

Simos v Vic-Armen Realty, LLC

2010 NY Slip Op 33461(U)

December 3, 2010

Supreme Court, Nassau County

Docket Number: 9639/09

Judge: Roy S. Mahon

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

DEMETRA SIMOS,

TRIAL/IAS PART 7

Plaintiff(s),

INDEX NO. 9639/09

- against -

**MOTION SEQUENCE
NO. 1 & 3**

**VIC-ARMEN REALTY, LLC, BLVD WINES & LIQUORS
INC., THE TOWN OF NORTH HEMPSTEAD, and THE
COUNTY OF NASSAU,**

**MOTION SUBMISSION
DATE: September 22, 2010**

Defendant(s).

The following papers read on this motion:

Notice of Motion	XX
Affidavit in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by the defendant Blvd. Wines & Liquors Inc. (hereinafter referred to as BLvd) for an Order pursuant to CPLR §3211 dismissing the plaintiff's complaint on the grounds that it fails to state a cause of action against Blvd Wines & Liquors Inc. and the motion by the defendant County of Nassau for an Order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint and all cross claims, are both determined as hereinafter provided:

This personal injury action arises out of a trip and fall accident that occurred on February 18, 2008 at approximately 7:00 pm on the sidewalk vault/cellar doors on Glenwood Street at or near Northern Boulevard, Great Neck, New York.

The plaintiff in the plaintiff's affidavit in opposition described the incident in issue setting forth:

"2. On February 18, 2008 I suffered serious personal injuries as a result of a trip and fall accident which is the basis of this law suit. On that date, at approximately 7:00 pm I parked y car in the rear parking lot of Blvd Wines & Liquors Inc. where I was going to purchase a bottle of wine. The store, with an address of One Northern Boulevard, Great Neck, New York, is located at the northeast corner of the intersection of Glenwood Street and Northern boulevard in Great Neck, New York. The parking lot is located at the rear of the store and the entrance to that parking lot is on Glenwood Street. To give

the Court a better understanding, annexed hereto, respectively, as Exhibits "1" and "2", are an aerial photo/map printed from the Nassau County Department of Assessment website, and a street level photograph of the same corner (showing the storefront along Northern Boulevard), also printed from the Nassau County Department of Assessment website.

3. After parking my car, I walked out of the parking lot and turned left onto the sidewalk, heading southeasterly towards Northern Boulevard, where the store's entrance is located. It is a narrow sidewalk and it was drizzling or misting at the time. I walked close to the building. As I approached the corner, there was a set of metal cellar doors located on the sidewalk right next to the building. At around the same part of the sidewalk, there is also a wooden utility pole set in the sidewalk but further away from the building and closer to the street. As I walked on the sidewalk and over the metal doors, I tripped and fell violently to the ground. As I realized after my fall, the cellar doors were not level as I stepped on them, with one being higher than the other. As I stepped on the doors, the front of my left foot became wedged right in the middle between the doors and got stuck causing me to fall. Annexed hereto as Exhibit "3" are copies of some photographs showing the metal doors and sidewalk where my accident occurred."

In examining the issue of an application to dismiss pursuant to CPLR §3211(a)(7), the Court in **Doria v Masucci**, 230 AD 764, 646 NYS2d 363 (Second Dept., 1996) stated:

"In considering a motion to dismiss for failure to state a cause of action (*see CPLR 3211[a][7]*), the pleadings must be liberally construed (*see, CPLR 3026*). The sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17, *see also, Bovino v Village of Wappingers Falls*, 215 AD2d 619, 628 NYS2d 508). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see, Morone v Morone*, 50 NY2d 481, 429 NYS2d 592, 413 NE2d 1154; *Gertler v Goodgold*, 107 AD2d 481, 487 NYS2d 565, *affd.* 66 NY2d 946, 498 NYS2d 779, 489 NE2d 748). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he had stated one" (*Guggenheimer v Ginzburg, supra*, at 275, 401 NYS2d 182, 372 NE2d 17). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*Guggenheimer v Ginzburg, supra* at 275, 401 NYS2d 182, 372 NE2d 17; *Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3211:25 at 39*)."

Doria v Masucci, supra at 365

In support of the defendant Blvd's application, said defendant has submitted an affidavit of Yonsoo Woo, the owner of Blvd and the lease for the premises which Blvd has with the defendant Vic-Armen Realty. In pertinent part, Mr. Woo sets forth:

1. That I am the sole owner of Blvd Wines & Liquors, Inc. (Blvd Wines), one of the defendants in this lawsuit.
2. It is my understanding, after reviewing plaintiff's complaint that the claims against Blvd Wines relate to a trip and fall accident that occurred on the cellar doors located on Glenwood street, in the Town of North Hempstead, County of Nassau, State of New York on February 18, 2008.
3. Blvd Wines leases the ground floor of the premises located at 1 Northern Boulevard, Great Neck, New York (the premises). Blvd Wines operates a store within the building. The store is located on the corner of Glenwood Street and Northern Boulevard. The cellar opening and metal covering doors where plaintiff purportedly tripped are located on Glenwood Street abutting the premises. A copy of the lease between Blvd Wines and Vic-Armen Realty, LLC, is annexed hereto as Exhibit "1".
4. Blvd Wines operates a wine and liquor store at the premises. Adjacent to Blvd Wines in the same building, is a bicycle store. BrickWell.
5. The basement of the premises contains a partition, where by Blvd Wines portion of the basement can only be accessed from the inside of the building, not by the outside cellar doors located on Glenwood Street.
6. Blvd Wines does not have access to the cellar doors and, in fact, cannot access its portion of the basement from the cellar door entrance on Glenwood Street.
7. Upon information and belief, that part of the basement accessible by the cellar doors located on Glenwood Street is currently possessed and used by BrickWell, which is located in the same building as Blvd Wines. In fact, to this affirmant's knowledge, BrickWell is the only tenant of the building that uses the cellar doors and the only tenant that has access to same.
8. Blvd Wines has never had possession or control for the cellar doors and in fact, has never even had the keys to same.
9. Blvd Wines has never had possession or control of that part of the basement to which the cellar doors access.
10. Blvd Wines has never had any duty to repair, maintain or inspect the cellar opening covering and has never done so.
11. Blvd Wines has never owned, operated, managed, maintained, or controlled the cellar doors where plaintiff purported to have tripped.
12. Blvd Wines did not ever have any duty to operate, manage, maintain or control the cellar doors.
13. Blvd Wines did not ever contract with any entity to perform any work on the subject cellar doors.

14. Blvd Wines did not have anything to do with the ownership, operation, management, maintenance, supervision and/or control of the cellar doors at all."

In opposition to the defendant Blvd's requested relief, the plaintiff has not established that the defendant Blvd has any duty in relation to the control, maintenance or repair of the vault/cellar doors that are alleged to have caused the plaintiff's alleged injury. As such, the defendant Blvd's application for an Order pursuant to CPLP §3211 dismissing the plaintiff's complaint on the grounds that it fails to state a cause of action against Blvd Wines & Liquors Inc., is **granted**.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994)**:

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

In support of the defendant County of Nassau's application, the defendant offers the affidavit of John Dempsey. Mr. Dempsey states:

"1. I am a Civil Engineer II with the Nassau County Department of Public Works in the Construction Management Unit with an office located at 1194 Prospect Avenue, Westbury, New York.

2. In my capacity as Civil Engineer II and by way of work experience and records maintained by the Nassau County Department of Public Works, I am familiar with appurtenances, roadways, and sidewalks under the jurisdiction of the County of Nassau.

3. I was asked to conduct an investigation by the Office of the County Attorney about this claim alleging an injury which occurred on February 18, 2008 on the sidewalk vault/cellar doors with lock which are adjacent to the easterly side of Glenwood Street, near its intersection with the northerly side of Northern Boulevard, which sidewalk is adjacent to premises known as 1 Northern Boulevard, Great Neck, New York and more particularly at the closed sidewalk vault/cellar doors with lock located approximately thirty-three (33) feet north from the northerly curb line of Northern Boulevard, and

approximately six (6) feet east from the easterly curb line of Glenwood Street, Great Neck, New York (hereinafter referred to as the "Subject Location").

4. In response to this request from the County Attorney's Office, I attest that I personally searched the records of the Nassau County Department of Public Works, which include contracts, sidewalk complaints, and repair records, which are kept at department offices located at 1194 Prospect Avenue, Westbury, New York.

5. As a result of this search as well as my personal knowledge as a Civil Engineer II, I attest that the subject location is not under the jurisdiction of the County of Nassau.

6. I also found in my search of Department of Public Works' record that the County of Nassau did not contract for any work at the subject location nor did it make any repairs at the subject location."

Said defendant also offers the affidavit of Veronica Cox. Ms. Cox sets forth:

"1. Your deponent is assigned to the Bureau of Claims Management in the Office of the Nassau County Attorney. As part of my job duties, I maintain the files containing the notices of claim and prior written notice.

2. I was asked to conduct a search to determine whether the Office of the Nassau County Attorney received prior written notice of the alleged defective condition addressed in Plaintiff's Notice of Claim, and Verified Complaint. Specifically, I was asked to determine if the County of Nassau had any prior written notice of any defective, broke, uneven, bent, unlevel, or dangerous parts on the sidewalk vault/cellar doors with lock which are adjacent to the easterly side of Glenwood Street, near its intersection with the northerly side of Northern Boulevard, which sidewalk is adjacent to premises know as 1 Northern Boulevard, Great Neck, New York and more particularly at the closed sidewalk vault/cellar doors with lock located approximately thirty-three (33) feet north from the northerly curb line of Northern Boulevard, and approximately six (6) feet east from the easterly curb line of Glenwood Street, Great Neck, New York (hereinafter "Subject Location")/

3. In response to this request, I attest that I personally searched the Nassau County Notice of Claim Files and Notice of Defect Files, which are kept by date and location at the Office of the Nassau County Attorney located at One West Street, Mineola, New York 11501, for a period of three (3) years prior to, up to and including February 18, 2008.

4. As a result of this search, I attest that the County of Nassau received no prior notices of claim or notices of defect regarding any defect(s) alleged at the Subject Location."

Based upon the foregoing, the defendant County of Nassau has established a prima facie case for the requested relief (see, **Amabile v City of Buffalo**, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104). In

opposition, the plaintiff has not established that the defendant County of Nassau either was the recipient of prior written notice, created the condition in issue or received a benefit through a special use (see **Amabile v City of Buffalo**, supra). As such, the defendant County of Nassau's application for an Order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint and all cross claims, is granted.

SO ORDERED.

DATED: 12/3/2010

..... *Rays. Walker*
J.S.C.

ENTERED
DEC 09 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE