

Pastore v Kayeley, LLC
2018 NY Slip Op 32824(U)
November 1, 2018
Supreme Court, New York County
Docket Number: 151243/2015
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEOVITS **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 151243/2015

MAUREEN PASTORE & PETER PASTORE

MOTION SEQ. NO. 003

Plaintiff,

- v -

KAYELEY, LLC & STARBUCKS COFFEE COMPANY,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

Plaintiffs Maureen and Peter Pastore move for partial summary judgment against defendant Starbucks Coffee Company (Starbucks) on the issue of liability.

This is a slip and fall action based on an incident occurring on January 1, 2015, in which plaintiff Maureen Pastore allegedly suffered severe injuries resulting from her slipping and falling in front of a building owned by defendant Kaleley, LLC (Kaleley) and managed by Starbucks, located at 78th Street and Lexington Avenue, New York, New York. The complaint alleges that defendants created a dangerous condition on the sidewalk located in front of the building, as well as having actual and/or constructive notice of said condition. Plaintiffs are suing defendants for damages, including loss of consortium.

Plaintiffs now move for summary judgment against Starbucks on the issue of liability. They contend that there is sufficient proof to hold Starbucks liable as a matter of law for creating an unsafe, slippery condition on the sidewalk where Ms. Pastore slipped and injured herself. They submit as evidence, their own deposition testimony as well as that of Kevin Lopez, the manager of the Starbucks store, and Auralisa Menjivar, a Starbucks employee who was responsible for cleaning up the sidewalk prior to the accident.

In her testimony, Ms. Pastore remembered the accident as occurring between 7:45 to 7:50 am, and that the weather was very cold and brisk. She stated that she was walking to work with a friend and co-worker. According to Ms. Pastore, her friend, who was on her right side closer to the street, watched her slip and fall on the sidewalk in front of the premises. She claimed that some part of her body came into contact with the sidewalk and that both of her knees and hands

landed on the sidewalk. She claimed not to have seen the ice on the sidewalk until after the fall. Ms. Pastore testified that she spoke to Menjivar after her fall, and that Menjivar told her that she fell on ice and that someone had cleaned the sidewalk with water to remove some vomit that was there. Ms. Pastore testified that there were no warning signs on display at the time, but signs were placed on the sidewalk after she notified the people at the store. Upon speaking to Starbucks people after the fall, she was told that other people had previously fallen in front of the building.

Testimony from Menjivar reveals that she was the shift supervisor at the store, and that she had inspected the exterior of the store for slippery substances and debris. She stated that on the day of the accident, she used a hose to clean up vomit earlier in the morning. She described the weather that morning as cold but did not recall if it was freezing. She affirmed a conversation she had with Ms. Pastore after the accident occurred. At that time, Menjivar observed that the vomit had been cleaned up and ice was there. She did not recall when the warning signs were set up on the sidewalk. She stated that she wrote an incident report for Starbucks, though she did not remember the actual time of the fall. The report referred to the icy pavement in front of the building. Menjivar testified that she spoke to the store manager Kevin Lopez about the incident. She acknowledged an email from Lopez, dated March 24, 2015. The email stated that on January 1, Menjivar entered the store and noticed the vomit on the sidewalk. After opening the store at 5:30 am, she attempted to clean up the vomit with hot water. However, the temperature was freezing and froze the water used to clean up the vomit.

Lopez testified that he was not at the store at the time of the accident, but spoke to Menjivar via phone after the accident occurred. Lopez stated that Menjivar explained the accident to him. He acknowledged that Menjivar had attempted to clean up the vomit, and that after cleaning up the vomit in front of the store, the leftover water iced up, resulting in the fall. Lopez recalled the weather on that day to be cold and that water was likely to turn to ice under such conditions. He testified that he spoke to Ms. Pastore after the accident and that she told him that she slipped because of ice that was outside the store.

Plaintiffs submit a copy of Certified Meteorological records for that day in New York City, indicating that the maximum temperature was 39 degrees and the minimum temperature was 27 degrees. The temperature from midnight to 7 am was reported to be between 27 and 28 degrees. Plaintiffs argue that the use of water on sidewalks in such a climate could lead to dangerous conditions.

Based on this evidence, plaintiffs contend that Starbucks created the icy condition on the sidewalk in front of the store which led to Ms. Pastore's slip and fall. In the absence of any issues of fact, plaintiffs argue that they are entitled to summary judgment on the issue of liability.

In opposition to this motion, Starbucks argues that there is an issue of fact precluding judgment. This issue concerns whether Starbucks' effort to remove the vomit on the sidewalk area created or exacerbated the hazardous condition there. According to Starbucks, it is not clear that Menjivar's actions in cleaning up the sidewalk were unreasonable. Starbucks also argues that there is an issue of whether Starbucks had reason to know of a hazardous condition on the sidewalk.

In reply, plaintiffs contend that there is no doubt that the icy condition on the sidewalk was a hazardous one that resulted in the accident, that weather records demonstrate that the weather at the time of the cleanup was freezing, and that Starbucks was aware of said condition, prior to this accident.

“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 [citation omitted]” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). On a motion for summary judgment, the movant must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact [citation and internal quotation marks omitted]” (*Richardson v County of Nassau*, 156 AD3d 924, 925 [2d Dept 2017]). Only if the movant succeeds in meeting its burden will the burden shift to the opponent to demonstrate through sufficient evidence that there exists a triable issue of fact (*Id.*).

“An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition [citations omitted]” (*Hernandez v Conway Stores, Inc.*, 143 AD3d 943, 944 [2d Dept 2016]). In order for a plaintiff in a slip and fall case to establish a prima facie case of negligence, plaintiff must demonstrate that defendant created the condition which caused the accident, or that defendant had actual or constructive notice of the condition (*Id.*).

The evidence submitted by plaintiffs demonstrates that Starbucks knowingly created the icy condition which caused Ms. Pastore to slip and fall. While Menijvar intended to remedy the presence of vomit through cleaning and hosing the sidewalk, the results were a clearly dangerous condition. The weather information submitted by plaintiff has not been challenged by Starbucks. In his testimony, Lopez acknowledged that the results of Menijvar’s work would be potentially hazardous. Starbucks has not challenged evidence that its employees were aware of people slipping on the same sidewalk area used by Ms. Pastore before her fall.

The court finds that plaintiffs are entitled to partial summary judgment against Starbucks on the issue of liability. The remaining triable issues of fact arising from this matter relate to the amount of damages to which plaintiffs are entitled.

Accordingly, it is

ORDERED that plaintiff’s partial-summary judgment motion is granted on liability; and it is further

ORDERED that the case remains on the court’s trial calendar; and it is further

ORDERED that plaintiffs shall, within 20 days from entry of this order, serve a copy of

this order with notice of entry upon counsel for Starbucks Coffee Company.



 GERALD LEBOVITS, J.S.C.

11/1/2018

 DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					REFERENCE