

Mancini v Vornado Realty, L.P.

2007 NY Slip Op 30458(U)

March 23, 2007

Supreme Court, New York County

Docket Number: 0103543/2004

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 103543/2004

MANCINI, NICHOLAS

vs

VORNADO REALTY

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO.

103543/04

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

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

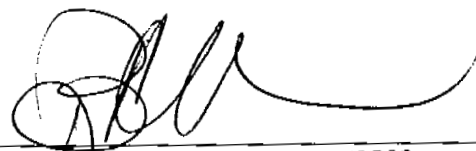
and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED

APR 02 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/23/07



BARBARA R. KAPNICK S.C.
J.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
NICHOLAS MANCINI and IMMACOLATA MANCINI,

Plaintiffs,

- against -

VORNADO REALTY, L.P., FREEPORT VF
L.L.C., AMBROSE SCHMITT and PARK LINE
ASPHALT MAINTENANCE, INC.,

Defendants.

-----X
VORNADO REALTY, L.P. AND FREEPORT VF
L.L.C.,

Third-Party Plaintiffs,

- against -

AMBROSE SCHMITT,

Third-Party Defendant.

-----X
VORNADO REALTY, L.P. AND FREEPORT VF
L.L.C.,

Second Third-Party Plaintiffs,

- against -

PARK LINE ASPHALT MAINTENANCE, INC.,

Second Third-Party Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 103543/04

Motion Seq. No. 002

Third-Party

Index No. 590145/05

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

In this action, plaintiffs seek to recover damages for personal injuries sustained by plaintiff Nicholas Mancini on January 20, 2004 when he allegedly slipped and fell on ice on the ground of the parking lot outside of a Home Depot store in Freeport, New York. Plaintiffs claim that the area where he fell had not been sanded or salted.

Defendants/third-party plaintiffs/second third-party plaintiffs Vornado Realty L.P. ("Vornado") and Freeport VF L.L.C. were the owner and managing agent of the parking lot, respectively.

Defendant/third party defendant Ambrose Schmitt ("Schmitt") was the contractor hired by Vornado to remove snow from the parking lot pursuant to a Purchase Order for snow plowing. Defendant/second third-party defendant Park Line Asphalt Maintenance, Inc. ("Park Line") performed certain maintenance work in the parking lot.¹

Defendant/third-party defendant Schmitt now moves for summary judgment dismissing plaintiffs' complaint and any third-party complaint, cross-claims and counterclaims asserted against him.

Defendant/second third-party defendant Park Line cross-moves for summary judgment dismissing any and all claims asserted against it.

In support of his motion, defendant/third-party defendant argues that he owed no duty to the plaintiff or to any other party. Schmitt further contends that he did not breach any duty and was not responsible for causing plaintiff's accident.

¹ After the commencement of the third-party actions, both the third-party defendant and the second third-party defendant were named as direct defendants.

Plaintiffs, as well as the defendants/third-party plaintiffs, argue in opposition to the motion that there are triable issues of fact as to whether Schmitt's snow removal operations created or increased a dangerous condition.

It is well settled that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third-party (citation omitted)." Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 138 (2002). However, "an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so to have 'launched a force or instrument of harm' (citations omitted)." Prenderville v. International Service Systems, Inc., 10 A.D.3d 334, 337 (1st Dep't 2004).

In Prenderville, the defendants, "had no personal recollection of the condition of the curb cut on the date of this accident, or the nature and extent of snow removal operations on the relevant days" (supra at 337). Thus, the Appellate Division, First Department held that defendants had failed to make a prima facie showing of entitlement to summary judgment.

In the instant case, Schmitt likewise did not have an independent recollection of plowing at the location on January 14 and 18, 2004, although Schmitt's invoices indicate that he plowed the area four

times, at six hour intervals for each plow, just two days before plaintiff's accident.

Accordingly, based on the papers submitted and the oral argument held on the record on December 20, 2006, this Court finds that there are triable issues of fact as to whether defendant/third-party defendant Schmitt undertook to perform services under his contract which created or exacerbated a dangerous ice condition. Schmitt's motion for summary judgment is, therefore, denied.

Defendant/second third-party defendant Park Line argues that all claims asserted against it should be dismissed on the ground that it had no continuing duty to either remove snow and ice from the property or to clean the drains.

Although Park Line acknowledges that it would pump water that had accumulated in the parking lot 'from time to time' when it would receive an express request from Vornado or a tenant in the shopping center, Park Line claims that its only continuing obligation was to remove debris with a mechanical sweeper and to hand pick debris from the perimeter of the property.

Plaintiffs argue in opposition to Park Line's cross-motion that there are triable issues of fact as to whether Park Line's pumping of the parking lot and cleaning and repairing of the drains on or about

November 12, 2003, two months prior to plaintiff's accident, created and/or increased a dangerous condition.

However, there is no evidence, either by way of eye witness or expert testimony, that any activity undertaken by Park Line in November 2003 contributed in any way to the ice condition upon which plaintiff fell in January 2004.

Accordingly, defendant/second third-party defendant Park Line's cross-motion for summary judgment must be granted. The Clerk may enter judgment dismissing plaintiffs' Complaint and all cross-claims, third-party claims and counterclaims asserted against Parkline Asphalt Maintenance, Inc. with prejudice and without costs or disbursements.

Plaintiffs' claims against the co-defendants are severed and continued.

A pre-trial conference shall be held in 1A Part 12, 60 Centre Street, Room 341 on April 25, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

FILED
Dated: March 23 2007
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J.S.C.
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