Randazzo v Ketcham
2021 NY Slip Op 33521(U)
April 27, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 609308/2018
Judge: Joseph A. Santorelli

SHORT FORM ORDER

INDEX No. 609308/2018
CAL. No. 202000607OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 12/10/20 (001)
MOTION DATE 12/16/20 (002)
ADJ. DATE 2/18/21
Mot. Seq. # 001 MD
Mot. Seq. # 002 MG

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JOHN RANDAZZO,

Plaintiff,

- against -

GARY KETCHAM and MICHAEL J. MARRA, INC.,

Defendants.

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Upon the following e-filed papers read on these motions for summary judgment: Notice of Motion and supporting papers by defendant Michael J. Marra, Inc., dated November 3, 2020; Notice of Motion and supporting papers by defendant Gary Ketcham, dated November 9, 2020; Answering Affidavits and supporting papers by plaintiff, dated February 11, 2021; Replying Affidavits and supporting papers by defendant Michael J. Marra, Inc., dated February 16, 2021; Replying Affidavits and supporting papers by defendant Gary Ketcham, dated February 17, 2021; it is

ORDERED that the motion (seq. 001) by defendant Gary Ketcham, and the motion (seq. 002) by defendant Marra, Inc., are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Gary Ketcham for summary judgment dismissing the complaint and cross claims against him is denied; and it is further

ORDERED that the motion by defendant Michael J. Marra, Inc., for summary judgment dismissing the complaint and cross claims against it is granted.

This action was commenced by plaintiff John Randazzo to recover damages for injuries he allegedly sustained on March 23, 2018, when he slipped and fell on ice in the driveway at a location known as14 Bristol Street, Lindenhurst, New York. It is undisputed that plaintiff leased the subject premises from defendant Gary Ketcham. Defendant Michael J. Marra, Inc., installed certain gutters and downspouts which plaintiff claims contributed to the alleged defective condition. Defendants assert cross claims against one another for contribution and indemnification.

Defendant Gary Ketcham now moves for summary judgment in his favor, arguing that as an out-of-possession landlord, he owed no duty to plaintiff. He further argues that it was impossible for there to be a melt/re-freeze condition as plaintiff alleges, and that the presence of any ice was solely due to plaintiff's own failure to properly remove it pursuant to the lease agreement. In support of his motion, Mr. Ketcham submits, among other things, transcripts of the parties' deposition testimony, a copy of a lease agreement, an expert affidavit of meteorologist George Wright, and one photograph.

Defendant Michael J. Marra, Inc. (Marra) also moves for summary judgment in its favor, arguing that as a third-party contractor, it owed plaintiff no duty of care; that it did not create or have notice of the alleged defective condition; and that, as to Mr. Ketcham's cross claims, it was not negligent in the installation of the subject gutters and downspout, and did not own or have any obligation to maintain the subject premises. In support of its motion, Marra submits, among other things, transcripts of the parties' deposition testimony, an affidavit of nonparty Michael J. Marra, and copies of invoices.

Plaintiff testified that at 6:40 a.m. on the date in question, he walked out of his residence, down a walkway, onto a sidewalk, then up the lefthand side of a wide driveway, the right half of which was owned by the neighbor. He indicated that the sun was out, and no precipitation was falling. Plaintiff stated that he believes it had snowed two days earlier, and that most of it had melted, but that some remained in areas where it had been piled during shoveling. Upon questioning, plaintiff admitted that pursuant to his lease with Mr. Ketcham, he had the duty to shovel all walkways after snowfalls, and that he fulfilled that duty himself. However, plaintiff testified that while he has purchased salt and sand prior to his incident, he never applied salt, sand, or ice-melting chemicals to paved outdoor surfaces after he completed his shoveling. Plaintiff stated that as he walked 5 or 10 feet up the left side of the driveway, the side closest to his house, his left foot slipped on ice just prior to reaching the rear of his car and he fell backwards onto the driveway. When on the ground, he could feel with his hand the ice underneath him. He described the ice as clear, 5 to 10 feet wide, and that it "went probably about halfway up [his] driveway."

Plaintiff further testified that from the time he began leasing the subject premises in late 2017 to the time of his fall, there was a gutter with a downspout which directed water from his home's roof down onto the driveway. Upon questioning, plaintiff denied that either he or his fiancee ever complained about the positioning of the downspout, stating that they "never had a build-up of ice like this before [his accident]." He indicated that the downspout was approximately 10 feet from the location of his fall, and that he observed that the ice originated at the downspout and spread down the sloped

driveway toward the street, widening to between 10 and 15 feet at the sidewalk. Asked who was responsible for spreading salt or sand in the event of an icy condition on the driveway, plaintiff replied "[w]e would have been."

