Gruppuso v 67 Newtown Lane L.P.
2021 NY Slip Op 33437(U)
June 1, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 601717/2019
Judge: George M. Nolan
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SHORT FORM ORDER

INDEX No. 601717/2019
CAL. No. 202001054OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 2/19/21 (002)
MOTION DATE 4/22/21 (003 & 005)
MOTION DATE 4/29/21 (004)
ADJ. DATE 4/29/21
Mot. Seq. # 002 WDN
Mot. Seq. # 003 WDN
Mot. Seq. # 004 MG
Mot. Seq. # 005 MG; CASEDISP

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MARIANO GRUPPUSO,

Plaintiff,

- against -

67 NEWTOWN LANE LIMITED PARTNERSHIP, DIVERSEY, INC., and SEALED AIR CORPORATION,

Defendants.

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Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers (mot seq 002) by defendant 67 Newtown Lane, dated January 19, 2021; Answering Affidavits and supporting papers by plaintiff, dated February 17, 2021; Other defendant 67 Newtown Lane's letter dated March 12, 2021; Notice of Motion/ Order to Show Cause and supporting papers (mot seq 003) by defendant 67 Newtown Lane, dated March 15, 2021; Other defendant 67 Newtown Lane's letter dated March 18, 2021 Notice of Motion/ Order to Show Cause and supporting papers (mot seq 004) by defendant 67 Newtown Lane, dated March 19, 2021; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff ,dated April 22, 2021 ; Replying Affidavits and supporting papers by 67 Newtown Lane, dated April 27, 2021 ; Notice of Motion/ Order to Show Cause and supporting papers by defendants Diversey and Sealed Air, dated March 19, 2021; Answering Affidavits and supporting papers by plaintiff, dated April 14, 2021; Replying Affidavits and supporting papers by Diversey and Sealed Air, dated April 28, 2021; Other ____; it is

ORDERED that the motions of defendant 67 Newtown Lane Limited Partnership and the motion of defendants Diversey, Inc., and Sealed Air Corporation are consolidated for the purposes of this determination; and it is

ORDERED that the motion (seq. 002) of defendant 67 Newtown Lane Limited Partnership dated January 19, 2021, pursuant to CPLR 3212 for summary judgment dismissing the complaint is hereby withdrawn in accordance with a letter from defendant dated March 12, 2021; and it is

ORDERED that the motion (seq. 003) of defendant 67 Newtown Lane Limited Partnership dated March 15, 2021, pursuant to CPLR 3212 for summary judgment dismissing the complaint is hereby withdrawn in accordance with letter from defendant dated March 18, 2021; and it is

ORDERED that the motion (seq. 004) of defendant 67 Newtown Lane Limited Partnership pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted; and it is

ORDERED that the motion of defendants Diversey, Inc. and Sealed Air Corporation pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted; and it is further

ORDERED that defendants Diversey, Inc. and Sealed Air Corporation shall provide a certificate of conformity to cure the defective affidavit of its witness, which was executed outside of New York, within 30 days after the date of this order.

The plaintiff commenced this action to recover damages for injuries that he allegedly sustained while he was working at a Stop a & Shop supermarket located in East Hampton, New York. The plaintiff alleges, among other things, that he tripped and fell over a hose that was connected to a sink inside the meat department in the store. The plaintiff further alleges that the owner of the premises, defendant 67 Newtown Lane Limited Partnership ("Newtown"), and the manufacturer and the parties responsible for maintenance of the equipment inside the department, defendants Diversey, Inc. ("Diversey") and Sealed Air Corporation ("Sealed Air"), were the sole proximate cause of his accident.

Newtown now moves pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's claims against it on the ground that it was an out-of-possession landlord and that it was not responsible for maintenance of the meat department during the relevant period. The plaintiff opposes the motion.

At the outset, court records show that Newtown has made three separate motions for summary judgment in this matter. The first motion, motion sequence 002, was made by notice of motion dated January 19, 2021. Newtown argued that it was an out-of-possession landlord and that it was not responsible for maintaining and repairing the property when the plaintiff's accident occurred. In support of its motion, Newtown submitted, among other things, a copy of a lease agreement concerning the Stop & Shop location in East Hampton. The plaintiff opposed the motion on February 17, 2021, arguing, in part, that the lease agreement was not admissible because it was not authenticated. The motion was thereafter adjourned by stipulation of the parties, and by letter dated March 12, 2021, Newtown withdrew the motion. The second motion, motion sequence 003, was made by notice of motion dated March 12, 2021. In that motion,

Newtown made arguments for dismissal similar to those it made in motion sequence 002, and in support, it submitted the lease agreement along with an affidavit of its president to authenticate the lease agreement. By letter to the court dated March 18, 2021, Newtown withdrew the motion.

