

Gelardi v Food Parade/Greenfield, Inc.

2015 NY Slip Op 30068(U)

January 15, 2015

Supreme Court, New York County

Docket Number: 155104/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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GIUSEPPE GELARDI,

Plaintiff,

-against-

Index No. 155104/2014

DECISION/ORDER

FOOD PARADE/GREENFIELD, INC., FOOD PARADE/
GREENFIELD, INC., doing business as SHOPRITE OF
PLAINVIEW, FOOD PARADE, INC., FOOD PARADE,
IND., doing business as SHOPRITE OF MOTON
VILLAGE, GREENFIELD'S SUPERMARKETS, LLC,
GREENFIELD'S SUPERMARKETS LLC, doing business
as SHOPRITE OF PLAINVIEW, MORTON VILLAGE
SHOPPING CENTER CORP., PHILIPS INTERNATIONAL
HOLDING CORP. and MORTON VILLAGE REALTY
CO., INC.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

In this personal injury action, plaintiff alleges that he was struck by a cart while he was shopping at the ShopRite Supermarket located in Nassau County. Defendants Food Parade, Inc. ("Food Parade") and Greenfield's Supermarkets, LLC ("Greenfield") (collectively referred to herein as the "Supermarket Defendants") now move for an order pursuant CPLR § 511 changing

the venue in this action from New York County to Nassau County. Defendants Phillips International Holding Corp. (“Phillips International”) and Morton Village Realty (“Morton Village”) cross-move for an order pursuant to CPLR § 3211 and/or CPLR § 3212 dismissing this action as to them or, in the alternative, transferring the action to Nassau County. For the reasons set forth below, both motions are granted.

The relevant facts are as follows. This is a personal injury action arising from an alleged accident that occurred within a supermarket located in Nassau County. Specifically, plaintiff alleges that on June 8, 2011, he was struck by a “U-Boat” type cart while shopping within the ShopRite Supermarket located at 1054 Old Country Road, Plainview, New York (the “supermarket”), which is owned and operated by defendant Food Parade. The supermarket is located in the shopping center known as Morton Village Plaza, which is owned by defendant Morton Village and managed by defendant Philips International, whose principle place of business is located in New York County. Food Parade occupies the supermarket pursuant to a Lease with Morton Village, which was entered into on or about June 30, 1994 (the “Lease”).

As an initial matter, defendants Morton Village and Philips International’s cross-motion to dismiss this action as to them, which this court shall treat as one for summary judgment, is granted. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See id.*

In the present case, defendants Morton Village and Phillips International are entitled to summary judgment as a matter of law as Morton Phillips is an out-of-possession landowner and the dangerous condition that allegedly caused plaintiff's accident is neither a structural nor design defect. It is well settled that "[a] landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision." *Malloy v. Friedland*, 77 A.D.3d 583 (1st Dept 2010) (quoting *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d 439, 440 (1st Dept 2010)); *see also Stryker v. D'Agostino Supermarkets Inc.*, 88 A.D.3d 584, 585 (1st Dept 2011).

Here, it is undisputed that Morton Village was an out-of-possession landlord at the time of plaintiff's accident and neither of the exceptions to the general rule are applicable. As an initial matter, Morton Village was not contractually obligated to make repairs or maintain the supermarket. On the contrary, pursuant to the Lease between Morton Village and Food Parade, Food Parade had sole responsibility for maintaining the supermarket, including the supermarket carts that plaintiff alleges caused his injuries. Indeed, Morton Village was obligated to make repairs to the structure of the premises only. Further, although Morton Village maintained the general right reenter to make necessary repairs under the Lease, plaintiff does not allege that his accident was caused by either a design or structural defect. Thus, Morton Village, as an out-of-

possession landowner cannot be held liable for plaintiff's injuries. Moreover, as Phillips International was merely Morton Village's managing agent, its duties did not extend beyond Morton Village's and, as such, it also cannot be held liable for plaintiff's injuries.

To the extent plaintiff contends that summary judgment should be denied as premature as no discovery has yet taken place, such contention is without merit. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Ruttur & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, no amount of discovery can change the essential facts that Morton Village was an out-of-possession landowner and that plaintiff's injuries were allegedly caused by being struck by a cart, which is neither a structural nor design defect.

Additionally, based on the foregoing, Supermarket Defendants' motion to change venue is granted. "Where venue is initially placed on the basis of the principal place of business of an improper party, a motion to change venue should be granted after the action is dismissed as against the improper party." *Halina Yin Fong Chow v. Long Is. R.R.*, 202 A.D.2d 154, 155 (1st Dept 1994) (citing *Gramazio v. Borda, Wallace & Witty*, 181 A.D.2d 428, 429 (1st Dept 1992)). In the present case, venue was placed in New York County solely on the basis that Phillips International's principle place of business is located here. However, as this court has granted Phillips International summary judgment dismissing this action as to it, and all remaining parties reside in Nassau County where the alleged accident took place, Nassau County is now the proper venue for this action.

Accordingly, the Supermarket Defendants' motion and Morton Village and Phillips

