Herms v Chili's Grill Bar & Rest.
2021 NY Slip Op 32982(U)
June 11, 2021
Supreme Court, Nassau County
Docket Number: Index No. 615289/18
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

_____X

CYNTHIA HERMS,

Plaintiff(s),

-against-

CHILI'S GRILL & BAR RESTAURANT, CASKROW II REALTY LLC, BRINKER RESTAURANT CORPORATION, BRINKER SERVICES CORPORATION, COUNTY OF NASSAU,

Defendant(s).

_____X

TRIAL/IAS, PART 12
NASSAU COUNTY

Index No. 615289/18

Motion Seq. No.: 004

Motion Submitted: 4/12/21

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendants, Chili's Grill & Bar Restaurant (Chili's), Caskrow II Realty LLC (Caskrow), Brinker Restaurant Corporation (Brinker) and Brinker Services Corporation (BSC), move this court for an order granting them summary judgment and dismissing the

complaint against them. Plaintiff, Cynthia Herms, and Co-Defendant County of Nassau, oppose the motion.

The procedural and factual history of this matter have been recounted in a prior order and need not be restated herein. For the purposes of this motion, it is necessary to know that Herms alleges she fell on a defective sidewalk behind a Chili's restaurant.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.,* 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York,* 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy,* 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). "To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

Caskrow

The moving Defendants' first argument is that the complaint should be dismissed against Caskrow as it is an out-of-possession landlord, and as such cannot be liable for Herms' injuries. (*Byrd v. Brooklyn 46 Realty, LLC*, 129 AD3d 882 [2d Dept. 2015]). A review of the lease between Caskrow and the Brinker, specifically paragraph "12", makes it clear that Caskrow was not responsible for repairs to the property: "Tenant shall take good care of the Improvements during the term of this Lease and shall maintain the same in reasonably good condition, including repairs to the interior, exterior and structure, *it being understood that Landlord shall not be required to make any repairs to the Improvements during the term hereof.* " (Emphasis added). Based upon this provision, the court finds Caskrow has established entitlement to summary judgment as a matter of law. The burden shifts to Herms and the County to raise a material issue of fact requiring a trial of the action. They are unable to do so. As such, the complaint will be dismissed against Caskrow.

BSC

Defendants argue that Brinker, and not BSC, is the tenant and that BSC has no connection to this case. The lease in this matter states it is between Caskrow and Brinker Restaurant Corporation, with non-party Brinker International, Inc., as guarantor. As there is no lease with BSC's name on it, or any other document connecting them to this case, the court finds BSC has established entitlement to summary judgment as a matter of law.

The burden shifts to Herms and the County to raise a material issue of fact requiring a trial of the action. They are unable to do so. Therefore the complaint will be dismissed against BSC.

Chilis

In the moving papers and in reply, it is argued that Chilis is not a legal entity. Specifically, in reply, counsel asserts Chilis "...is only a restaurant with no corporate status." It is possible counsel intended to say that Chilis is just a brand name, or something along those lines, but a restaurant is a legal entity, and just because it has no corporate status does not mean it lacks another type of status. Therefore, the court finds the Chilis has failed to establish entitlement to summary judgment as a matter of law.

Brinker

Brinker argues that there was no defective condition on the sidewalk. But if there was one, the Nassau County Administrative Code does not shift liability for failing to correct it onto the landowner. In general, a municipality, and not a landowner, is liable for injuries caused by a defective sidewalk. (*Ankin v. Spitz*, 129 AD3d 1001 [2d Dept 2015]). While the Chilis restaurant is located within the Town of Oyster Bay which does have a liability shifting statute, the street and sidewalk are within the control of Nassau County. As proof of this, Brinker cites to an affidavit by an employee of the Town submitted in opposition to Herms' motion to file a late notice of claim, which was heard by a different judge of this court. The employee, Kenneth J. Bishop, stated the sidewalk

was not within the ownership or control of the Town, and Judge Sharon Gianelli of this court issued a ruling consistent with that position. Other than a liability shifting statute, the only exceptions to a landowner being responsible for a defect on a sidewalk is when the owner affirmatively created the defect, negligently made repairs to the sidewalk, or caused the condition through a special use. *Id.*

Brinker argues none of the exceptions apply herein and submits the deposition testimony of Nicole Delerme, manager of Chilis at the time of the alleged fall, and James Stephens, who was hired by Chilis to clean the outside of the property. Both Ms. Delerme and Mr. Stephens deny being aware of any defect on the sidewalk, nor did anyone ever report to them there was a defect on the sidewalk. Ms. Delerme was unaware of Chilis performing any work on the sidewalk.

Based upon the deposition testimony of Ms. Delerme and Mr. Stephens and the other admissible evidence, along with taking judicial notice of the Nassau County Administrative Code, the court finds Brinker has established entitlement to summary judgment as a matter of law. The burden shifts to Herms and the County to raise a material issue of fact requiring a trial of the action.

In opposition, Herms argues that even though Judge Gianelli found that the Town did not own or control or have any responsibility for the sidewalk, their liability shifting statute still applies Brinker, as opposed to the Nassau County Administrative Code. In other words, while the County may own and control the sidewalk, the Town's liability

shifting statute still applies because the sidewalk is physically within the Town. In support of this argument, Herms cites to *Sachs v County of Nassau*, 60 AD3d 1032 (2d Dept 2009). In *Sachs*, summary judgment was denied to a landowner whose sidewalk abutted a County road. The *Sachs* court found the Town of Oyster Bay's liability shifting statute applied to the landowner. This court finds the *Sachs* case raises an issue of fact. While Brinker argues that *Sachs* is distinguishable because it is unclear whether the Town or County raised the issue of who was responsible for the particular sidewalk, the decision's silence on that issue does not mean it was not raised. Because the facts of *Sachs* are still strikingly similar to the matter herein, and therefore this court is bound by its precedent.

Accordingly, it is hereby

ORDERED, that Defendants' motion to dismiss is GRANTED in part and DENIED in part. It is GRANTED to the extent that the complaint is dismissed against Caskrow and BSC, and is DENIED as to Brinker and Chilis.

This constitutes the decision and order of the court. The court has considered the remaining arguments of the parties and finds them to be without merit.

Dated: June 11, 2021
Mineola, New York

Hon. James P. McCormack, J. S. C.

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