Sprague v Profoods Rest. Supply, LLC
2010 NY Slip Op 33872(U)
April 2, 2010
Sup Ct, Bronx County
Docket Number: 18270/06
Judge: Howard H. Sherman
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[* 1]

NEW YORK SUPREME COURT - COUNTY OF BRONX

W.

PART 04

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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SPRAGUE,DONALD

Index №. 0018270/2006

-against-

Hon. HOWARD H. SHERMAN,

PROFOODS RESTAURANT

Justice.

----------X

The following papers numbered 1 to 3 Read on this motion, SUMMARY JUDGMENT DEFENDANT
Noticed on October 05 2009 and duly submitted as No. ____ on the Motion Calendar of 12/3/09

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits A-N and Affidavits Annexed	1	
Answering Affidavit and Exhibits A-H	2	
Replying ~~Affidavit and Exhibits~~ Affirmation	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion by defendant for an order awarding it summary judgment dismissing the complaint is decided in accordance with the accompanying decision/order filed herein.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 4/2/10

Hon. _____
HOWARD H. SHERMAN, J.S.C.

HOWARD H. SHERMAN

FILED May 07 2010 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Donald Sprague

Index No. 18270/06

Plaintiff,

DECISION/ORDER

-against-

Present:

Profoods Restaurant Supply, LLC
JPN Associates and
BJ's Wholesale Club, Inc.

Hon. Howard H. Sherman
Justice

Defendants

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Facts and Procedural History

Plaintiff seeks recovery for injuries allegedly sustained on the morning of November 25, 2005 , when he slipped and fell on ice in the parking lot in the vicinity of the loading docks of commercial premises owned and managed by defendant JPN Associates ("JPN"), and occupied by defendant Profoods Restaurant Supply, LLC ("Profoods") , a wholly owned subsidiary of defendant BJ's Wholesale Club, Inc. ("BJ's").

This action was commenced in July 2006 alleging the negligence of defendants in their ownership, operation , maintenance, management , control and supervision of the premises where plaintiff was caused to fall and sustain injuries as the result of water and/or ice that accumulated from a clogged and/or defective drain.

In the Response to Interrogatories of February 14, 2007, plaintiff alleges that the location of the accident was the "area of loading bays for trucks near a drain." [Response to Interrogatories ¶ 3] The specific negligent acts asserted were described as "allowing a broken, clogged and defective drain to be and remain in the area of the loading bays and pavement thereat" , and allowing snow and ice to accumulate there, and failing to take preventive and remedial steps with respect to this accumulation or to warn of its existence [Id.

¶ 5].

Issue was joined the following month with the service of defendants' answer denying the claim and asserting twelve affirmative defenses.

Plaintiff served a Response to Interrogatories in February 2007 and depositions were completed in October 2008.

The Note of Issue was filed on July 2, 2009 .

Motion

Defendants move for an award of summary judgement dismissing the complaint. In support defendants submit copies of the pleadings , interrogatory and discovery demands and responses thereto [Exhibits A-C]; the examinations before trial testimony of plaintiff [Exhibit K], and defendants' witnesses [Exhibits L,M]; the affidavit of Profood's general manager [Exhibit N]; an accident report [Exhibit D]; climatological data [Exhibit E]; the site plan for the accident location [Exhibit F], as well as photographs of the location as identified and authenticated at the various depositions [Exhibits G-K].

Contentions of the Parties

Defendants maintain that there is no material issue of fact as to their lack of liability for the underlying accident because: 1) there is no evidence that defendants created the ice condition on which plaintiff allegedly fell ; 2) the record is devoid of any evidence indicating that defendants had either actual or constructive notice of that ice condition, and 3) with respect to defendant JPN Associates, as an out-of-possession landowner with no right to control the premises, no liability could exist as a matter of law.

Plaintiff opposes the motion contending that there are material unresolved issues of fact precluding summary disposition. A specific issue deemed unresolved is the question of whether and to what extent an adequate inspection was performed prior to the opening of the parking area for business on the date of the incident . Plaintiff contends that inconsistencies in the testimony and the affidavit of the general manager raise an issue of fact as to whether any inspection of the grounds was made prior to the commencement of the delivery process on the morning of the accident. In addition, plaintiff submits the affidavit of a professional meteorologist [Exhibit A] which, it is contended , establishes that ice formed at the location approximately two days before the incident . Plaintiff maintains that other evidence in the record also demonstrates that the icy condition was visible and apparent . As such, it is argued , given its appearance , and the length of time it existed, an issue is raised as to whether , in the exercise of reasonable care, defendants upon reasonable inspection should have discovered the icy condition and taken steps to remove it and/or warn of its existence.

Testimonial Evidence

Donald Sprague[1] testified that at the time of the accident he was employed as a company driver for the Vermont-based Hi-Low Trucking Company [SPRAGUE EBT: 15-16]. He drove a tractor-trailer making regular deliveries of paper products from a Vermont factory to the New York metropolitan area [EBT: 18-19]. On November 25, 2005, he left Vermont at 2:30 AM to make a deliver to Profoods located in Long Island City, a site to which he had made deliveries on three or four previous occasions [Id. 36;25]. During the trip, he did not see any rain, snow, or residual moisture on the roads [Id. 82].

When he pulled his truck into the site, he observed a truck in the loading bay and a tractor-trailer approaching the site from behind his truck [Id. 41-43]. Mr. Sprague testified

[1] Exhibit K

that he could not recall seeing anything on the ground of the parking lot at that time and nothing caught his attention [Id. 41;43]. He parked his truck and went to the receiver's office to present the bills of lading and receive instructions as to which of the bays he should use to make his delivery [Id. 47]. He received the instructions and walked back to the truck. Prior to arriving at the office, he was able to observe that there was no obstruction to his backing his truck into the delivery bay [Id. 46]. On both the walk to and from the receiver's office he observed no condition on the ground that came to mind [Id. 45-47]. He proceeded to back his truck into the designated loading bay [Id. 48]. He left to return to the receiver's office to have the bill of lading signed and make sure that the truck was emptied [Id.51- 52]. Mr. Sprague testified that he observed nothing on the ground as he proceeded to and from the office on this visit [Id. 52;57], and specifically, he did not observe any wetness on the ground as he walked to the front of his truck [Id. 54]. He pulled his truck away from the bay to allow another truck to move into a different bay [Id. 57-59]. After maneuvering the truck, he stepped out to make sure that the other truck had cleared so that he could back up again [Id. 59]. He testified that as he walked around to the front of his truck, "[r]ight at the front corner is where my feet went out in front of me and down I went." [Id.59:10-12]. He fell with the upper to mid back on the left side first hitting the ground and then his head "forcibl[y]" doing so [Id. 67-68].

Mr. Sprague testified it was daybreak and he observed that there was nothing obstructing the path of 10 feet from the door of the vehicle to the front [Id. 60-61;75]. He did not experience any difficulty seeing on the "bright gray"asphalt there [Id. 62;64:21]. He testified that he was looking where he was walking prior to the fall [Id. 75]. After the accident, Mr. Sprague returned to the truck and again backed it into the delivery bay, and with the assistance of another trucker, went to the office where his head was bandaged [Id. 69-72].

He described his observations of the the location of his fall in the dock area of the parking lot , viewed while he was getting up, as containing a "shiny, like, ice, thin coat of black ice [.]" [Id. 71:4-5], "three by four feet, possibly larger." [Id. 75:16-17]. He also observed a drain "just outside" the location where he fell [Id. 79:19]. He testified that he had never walked by that specific location at anytime that morning [Id. 71]. He accompanied the warehouse manager to show him the specific location, and at that point, he observed it to have been sanded and salted [Id. 76-77]. Mr. Sprague also testified that when he left he observed other areas of "black ice" at the site [Id. 78].

Stuart Krueger[2] testified that he was one of twelve limited partners of J.P.N. Associates, which was formed in 1966 "as an investment vehicle" [KRUEGER EBT: 9:18-19;11]. His wife was a general partner [EBT: 10]. Since its formation, Mr. Krueger has been involved in the management of the JPN owned warehouse property located at 5301 11th Street, Long Island City [Id. 11]. In 2004, the property was leased by JPN to Profoods with B.J.'s as a guarantor on the lease [Id. 13]. The lease continued in effect until terminated in 2007 when Profoods went out of business [Id. 15]. The property is now leased to Fresh Direct [Id].

Mr. Krueger testified that he had no recollection of anyone from JPN visiting the property during the period of Profoods' occupancy [Id.17]. He also testified that JPN did nothing with respect to the maintenance of the property [Id. 36]. He was aware of certain renovations made by Profoods including work on the exterior and blacktopping of the parking lot [Id. 17-19]. JPN had been provided with copies of the renovation plans, but Mr. Krueger testified that he discarded the plans with other documents when Profoods vacated the premises [Id. 28]. He testified that he had no idea if at anytime the property contained any drains or catch basins for the drainage of water [Id. 19-20], or how any accumulated rain or

[2] Exhibit L

snow was drained from the area [Id. 23]. He also testified that a tenant would only be required to notify JPN of any contemplated changes affecting the structural integrity of the building , and he did not consider any changes to slope or to the drainage of the parking area to qualify as such [Id. 29-30]. He testified that he did not have any knowledge of plaintiff's accident except for that imparted by counsel [Id. 36].

Orlano Farino [3]testified that he was employed by Profoods as general manager of its Long Island City facility for the period commencing with its opening in January 2005 , through October 2006 [FARINO EBT: 8-13]. He described Profoods as a "hybrid" retail/wholesale operation engaged in selling foodstuffs and related products to which trucks regularly made deliveries [EBT: 13,18]. His duties were described as overseeing all operational functions , supervising the sixty-five to seventy-five employees and "overseeing the facilities, everything form maintenance to everything that had to be fixed or repaired ." [Id. 11:9-11].

With respect to the parking lot area, used by both customers and through which delivery trucks accessed the receiving area , Mr. Farino testified that it had a somewhat triangular shaped configuration and estimated that it was "maybe two hundred feet on one side and one hundred fifty on the other." [Id. 22:22-24] with a black asphalt surface [Id. 50]. Three or four tractor trailers could fit along the waterfront side in front of one another [Id 23]. Mr. Farino recalled that the entire lot sloped towards the water and "sometimes we would have wagons out there and they would start going on their own..." in the direction of the water, a tributary of the East River [Id. 33:16-18-34:18]. At no time while working there did Mr. Farino notice any problems with drainage of water or of melting snow [Id. 39], nor did he remember observing any drains in the exterior of the property [Id. 40].

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[3] Exhibit M

Profoods was opened at 7:00 AM , unless there were earlier deliveries scheduled [Id. 24], and it was gated with a lock during non-working hours [Id]. The employee who was the "opening manager" would be required to open the lock, swing open the gate and then open the building [Id. 25]. On the morning of the accident, this job was performed by Mr. Farino [Id. 52] , and he testified that he had observed neither ice nor wetness on the lot [Id. 52-53;60]. He testified as to the duties of the visual inspection of the lot surface.

> A. Well, as opening manager when he opens the gate has his journey through the parking lot to the receiving bay because we normally parked along this side of the building parking lot.
>
> • • • •
>
> A. Yes, and we would try to train the managers to park as far away from the building as possible to give the customers preference parking. So, we would have to go down in this area (indicating) . We would have to walk through the parking lot this way to get to the receiving entrance, and you would make general observations in the parking lot as you walk through such as, did the closing manager clean the lot up last night, is everything left in good shape, you know, things of that nature.

Id. 51:22-52:20

Mr. Farino testified that he was informed of the accident when paged by one of the receiving office employees and he went to the office and spoke to plaintiff and asked him if he required medical assistance [Id. 41-43]. While plaintiff was being bandaged, Mr. Farino went outside to locate plaintiff's truck as he had been informed that Mr. Sprague had fallen in its vicinity [Id. 45]. When there, he observed a "patch of ice about a foot square, maximum a foot -and-a-half square [ ]" [Id. 48:10-11] of a square shape [Id. 48:13] in close proximity to the truck that had been pointed out as belonging to plaintiff , with Mr. Farino also testifying that "he would probably step on it as he got out of the truck." [Id. 48:24-49:2]. He further

described the ice as not being like "black ice" because there was some white on the top of it and white around the edges , "not where it was invisible [ ] [y]ou could see it." [Id.50:22-23]. Mr. Farino also inspected the immediate area for garbage or oil spills and found none [Id. 49]. There was no sand or rock salt on the surface of the lot anywhere [Id. 51]. He instructed the receiving manager to arrange for salt to be spread on the spot where plaintiff fell [Id. 55]. He notified his boss of the accident that day and made a written report of it within a day after [Id. 61-62].

Mr. Farino's affidavit[4] is also tendered in support of the motion. He attests that he arrived at work on November 25, 2005 shortly after 6:00 AM and that plaintiff's accident occurred "very soon after the facility was opened for acceptance of deliveries ." [Affidavit of Orlando Farino ¶ 2]. He further attests to having performed a "general walk inspection of the parking lot condition prior to plaintiff's incident" after parking his car along a fence at the perimeter of the property, and proceeding to the receiving door to open the store [Id.¶¶ 5-6], and having felt no change on traction or having seen any snow or icy condition on the surface of the lot [Id. 6]. He attests that at no time on November 25,2005 did any truck driver or employee advise him, or notify the receiver with whom the truckers interacted, that there was a hazardous or icy condition on the surface of the lot [Id. ¶ 10].

The accident report [5] of the incident incorporates a description of plaintiff's fall "while walking on an ice patch" and the pavement/ground descriptive designation in "icy partially."

Defendants also submit copies of local climatological data[6] in which the average temperature for 11/25/05 is noted as being 29 degrees with no precipitation recorded.

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[4] Exhibit N

[5] Exhibit D

[6] Exhibit E

In reverse chronological order , the conditions as reflected in these records indicate that on the 24th , the average temperature was 38 degrees and there was a total amount of precipitation [rain/snowfall] with a "water equivalent" of .10 inches. , with trace amounts of rain recorded at 4:00 pm and .03 inches at 5:00p.m. and trace elements of snow observed during the hours between 9:00 - 11:00 p.m. On the 23rd , the average temperature was recorded as 33 degrees with no precipitation noted. On the 22nd, the average temperature is listed as 44 degrees and there was rainfall in the total amount of .61 inches , while on the 21st, total rainfall was .51 inches , and the average temperature was forty-nine degrees.

Applicable Law

Summary Judgment

It is by now well settled that the proponent of a motion 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 a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]. Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735 [2008]) . Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing

to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634 [2d Dept. 2003]).

Once this burden is met, the opposing party may defeat the motion with proof "sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). The court is required at this stage to discern whether any material issues of fact exist (Sillman v Twentieth Century-Fox Film Corp., op.cit at 404). Although hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition (Navarez v NYRAC, 290 AD2d 400, [1st Dept. 2002]; see also, Briggs v 2244 Morris,L.P., 30 A.D.3d 216 [1st Dept. 2006]).

Premises Liability

It is settled that landowners have a general duty to exercise reasonable care under the circumstances to maintain their property in a safe condition (see, Basso v. Miller, 40 NY2d 233,241 [1976] , and " [d]efining the nature and scope of the duty and to whom the duty is owed requires consideration of the likelihood of injury to another from the dangerous condition or instrumentality on the property; the severity of potential injuries; the burden on the landowner to avoid the risk; and the foreseeability of a potential plaintiff's presence on the property [internal citations omitted]." (Kush v. City of Buffalo, 59 N.Y.2d 26,29-30 [1983]; see also, Golden v. Manhasset Condominium, 2 A.D.3d 345,346-347 [1st Dept. 2003]) The scope of this duty may also include the duty to warn of a latent dangerous condition , a landlord having no duty to warn of an open and obvious danger.(Cupo v. Karfunkel , 1 AD3d 48, 51 [2d Dept. 2003], citing authority of Tagle V. Jakob, 97 N.Y.2d 165,169-170

[2001]). Proof that a dangerous condition is open and obvious may relieve the party charged with maintaining premises of the duty to warn of that condition, it does not preclude a finding of liability for a breach of the general duty to maintain the premises in a safe condition; notwithstanding , such proof is relevant to the issue of the comparative negligence of the plaintiff (see, Westbrook v. WR Actvities-Cabrera Mkts., 5 A.D.3d 69, 72-72 [1st Dept. 2004]; Garrido v. City of New York, 9 A.D.3d 267 [1st Dept. 2004]; DeJesus v. F.J. Sciame Construction Co., 20 A.D.3d 354 [1st Dept. 2005]).

No liability for failure to maintain premises can be found absent proof that the owner or party charged with that duty of care[7], created the specific dangerous condition or had actual or constructive notice of its existence, the latter being found upon a showing that the specific defective condition[8] was visible and apparent and existed for a sufficient length of time prior to the accident to allow for its discovery and correction (see, Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967 [1994]; Gordon v. American Museum of Natural History, 67 N.Y.2d 836 [1986]).

However, it is settled that on a motion for summary judgment a defendant in a slip-and-fall action bears the initial burden to demonstrate that it neither created the hazardous condition , nor had actual or constructive notice of its existence (see, Mitchell v. City of New York, 29 A.D.3d 372,374 [1st Dept. 2006]; Manning v. Amercold Logistics, 33 A.D.3d 427 [1st Dept. 2006]; George v. New York City Tr. Auth., 306 A.D.2d 160, 161, [1st Dept. 2003] ;295

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[7] Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (Gibbs v Port of Auth. of N.Y., 17 AD3d 252, 254, [1st Dept. 2005]; Balsam v Delma Eng'g Corp., 139 AD2d 292, 296-297, [1st Dept. 1988], lv dismissed and denied 73 NY2d 783,[1988]). Jackson v. Board of Education of the City of New York, 30 A.D.3d 57,60 [1st Dept . 2006] ; see also, Butler v. Rafferty, 100 NY2d 265, 270 [2003]

[8] A "general awareness" that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall (see, Gordon v American Museum of Natural History, 67 NY2d 836, 838 ; see also, Madrid v City of New York, 42 NY2d 1039)" Piacquadio , 84 NY2d 967,969 [1994]

A.D.2d 86, 91,; Giuffrida v. Metro N. Commuter R. R. Co., 279 A.D.2d 403, 404, [1st Dept. 2001]. With respect to the particular defective condition alleged here, it is clear that "the mere presence of ice does not establish negligence on the part of the entity responsible for maintaining the property. Rather, plaintiff must present evidence from which it may be inferred that the ice on which he slipped was present on the [lot]for a long enough period of time before the accident that the party responsible.. would have had time to discover and remedy the dangerous condition (see Simmons v Metropolitan Life Ins. Co. 84 NY2d 972, 646 N.E.2d 798, 622 N.Y.S.2d 496 [1994])." (Lenti v. Initial Cleaning Svcs.Inc., 52 A.D.3d 288, 289 [1st Dept. 2008])

It is also established that with respect to leased premises, an out-of -possession owner "who did not create the unsafe condition will not be liable for injuries that occur on the premises unless it has retained control over the premises or is contractually or statutorily obligated to repair or maintain the property [internal citations omitted]."(Negron v. Rodriguez & Rodriguez Storage & Warehouse, 23 A.D.3d 159,160 [1st Dept. 2005])

Discussion and Conclusions

Upon review of the evidence and upon consideration of the applicable law, defendants have sustained their initial burden to establish as a matter of law that they did not cause or create by operation of a defective drainage system, or otherwise, the icy condition on which plaintiff slipped and fell . In addition, defendants have also shouldered their burden to establish that they lacked actual knowledge of the existence of the ice prior to the accident.

However, in light of the the stark contrast in the descriptions of the icy condition afforded by plaintiff and the facility's manager , which varied widely not only as to the size of the patch of ice , but its relative visibility, defendants have failed to demonstrate on this

record the absence of material issues of fact with respect to their lack of constructive notice of the icy condition on the facility's lot. Moreover, in light of the meteorological records indicating that trace amounts of snow flurries had ceased to fall more than eight hours before the accident there is unresolved on this record the issue of whether defendant had sufficient time to discover the condition described by Mr. Farino as visible with white edges, and to take steps to remedy it.

With respect to the branch of the motion addressed to defendant JPN, in the absence of any evidence of either a statutory or contractual obligation to maintain or repair the parking lot of the subject commercial premises , defendants have shouldered their burden for summary dismissal of the claims as asserted against JPN . In opposition, plaintiff does not address this portion of defendants' motion.

In light of this determination that defendants have failed to make their requisite prima facie showing, it is required that the motion be denied , regardless of the sufficiency of the opposing papers.

Accordingly, the motion of the defendants is granted solely to the extent of awarding summary judgment in favor of defendant JPN ASOCIATES dismissing the complaint as asserted against it and is otherwise denied.

This constitutes the decision and order of this court.

April 2, 2010

Howard H. Sherman

HOWARD H. SHERMAN