Lyons v Burger King Corp.

2012 NY Slip Op 30252(U)

January 23, 2012

Sup Ct, Nassau County

Docket Number: 003285/2010

Judge: Thomas P. Phelan

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

AGATHA LYONS,

Plaintiff(s),

ORIGINAL RETURN DATE: 11/29/2010
SUBMISSION DATE: 11/29/2010
INDEX No.: 003285/2010

-against-

BURGER KING CORPORATION and MILLER REALTY ASSOCIATES, LLC,

Defendant(s).

MOTION SEQUENCE #4

Notice of Petition.....	1
Verified Answer.....	2
Plaintiff's Affirmation in Opposition.....	3
Reply Affirmation.....	4

Motion by defendants for leave to renew their prior motion for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint as against them is granted; and, upon renewal, the motion is denied.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as a result of an alleged slip and fall on ice in the parking lot of the Burger King restaurant ("Burger King") located at 4201 Hempstead Turnpike, Bethpage, New York. The accident occurred on or about December 22, 2009.

By order dated October 13, 2011, defendants' motion for summary judgment without prejudice was denied with leave to renew within thirty (30) days from the date of said order. Movant's reliance upon the transcripts of deposition testimony, which were unsigned and unsworn, and the absence of letters transmitting the transcripts of the depositions of the witnesses for defendants, or an affidavit submitted by anyone with personal knowledge, necessitated the denial of the motion as facially deficient.

Upon review of the papers submitted, the Court finds that defendants have cured the evidentiary defect as all of defendants' witnesses have executed their deposition transcripts (CPLR 3116(a)). Defendants have also annexed a full copy

of plaintiff's transcript to their Reply papers which was certified by the Court Reporter.

After defendants discontinued the action against third-party defendant, South Shore Building Maintenance, Mr. Gendelman refused to execute his transcript. Where a deponent refuses to execute his transcript when duly offered, the transcript will be deemed admissible (*See, Thomas v Hampton Express,* 208 AD2d 824 [2d Dept 1994] *lv to app den.*, 85 NY2d 803 [1995]).

In support of their motion, defendants submit, *inter alia*, the transcripts of testimony of plaintiff, Theresa Sharp, the driver's assistant; Stephanie Moran, the hourly manager at Burger King; Diana Marquez, the general manager at Burger King; and Bruce Gendelman, the owner of South Shore Building Maintenance.

Overall, defendants assert that they did not create the patch of black ice on which plaintiff fell nor did they have actual or constructive notice of the allegedly dangerous condition, *i.e.*, black ice. Further, there can be no notice of a black ice condition as a matter of law *(Christal v Ramapo Cirque Homeowners Ass'n*, 51 AD3d 846 [2d Dept 2008]).

While it had snowed three days prior to plaintiff's alleged fall, the testimony shows that Burger King Corporation hired South Shore Building Maintenance to plow the parking lot of the subject Burger King immediately after the snow ceased to fall. In Mr. Gendleman's post-job inspection, he did not observe any ice in the parking lot. Therefore, the previous snowfall and the patch of black ice on which plaintiff allegedly fell on December 22, 2009, are completely unrelated. Moreover, the testimony of Stephanie Moran establishes that, on the morning of the alleged fall, she inspected the parking lot and did not observe any ice.

In opposition to defendants' motion, plaintiff submits, *inter alia*, her own deposition testimony, a photograph of the icy condition taken on the date of the accident immediately thereafter and a certified weather report which reveals that 10 inches of snow, ice pellets, hail and ice were observed on the ground on the day of plaintiff's accident.

In sum, plaintiff asserts that defendants have failed to submit evidence that they requested salt or sand on the premises; that they salted or sanded the premises after the December 20, 2009, snowstorm; that they inspected the parking lot on the premises at any time after the December 20, 2009, snowstorm; that the piles of

snow did not contribute to the formation of ice which caused Ms. Lyons to fall; and triable issues of fact exist.

A landowner has a duty to maintain its premises in a reasonably safe manner (*see Basso v Miller*, 40 NY2d 233, 241 [1976]) and, thus, may be found liable if it created or had actual or constructive notice of the alleged defective condition *(See Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Cassone v State of New York*, 85 AD3d 837 [2d Dept 2011]; *Luksch v Blum-Rohl Fishing Corp.*, 3 AD3d 475, 476 [2d Dept 2004]). However, there is no duty to protect or warn against open and obvious conditions that are not inherently dangerous (*Franzese v Tanger Factory Outlet Centers Inc.*, 2011 NY Slip Op. 07200; *see Russ v Fried*, 73 AD3d 1153 [2d Dept 2010]; *Weiss v Half Hollow Hills Cent. School Dist.*, 70 AD3d 932 [2d Dept 2010]; *Pipitone v 7-Eleven Inc.*, 67 AD3d 879 [2nd Dept 2009]; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). The issue of whether a dangerous condition is open and obvious is fact specific and usually a question of fact for a jury to resolve (*see Shah v Mercy Med.* Ctr., 71 AD3d 1120 [2d Dept 2010]). Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances. 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 plaintiff is distracted (*see Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008, 1009 [2d Dept 2008]; *Mauriello v Port Auth. of N,.Y. and N.J.*, 8 AD3d 200 [1st Dept 2004]).

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it *(see Amendola v City of New York*, 89 AD3d 775 [2d Dept 2011]; *Schiano v Mijul, Inc.*, 79 AD3d 726 [2d. Dept 2010]; *Walsh v Super Value, Inc.*, 76 AD3d 371[2d Dept 2010]; *Gambino v City of New York*, 60 AD3d 627 [2d Dept 2009]). "To meet its initial burden on the issue of . . . constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Amendola v City of New York, supra; Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2d Dept 2008]; *see Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610 [2d Dept 2011]; *Kostic v Ascent Media Group, LLC*, 79 AD3d 818 [2d Dept 2010]; *Gershfeld v Marine Park Funeral Home*, 62 AD3d 833 [2d Dept 2010]; *see Piacquadio v Recine Realty* Corp., 84 NY2d 967, 969 [1994]).

Viewing the evidence in the light most favorable to the non-movant (Taylor v

Rochdale Village Inc., 60 AD3d 930 [2d Dept 2009]; *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt.*, 7 NY3d 96 [2006]; see Mosheyev v Pilevsky, 283 AD2d 469 [2d Dept 2001]; *see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), issues of fact exist which preclude the granting of summary judgment. Accordingly, the motion is denied.

This constitutes the order and judgment of this Court.

Dated: January 23, 2012

HON THOMAS P. PHELAN

J.S.C.

ENTERED
JAN 25 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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