

Slatkin v City of New York

2007 NY Slip Op 31145(U)

May 3, 2007

Supreme Court, New York County

Docket Number: 0105075/2003

Judge: Eileen A. Rakower

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

PRESENT: Rakower
Justice

PART 5

Index Number : 105075/2003

SLATKIN, FLORENCE

vs

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits _____

3, 4, 5 (x motion)

Replying Affidavits _____

6, 7, 8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

MAY 09 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/3/07


EILEEN A. RAKOWER S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
FLORENCE SLATKIN,

Plaintiff,

Index No.
105075/03

- against -

THE CITY OF NEW YORK, PACIFIC LAWN SPRINKLERS,
INC., and THE AMERICAN MUSEUM OF NATURAL HISTORY

Defendants.

HON. EILEEN A. RAKOWER

Decision and
Order
FILED
MAY 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff brings this action for personal injuries allegedly sustained when she slipped and fell on an icy patch of the pathway within a park located between the lawns on the 81st Street side of the New York City Planetarium between Central Park West and Columbus Avenue, in the County and State of New York on December 4, 2002. Plaintiff filed a timely notice of claim. Specifically, plaintiff alleges that water coming from a nearby sprinkler system caused the icy patch. Defendant American Museum of Natural History (AMNH) brought cross claims as against the City of New York (City) and Pacific Lawn Sprinklers, Inc. (Pacific) for indemnification and breach of contract. AMNH now moves for summary judgment pursuant to CPLR 3212, dismissing plaintiff's claim as against it, and seeks a default judgment as against City and Pacific for failing to answer its cross claims. Finally, and in the alternative, AMNH seeks summary judgment on its cross claims against City and Pacific. Plaintiff and Pacific file partial opposition to AMNH's motion. City cross moves seeking to dismiss AMNH's cross-claims as against the City, and for summary judgment on its claim for contractual indemnification as against AMNH. AMNH opposes the City's cross motion.

AMNH was directed by the City that it was again time to winterize the sprinkler system. AMNH contracted Pacific for this purpose. AMNH gave the

Pacific crew access to the sprinkler valves. On the date of plaintiff's accident, water was drained from the system beneath the museum, and the system was flushed with air. During the process, City accompanied a Pacific employee to monitor the sprinkler heads above ground and in the park where plaintiff had her accident.

AMNH claims that other than noted above, it had no other role or duty regarding the alleged incident. Rather, AMNH asserts that the City was solely responsible for snow and ice removal in the area where plaintiff fell.

AMNH makes a further claim as against Pacific that Pacific was obligated by contract to provide a separate "Owner's Protective Policy" to protect AMNH. AMNH made a demand that Pacific and/or its insurer represent AMNH in the instant matter, but neither responded to the demand. AMNH states further, that Pacific's failure to obtain insurance constituted a breach of contract. Finally, AMNH argues that Pacific failed to answer its cross claim for breach of contract and AMNH is thus entitled to a default judgment against Pacific.

AMNH, in support of its motion, provides the deposition testimony of Charles, Tantillo (AMNH's Director of Facilities Operations), Ronnit Bendauid-Val (Horticultural Manager at Theodore Roosevelt Park), John Dellafiora for Pacific, the contract between AMNH and Pacific Lawn Sprinklers, Inc., the museum insurance package, and certain correspondence and pleadings.

AMNH points out that plaintiff's accident occurred in the Park, outside of AMNH's leasehold, in an area in which AMNH had no maintenance responsibilities. The City was solely responsible for snow and ice removal on the path in question. Aside from AMNH owing no duty to plaintiff, AMNH contends that it did not cause or create the condition which caused the accident, nor did it have actual or constructive notice of the condition.

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118 [92 N.E.2d 918]). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019 [116 N.Y.S.2d 857]) In addition, "[t]he party opposing the [summary judgment] motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." (*Gilbert Frank Corp. v. Federal*

Ins. Co., 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 520 N.E.2d 512.) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890.) *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 (1st Dept. 1989)

AMNH argues that the deposition testimony provided demonstrates that its only role in the winterization process, which may have caused the condition on which plaintiff fell, was to schedule a time for Pacific and the City to meet and for AMNH to give them access to the sprinkler valves, which were contained within AMNH's premises. Further, the evidence shows that AMNH did not supervise the outdoor work as it proceeded.

