Smith v County of Suffolk
2015 NY Slip Op 30145(U)
January 22, 2015
Supreme Court, Suffolk County
Docket Number: 09-50484
Judge: W. Gerard Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 09-50484
CAL. No. 14-00197OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-6-13 (#004)
MOTION DATE 2-4-14 (#005 & #006)
MOTION DATE 7-8-14 (#007)
ADJ. DATE 8-26-14
Mot. Seq. # 004 - MD # 006 - XMG
005 - MD # 007 - MD

JESSICA SMITH and MARK SMITH,

Plaintiffs,

- against -

COUNTY OF SUFFOLK, LONG ISLAND RAILROAD, TOWN OF BABYLON, TOWN OF ISLIP, SAGRESTANO INC., and JENCO ASSOCIATES, INC.,

Defendants.

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Upon the following papers numbered 1 to 135 read on these motions for summary judgment and cross motion to amend the answer ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 28; 29 - 53 ; Notice of Cross Motion and supporting papers 54 - 63 ; Answering Affidavits and supporting papers 64 - 79; 80 - 95; 96 - 98; 99 - 122 ; Replying Affidavits and supporting papers 123 - 135 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purpose of this determination these motions for summary judgment (# 004) by Jenco Associates, Inc., (# 005) by Sagrestano, Inc., and (# 007) by the County of Suffolk and

Long Island Rail Road and the cross motion (# 006) by the County of Suffolk and Long Island Rail Road to amend their answer are consolidated and decided together; and it is further

ORDERED that the motion (# 004) by defendant Jenco Associates, Inc. for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion (# 005) by defendant Sagrestano, Inc. for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the cross (# 006) by defendants County of Suffolk and Long Island Rail Road to amend their answer is granted; and it is further

ORDERED that the motion (# 007) by defendants County of Suffolk and Long Island Rail Road for summary judgment dismissing the complaint and all cross claims against them is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Jessica Smith on January 12, 2009 at approximately 7:00 a.m. when she slipped and fell on ice in the parking lot of the Long Island Railroad station in Deer Park, New York, while walking towards the platform. The gravamen of the complaint is that the defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition. Prior to the accident, the County of Suffolk ("County") entered into separate snow removal contracts with Jenco Associates, Inc. ("Jenco") and Sagrestano, Inc. ("Sagrestano").

Defendant Jenco moves (# 004) for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. Jenco contends that it had no duty of care to the plaintiffs and that it did not create the alleged dangerous condition. In support, Jenco submits, *inter alia,* the pleadings, the bill of particulars, and the transcripts of the deposition testimony given by plaintiff Jessica Smith, Tracy Reynolds, a representative of the County, and Mark Klein, a representative of Jenco.

At her deposition, plaintiff Jessica Smith testified to the effect that on the morning of the accident, she entered the subject parking lot and parked her vehicle. After exiting, she walked towards the rear of her vehicle. When she took one or two steps from the rear of her vehicle, heading towards the platform of the station, her right foot slipped and fell on an "ice patch." Prior to the accident, when she drove into the parking lot, she did not observe any ice, and she did not notice an ice patch in the area of the accident. After she fell, she saw the ice patch, and described it as "large" and "several feet each way."

At his deposition, Tracy Reynolds testified to the effect that at the time of the accident, he was a highway crew leader employed by the Suffolk County Department of Public Works. In January 2009, he supervised the plowing operations at the parking lot of the Deer Park Railroad station. He testified that both Jenco and Sagrestano were hired to perform snow removal services at the parking lot for the County. When he left the lot to check other areas, there would be no County employee at the lot during the snow removal operations performed by the contractors. He had no independent recollection of

overseeing plowing operations performed at the parking lot in January 2009. Only Jenco and Sagrestano performed plowing operations at the lot; the County did not. After inspecting the parking lot, he determined whether the plowing was finished and whether salt would be spread in the parking lot. He testified that although he knew that Sagrestano's vehicles would be used to push corners to keep the entrance to the lot open, there were "no assigned areas of the [parking] lot to any contractors," and "everybody was just trying to cover" the entire lot.

At his deposition, Mark Klein testified to the effect that at the time of the accident, he was employed by Jenco and drove its pickup truck. He testified that he performed snow removal operations at the parking lot of the Deer Park Railroad station several times. Upon request of the County, Jenco performed either plowing or sanding, or both. However, he had no recollection as to whether he was at the subject parking lot for snow removal in January 2009.

As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third-parties (*see* ***Diaz v Port Auth. of NY & NJ***, 990 NYS2d 882, 2014 NY Slip Op 05830 [2d Dept 2014]; ***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 1103, 915 N.Y.S.2d 103 [2d Dept 2010]). However, in ***Espinal v Melville Snow Contrs.***, (98 NY2d 136, 746 NYS2d 120 [2002]), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*id.*).

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Figueroa v Lazarus Burman Assoc.***, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, Jenco is required to establish that it did not perform any snow removal operations related to the condition which caused the plaintiff's accident or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (*see* ***Diaz v City of New York***, 93 AD3d 755, 940 NYS2d 654 [2d Dept 2012]; ***Schwint v Bank St. Commons, LLC***, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; ***Keese v Imperial Gardens Assoc., LLC***, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]).

Here, the Court notes that although it is disputed as to whether there was a written contract between the County and the contractors for snow removal services, it is undisputed that there were verbal contracts with them. Jenco's limited contractual undertaking to provide only snow removal services is not a comprehensive and exclusive property maintenance obligation which entirely displaced the County's duty to maintain the premises safely (*see* ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; ***Katz v Pathmark Stores***, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]), as the County retained control over the parking lot. Nevertheless, Jenco's submissions failed to establish its entitlement to judgment as a matter of law (*see* ***Keese v Imperial Gardens Assoc. LLC***, *supra*).

There are questions of fact as to whether Jenco performed snow removal at the subject parking lot prior to the subject accident; whether it had actual or constructive notice of the icy condition on the parking lot; whether it properly performed snow removal operations related to the condition which caused plaintiff Jessica Smith's injury; whether it exercised reasonable care under the circumstances; and whether plaintiff Jessica Smith was comparatively negligent (*see* ***Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]). Accordingly, Jenco's motion for summary judgment is denied.

Defendant Sagrestano moves (# 005) for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. Sagrestano contends that it had no duty of care to the plaintiffs and that it did not create the alleged dangerous condition. In support, Sagrestano submits, *inter alia,* the pleadings, the bill of particulars, and the transcripts of the deposition testimony given by plaintiff Jessica Smith, Tracy Reynolds, and Leo Sagrestano, a representative of Sagrestano.

At his deposition, Leo Sagrestano testified to the effect that he is the vice president and 50% owner of Sagrestano. During the winter of 2008 and 2009, Sagrestano was hired by the County to provide only "snow plowing" services for the parking lot of the Deer Park Railroad station and was supervised and instructed by Tracy, a foreman from the County. Mr. Sagrestano testified that the County put snowplow trucks at the parking lot during snow removal operations and ultimately applied all the salt and sand. During snow removal operations, he was instructed by the foreman to push corners to keep the entranceway to the parking lot open. However, on the day of the accident, he had no personal recollection as to what he did at the parking lot.

Here, Sagrestano's limited contractual undertaking to provide only snow plowing services is not a comprehensive and exclusive property maintenance obligation which entirely displaced the County's duty to maintain the premises safely (*see* ***Linarello v Colin Serv. Sys.***, *supra*; ***Katz v Pathmark Stores***, *supra*), as the County retained control over the parking lot. Nevertheless, Sagrestano's submissions failed to establish its entitlement to judgment as a matter of law (*see* ***Keese v Imperial Gardens Assoc. LLC***, *supra*). There are questions of fact as to whether Sagrestano performed snow plowing services at the subject parking lot prior to the subject accident; whether it had actual or constructive notice of the icy condition on the parking lot; whether it properly performed snow removal operations related to the condition which caused plaintiff Jessica Smith's injury; whether it exercised reasonable care under the circumstances; and whether plaintiff Jessica Smith was comparatively negligent (*see* ***Bruker v Fischbein***, *supra*). Accordingly, Sagrestano's motion for summary judgment is denied.

Defendant County and Long Island Rail Road ("LIRR") cross-move (# 006) for an order granting leave to amend their answer to include cross claims against Jenco and Sagrestano for contractual indemnification.

Generally, leave to amend or supplement a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party (*see* ***Lariviere v New York City Tr. Auth.***, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]).

Here, the movants contend that their failure to assert cross claims against Jenco and Sagrestano for contractual indemnification in their answer was the result of a law office failure when a related action (Index No. 01703-2012) where Jenco and Sagrestano were defendants was consolidated with this action. The proposed amendments cannot be characterized as palpably insufficient or patently devoid of merit on their face (*see* ***Giunta's Meat Farms, Inc. v Pina Constr. Corp.***, 80 AD3d 558, 642, 914 NYS2d 641 [2d Dept 2011]). In opposition, Jenco contends that there is no express language of indemnification in the document entitled "Contractor's Vendor's Public Disclosure Statement" on which the County and LIRR rely, and that the County and LIRR failed to offer any admissible proof that "there is a good faith basis for making" this cross motion to amend the answer. However, as discussed above, since there is an issue of fact as to whether there were written agreements between the County and the contractors containing contractual indemnification clause, a determination as to the existence of the contractual indemnification clause cannot be made at this stage (*see* ***Clark v Taylor Wine Co.***, 148 AD2d 908, 539 NYS2d 536 [3d Dept 1989]). The plaintiffs and other defendants have failed to establish that any prejudice would result if the request by the movants for leave to amend their answer is granted. Accordingly, this cross motion is granted. The movants are directed to file and serve the amended answer within twenty (20) days of the entry date of this order.

The County and LIRR also move (# 007) for summary judgment dismissing the complaint and all cross claims against them on the ground that the County did not receive prior written notice of the alleged defective condition in the subject parking lot as required by Suffolk County Charter § C8-2 (A). The County also contends that it did not create the alleged icy condition. In support, the County and LIRR submit, *inter alia*, the pleadings, the bill of particulars, the testimony given by plaintiffs Jessica Smith and Mark Smith at the General Municipal Law § 50-h hearing, and the transcripts of the July 13, 2010 deposition testimony and the December 14, 2012 deposition testimony given by plaintiffs Jessica Smith and Mark Smith.

Where as here, a municipality has adopted a prior written notice law, it cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies (*see* ***Albano v Suffolk County***, 99 AD3d 741, 952 NYS2d 245 [2d Dept 2012]; ***Hanover Ins. Co. v Town of Pawling***, 94 AD3d 1055, 943 NYS2d 152 [2d Dept 2012]; ***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). The County established that there was no prior written notice of the defect in the area of the accident. The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property (*see* ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Forbes v City of New York***, *supra*).

When a governmental agency is acting in a proprietary capacity as a property owner or landowner, it owes the same duty to maintain its property as a private landowner (*see* ***Maccarello v County of Suffolk***, 100 AD3d 972, 954 NYS2d 609 [2d Dept 2012]; ***Dick v Town of Wappinger***, 63 AD3d 661, 880 NYS2d 180 [2d Dept 2009]). A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only if it created the dangerous condition or had actual or constructive notice of the condition (*see* ***Devlin v Selimaj***, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; ***Morreale v Esposito***, 109 AD3d 800, 801, 971 NYS2d 209 [2d Dept 2013]; ***Gushin v Whispering Hills Condominium I***, 96

AD3d 721, 721, 946 NYS2d 202 [2d Dept 2012]). Thus, 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 (*see* ***Dhu v New York City Hous. Auth.***, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; ***Cruz v Rampersad***, 110 AD3d at 670, 972 NYS2d 302 [2d Dept 2013]; ***Santoliquido v Roman Catholic Church of Holy Name of Jesus***, 37 AD3d 815, 830 NYS2d 778 [2d Dept 2007]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see* ***Dhu v New York City Hous. Auth.***, *supra*; ***Oliveri v Vassar Bros. Hosp.***, 95 AD3d 973, 943 NYS2d 604 [2d Dept 2012]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Clark v AMF Bowling Ctrs.*, Inc.**, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; ***Moons v Wade Lupe Constr. Co.,*** 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Fasano v Green-Wood Cemetery***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]).

Here, the County has failed to establish its entitlement to judgment as a matter of law, as it did not proffer evidence demonstrating when the subject parking lot was last cleaned or inspected relative to the time of the subject accident. There are questions of fact as to whether a dangerous condition existed on the subject parking lot so as to create liability on the part of the County; whether it performed snow removal operations including application of the salt and sand in the area of the accident prior to the accident; whether it had actual or constructive notice of the dangerous condition (*see* ***Rhodes-Evans v 111 Chelsea LLC***, *supra*); whether reasonable inspections were made on the premises prior to the accident (*see* ***McCummings v New York City Tr. Auth.***, *supra*; ***Basso v Miller***, *supra*); and whether plaintiff Jessica Smith was comparatively negligent (*see* ***Bruker v Fischbein***, *supra*). The court has considered the remaining claims of the County and found them to be without merit. Moreover, the court notes that the LIRR failed to establish its entitlement to judgment as a matter of law as it did not advance any argument that the complaint should be dismissed as asserted against it. Accordingly, the motion by the County and LIRR for summary judgment is denied.

Dated: Jan. 22, 2015

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**