

Smith v Fister

2007 NY Slip Op 30817(U)

March 26, 2007

Supreme Court, Suffolk County

Docket Number: 0020593/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11/2/06
ADJ. DATE 12/14/06
Mot. Seq. # 001 - MG
002 - MG; CASEDISP

-----X
TARA A. SMITH, :
 :
 : Plaintiff, :
 :
 :
 : - against - :
 :
 JOHN C. FISTER, EILEEN C. FISTER, LIPARI :
 FAMILY TRUST and DARRYL M. LEHR d/b/a :
 WITH PRIDE LANDSCAPING, :
 :
 : Defendants. :
-----X

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Upon the following papers numbered 1 to 45 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1-13; 14-32; Notice of Cross Motion and supporting papers _____;
Answering Affidavits and supporting papers 33-34; 35-36; 37-41; Replying Affidavits and supporting papers 42-43; 44-45;
Other _____: (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#001) by defendants Eileen C. Fister, John C. Fister and Lipari Family Trust (hereinafter collectively "defendants Fister") for summary judgment and this motion (#002) by defendant Darryl M. Lehr d/b/a With Pride Landscaping (hereinafter "defendant Lehr") are consolidated for the purposes of this determination; and it is further

ORDERED that this motion by defendants Eileen C. Fister, John C. Fister and Lipari Family Trust for an order pursuant to CPLR 3212 granting them summary judgment dismissing the plaintiff's complaint and all cross claims against them is granted; and it is further

ORDERED that this motion by defendant Darryl M. Lehr d/b/a/ With Pride Landscaping for an order pursuant to CPLR 3212 granting him summary judgment dismissing the plaintiff's complaint and all cross claims against him is granted.

Plaintiff commenced this action to recover damages for injuries allegedly sustained on April 28, 2003 after she slipped and fell on yellow pre-emergent fertilizer pellets that were located on the landing of the rear entry of the premises known as 160 Brentwood Road, Bay Shore, County of Suffolk, New York. The subject premises are owned by defendants Fister and were under a landscaping contract with defendant Lehr at the time of plaintiff's accident.

Plaintiff testified at an examination before trial that she arrived at work at approximately 7:30 a.m. on Monday, April 28, 2003, at the subject premises. Plaintiff stated she parked her vehicle in the rear parking lot and headed towards the rear entry door. Plaintiff stated that she was looking straight ahead while walking and carrying her purse and lunch bag in her left hand. She stated that the parking lot surface was a dry paved surface and the three steps to the landing of the rear entry were a dry concrete surface. Plaintiff testified that as she went to place her right foot onto the third step, her right foot slipped backwards, causing her to fall forward and onto her right shoulder, side and abdomen. Plaintiff testified that after her fall she observed fertilizer pellets scattered across the landing and the handicap ramp leading into the building. She stated the fertilizer pellets were also located in the garden beds to the left of the stairway. She stated the fertilizer pellets were smaller than a green pea, yellow in color, hard, round and had a strong chemical smell. Plaintiff testified the pellets were imbedded in her hand, mouth and hair. Plaintiff testified that prior to her fall she did not observe the fertilizer pellets and had never seen fertilizer pellets in that particular area before her incident. Plaintiff testified that she did not smell any strange odors prior to her fall. Plaintiff further stated that she had never complained about the entryway before her accident and that she did not see any signs indicating that fertilizer had been used in the area.

Darryl Lehr testified at an examination before trial stating that he is the owner of With Pride Landscaping and that he had an account with the defendants Fister for the past 5 years prior to plaintiff's accident to provide landscaping services at the subject premises. Mr. Lehr testified that he would negotiate an annual contract with Mrs. Fister and he never once received any complaints from Mrs. Fister about his work or fertilizer pellets having been left on the sidewalk. He stated that the landscaping services for the premises included, cleanup, lawn cutting, leaf cleanup, pruning and fertilizing. Mr. Lehr testified that generally cleanup occurred in late March or April and depending upon the weather, the placement of pre-emergent fertilizer, which combines both crab grass control and fertilizer in one pellet, would occur on either May 1st to May 7th. Mr. Lehr testified that according to the daily log that he kept of all the work performed for all of his customers, he was at the defendants Fister's premises on Thursday, April 24, 2003 to perform cleanup, power raking and apply pre-emergent fertilizer. Mr. Lehr stated that he applied the pre-emergent fertilizer pellets with a lawn broadcast spreader that held the pellets in a 20 to 24 inch box. Mr. Lehr stated that he always used a blower to clear the sidewalks and parking lot after he finished landscaping the premises, although he did not specifically recall using one on April 24th. Mr. Lehr testified that the pre-emergent fertilizer pellets that he used were manufactured by Bissett and the pellets were slightly bigger than a pen [*sic*] top, yellow in color, round in shape and had a small odor when they were taken out of the bag. Mr. Lehr stated that the pellets were applied once a month and afterwards regular fertilizer was applied every six weeks. Mr. Lehr testified that the fertilizer pellets application was exclusive to the lawn and shrub fertilizer was used in the bushes. Mr. Lehr testified that the shrub fertilizer was black powder, very small pellets, and made by Polytone. Mr. Lehr further testified that he was informed of the plaintiff's accident by Mrs. Fister.

As relevant to the instant motions, defendant Eileen Fister testified at an examination before trial that the defendants Fister were the owners of the subject premises. Mrs. Fister stated that the building is managed by Fister Management and as the sole employee of Fister Management she negotiated the yearly contract with defendant Lehr. She stated that defendant Lehr had been responsible for the lawn's maintenance, which included, cutting and edging, fertilizing, shrubbery maintenance and operation of the sprinkler system, for over five years. She testified that she had never seen fertilizer pellets on the paved areas, had never complained to defendant Lehr and no one else had ever complained about the work performed by defendant Lehr. Mrs. Fister testified that during the 2003 year she came into the office in the afternoon, approximately four or five times a week, and before coming into the building she would inspect the grounds by walking around the circumference of the building. She stated that she was advised of the accident by plaintiff's employer's manager. She stated that she and the manager went out to the incident's location, at the rear entryway, and she observed a three by three area containing three to five pellets of fertilizer on the landing. Mrs. Fister stated the pellets were green in color and "like the head of a pin." She testified that she notified defendant Lehr of the problem and told Mr. Lehr's wife to inform their insurance company. Mrs. Fister also stated that she did not notice any pellets anywhere on the premises prior to be notified of the plaintiff's accident. Mrs. Fister further testified that a maintenance company was employed to maintain the inside of the premises but defendant Lehr was the only entity to maintain the outside of the premises.

Defendants Fister now move for summary judgment on the basis that they did not have either constructive or actual notice of any defective condition existing on their property and nor did they create the defective condition, if one did exist. Defendants Fister also oppose defendant Lehr's motion on the grounds that a claim for contribution exists if it is found that Darryl Lehr negligently applied the fertilizer pellets. Defendants submit, the pleadings, copies of the deposition transcripts of plaintiff and defendants Darryl Lehr and Eileen Fister.

Defendant Lehr also moves for summary judgment on the basis that he did not owe the plaintiff a duty of care and there is no evidence that the work performed by defendant Lehr was done in a negligent manner. Defendant submits Darryl Lehr's affidavit, contract between defendant Lehr and defendants Fister, Darryl Lehr's daily calendar, DocuWeather, USA Daily Weather Summary for April 23-28, 2003, and copies of the deposition transcripts of plaintiff and defendants Darryl Lehr and Eileen Fister.

Plaintiff opposes the instant motion by defendants Fister on the grounds that defendants Fister had notice of the defective condition existing on their premises. Plaintiff also opposes defendant Lehr's motion on the grounds that Darryl Lehr negligently applied the pre-emergent fertilizer pellets. Plaintiff submits, copies of the deposition transcript of plaintiff and Darryl Lehr.

On a motion for summary judgment the court's function is to determine whether issues of fact exist: not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). However, where a plaintiff fails to submit any evidence that the condition alleged to have caused the injury was actually defective or dangerous, summary judgment must be granted in defendant's favor (*Przbyzowski v Wonder Works Construction, Inc.*, 303 AD2d 482, 755 NYS2d 435 [2003]), and mere conclusions and unsubstantiated allegations are

insufficient to raise any triable issues of fact (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]).

It is well settled that a landowner has a duty to take reasonable measures to maintain his or her property in a reasonably safe condition (*see, Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). A landowner, however, is not the insurer of the safety of those on the land (*see, Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]). Furthermore, in order for a plaintiff to impose liability upon a defendant in a negligence action predicated upon a slip and fall, there must be evidence that establishes that the defendant either created the defective condition that caused the fall or had actual or constructive notice of the defective condition (*Moss v JNK Capital Ltd.*, 85 NY2d 1005, 631 NYS2d 280 [1995]; *Lowrey v Cumberland Farms, Inc.*, 162 AD2d 777, 557 NYS2d 689 [1990]). Constructive notice may be inferred where it is shown that the dangerous condition existed for a sufficient length of time to permit the defendant to discover and remedy the condition; it may not, however, be inferred where the evidence is speculative regarding the length of time that the substance was on the floor (*Dardzinski v A&P*, 242 AD2d 362, 661 NYS2d 284 [1997]; *Bernard v Waldbaums, Inc.*, 232 AD2d 596, 648 NYS2d 700 [1996]; *Davis v Supermarkets Gen. Corp.*, 205 AD2d 730, 613 NYS2d 701 [1994]; *Cafiero v Insera Supermarkets*, 195 AD2d 681, 599 NYS2d 342 [1993]). Moreover, the fact that the defendant may have a general awareness that a defective condition may exist is not legally sufficient to constitute notice of the particular condition that caused the plaintiff's injuries (*Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Kennedy v Wegmans Food Markets, Inc.*, 90 NY2d 923, 664 NYS2d 259 [1997]; *Bernard v Waldbaum, Inc.*, *supra*).

Here, the adduced evidence establishes that defendants Fister have met their burden in demonstrating that they did not create nor have actual or constructive notice of the alleged defective condition that resulted in plaintiff's injuries (*Moss v JNK Capital Ltd.*, *supra*; *Robinson v Lupo*, 261 AD2d 525, 690 NYS2d 640 [1999]; *Kuchman v Olympia & York, USA, Inc.*, 238 AD2d 381, 656 NYS2d 323 [1997]). Plaintiff stated that while she was lying on the ground for 10 to 15 minutes she came to the realization that she had slipped on fertilizer pellets, although she did not notice any pellets on the paved areas prior to her fall. Therefore, plaintiff has failed to present any evidence establishing that the defendants Fister had notice of the defective condition existing on their premises (*Moorman v Huntington Hosp.*, 262 AD2d 290, 691 NYS2d 548 [1999]; *George v Big V Supermarket*, 258 AD2d 438, 684 NYS2d 609 [1999]). In addition, no evidence has been produced to establish the length of time that the pre-emergent fertilizer was on the landing of the rear entry. Although, plaintiff relies upon the fact that Darryl Lehr testified that he applied the pre-emergent fertilizer pellets on April 24, 2003, approximately four days before plaintiff's accident, plaintiff also testified that on Friday, April 25, 2003, she did not notice any fertilizer pellets on the paved areas of the subject premises. Additionally, Mrs. Fister testified that she had never received any complaints about the fertilizer pellets prior to plaintiff's accident. Therefore, plaintiff has not proven that defendants Fister were made aware of the hazardous condition on the premises for a significant length of time prior to plaintiff's accident and failed to take corrective action (*Gordon v American Museum of Natural History*, *supra*; *Dardzinski v A&P*, *supra*). Consequently, a jury would be relegated to basing its decision on mere speculation, surmise and conjecture, which is insufficient to defeat a motion for summary judgment (*Bowers v Vial*, 78 AD2d 534, 431 NYS2d 719 [1980]). Thus, plaintiff has failed to raise a triable issue of fact as to whether the

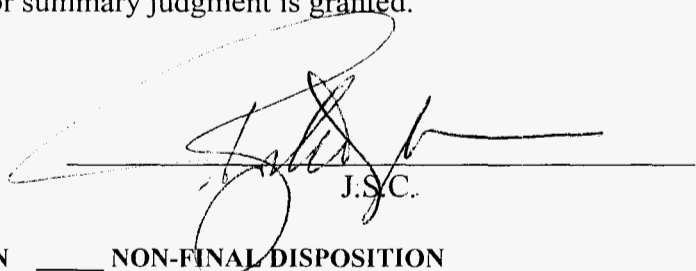
defendants Fister had notice of the scattered fertilizer pellets on the landing of the rear entrance to their premises (*Lowrey v Cumberland Farms, Inc., supra; Cafiero v Insera Supermarkets, supra*).

Accordingly, defendants Fister's motion for summary judgment is granted.

With regard to defendant Lehr's motion for summary judgment, plaintiff must show that by virtue of a defendant's landscaping contract, defendant displaced the duty of the landowner to safely maintain the premises (*Espinal v Melville Snow Contr., Inc.*, 283 AD2d 546, 724 NYS2d 893 [2001]) and assumed a duty to plaintiff to exercise reasonable care to prevent all foreseeable harm to the plaintiff such that the plaintiff detrimentally relied on the defendant's performance of the defendant's duties under the landscaping contract (*see, Palka v Servicemaster Mgt Services*, 83 NY2d 579, 611 NYS2d 817 [1994]; *Pavlovich v Wade Assoc., Inc.*, 274 AD2d 383, 710 NYS2d 615 [2000]) or that the defendant's actions "advanced to such a point as to have launched a force or instrument of harm" (*Pavlovich v Wade Assoc., Inc., supra*). Under the instant circumstances, plaintiff has failed to do so. Plaintiff has failed to establish that defendant Lehr's landscaping contract was of such a comprehensive and exclusive nature that it replaced defendants Fister's duty to safely maintain the premises thereby giving rise to a separate duty to the plaintiff (*see, Gor v High View Estates Owners Corp.*, 17 AD3d 316, 793 NYS2d 98 [2005]; *Tiwari v EAB Plaza*, 261 AD2d 534, 690 NYS2d 624 [1999]). The nexus between plaintiff's injury and defendant Lehr's contractual relationship is not direct and demonstrable, it is tenuous at best (*Palka v Servicemaster Mgt Services; supra; Strauss v Belle Realty Co.*, 65 NY2d 399, 492 NYS2d 555 [1985]). The only evidence that has been submitted by way of suggesting that defendant Lehr negligently performed its duties under the landscaping contract is the fact that plaintiff's injury occurred and afterwards while lying on the ground, plaintiff observed yellow fertilizer pellets on the landing. However, plaintiff testified that she did not observe any fertilizer pellets on the landing on Friday, the 25th of April, the day immediately following Mr. Lehr's performance under the contract nor did she observe any pellets prior to her fall. Mr. Lehr testified that he personally applied the pre-emergent fertilizer pellets using a broadcast lawn spreader and then cleared the paved areas using a blower on Thursday, April 24th and did not return to the subject premises for any purpose before April 28th, the day of plaintiff's accident. Therefore, no evidence has been submitted to show that defendant Lehr negligently performed his duties under the landscaping contract (*Espinal v Melville Snow Contr., Inc., supra; Pavlovich v Wade Assoc., Inc., supra*). Nor has plaintiff established that she detrimentally relied upon defendant Lehr's performance of the landscaping contract (*Keshavarz v Murphy*, 242 AD2d 680, 662 NYS2d 795 [1997]) or that defendant Lehr launched a force or instrumentality of harm (*Roesch v Hillick*, 247 AD2d 927, 668 NYS2d 787 [1998]). Thus, plaintiff has failed to demonstrate the existence of any material facts warranting the denial of defendant Lehr's motion for summary judgment (*see, Pavlovich v Wade Assoc., Inc., supra; Gor v High View Estates Owners Corp., supra*).

Accordingly, defendant Lehr's motion for summary judgment is granted.

Dated: MAR 26 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION