SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

ROBERT JESBERGER,

Plaintiff,

-against-

BALY TOTAL FITNESS, SUNOCO REALTY COMPANY and WALDBAUMS SUPERMARKET,

Defendant(s).

MOTION DATE: 05-31-06

INDEX NO.: 018495/03

MOTION SEQ # 002, 003

The following papers having been read on the motion: [numbered 1-5]

Defendant WALDBAUM's Notice of Motion, Affirmation in Support & Exhibits & Memorandum of Law.....1
Defendant BALLY TOTAL FITNESS Notice of Cross Motion, Affirmation in Support 2
Plaintiffs Affirmation in Opposition to Motion.....3
Plaintiffs Affirmation in Opposition to Cross Motion.....4
Reply Affirmation of Defendant WALDBAUM.....5

The motion by defendant Waldbaums Supermarket ("Waldbaums") and the cross motion by defendant Bally Total Fitness ("Bally"), both seeking summary judgment are **denied** for the reasons set forth herein.

Plaintiff commenced this action due to injuries allegedly sustained in a slip and fall that occurred on January 24, 2003 at approximately 8:35 PM in the weight room at Bally, a health club. Located in the same building, but situated above Bally, is Waldbaums.

Plaintiff testified that some ceiling tiles were removed and there were buckets on the gym floor due to the leaking water (see Exhibit E, pg. 30 annexed to Waldbaums' motion). Plaintiff stated he slipped and fell on water on the gym floor (Exhibit F, pg. 34-35), plaintiff did not know how long the water was present prior to his fall (p. 80), but he had seen buckets five (5) to ten (10) times on prior occasions.

Waldbaums admits the water leaking into the gym came from Waldbaums but it alleges

the source of the water that caused plaintiff to fall was from a suddenly broken sprinkler pipe that exploded (see Exhibit F annexed to Waldbaums' motion, pg. 21-24, the deposition of Martin Drury, store manager of Waldbaums' on the date of the incident).

Waldbaums contends that the sudden pipe burst was not caused by an employee of Waldbaums since it alleges there were no prior problems with the sprinkler system (see Exhibit F, pgs. 23-25 annexed to Waldbaums' motion). Thus, Waldbaums contends the condition did not exist for a sufficient amount of time to have actual and/or constructive notice of the problem. Bally, in its cross motion for summary relief, adopts the arguments and theories presented by Waldbaums.

Plaintiff argues Waldbaums and Bally both had notice of the problem. Plaintiff contends Waldbaums was aware of the complaints of Bally as to the drips/stained ceiling tiles (see Exhibit F, pg. 1f5, 17-18) and Bally was aware of the problem (see Exhibit 4 annexed to plaintiff's affirmation in opposition). Also, plaintiff testified that the water on the floor when the incident occurred was not clear and had an odor (see Exhibit E, pg. 72 annexed to Waldbaums' motion). Thus, plaintiff argues the offending water came from a leak in Waldbaums' freezer and not from a sudden burst of a pipe in the sprinkler system. Thus, plaintiff avers both Bally and Waldbaums had notice of the problem.

Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property, and the existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care (*Nappi v Incorporated Village of Lynbrook*, 19 AD3d 565). Thus, both Waldbaums and Bally could have liability for plaintiff's alleged injury.

A landowner/occupant/possessor owes a duty to a person coming upon the land to keep it in a reasonably safe condition (*Gustin v Association of Camps Farthest Out, Inc.*, 267 AD2d 1001). A reasonably safe condition takes in all circumstances including the purpose of the person's presence on the property, the likelihood of injury (*Macey v Truman*, 70 NY2d 918), the seriousness of the injury, and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139). For a landowner, etc., to be liable in tort for an injury resulting from an allegedly defective condition upon his property, the existence of a defective condition must be established

(*Sadowsky v 2175 Wantagh Ave. Corp.*, 281 AD2d 407).

In order for a premises owner/possessor to have constructive notice "of a defective condition on the premises, the defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to discover and remedy it (*Negri v Stop & Shop*, 65 NY2d 625; *Britto v Great Atlantic & Pacific Tea Company, Inc.*, 21 AD3d 436).

As a general rule, where a dangerous condition existed on real property so as to create liability depends on the particular facts and circumstances of each case; such a case by case evaluation presents a question of fact for the jury (*Corrado v City of New York*, 6 AD3d 380).

If a defendant submits evidence to establish a *prima facie* case that it did not create the alleged hazardous condition, and that the defendant had neither actual nor constructive notice of the condition (*Ryder v King Kullen Group Co., Inc.*, 289 AD2d 387), at this point, the burden would shift to the plaintiff to come forward with evidence sufficient to raise a triable issue of fact (*see Gill v City of Mount Vernon*, 275 AD2d 733).

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511).

The issue of whether a dangerous or defective condition exists on the property of another depends on the peculiar circumstances of each case and generally presents a question of fact for the jury (*Corrado v City of New York*, 6 AD3d 380; *Sanna v Wal-Mart Stores, Inc.*, 271 AD2d 595). Clearly, that is the situation here. Defendants have not presented enough to establish that they are entitled to summary judgment.

Also, the fact that the condition that allegedly caused the plaintiff's injury was, arguably, of an open and obvious nature does not preclude a finding of liability against the property owner; the open and obvious condition goes to the issue of comparative negligence (*Cupo v Karfunkel*, 1 AD3d 48). Thus, the fact that a plaintiff may have been comparatively negligent does not negate the liability of the landlord/possessor who has the duty to keep the premises safe (*DiVietro v Gould Palisades Corp.*, 4 AD3d 324; *Powers v St. Bernadette's Roman Catholic Church*, 309 AD2d 1219).

summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News,* 211 AD2d 626). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio,* 81 NY2d 1062). Here, Waldbaums and Bally have not met their respective burdens.

This constitutes the Order of the Court.

Dated: 8/12/06 **ENTER:**

J.S.C.

ENTERED

SEP 15 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE