

Radigan v Water Mill Bldg. Supply, LLC
2025 NY Slip Op 35525(U)
March 14, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 616766/2022
Judge: C. Stephen Hackeling
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SHORT FORM ORDER

INDEX No. 616766/2022
 CAL. No. 202400213MV

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. C. STEPHEN HACKELING
 Justice of the Supreme Court

MOTION DATE 7/12/24
 ADJ. DATE 9/25/24
 Mot. Seq. # 001 MD

-----X
 JAMES RADIGAN,

Plaintiff,

- against -

WATER MILL BUILDING SUPPLY, LLC and
 WATER MILL BUILDING SUPPLY REALTY,
 LLC,

Defendants.
 -----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by defendants, dated June 4, 2024; Answering Affidavits and supporting papers by plaintiff, dated August 20, 2024; Replying Affidavits and supporting papers by defendants, dated September 18, 2024; it is

ORDERED that the motion by defendants for summary judgment dismissing the complaint against them is denied.

This action was commenced by plaintiff James Radigan to recover damages for injuries he allegedly sustained on July 6, 2022, when, while shopping for lumber at a building supply store operated by defendant Water Mill Building Supply, LLC (WMBS), he walked into the eye-level prong of a forklift. The subject premises, known as 1110 Montauk Highway, Water Mill, New York, is owned by defendant Water Mill Building Supply Realty, LLC.

Defendants now move for summary judgment in their favor, arguing that the forklift was open, obvious, and not inherently dangerous. In support of their motion, defendants submit, among other things, transcripts of the parties' deposition testimony and Kevin Seng's affidavit.

Plaintiff testified that at approximately 7:00 a.m. on the incident date he was present at the building supply store, purchasing lumber. He stated that he has been to the store many times, and that it has two warehouses where its lumber is kept. Upon questioning, plaintiff acknowledged that he was aware that

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forklifts were present in those warehouses, that walking under the forks of a forklift can be dangerous, and that “it would make good common sense” to stay clear of forklifts. He indicated that he first entered WMBS’s “main building,” where he “told them what [he] wanted,” after which they entered his order into their computer, printed him a receipt, and he “went to the back to pick up the lumber.” Plaintiff testified that he observed two forklifts in the area where he needed to retrieve his lumber, neither of which was manned by a WMBS employee. He noted that he believes one of the forklifts had its prongs elevated approximately two feet off the ground, while the second had its prongs at eye level. Plaintiff explained that the forklift with its prongs at eye level also carried a stack of 16-foot-long pine lumber, which was being transferred by a WMBS employee from the forklift to a lumber storage rack.

Plaintiff testified that he began browsing the warehouse, looking for the lumber he needed. Once he obtained the piece of lumber he sought, he “went down underneath the forks to bring the wood outside.” Asked why he elected to walk underneath the raised prongs of the forklift, plaintiff replied, “Because I’m sure it was easier than trying to maneuver a large piece of wood around a forklift, [and] it was easier to go down and straight out.” Plaintiff stated that he successfully carried his first piece of lumber under the elevated prongs of the subject forklift, placed it in his pickup truck, and then returned to the warehouse to obtain the second piece of lumber he needed. He noticed the other lumber was on the second floor of the warehouse, so he “proceeded towards the stairs.” Plaintiff explained that the stairway used to ascend to the second floor “was basically in between the two forklifts,” and that after spotting the piece of lumber he needed, he “was walking towards the stairs . . . when [he] hit the forklift.” He denied that anything was blocking his view of the forklift. In response to questioning, plaintiff admitted that he knew the subject forklift was present, that the forklift had its forks raised, that there was wood on top of the forks, and that he did nothing to avoid walking into the forklift. Plaintiff testified that he was looking toward the stairs and “didn’t see” the eye-level prongs extending out “probably a foot and a half or two feet” from beneath the lumber atop them, because “the end of the forklift comes to a point . . . basically down to nothing at the very point of the forks.” He indicated that the prong of the forklift “hit [his] eyebrow and went into [his] eye from there.” Asked if he could have walked behind the subject forklift instead, he stated that the WMBS employee was blocking that route, though he acknowledged he could have waited for that employee to move aside.

Kevin Seng testified that at the time of plaintiff’s accident he was WMBS’s operations manager. He stated that WMBS had one warehouse that contained lumber and was open to the general public. Mr. Seng indicated that while retrieving lumber was “self-service,” WMBS employees were ready and willing to provide assistance if asked. He also confirmed that WMBS has 10 forklifts, of varying brands and types, at the subject premises. With regard to the subject incident, he testified that he was present at the accident location “about two or three minutes” after it happened. Mr. Seng stated that there were two WMBS employees present in the subject warehouse at the time, but neither witnessed plaintiff’s accident.

Shown a surveillance camera recording of the subject incident, Mr. Seng stated that it depicts two “smaller capacity forklifts” and, most likely, a WMBS employee named Jason Grodski. While he states that the first forklift is shown engaging in the “common practice” of lifting wood for unloading onto higher shelving units, he does not know why the second forklift is present. Mr. Seng acknowledged that the subject forklift is raised and has wood stacked on its approximately 40-inch-long forks, which “get thinner”

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the further they are from the forklift body. He indicated that when a forklift has its prongs raised high, to perhaps 10 feet off the ground, “it is customary” for WMBS employees to “put out rolling gates” to prevent customers from walking underneath them. However, Mr. Seng testified that, in his opinion, gates would not be necessary when the forks are raised only five or six feet, as here. He further testified that, customarily, the raised prongs of a forklift would only be lowered if the forklift operator was leaving the machine unattended. Asked if he thinks a gate surrounding the subject forklift would have prevented plaintiff’s incident, he replied, “I believe so.”

A party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

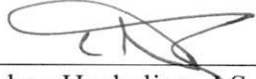
Liability for a dangerous or defective condition on property is generally “predicated upon ownership, occupancy, control, or special use of the property” (*Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]). However, “there is no duty to protect or warn against conditions that are open and obvious and not inherently dangerous” (*Beier v Giglio*, 230 AD3d 733, 733, 215 NYS3d 527 [2d Dept 2024]). “A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident” (*id.* at 733-734). Yet, a “condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted” (*id.* at 734 [citation omitted]).

Defendants failed to establish a prima facie case of entitlement to summary judgment in their favor (*see Juonienne v H.R.H. Constr. Corp.*, 6 AD3d 199, 774 NYS2d 525 [1st Dept 2004]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). “Store owners are charged with the duty of keeping their premises in a reasonably safe condition for the benefit of their customers” (*Russo v Home Goods, Inc.*, 119 AD3d 924, 925, 990 NYS2d 95 [2d Dept 2014]). “[W]hether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case” (*Holmes v Macy’s Retail Holdings, Inc.*, 184 AD3d 811, 811, 124 NYS3d 582 [2d Dept 2020]). Viewing the evidence in the light most favorable to plaintiff, which it must on a motion for summary judgment, the court finds the deposition testimony submitted by defendants reveals triable issues to be resolved by the ultimate fact finder at trial. While the subject forklift’s large body may have been open and obvious, certain factors in this case militate against absolving defendants of liability as a matter of

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law. A reasonable jury could find, under the circumstances, that the forklift's thin, eye-level metal tines extending into the air from below stacked lumber were not open and obvious, or that their height transformed them into an inherently dangerous condition. Defendants' submissions having failed to eliminate all triable issues, the court need not review plaintiff's submissions in opposition (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Accordingly, the motion by defendants for summary judgment dismissing the complaint against them is denied.

Dated: March 14, 2025



Hon. C. Stephen Hackeling, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION

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