

SCAN

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present: HON. JOSEPH COVELLO

Justice

HOWARD VON GERICHTEN,

Plaintiff,

-against-

**THE COUNTY OF NASSAU, THE
TOWN OF OYSTER BAY, JNK
PROPERTIES, LLC, and SORTO'S
BAGELS DELI AND GROCERY, INC.,
Defendants,**

**TRIAL/IAS, PART 22
NASSAU COUNTY**

Index #: 016581/03

Motion Seq. No.: 05, 06

Motion Date: 06/20/05

The following paper read on this motion:

Notice of Motion	X
Notice of Cross-Motion	X
Affirmations in Opposition	X X X
Reply Affirmations	X X

Upon the foregoing papers, the motion by defendant, Sorto's Bagels Deli and Grocery, Inc. (Sorto's), for an Order pursuant to CPLR §3212 granting it summary judgment dismissing the plaintiff's complaint and all cross-claims against Sorto's, is denied.

The cross-motion by defendant, JNK Properties, LLC. (JNK), for an Order, pursuant to CPLR §3212, granting summary judgment dismissing the plaintiff's complaint and all cross-claims against JNK, is granted.

This personal injury action arises out of a slip-and-fall type accident, which occurred on December 12, 2002, at approximately 12:30 a.m., in the rear parking lot behind Sorto's Bagels located at 107 Broadway in Hicksville, New York. Plaintiff asserts that the accident occurred when he slipped and fell in the parking lot while

traversing over a pile of snow between the sidewalk and the parking lot.

Plaintiff, Howard Von Gerichten (Gerichten), commenced the instant action against the County of Nassau, the Town of Oyster Bay, Sorto's and JNK seeking to recover damages for personal injuries he sustained as a result of the herein above described incident. Plaintiff alleges that the defendants, Sorto's and JNK, were negligent in creating the condition in the area where the accident occurred. At the time of the accident, Sorto's was a tenant of JNK. The defendants, Sorto's and JNK, seek summary judgment contending that they do not own, possess or control the area where the plaintiff's accident occurred. Defendant, JNK, additionally seeks summary judgment because plaintiff has failed to establish that defendant had a duty to the plaintiff, which resulted in an injury to the plaintiff.

The plaintiff testified at his deposition that the accident occurred as he walked to his car which was approximately 20 feet away from the rear entrance of Sorto's. Near his car he held on to the parking meter, stepped down with his right foot and went up in the air with his left foot. Plaintiff concedes that the defendants, Sorto's and JNK, did not own, possess or control the Town of Oyster Bay parking lot where plaintiff's accident occurred. However, plaintiff asserts that an issue of fact exists as to whether defendant, Sorto's, created or contributed to the condition causing plaintiff's injuries. Plaintiff testified that he slipped and fell due to ice under the snow. He also testified that the workers who cleaned the floors at Sorto's had a habit of washing the floor inside and then dumping the water outside the back of the store and it would flow downgrade to the right.

Angela Orrego, an owner of Sorto's, testified at her deposition that there was a

downgrade to the right of the kitchen door. She said that the employees would throw the mop water down that way, and then get fresh water, clean it out, and then send it out again. (*Defendant, Sorto's Exhibit "F" deposition transcript of Angela Orrego, pgs. 25-26*).

While a landowner owes a duty, to parties entering upon its property, to maintain its premises in a reasonably safe condition under the circumstances, it is not obligated to insure against every injury which may occur. *Smith v. State*, 260 AD2d 819. In order for a plaintiff in a slip and fall case to establish a *prima facie* case of negligence, a plaintiff is required to show that the defendant created the condition, which caused the accident, or that the defendant had actual or constructive notice of the condition. To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. See, *Kraemer v. K-mart Corp* , 641 N.Y.S.2d 130; *Bykofsky v. Waldbaum's Supermarkets, Inc.*, 619 N.Y.S.2d 760.

An examination of the testimonial evidence and photographs reveals that an issue of fact exists as to whether defendant, Sorto's, created and / or contributed to the condition giving rise to plaintiff's injuries.

Accordingly, defendant, Sorto's motion for summary judgment is denied.

Mr. James Kalaitzis testified on behalf of JNK Properties, LLC., that he is a joint owner of JNK with his wife, Niki Kalaitzis, and that JNK Properties acquired 107 Broadway, Hicksville, New York in August 1999. At the time JNK acquired 107 Broadway it assumed a leasehold agreement with a Mr. Stomatinos, one of the tenants in

the subject premises. In or about April 6, 2001, Mr. Stomatinos assigned his lease to Sorto's.

It is asserted that JNK did not own, control, or possess the premises where plaintiff's accident occurred. It is further asserted that JNK did not create, or contribute to the condition giving rise to plaintiff's accident. JNK also asserts that it was not aware that its tenant was dumping mop water outside the rear of its premises prior to plaintiff's accident.

Neither plaintiff, nor co-defendants have come forward with any evidence that JNK created the alleged condition, or had any notice that its tenant, Sorto's, was dumping the water from the mop bucket outside the back of its premises at any time before the occurrence on December 12, 2002.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material facts. See, *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851; *Zuckerman v. City of New York*, 49 NY2d 557, 562. Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. See, *Winegrad v. New York Univ. Med. Center*, *supra*, 64 NY2d at 853.

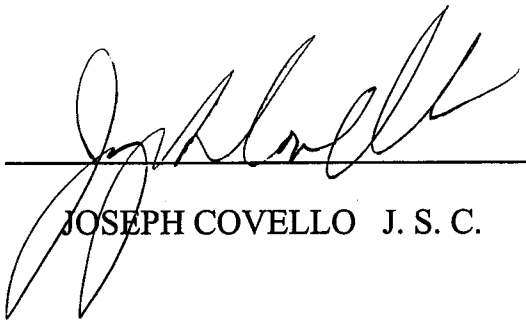
Accordingly, JNK has established that it is entitled to summary judgment, which has not been rebutted. Therefore, it is hereby

ORDERED, that defendant, Sorto's Bagels Deli and Grocery, Inc.'s motion for summary judgment, is denied in its entirety. It is further

ORDERED, that JNK Properties, LLC's motion for summary judgment is granted, the plaintiff's complaint and all cross-claims against defendant, JNK Properties, LLC., are severed and dismissed.

This constitutes the decision and Order of the Court.

Dated: July 25, 2005



JOSEPH COVELLO J. S. C.

ENTERED

JUL 29 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE