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

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JOSEPH BLUMENBERG,

Plaintiff,

-against-

1523 AVENUE M LLC and MOUNTAIN FRUITS OF AVE. M, INC.,

Defendants.

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Index # 516835/2022

ORDER

Motion Seq. # 3

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on November 18, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1& 2 [Exh. A-E]
Affirmation/Affidavit in Opposition	3 [Exh. A-E]
Reply Affirmation	4

Plaintiff, Joseph Blumenberg, commenced this action due to an alleged slip/trip and fall into an uncovered drain/grease trap at Mountain Fruits grocery store located at 1523 Avenue M, Brooklyn, New York on November 22, 2021. The defendants, 1523 Avenue M LLC and Mountain Fruits of Ave M, Inc., (hereinafter, "Mountain Fruits") own and operate the subject grocery store.

Plaintiff moves for summary judgment on the issue of liability pursuant to CPLR § 3212 against defendants and to strike defendants' affirmative defenses of comparative fault, culpable conduct, and assumption of risk. The defendants oppose plaintiff's motion on the grounds that there are genuine issues of triable fact as to (1) whether the sole proximate cause of this accident was plaintiff's own actions in failing to observe an open and obvious condition and heed to defendants' warning, and in moving a barricade placed to close off the affected area; 2) whether defendants acted reasonably in maintaining the area of the affected drain in a reasonably safe condition in light of the circumstances, in providing adequate

warnings to plaintiff, and in taking steps to remedy the condition before the accident occurred; and 3) whether the conflicting testimony in the evidentiary record, namely, whether plaintiff was an unexpected visitor or an invited guest on the property and whether plaintiff was verbally warned of the condition before the accident, constitute issues of material fact and/or credibility that must be determined by a jury.

After careful review of the moving papers, and opposition thereto, the court finds as follows:

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 (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).

In support of his motion for summary judgment, plaintiff submitted a video of plaintiff's fall. Plaintiff also submitted the deposition transcripts of the plaintiff and the defendant, Mountain Fruits, by its general manager, Chiam Prodrigal. According to plaintiff's deposition testimony, he was called to the subject premises to perform a Kosher inspection of Mountain Fruits' lettuce in its basement kitchen. The plaintiff alleges that he spoke with the kitchen manager, Leizer Nussenccweig, who did not mention anything about a flooded kitchen. There was water on the kitchen floor and as the plaintiff approached the kitchen sink, he fell into an uncovered drain/grease trap. According to plaintiff, the kitchen manager stated that he forgot to tell the plaintiff that the drain is open and that he should not walk there. According to the deposition testimony of Mr. Prodrigal, there was a water backup in the kitchen's drain/grease trap which caused water to come up; the corrugated metal plate that covered the drain/grease trap was removed; and nothing was done to barricade the area off. Plaintiff argues that the subject video and deposition testimony demonstrate that defendants were aware of a dangerous hazard that they negligently created, failed to correct same, and failed to warn the plaintiff of the dangerous hazard either verbally or by placing cones, signs, or barricades. Plaintiff

further argues that the defendants have the statutory obligation to maintain and repair their building pursuant to New York Multiple Dwelling Law Section 78(1) and New York City Administrative Code Section 27-2005.

In opposition, defendants argue that there is a material issue of fact as to whether plaintiff's own actions in walking towards the open and obvious flooded area of the drain, moving a garbage can used as a barricade, and disregarding a verbal warning was the sole proximate cause of the accident. According to the deposition testimony of the defendants' employee, Joel Friedman, he verbally warned the plaintiff prior to the incident not to walk in that area and the plaintiff was not directed to the sink area as it is only for dishes and inspections do not take place there. As such, defendants argue that there are material issues of fact concerning the conflicting testimony of the parties about when defendants' employee warned plaintiff about the alleged dangerous condition. Defendants allege that plaintiff is observed on the video moving a large garbage bin used as a barricade to walk towards an area that was closed off to him. Defendants further argue that there is a material question of fact as to whether the garbage bin placed by defendants as a barricade was in a reasonable location to act as an adequate warning. Defendants also argue that plaintiff was not an expected or anticipated visitor and there is a material issue of fact as to whether plaintiff was an expected/anticipated visitor.

A landowner has a duty to exercise reasonable care in maintaining his or her own property in a reasonably safe condition under the circumstances. See, *Galindo v Town of Clarkstown*, 2 N.Y.3d 633, 781 N.Y.S.2d 249 (2004). Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. See, *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 (2nd Dept., 2008).

The court finds that the plaintiff is entitled to summary judgment on the issue of liability. The plaintiff has satisfied his prima facie burden of demonstrating through video and deposition testimony that the defendants created the dangerous condition of an uncovered drain/grease trap that caused the accident and were aware of it, yet did not remedy the dangerous condition. See, *Sloan v 216 Bedford Kings Corp.*, 208 A.D.3d 1192, 175 N.Y.S.3d 105 (2nd Dept., 2022). In opposition, defendants have failed to raise a triable issue of fact. The court further finds that the dangerous condition was not open and obvious as the uncovered drain/grease trap was obscured by the flood water. See, *Kolari v Whitestone Constr. Corp.*, 138 A.D.3d 1070, 31 N.Y.S.3d 525 (2nd Dept., 2016). The defendants' arguments that the garbage can was used as a barricade, plaintiff was not an expected/anticipated visitor, and plaintiff ignored warnings are unavailing and not sufficiently supported

with admissible evidence. Moreover, the plaintiff established that the defendants were the sole proximate cause of the accident, which warrants dismissal of the defendant's affirmative defenses of comparative fault, culpable conduct, and assumption of risk. *See*, *Yawagyentsag v. Safeway Construction Enterprise LLC*, 225 A.D.3d 827, 207 N.Y.S.3d 608 (2nd Dept., 2024)

Accordingly, plaintiff's motion for summary judgment on the issue of liability and striking the defendants' affirmative defenses of comparative fault, culpable conduct, and assumption of risk, is hereby granted.

Based on the foregoing, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the issue of liability and striking the defendants' affirmative defenses of comparative fault, culpable conduct, and assumption of risk is hereby granted.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
June 27, 2025

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

HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
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