O'Sullivan v 7-Eleven, Inc.
2016 NY Slip Op 30927(U)
March 29, 2016
Supreme Court, New York County
Docket Number: 154536/14
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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CHRISTINE O'SULLIVAN,

Plaintiff,

-against-

Index No. 154536/14

7-ELEVEN, INC. and SEUNG YUP SAKONG d/b/a 7 11 FOOD STORE #33579,

Defendants.

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DONNA MILLS, J. :

Defendants 7-Eleven, Inc. (7-Eleven) and Seung Yup Sakong d/b/a 7 11 Food Store # 33579 (Seung) move for summary judgment dismissing the complaint.

This is a slip and fall personal injury action. On December 14, 2013, at approximately 7:00 p.m., at or near the front interior of a 7-Eleven store located at 1453 Third Avenue in New York, New York, plaintiff fell and injured herself. Plaintiff alleges that she entered the store as a customer at a time when it was snowing. After paying for some items at the register, she claims that she turned towards the door to leave and suddenly slipped on slush on the floor. She is suing defendants for negligent conduct, specifically, causing and permitting a dangerous and defective condition to remain on the floor at the time of the incident.

Defendants move for summary judgment dismissing this complaint, stating that plaintiff has failed to establish a prima facie case of negligence. Defendants provide three arguments which merit their dismissal.

First, defendants contend that plaintiff has failed to establish that they had created a dangerous condition on the floor of the premises, or that defendants had actual or constructive notice of such a dangerous condition. Relying on plaintiff's deposition testimony, defendants

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argue that plaintiff has only speculative notions of their conduct at the time of the incident. Plaintiff testified that she did not know how the accumulation of slush came to be on the floor prior to her fall, but assumed that it was due to foot traffic with customers bringing in snow and slush from outside. Plaintiff testified that she did not know for how long the accumulation existed. Defendants state that it cannot be reasonably inferred from this testimony that the substance on the floor had been on the floor for any appreciable length of time. Defendants claim, that in accordance with prevailing case law, plaintiff has not established that any slushy condition existed for a sufficient period of time to charge them with notice.

Defendants provide affidavits from two employees, Gautam Maharjan and Binay Limbu, both present at the time of the incident. Both employees assert that during times of inclement weather, store employees constantly dry mop the floor, and provide a floor mat at the entrance as well as an orange wet cone or sign. During their shift at the store, Maharjan, who was assigned floor duty, dry mopped the floor approximately every 15 minutes due to the persistent snow. Maharjan states that he had dry mopped the floor no more than 15 minutes prior to the alleged accident. Both employees declare in their affidavits that at the time of the accident, the store had a floor mat next to the entrance and a wet floor cone near the area where plaintiff fell.

Defendants argue that the use of reasonable precautions had been taken to minimize potential hazards on the premises, in consideration of the ongoing snowfall. However, they claim that this in itself did not mean that they admittedly knew of the specific condition on the floor at the time of the incident.

The second argument made by defendants is that they are precluded from liability pursuant to the storm in progress doctrine. Under this doctrine, the legal obligation to take

reasonable measures to remedy a dangerous condition caused by a storm does not commence until a reasonable time after the storm has ended. *See Pippo v City of New York*, 43 AD3d 303, 304 (1st Dept 2007) (see discussion below). In this case, the storm was in progress before and during the alleged accident. Defendants submit a certified copy of a weather report for New York City on the date of the incident in order to establish that continuous snow had fallen during the evening hours. Defendants provide some of plaintiff's deposition testimony where plaintiff stated that there was moderate snowfall when she entered the store, and that there may have been an one-inch accumulation of snow and slush outside the store at the time. Defendants aver that they had no duty to take reasonable steps to remedy any dangerous condition in the store until the cessation of the snowfall. Defendants also claim that the measures provided by the employees at that time were sufficiently reasonable in terms of precautionary work.

The third argument relates to 7-Eleven alone. Defendants contend that 7-Eleven, as a franchisor, cannot be held liable for the acts or omissions of the franchisee, unless it had sufficient control over the regular activities of the franchisee. Defendants argue that franchisee Seung is the party who operates and maintains the store pursuant to the Franchise Agreement (Agreement) between defendants. The Agreement provides that Seung is responsible for cleaning and maintaining the store, as he was at the time of the incident. Moreover, defendants claim that 7-Eleven did not and does not own or operate the store, or exercise any control over the daily operation or maintenance of the store. Therefore, defendants request that 7-Eleven be dismissed from this suit as an improper defendant.

In opposition, plaintiff argues that defendants did have notice of a dangerous condition, since they conceded that prior to the fall, their employees placed a cone in the general area of the

fall in an attempt to warn patrons of the dangers on the floor. Plaintiff considers the placement of the cone to be an incompetent attempt to prevent an accident in the area, and claims that an issue of fact exists as to whether defendants were negligent in failing to provide a sufficient warning of a dangerous condition at the time.

Plaintiff contends that the storm in progress doctrine is not applicable here because she claims that the actual snowfall at the time of the incident was less than half an inch. Plaintiff argues that there was no actual storm condition to warrant the application of the doctrine. Moreover, plaintiff argues that there is an question as to whether defendants' preliminary measures were reasonable in light of the standards of negligence. Plaintiff claims that defendants had notice of the dangerous condition, and that there is an issue as to whether the fall could have been averted under the circumstances.

