

Diaz v Silver Bell Co. Limited Partnership

2004 NY Slip Op 30266(U)

August 3, 2004

Supreme Court, New York County

Docket Number: 112459/02

Judge: Paula J. Omansky

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY

PART 47

0112459/2002

DIAZ, JAMES
VS
SILVER BELL COMPANY

INDEX NO. _____

MOTION DATE 6/16/04

MOTION SEQ. NO. _____

MOTION CAL. NO. 128

SEQ 04

DISC

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion

have been decided in accordance with
the accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
AUG 12 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/3/04

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X
JAMES DIAZ and BEATRIZ DIAZ

Index No. 112459/02

Plaintiffs,

DECISION AND ORDER

-against-

SILVER BELL COMPANY LIMITED PARTNERSHIP,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
INC. TROLAND, INC. and EMIL LANDAU TERM
TRUST OF MAY 1, 1989,

Defendants.

----- X
PAULA J. OMANSKY, J.:

FILED
AUG 12 2004
NEW YORK
COUNTY CLERKS OFFICE

In this action for personal injuries arising from a slip and fall, defendant Emil Landau Term Trust of May 1, 1989 (the "Landau Trust") moves for summary judgment and to dismiss the complaint of plaintiffs James Diaz and Beatriz Diaz as well as all cross complaints.

Defendant Troland Inc. (Troland") cross-moves for summary judgment and to dismiss the complaint and all cross claims.

FACTS

The alleged accident occurred on March 5, 2002, at approximately 9:00 a.m. at the loading area of the A&P Supermarket located at 1233 Nepperham Avenue, Yonkers, New York. The A&P Supermarket is one of five stores comprising a shopping center owned and leased by defendant, the Landau Trust. Defendant the Great Atlantic & Pacific Tea Company (the "A&P Company") leased the commercial space from the Landau Trust.

Plaintiff James Diaz testified that at the time of the accident he was employed by Nestle Ice Cream Company (a non-party)

as a route sales associate. He described the pavement in the area where the accident occurred as being "uneven" but without potholes. In addition, plaintiff stated that it was drizzling at the time of the accident and that the weather was "pretty cold."

According to plaintiff, he exited his truck and noticed that there was a five foot by eight foot sheet of ice. Plaintiff maintains that the ice accumulated in an area of pavement which was uneven. On that day, plaintiff walked across the ice into the store without incident. However upon returning to his truck, he crossed the same area, slipped, and fell. Plaintiff allegedly suffered a bimalleolar fracture of his right ankle which extended up the right distal tibia. This injury allegedly required open reduction with internal fixation on March 13, 2002. In addition, plaintiff underwent removal of a screw from the right ankle on June 2003.

Plaintiff testified that he noticed on prior visits to the site that a stream of water would accumulate in the area where he allegedly fell and that he was aware that two other co-workers also noticed the condition when they worked the route.

The Landau Trust's property manager, Frederic Schwab, testified that he received a letter regarding the running off of water which was causing a problem in the loading dock area and the adjacent parking lot. Schwab stated that he had received three repair notices from A&P Company 's Regional Maintenance Department, Atlantic Region. The first notice, dated March 16, 2001, stated that "there are pot holes by the front of the store and the

receiving dock area, that need to be repaired;" whereas, the second notice, dated March 26, 2001, informed the landlord that "the parking lot needs to be restriped." The third notice, dated February 22, 2002, again stated that "there are potholes that need to be repaired and the parking lot needs to be re-striped." All three notices notified Schwab that the Regional Maintenance Department reviewed the lease, ascertained that the repair work was the responsibility of the lessor, and recommended that the landlord advise its contractor about the situation. Although Schwab acknowledges that he received correspondence about the parking lot, he never specifically admitted the landlord's liability. Instead, he notes that the landlord permitted A&P Company to expand in 1978 and that the store was responsible for repairing any damage.

Paul Bordash, the co-manager of the A&P store in question, testified that OSHA completed an investigation which stated that the running off condition was allegedly caused by the "bubbling up" of water. According to Bordash, the water bubbles up through cracks in the blacktop. A copy of this investigation has not been submitted to the court.

The Landau Trust disputes the assertions of the A&P Company maintaining that it was not liable since formation of ice has nothing to do with a purported recurring condition. In support of its claim, the Landau Trust submits copies of the National Climatic Data Center showing the amount of precipitation that allegedly fell on the day of, and prior to the date of the

accident. The submitted weather report shows that there was almost no precipitation during the entire month of February 2002 and that the amount of precipitation which fell during the days proceeding the accident was minimal. According to the weather report precipitation did fall on March 3, 2004 and that the total amount for the day was read as "0.82 water equivalent".

The record also shows that defendant A&P Company entered into a snow removal agreement with defendant Troland. A copy of this agreement has not been submitted. However, the record indicates that Troland would visit the site only after two inches of snow accumulated on the ground or at A&P's request. Troland further alleges that it did not create or exacerbate the alleged dangerous or defective condition citing the weather report which shows virtually no precipitation during the months of February and March 2002. Ernest Troiano, Troland's owner opines that the ice condition at the loading/receiving area existed because of a "runoff" condition and not because of his company's snow removal efforts. According to Troiano, Troland last removed snow in January 2002 and ^{the} A&P Company did not request snow removal or salt spreading during the months of February and March 2003.

DISCUSSION

The Landau Trust

In New York, an out-of possession owner or lessor is not liable for injuries which occur on the demised premise unless the owner or lessor retained control over the premises or is contractually obligated to repair or maintain the premises (Ritto

v Goldberg, 27 NY2d 887 [1970]; Dalzell v McDonald's Corp., 220 AD2d 638 [2d Dept 1995], lv denied 85 NY2d 815 [1996]). In particular, a landowner is not liable for the conduction of water, snow or ice by natural means absent a wrongful act (Roark v Hunting, 24 NY2d 470, 475 [1969]).

Tenants in New York do not ordinarily owe a duty of care with respect to unsafe condition in a common parking lot (Kozak v Broadway Joe's, 296 AD2d 683, 684 [3d Dept 2002]). However, a tenant in New York is liable for injuries which occur in a parking lot if the tenant created the dangerous condition, owned or retained control over the parking lot or had the authority to correct the condition (ibid.).

There is no evidence that the Landau Trust improperly removed snow since paragraph 3 of the Lease Amendment placed the duty of all snow removal on to the tenant, the A&P Company.

However, the Landau Trust is not entitled to summary judgment and dismissal of the complaint at this juncture since plaintiffs also allege that Mr. Diaz's injuries were proximately caused by a fall on the ice which developed from the accumulation of water which arose from running-off or bubbling up of water through cracks in the black top. The record contains evidence of cracks and other defects in the asphalt surface in the parking lot areas. Schwab, the Landau Trust's property manager, testified that he received letters from representatives from A&P's Regional Maintenance Department which noted the water accumulation problem and the need to repair the asphalt surface the parking lot areas.

The Landau Trust Company retained the duty to repair the surface of the parking lot and the latter's alleged failure to do so could make it liable for plaintiffs' injuries if they are able to prove that such failure is the proximate cause of Mr. Diaz fall.

The initial portion of paragraph 3 of the 1992 amendment to the lease (the "1992 lease amendment") provides, in pertinent part, that the landlord (The Landau Trust)

shall be responsible for the maintenance, repair and replacement of the surface, subsurface, drains, lighting poles, standards, bulbs, and ballasts, and any and all other structural repairs to the Added Parking Area and the ramp leading to such Added parking Area

Paragraph 3 of the 1992 Lease Amendment contains additional provisions which grant the tenant A&P Company the right to alter certain portions of the demised premises. Along with these alteration rights, A&P Company takes on the duty to repair the building (1992 lease amendment ¶ 4) as well as make specific repairs to the parking lot, including striping and restriping the surface area to mark out spacing where the alleged injuries occurred (1991 lease amendment ¶ 3). Paragraph 3 of the 1992 Lease Amendment provides in pertinent part that the

[t]enant is hereby granted the right to erect a fence of such design and construction, as Tenant alone shall determine, around all or so much of such Added Parking Area*, as Tenant alone shall determine. Tenant shall be obligated to maintain, repair and replace such fence as and when Tenant alone shall determine. The striping and restriping of the Added Parking Area* shall be Tenant's obligation when as Tenant alone shall determine at Tenant's sole cost and expense. Tenant shall have the right to make any additions and/or alterations to the Added Parking Area* or the Premises which may be necessary or desirable as determined by Tenant to enhance

Tenant's use of the Added Parking Area*¹

The 1992 Lease Amendment does not further explain the repair duties. A review of paragraph 16 of the original lease for the store signed by A&P Company on November 27, 1956 indicates that the landlord retained the obligation to perform all major structural repairs:

The Lessee will keep the interior parts of the demised premise in as good as repair as same are in when possession hereunder is given to Lessee, except for repairs occasioned by fire, termites, the elements, other casualty or happening, unsafe conditions or settling of the building, reasonable wear and tear, structural repairs, water or sewer service or system, and repairs of an extraordinary character. ...

In the 1992 Lease Amendment, the Landau Trust extended its duty to repair structural defects in the building to include the replacement of the surface, surface, drains and other items located in the Added Parking Area and ramp. A structural defect does not encompass cosmetic or minor defects (see, Morrone v Chelnyk Parking Corp., 268 AD2d 269 [1st Dept 2000] [Wobbly drain covers in parking lot are not structural defects]). In this instance, the amended lease must be interpreted to mean that the Landau Trust agreed to repair the surfacing of the common parking area when the defect is so extensive that it requires the removal and rebuilding of the underlying road bed, in whole or in part (cf., Ulich v Canada Dry Bottling Co. of New York, 305 AD2d 107 [Broken fragments of asphalt do not constitute a significant structural defect]).

¹ Pursuant to the Amended Lease, "[t]he Added Parking Area includes the ramp leading to such Added Parking Area."

In contrast, A&P Company's repair duties in the parking area are limited and do not involve any structural elements except for repair of fencing which it installed.

Since the Landau Trust does not submit an expert opinion, the court is unable to determine the origin of the stream of water which Mr. Diaz claims to have witnessed. The submitted depositions do not prove, as a matter of law, whether the alleged accumulation of water was the result of a major structural defect in the surface of the road or its drainage system which allowed ground water to bubble through up to the surface of the parking lot. Accordingly, this court is unable to determine whether the Landau Trust performed its duty under the 1992 Lease Amendment. The Landau Trust's motion for summary judgment is denied.

Troland's Liability

Plaintiffs have voluntarily dismissed the cause of action against Troland. Accordingly, the court need not reach the issue of whether Troland breached its duty of care to plaintiffs, both of whom are non-contracting parties. Troland's motion for summary judgment on the main complaint is granted on consent.

As for co-defendants cross-claims against Troland, the record does not contain any evidence that Troland agreed to assume any safety-related obligations or that it created or exacerbated any risk to plaintiff by failing to adequately perform its obligations under its service contract with the A&P Company (Fernandez v Otis Elevator Co., 4 AD3d 69, 70 [1st Dept 2004] citing Espinal v Melville Snow Contrs., 98 NY2d 136, 138 [2002]).

Although Troland undertook to provide snow removal services under specific circumstances, A&P Company has not shown that Troland agreed to inspect or monitor the premises for snow or ice on a routine basis (Espinal v Melville Snow Contrs., supra, 98 NY2d, at 141). Bordash, co-manager of the A&P Company, testified that the snow removal agreement with Troland required the latter to plow only after two inches of snow accumulated on the ground.

Moreover, the A&P Company cannot show Troland had actual or constructive notice that two or more inches of snow fell prior to the accident (Kozak v Broadway Joe's, supra, 296 AD2d, at 685-686). Nothing in the record shows that two or more inches of snow fell on March 3, 2002 or that reading of "0.82 water equivalent" constitutes an accumulation of two or more inches of snow. In fact, the Landau Trust argues that the amount of precipitation which fell on March 3, 2002 was "minimal." In addition, there are no temperature reports and the court cannot even ascertain whether the precipitation on March 3, 2002 fell as rain, sleet or snow. Even if some snow fell on March 3, 2004, there was no further accumulation since the submitted weather reports clearly indicate that no precipitation fell on either March 4 or 5, 2002, the time period immediately before the accident.

A&P Company cannot argue that Troland failed to answer its service call since the former does not dispute Troland's claim that the A&P Company did not request snow removal during the months of February and March 2003. Accordingly, there is no indication that Troland breached its snow removal agreement with A&P Company.

Furthermore, the dispute between the Landau Defendants and the A&P Company as to which party was responsible to repair the parking lot surface, is not relevant to the cross claims against Troland. Since Troland's contract with A&P Company is limited solely to snow removal, Troland is not obligated to perform any repairs and has no duty to correct the asphalt surface or the underlying drainage system. Accordingly, Troland is not responsible for water accumulation and there is no basis for co-defendants' liability cross claims. That branch of Troland's cross motion to dismiss all cross-claims against it is granted.

Accordingly, it is

ORDERED that defendant Landau Trust's motion for summary judgment and to dismiss the plaintiffs' complaint and all cross claims is denied; and it is further

ORDERED that the branch of defendant Troland's cross motion which seeks summary judgment on the complaint is granted on consent and plaintiffs' causes of action against Troland are severed and dismissed; and it is further

ORDERED that the branch of defendant Troland's cross motion for an order of summary judgment on all cross claims is granted and

these claims and cross claims are severed and dismissed for the reasons stated herein; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on October 15, 2004, at 11:00 a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: August 3, 2004

ENTER:



PAULA J. OMSKY
J.S.C.

FILED
AUG 12 2004
NEW YORK
COUNTY CLERK'S OFFICE