

Balducci v Inserra Supermarkets, Inc.

2017 NY Slip Op 33509(U)

August 22, 2017

Supreme Court, Rockland County

Docket Number: Index No. 034445/2015

Judge: Thomas E. Walsh II

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
JOSEPH BALDUCCI and PHILOMENA BALDUCCI,

Plaintiff

DECISION & ORDER
Index No. 034445/2015

-against-

INSERRA SUPERMARKETS, INC., SHOP-RITE
SUPERMARKETS, INC., SHOP-RITE OF TALLMAN
and WAKEFERN FOOD CORP.,

Defendant

-----X
Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1- 3 read on this motion by Defendant for an Order pursuant to *Civil Practice Law and Rules* § 3212 granting summary judgment and dismissing Plaintiff's complaint and all cross-claims against Defendants and for such other and further relief as this Court deems just, proper and equitable:

PAPERS

NUMBERED

Notice of Motion/Affirmation of James C. Miller, Esq./Affidavit of Richard Chamberlain/Exhibits (A-J)	1
Affirmation of Scott D. Frendel, Esq./Exhibits (1-2)	2
Reply Affirmation of James C. Miller, Esq.	3

This action is a suit to recover damages for personal injuries sustained by the Plaintiff while he was shopping on February 16, 2013 at the Shoprite of Tallman located in Tallman, New York. Defendant and Plaintiff agree when plaintiff stepped between the smoked meat case and a U-Boat an employee of Defendant was using to stock meats in the smoked meat case.

Defendant submits that Plaintiff has made three (3) separate statements after the accident which differ in identifying the cause of Plaintiff's fall. Specifically, Defendant avers that a Plaintiff that cannot identify the cause of their fall or injuries cannot sustain an action for negligence. The second argument raised by Defendant in support of their application for

Summary Judgment is that a property owner does not have a duty to warn or protect Plaintiff against open and obvious conditions that are not inherently dangerous. As such, Defendant argues that the U-Boat cart in the aisle was open and obvious and not inherently dangerous.

A third argument raised by Defendant through the Affidavit of Richard Chamberlain, the Corporate Financial Officer of Inserra, is that the only proper Defendant is Inserra Supermarkets. Richard Chamberlain asserts in his Affirmation that no such corporation Shop-Rite of Tallman or Shop-Rite Supermarket, Inc. exists. As such, Defendant is seeking to have the action against Shop-Rite of Tallman and Shop-Rite Supermarket, Inc. dismissed.

In opposition Plaintiff submits that he has not wavered as to the cause of his fall. Specifically, Plaintiff avers that he has always asserted that the fall was caused by the Defendant's employee when he moved the U-Boat, which struck Plaintiff's leg. Plaintiff asserts that the documents submitted by Defendant in support of their argument that Plaintiff has failed to state a cause of action were not created by Plaintiff and as such contain statements that are attributed to him that he did not state. In support of their opposition Plaintiff direct the Court's attention to Plaintiff's Examination Before Trial (hereinafter EBT) testimony in which Plaintiff unequivocally states that he felt the U-Boat on the back of his leg right before he fell. Further, Plaintiff submits that the documentary evidence annexed to Defendant's Motion for Summary Judgment are both verified/certified and as such are not admissible evidence upon which the Court can rely.

Plaintiff also opposes Defendant's argument that the U-Boats were an open and obvious condition that were not inherently dangerous, stating that in considering whether a condition is open and obvious the totality of circumstances/surroundings should be considered on a case by case basis.

As to the Affidavit of Richard Chamberlain, Plaintiff states that the affidavit does not address any of the arguments raised by Defendant and should not be considered as part of the Defendant's Motion for Summary Judgment. In Reply, Defendant's clarify that the sole purpose of the Chamberlain Affidavit was to support the relief sought in dismissing the improperly named Defendants Shop-Rite Supermarkets, Inc. and Shop Rite of Tallman. Plaintiff fails to object to the argument raised in the Chamberlain Affidavit or argue that Shop-Rite of Tallman or Shop-Rite Supermarkets, Inc. are proper Defendants.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case and to warrant a court to direct judgment in its favor, as a matter of law. [*Civil Practice Law and Rules* § 3212(b); *Giuffrida v. Citibank Corp., et al*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)]. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. [*Winegrad v. New York University Medical Center*, 64 N.Y. 2d 851 (1985)].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Gonzalez v. 98 Maq Leasing Corp.*, 95 NY2d 124 (2000), citing *Alvarez*, supra; *Winegrad v. New York University Med. Center*, 64 NY2d 851 (1985)]. The opponent must assemble, lay bare and reveal his proofs, in order to show that the matters set up in his complaint are real and are capable of being established upon a trial. [*Di Sabato v. Soffes*, 9 AD2d 297 (1st Dept 1959)].

Summary judgment will be granted only if there is no triable issue of fact, issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief. [*Judice v. DeAngelo*, 272 AD2d 583 (2d Dept 2000)].

Defendants have failed to demonstrate their entitlement to the summary relief requested and the motion therefore must be and is hereby denied in its entirety. As to Defendant's application to dismiss the instant action regarding Shop-Rite Supermarkets, Inc. and Shop-Rite of Tallman, the application is granted.

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

Accordingly it is hereby,

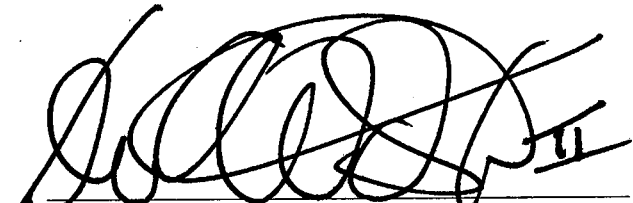
ORDERED that Defendant's Notice of Motion for Summary Judgment is denied in its entirety; and it is further

ORDERED that the instant action is dismissed as to Defendant's Shop-Rite Supermarkets, Inc. and Shop-Rite of Tallman; and it is further

ORDERED that the matter is adjourned to **THURSDAY SEPTEMBER 14, 2017 at 9:30 a.m.** for a pre-trial conference; and it is further

ORDERED that the parties are to appear for a trial date on **MONDAY SEPTEMBER 25, 2017 at 9:30 a.m.**

Dated: New City, New York
August 22 2017



Hon. Thomas E. Walsh II, J.S.C.

To:

BRAUNFOTEL & FRENDEL, LLC
Attorney for Plaintiffs
(via e-file)

JAMES C. MILLER, ESQ.
LAW OFFICES OF THOMAS M. BONA, P.C.
Attorney for Defendants
(via e-file)