Plaintiff opposes the dismissal of 7-Eleven from this case because she claims that the franchisee operated the store under 7-Eleven's control. Plaintiff states that 7-Eleven was the lessor of the premises when the accident occurred. Plaintiff maintains that a lessor cannot exempt itself from liability resulting from its negligence or the negligence of its agent, citing section 5-321 of the General Obligations Law. Plaintiff argues that the Agreement violates the statute, asserting that Seung is a lessee-agent of 7-Eleven, and that 7-Eleven has attempted to absolve itself of any liability for negligence.

In reply, defendants deny any notice of a specific dangerous condition on the floor, and the efforts of the employees to warn customers of a potentially dangerous condition on the premises were customary and reasonable measures. They state that the measures taken were not based on any notice of a dangerous condition, but a standard procedure in the event of snow

accumulation. Defendants contend that a duty to warn is not established in the absence of notice.

Defendants argue that the proof of ongoing snow indicates that there was a storm which continued through the evening hours, and that the storm in progress doctrine is applicable. As for 7-Eleven, defendants contend that Seung is not an agent of 7-Eleven. According to them, the Agreement specifically designates Seung as an independent contractor with the responsibility of maintaining the store. Since the Agreement does not provide that 7-Eleven exempts itself from its own liability, defendants contend that section 5-321 does not apply in this situation.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman,* 43 AD3d 374, 375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted]'" *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law." *Flores v City of New York,* 29 AD3d 356, 358 (1st Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then sifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." *Id.*

The court shall first determine the issue regarding 7-Eleven as an improper party in this action. There is no dispute over 7-Eleven's identity as a franchisor. 7-Eleven is being sued for the alleged negligence of its franchisee.

"In determining whether a defendant, as a franchisor, may be held vicariously liable for the acts of its franchisee, the most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred."

Khanimov v McDonald's Corp., 121 AD3d 1050, 1051 (2d Dept 2014).

There is no evidence of 7-Eleven having any control over the day-to-day operations of this store. The Agreement between 7-Eleven and Seung is a standard franchise agreement. Section 20 (a) of the Agreement provides that Seung agree "to be responsible for all maintenance, repairs, replacements, janitorial services and expenses relating to the Store . . . ," including cleaning the store's interior to remove snow and ice. "The mere existence of a franchise agreement is insufficient to impose vicarious liability on the franchisor for the acts of its franchisee; there must be a showing that the franchisor exercised control over the day-to-day operations of its franchisee [citations omitted]." *Martinez v Higher Powered Pizza, Inc.,* 43 AD3d 670, 671 (1st Dept 2007). Section 2 of the Agreement specifically designates Seung as an independent contractor, with the responsibilities associated with such an individual. The terms of this Agreement do not violation the General Obligations Law.

The court finds that in the absence of any control over Seung's operations, 7-Eleven is not liable for negligent activities here, and it shall be dismissed from this action.

The court shall consider the applicability of the storm in progress doctrine to this action. "[I]t is settled that the duty of an landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended [citation omitted]." *Pippo v City of New York,* 43 AD3d at 304. In fact, courts have held that evidence of a storm in progress

presents a prima facie case for dismissal. *See Powell v MLG Hillside Assoc.,* 290 AD2d 345 (1st Dept 2002).

The storm in progress doctrine has been applied in interior situations where an alleged slippery condition was said to be caused by precipitation tracked indoors during a storm. *See Richardson v S.I.K. Assoc., L.P.,* 102 AD3d 554 (1st Dept 2013); *Hussein v New York City Tr. Auth.,* 266 AD2d 146 (1st Dept 1999). In *Richardson,* a worker brought an action to recover damages for injuries she sustained during a slip and fall on water in the lobby of a building where she worked during an ongoing storm. The Appellate Division, First Department, dismissed her complaint, citing the Storm in Progress doctrine and holding that defendants were not required to provide a constant ongoing remedy during a storm.

The "doctrine is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of less severe, but still inclement, winter weather [citations omitted]." *Olejniczak v E.I. Dupont De Nemours & Co.,* 79 F Supp 2d 209, 216 (WD NY 1999). Based on the climatological data provided by defendants, there is sufficient evidence of an inclement condition at the time of the accident, which would warrant the application of this doctrine.

It is settled that "if a storm is ongoing, and a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating a hazardous condition or exacerbating a natural hazard created by the storm." *Anderson v Landmark at Eastview, Inc.,* 129 AD3d 750, 751 (2d Dept 2015). However, in the case of interior situations, defendants are not required to cover all of its floors with mats, nor to continuously mop up all moisture from tracked-in snow. *See Negron v St. Patrick's Nursing Home,* 248 AD2d 687, 687 (2d Dept 1998).

Defendants have provided affidavits from Seung's employees who assert that they regularly mopped the interior of his store pending the snowfall and placed mats by the entrance where customers walked. There is also a surveillance video which depicted the fall. As discussed by defendants, the video depicted plaintiff and a man entering the store in the evening and plaintiff slipping neat the counter. While the video does not show the condition of the floor, it shows a wet floor cone in the front of the store approximately two feet from the site of the accident.

The court finds that Seung acted reasonably during the snowfall and exercised appropriate safety measures in the store. The measures taken did not create a hazard or exacerbate a present hazard at the time. Thus, Seung is not liable pursuant to the storm in progress doctrine. The court need not consider the notice issue.

Accordingly, it is

ORDERED that defendants 7-Eleven, Inc. and Seung Yup Sakong d/b/a 7 11 Food Store #33579's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 3|29|16

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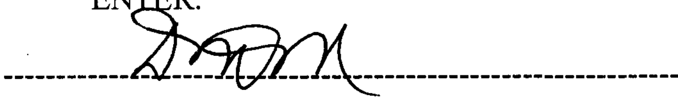

J.S.C.

DONNA M. MILLS