Motion sequence 004, which was made by notice of motion dated March 19, 2021, is pending before the court. Newtown's arguments in support of this pending motion for summary judgment are similar to the arguments that it has made in its previous motions for summary judgment. The plaintiff, in opposition, contends that the court should not consider the pending motion inasmuch as it is a successive summary judgment motion that is prohibited.

A party generally has a right to withdraw a motion at any time before its submission (2 Carmody-Wait 2d § 8:9 Withdrawal of motion). "A motion has been 'submitted' to the Court when the movant makes his oral argument or absent an oral argument when he presents his papers to the Clerk after the call of the case on the return day" (***Wallace v Ford***, 253 NYS2d 608, 44 Misc 2d 313, 314 [Sup Ct Erie County 1964]). "A motion which is withdrawn in the presence of the court is no longer pending even in the absence of the entry of an order . . . [and t]he effect of a withdrawal of a motion is to leave the record as it stood prior to its filing as though it had not been made" (***Matter of Stoute v City of New York***, 91 AD2d 1043, 1044, 458 NYS2d 640 [2d Dept 1983]).

Motion sequences 002 and 003 were withdrawn prior to submission, and the effect of the withdrawal is to leave the record as though the motions had not been made (*id.*). Accordingly, the court will consider Newtown's pending motion for summary judgment on the merits as it is a timely motion for summary judgment.

The crux of Newtown's motion is that it was an out-of-possession landlord when the plaintiff's accident occurred. The proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment as a matter of law by offering admissible evidence sufficient to eliminate any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the moving party has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). Generally, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also*, ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2003]). Thus, an out-of-possession landlord who has relinquished control over the premises will not be liable for personal injuries caused by a dangerous condition on the leased premises

unless the landlord had a duty imposed by statute, by contract, or by a course of conduct (*see* ***Iturrino v Brisbane S. Setauket, LLC***, 135 AD3d 907, 907, NYS3d 386 [2d Dept 2016] ***Vialva v 40 W. 25th St. Assocs., L.P.***, 96 AD3d 735, 945 NYS2d 723 [2d Dept 2012]; ***Butler v Rafferty***, *supra*).

In sworn testimony, the plaintiff stated that he tripped and fell on a hose that was located near a sink in the meat preparation room at Stop & Shop. The plaintiff was cutting meat using a saw and he turned to put a platter into a nearby sink. The hose was placed on the floor between the saw and the sink and the plaintiff tripped over it. The hose was used by Stop & Shop employees to clean the meat preparation room.

In support of its motion, Newtown submits, among other things, a lease agreement that it entered into with The Great Atlantic & Pacific Tea Company, Inc. in 1999 for lease of the subject property, and the assignment of that lease agreement to Stop & Shop in 2015. Relevant to this motion, the lease agreement specified that the tenant, which was Stop & Shop at the time of the plaintiff's accident in 2016, agreed that it would, "at its sole cost and expense, [] take reasonable care of the Demised Premises and the sidewalks and curbs adjoining the Demised Premises and will keep the same in good order, repair and condition and make all necessary repairs thereto, interior and exterior, ordinary and extraordinary, foreseen and unforseen, structural and nonstructural." Furthermore, Newtown's principal testified that the tenant was responsible for all maintenance and repair of the property, that Newtown did not enter the property to inspect, and that Stop & Shop did not seek permission to make changes to the premises.

On the record before the court, Newtown has established its entitlement to judgment as a matter of law dismissing the plaintiff's claims against it. The record shows that Newtown leased the subject property to Stop & Shop, and that the lease agreement between the parties dictated that Stop & Shop was responsible for maintenance and repair of the space where the accident occurred (*see* ***Bartels v Eack***, 164 AD3d 1202, 1202, 83 NYS3d 657 [2d Dept 2018]).

The plaintiff fails to raise an issue of fact to defeat Newton's motion. In opposition, the plaintiff contends that the court should deny the motion because the lease agreement is not admissible. The plaintiff argues that although Newtown submits an out of state affidavit to authenticate the lease agreement, the affidavit is defective because it is not accompanied by a valid certificate of conformity. Contrary to the plaintiff's position, the absence of a valid certificate of conformity is not, in and of itself, a fatal defect (***Midfirst Bank v Agho***, 121 AD3d 343, 351, 991 NYS2d 623 [2d Dept 2014]; *see* ***Todd v Green***, 122 AD3d 831, 832, 997 NYS2d 155 [2d Dept 2014]). "While an affidavit which is executed outside of New York State must be accompanied by a certificate of conformity, a court may permit a party to secure such certificate later and give it *nunc pro tunc* effect" (***E. W. Acupuncture v Safeco Ins. Co. of Indiana***, 2012 NY Slip Op 22095, 944 NYS2d 818 [App Term 2d Dept 2012]; *see* ***Capital One, N.A. v Mc Cormack***, 183 AD3d 644, 121 NYS3d 627 [2d Dept 2020]). In its reply, Newtown provides a corrected certificate of conformity; thus, the affidavit is sufficient to authenticate the lease. Furthermore, the plaintiff fails to raise an issue of fact whether Newtown, as an out-of-possession landlord, had a duty to maintain the premises in a reasonably safe condition pursuant to a statute or regulation, or the terms of the lease, or through its own course of conduct. Therefore, Newtown's motion for summary judgment dismissing the claims against it is granted.

Next, Diversey and Sealed Air (collectively, Diversey defendants) move for summary judgment dismissing the claims against them on the ground that their product was not the cause of the plaintiff's alleged injury. The plaintiff alleges that Diversey and Sealed Air were, among other things, negligent in designing and manufacturing the sink and hose connection that caused the plaintiff's injuries. According to the plaintiff, the Diversey defendants allowed the sink, a Sealed Air Diversey Care Sinkmizer ("Sinkmizer"), to be installed without a means to allow the hose to be properly stored next to the unit.

In an affidavit in support of the Diversey defendants' motion, Yoonjong Jo, the executive director of Sealed Air, stated, among other things, that at the time of the plaintiff's accident, Diversey was a wholly owned subsidiary of Sealed Air and that it was a separate and distinct corporation from Sealed Air. Jo further stated that it was Diversey and not Sealed Air that designed, manufactured, and sold the subject sink.

The plaintiff testified that the subject hose was located underneath a "hand wash sink" inside the meat department, and that the Sinkmizer, which was a "three-compartment sink," was located next to the hand wash sink. The layout of the meat department had not been changed since the plaintiff started working in the building some years prior to the accident. When the accident occurred, the plaintiff was standing near a band saw and his co-worker was using the Sinkmizer to wash pails. Although the Sinkmizer had its own hose, employees used the hose connected to the hand sink because the "pressure [was] stronger." The plaintiff recalled that prior to the accident, he requested that the hose be relocated. According to the plaintiff, the hose was either connected to a "pipe by the hand sink" or directly to the hand sink. The hose was approximately 50 feet long, and it was used to wash down the meat cutting equipment and to clean the floors at the end of the work day. After cleaning was completed, the hose was generally placed on an anchor on the wall. The plaintiff testified that his co-worker unraveled the hose and was using it to clean the pails in the Sinkmizer when he tripped and fell over it.

Walter Wrobel, account director for Diversey, testified that Diversey installed the Sinkmizer at the Stop & Shop; however, it did not install or supply the hose that caused the plaintiff to trip and fall. Diversey provided maintenance service to Stop & Shop for equipment that Diversey installed, and Wrobel testified that if the subject hose was in disrepair, Diversey would be responsible for replacing it. He further testified that based on Diversey's inspection records, the subject hose was installed in accordance with "standard practice" by the previous occupant of the building, and that Diversey would not have recommended reinstallation.