Gary Ketcham testified that the Gary C. Ketcham living trust, with his wife Marie as trustee, acquired the subject premises in March of 2017, approximately six months prior to September 19, 2017, the date of plaintiff's lease. He indicated that it was purchased solely as a rental and investment property. Questioned as to plaintiff's duties pursuant to the lease agreement, with regard to exterior maintenance, Mr. Ketcham stated that plaintiff was responsible for lawn maintenance and renovation and snow removal. He further stated that the tenants would be responsible for spreading salt at the premises. Mr. Ketcham indicated that "unless the tenant calls and requests some kind of maintenance [be] done," he does not visit the premises regularly. He testified that he may drive past the premises occasionally, just to ensure that the tenants are trimming the hedges and cutting the grass.

As to the gutters and downspout, or "leader" as Mr. Ketcham refers to it, at issue in this litigation, he testified that it was installed at the end of a period of improvements undertaken by him prior to leasing the premises to plaintiff. He explained that certain portions of the house lacked gutters and downspouts, namely "the driveway side of the house and on the front and back," and that he hired Marra to install them. His attention directed to a photograph of the subject premises, Mr. Ketcham identified one such gutter and downspout which terminated and drained water onto his asphalt driveway. Mr. Ketcham testified that he inspected Marra's work upon its completion and had no complaints as to its quality or the direction in which it channeled water.

Michael Marra testified that he is a licensed contractor and the owner of Marra, which was incorporated in the early 1980s. He indicated that Marra is in the business of installing rain gutters and soffits on both commercial and residential buildings. Mr. Marra stated that Marra was hired by Mr. Ketcham to install some gutters and leaders at the subject premises, and that the work was memorialized in an invoice dated September 7, 2017. He testified that Mr. Ketcham was a longtime client of Marra and had hired it for "[p]robably a couple hundred" similar projects.

As to the downspout plaintiff alleges caused the icy condition upon which he slipped, Mr. Marra testified that while his employees were in the process of replacing it, he called Mr. Ketcham to confirm its configuration. He stated he informed Mr. Ketcham that while the original downspout for the gutter drained onto the driveway, it could be altered to drain at the rear of the home instead. Mr. Marra indicated that Mr. Ketcham "thought about it for a couple of minutes," then instructed him to leave the downspout draining onto the driveway. Plaintiff's counsel, acknowledging that Mr. Marra has never been to the subject premises, asked him whether a downspout draining onto an asphalt driveway is "proper." Mr. Marra replied that such an installation is proper as long as the homeowner is informed that it may lead to the dangerous condition of ice formation on the driveway in the winter.

In his expert affidavit submitted on behalf of defendant Ketcham, George Wright states that he is a professional meteorologist and that he reviewed, among other things, plaintiff's bill of particulars, plaintiff's deposition testimony, photographs of the subject premises, and official copies of weather and climatological data, in preparation for forming an opinion as to the weather conditions at the time of

plaintiff's incident. He indicates that between 13 and 14 inches of snow fell at the subject premises during the period beginning in the morning of March 21, 2018, and ending the morning of March 22, 2018. Mr. Wright avers that the temperature rose to 49 degrees Fahrenheit at 5:00 p.m. on March 22, 2018, and opines that "[t]he combination of sunshine and above freezing temperatures melted any remaining snow that may have been present on the subject roof." He further opines that "dry, brisk northwest winds and low relative humidity dried the roof by evaporation so that no meltwater remained to form ice." In addition, Mr. Wright states that because the temperature remained above freezing from 8:15 a.m. on March 22, 2018, until the time of plaintiff's incident, "no ice formed during this period." In conclusion, he opines that the ice upon which plaintiff slipped was not formed by runoff from a gutter, but was "entirely formed by the approximate four (4) hours of freezing rain and sleet that occurred during the morning of March 22, 2018" and which was not adequately cleared by plaintiff.

A party moving 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 issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). For a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, "it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (***Touloupis v Sears, Roebuck & Co.***, 155 AD3d 807, 808, 63 NYS3d 518 [2d Dept 2017], quoting ***Lezama v 34-15 Parsons Blvd, LLC***, 16 AD3d 560, 560, 792 NYS2d 123 [2d Dept 2005]). However, "[a]n out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" (***Broughal v Tae J. Kwon***, 181 AD3d 641, 641, 117 NYS3d 873 [2d Dept 2020] [citations and internal quotation marks omitted]; *see* ***Gronski v County of Monroe***, 18 NY3d 374, 940 NYS2d 518 [2011]). Yet, "[e]ven in the absence of a duty to repair an allegedly defective condition, liability may attach to an out-of-possession landlord who has affirmatively created a dangerous condition or defect" (***Bartels v Eack***, 164 AD3d 1202, 1203, 83 NYS3d 657 [2d Dept 2018]).

A contractual obligation alone "will generally not give rise to tort liability in favor of a third party" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 138, 746 NYS2d 120 [2002]). Yet, there are "three situations in which a party who enters into a contract to render services may be said to have

assumed a duty of care– and thus be potentially liable in tort– to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140 [internal quotation marks and citations omitted]).

Marra established a prima facie case of entitlement to summary judgment in its favor by demonstrating that, pursuant to ***Espinal***, it owed no duty of care to plaintiff, and that its actions did not fall within any exception thereto (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). On the issue of Mr. Ketcham's cross claim, Marra demonstrated that it received no complaints from Mr. Ketcham regarding the quality or suitability of its work.

Mr. Ketcham also established a prima facie case of entitlement to summary judgment in his favor by demonstrating that as an out-of-possession landlord, he cannot be held liable for the alleged icy condition at the leased premises (*see* ***Broughal v Tae J. Kwon***, *supra*). He further demonstrated that neither the lease agreement, any statute, nor any course of conduct required him to remove snow or ice at the subject premises. Such demonstration was supported by his own testimony and plaintiff's testimony. While Mr. Ketcham failed to demonstrate that he did not have a duty to maintain the drainage system at the premises, namely the subject downspout (*see* ***Broughal v Tae J. Kwon***, *supra*; ***Bartels v Eack***, *supra*), he established, prima facie, through the report of his expert meteorologist, that the placement of the downspout was not a proximate cause of plaintiff's alleged injuries due to the weather conditions at the time. The burden then shifted to any opposing party to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition, plaintiff argues that Mr. Ketcham, despite being an out-of-possession landlord, retained sufficient control over the premises to owe plaintiff a duty of care. Plaintiff further argues that Mr. Ketcham retained a duty to remove ice from the subject premises because the lease agreement states that plaintiff was responsible for snow removal, but is silent as to ice. Plaintiff also argues that Mr. Ketcham created the alleged defective condition by causing the downspout to be positioned in a way that allowed water to run down the driveway and potentially freeze. In addition, as to Marra, plaintiff argues that its installation of a gutter downspout pointing toward the subject driveway "launched an instrument of harm," excepting it from the protections of ***Espinal***. In support of his arguments, plaintiff submits, among other things, transcripts of the parties' deposition testimony, his own affidavit, a copy of a video, and an expert affidavit by meteorologist Howard Altschule.

Initially, as to defendant Marra, the Court finds that the mere installation of a gutter downspout by a contractor, in the position and manner the property owner specifies, does not rise to the level of "launching an instrument of harm," such that it would operate as an exception to ***Espinal***. Mr. Ketcham did not submit papers opposing Marra's instant motion. Accordingly, the motion by defendant Marra for summary judgment dismissing the complaint and cross claims against it is granted.

Submitting an affidavit on behalf of plaintiff, Howard Altschule states that he is a certified consulting meteorologist, and that he reviewed, among other things, Mr. Wright's expert report, various photographs, multiple sources of weather data, and plaintiff's deposition testimony. While his findings

generally concur with Mr. Wright's weather analysis, he states that "[a] melting and refreezing process occurred" on March 22, 2018, with new ice forming between 5:09 a.m. and 7:55 a.m. He avers that the air temperature rose above freezing immediately thereafter, and remained so up to the time of plaintiff's accident. Mr. Altschule opines that while air temperatures remained above freezing until plaintiff's fall, five inches of snow and ice remained on untreated/undisturbed surfaces and that radiative cooling "during the early morning period on March 23, 2018 . . . allowed for ice formation in certain locations." He further opines that "[t]he fact that [plaintiff] did not see the ice until after he fell is consistent with a newly formed ice condition, and not a pre-existing ice condition." Mr. Altschule states that Mr. Wright's determination, namely that all snow and ice on the subject home's roof had melted prior to the accident, is speculative. In conclusion, Mr. Altschule states that plaintiff's testimony that the subject ice may have originated at the downspout in question is "consistent" with the weather conditions at the time.

First, on the issue of Mr. Ketcham's alleged retention of control over ice, plaintiff adduces no evidence that Mr. Ketcham ever visited the subject premises for the purpose of removing snow, ice, or remedying transient exterior conditions. Similarly, plaintiff does not argue that Mr. Ketcham had any right, or duty, to visit and inspect for the purposes of establishing no constructive notice, the premises on the frequent and consistent basis necessary for the detection of icy conditions. Further, at their depositions, both plaintiff and Mr. Ketcham testified that plaintiff was responsible for snow and ice removal when necessary. Nevertheless, plaintiff argues that the lease provision stating "Tenants will be responsible to cut grass, rake leaves, maintain yard and remove snow as required or hire someone at their expense to maintain as necessary," unambiguously omits "ice removal" from tenants' obligations. Such argument is unavailing.

"A landlord may be liable for failing to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs . . . [but a plaintiff] bears the burden of proving that the landlord had notice of the dangerous condition and a reasonable opportunity to repair it" (***Litwack v Plaza Realty Invs., Inc.***, 11 NY3d 820, 821, 869 NYS2d 388 [2008] [internal quotation marks and citations omitted]). "When an out-of-possession landlord retains some control and some contractual duty to make repairs to the leased premises, the question of liability will turn on whether the injury-producing condition fell within the landlord's contractual responsibilities" (***King v Marwest, LLC***, ___AD3d___, 2021 NY Slip Op 08225 [2d Dept 2021]). "The mere reservation of a right to reenter the premises to make repairs does not impose an obligation on the landlord to maintain the premises" (***Gallina v 7901-11 13th Ave. Realty Corp.***, 186 AD3d 1617, 1618, 129 NYS3d 834 [2d Dept 2020]). Here, the subject lease provision serves as a non-exhaustive list of tenants' maintenance obligations with regard to landscaping and precipitation-related conditions affecting the exterior areas of the premises. No portion of the lease assigns any similar duties to the landlord; instead, the lease provides "Major repairs not included in normal maintenance is (sic) the responsibility of the Landlord." Even assuming, despite the foregoing, that Mr. Ketcham retained some duty to remove icy conditions at the subject premises, plaintiff has not demonstrated that he had actual or constructive notice of such a condition. Plaintiff testified that he has never witnessed a similar icy condition in the past, and that he has never complained to Mr. Ketcham about any icy condition at the premises (*cf.* ***Sampaiolopes v Lopes***, 172 AD3d 1128, 101 NYS3d 77 [2d Dept 2019]; ***Campone v Pisciotta Servs., Inc.***, 87 AD3d 1104, 930 NYS2d 62 [2d Dept 2011]). Further,

on the issue of constructive notice, plaintiff's expert opined that the alleged icy condition was "newly formed" in the "early morning period" before plaintiff's 6:40 a.m. accident. Thus, even if Mr. Ketcham retained a duty to remedy icy conditions, he would not have had a reasonable period of time to discover the alleged condition (*see* ***Velasquez v Pro Park, Inc.***, 173 AD3d 1246, 104 NYS3d 674 [2d Dept 2019]). Thus, plaintiff has failed to demonstrate that Mr. Ketcham is liable for negligent snow or ice removal (*see* ***Bartels v Eack***, *supra*).

The question remaining, then, is whether Mr. Ketcham's choice in the positioning of the subject downspout created a defective condition for which he faces potential liability. The Court finds that such question is a triable issue for a factfinder. The two experts opining here disagree on whether the weather conditions were suitable for ice formation due to runoff from the subject downspout on the morning in question.

In his reply papers, Mr. Ketcham argues that his status as an out-of-possession landlord exempts him from the responsibility for any maintenance of the subject premises. He further argues that he did not "create" an alleged defective condition because he merely installed the subject downspout in the exact position it had been prior to his purchase of the premises. The ***Bartels*** case makes it clear that even a true out-of-possession landlord may retain liability for defective conditions he or she created. Therefore, Mr. Ketcham cannot avoid liability on that ground alone, especially in light of the fact that the lease agreement does not clearly delineate his maintenance responsibilities relative to the home itself (*cf.* ***King v Marwest, LLC***, *supra*). Given that the lease agreement prohibits plaintiff from changing locks, or painting interior rooms of the home without permission from Mr. Ketcham, the Court cannot say, as a matter of law, that plaintiff possessed the authority to correct any deficiencies in the property's drainage system (*see* ***Harkins v Tuma***, 182 AD3d 678, 122 NYS3d 383 [3d Dept 2020]). Furthermore, while evidence of subsequent remedial repairs undertaken by a defendant is inadmissible as to the dangerousness of a condition, when there is a dispute as to whether a defendant maintained the control necessary to effectuate a change, it is admissible (*see* ***Soto v CBS Corp.***, 157 AD3d 740, 69 NYS3d 61 [2d Dept 2018]; ***Del Vecchio v Danielle Assoc., LLC***, 94 AD3d 941, 942 NYS2d 217 [2d Dept 2012]). Consequently, Mr. Marra's testimony that Marra altered, some months after plaintiff's incident and at Mr. Ketcham's request, the subject downspout to now drain toward the rear of the premises, is some evidence that Mr. Ketcham was the party responsible for the maintenance of the home's drainage system.

Hence, triable issues remain, including whether the ice in question was caused by the subject downspout, or remained due to plaintiff's earlier, inadequate snow removal practices; whether a downspout which directs gutter runoff onto a driveway represents a dangerous or defective condition; whether Mr. Ketcham had a duty to correct such a defect, if any; and if more comprehensive snow and ice removal efforts by plaintiff would have negated any danger presented by the subject downspout. According, the motion by defendant Gary Ketcham for summary judgment dismissing the complaint against him is denied.

Dated: APR 27 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION