk to others.

Whether Blue Ribbon Had Notice of a Dangerous Condition

Tinsay's theory that Blue Ribbon itself created the unsafe condition obviates the traditional element of a premises liability action that the responsible party have had actual or constructive notice of the hazard (*see Septoff v. La Shellda Maintenance Corporation*, 242 AD2d 618 [2nd Dept 1997]).

Therefore, Blue Ribbon cannot obtain summary judgment even if it demonstrates that it did not have advanced warning of the dangerous condition posed by the manner in which it allegedly stacked its boxes.

Under these circumstances, Blue Ribbon has failed to satisfy its initial burden of proof to demonstrate that it is entitled to judgment as a matter of law.

The foregoing constitutes the Decision/Order of this Court.

DATED: September 4, 2024
Bronx, New York

HON. LAURA G. DOUGLAS
J.S.C.