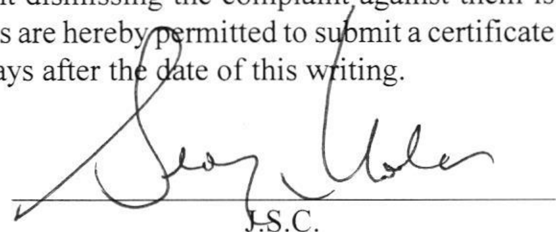
The Diversey defendants have established their entitlement to judgment as a matter of law dismissing the plaintiff's complaint against them. Whether the action is pleaded in strict products liability, breach of warranty or negligence, it is a plaintiff's burden to show that a defect in the product was a substantial factor in causing the injury complained of (*see* ***Beckford v Pantresse, Inc.***, 51 AD3d 958, 858 NYS2d 794 [2d Dept 2008]; ***Rizzo v Sherwin-Williams Co.***, 49 AD3d 847, 854 NYS2d 216 [2d Dept 2008]). The plaintiff must demonstrate, at a minimum, that injuries are the direct result of a defect in the product and that the defective product is the sole possible cause of his injury (*see* ***Beckford v Pantresse, Inc.***, *supra*; ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]). A product may be defective due to a mistake in the manufacturing process, an improper design or a failure to provide adequate warnings regarding the use of the product (***Gebo v Black Clawson***, 92 NY2d 387, 392, 681 NYS2d 221 [2d Dept

1998]; ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). In a products liability case, "if a defendant comes forward with any evidence that the accident was not necessarily attributable to a defect, the plaintiff must then produce direct evidence of a defect" to defeat the motion (***Rabon-Willimack v Robert Mondavi Corp.***, 73 AD3d 1007, 1008, 905NYS2d 190 [2d Dept 2010]). Furthermore, a defendant seeking summary judgment on the ground that "it did not manufacture the allegedly defective product has the initial burden of establishing that, as a matter of law, it did not manufacture the product in question" (***Baum v Eco-Tec, Inc***., 5 AD3d 842, 843-844, 5AD3d 842 [3d Dept 2004]).

The Diversey defendants demonstrated that they did not manufacture or install the hose that caused the plaintiff to trip (*see* ***Baum v Eco-Tec, Inc.***, *supra*). They also established that they were not responsible for the placement of the hose in the meat department. Although Diversey installed and maintained the Sinkmizer and its components, the subject hose was not connected to the Sinkmizer. Additionally, the defendants established that the plaintiff's accident was not attributable to a defective hose as there is no indication in the record that the hose was in disrepair or required maintenance. The plaintiff testified that his co-worker was using the hose while he was standing at the saw and that he turned, tripped over the hose, and fell. "The mere happening of an accident, in and of itself, does not establish liability of a defendant" (***Scavelli v Town of Carmel***, 131 AD3d 688, 690, 15 NYS3d 214 [2d Dept 2015]; *see* ***Foley v Golub Corp.***, 252 AD2d 905, 676 NYS2d 308 [3d Dept 1998]).

In opposition, the plaintiff has failed to raise an issue of fact to defeat the motion. The plaintiff contends that the Diversey defendants failed to submit the pleadings, that the deposition transcripts annexed to the motion are not admissible, and that YoonJong Jo's affidavit violates CPLR 2309 (c); therefore, the motion is unsupported and should be dismissed. The plaintiff's contentions are without merit. The pleadings were electronically filed and readily available to the parties and to the court; the plaintiff does not contend that his deposition transcript is inaccurate or that it was not provided to him for review, and the unsigned deposition transcripts of the defendants' witnesses are admissible under CPLR 3116 (a) since they were submitted by the defendants themselves and thus adopted as accurate; and the court has previously stated that the absence of a valid certificate of conformity is not, in and of itself, a fatal defect (*see* CPLR 2001; ***Baptiste v Ditmas Park, LLC***, 171 AD3d 1001, 1002, 98 NYS3d 280 [2d Dept 2019]; ***Sensible Choice Contr., LLC v Rodgers***, 164 AD3d 705, 707, 83 NYS3d 298 [2d Dept 2018]; ***Midfirst Bank v Agho***, 121 AD3d 343, 351, 991 NYS2d 623; *see* ***Todd v Green***, 122 AD3d 831, 832, 997 NYS2d 155 [2d Dept 2014]). Additionally, the plaintiff has failed to raise a triable issue whether the defendants created the dangerous condition that caused him to trip and fall, whether the defendants manufactured or installed the hose, and whether they were responsible for the placement of the hose in the meat department. Accordingly, the motion of the Diversey defendants for summary judgment dismissing the complaint against them is granted. With regard to Yoonjong Jo's affidavit, the defendants are hereby permitted to submit a certificate of conformity in accordance with CPLR 2309 (c) within 30 days after the date of this writing.

Dated: June 1, 2021



J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**