Plaintiff argues that the scheduling of the winterization on a very cold day was a reckless act, and that it was foreseeable that water flushed from the sprinkler system would freeze under the weather conditions as they existed on the date of plaintiff's accident. Plaintiff urges that the deposition of Ronnit Bendavid-Val supports her claim that it was AMNH that was negligent in delaying the winterization process, and in failing to obtain a contractor to perform the winterization earlier in the year.

Pacific opposes that portion of AMNH's motion which seeks a default judgment as against it, asserting that AMNH failed to so move within one year of the alleged default pursuant to CPLR § 2115 (c). Alternatively, Pacific seeks an opportunity to serve an answer to the cross claims. Additionally, Pacific opposes AMNH's motion for summary judgment as against Pacific for common law indemnification. Pacific does not, however, oppose the motion for summary judgment seeking to dismiss plaintiff's claims as against AMNH.

City opposes AMNH's motion in its entirety, and cross moves to dismiss the cross claims of AMNH as against it. City points out that the cross claims were served on April 28, 2005 and that AMNH failed to move for a default judgment until two years later, beyond the statutory time within which it must move to enter judgment. Consequently, City asserts that such cross claims must be deemed abandoned. City provides a memorandum of agreement as between AMNH and City, which provides for AMNH to indemnify City for the negligence of AMNH or its "agents, servants and employees, contractors, licensees and invitees." City concludes that it is AMNH that should indemnify it, rather than the reverse.

City concedes that it bears the responsibility to clean snow and ice from the pathway on which plaintiff fell; however, City asserts that it was AMNH's responsibility to hire a contractor to perform the winterization of the sprinkler system before the first freeze of the year. City submits that AMNH's negligent procrastination in hiring a contractor to winterize the system gives rise to City's entitlement to contractual indemnification as against AMNH. City moves for an order directing AMNH to defend and indemnify the City for this action.

Stated succinctly, AMNH was obligated to hire a contractor to perform the winterization of the sprinkler system. That winterization protects the system itself from being damaged should water remaining in the lines freeze and expand.

Q: Why would it have been very important to take care of it before the freeze?

A: When water freezes and it's not taken out of the pipes it expands and breaks the pipe and major damage can be caused.
(Deposition of Ronnit Bendaud-Val, page 20, lines 18-24)

The process itself of winterizing the system is performed by the appropriate person in the presence of the City. AMNH gives personnel access and escort through AMNH's facility as a measure of security for the museum's valuables. "In order to have access to the whole system they need to get downstairs into the museum which is why we need to work with the museum. (Deposition of Ronnit Bendaud-Val, page 31, lines 14-17). "[T]hey need to be actually accompanied behind locked doors to access six different boxes, so the museum personnel accompanies them for that." (Deposition of Ronnit Bendaud-Val, page 31, line 23 though page 32, line 2) There is no evidence that AMNH at any time directed or controlled the work of Pacific. AMNH personnel drained the sprinkler system from below prior to Pacific winterizing the system. "He turned the valve well below ground level, a whole story. You open the valve all the water in the system drains out the bottom, so, after that, the second step is blowing it out. At that point my understanding had been so much water drained out from below there would be minimal or nothing coming out of the top." (Deposition of Ronnit Bendaud-Val, page 37, lines 11-19)

The winterization contractor reports that Pacific works until Christmas. The appointment is made with little or no certainty as to what the weather conditions would be on the exact date of the winterization. It is scheduled one to three weeks

in advance (Deposition of Ronnit Bendauid-Val, page 26, line 3). City, at all times, controlled, maintained and remained responsible for the pathway where plaintiff fell.

- Q: Let me ask you this, on December 4, 2002, when you began purging the sprinkler system did any water come out of the sprinkler system?
- A: A very small amount in mist form.
- Q: How did you measure the amount of Miss [sic] that came out?
- A: Visually.
- Q: Where did you see the mist come out in the sprinkler system?
- A: The sprinkler system has, I believe, 58 different lines. Each line has anywhere from probably six to maybe 10 or more sprinklers on it and whatever remaining water would be in the system – you know – let’s say a trap at the base of the – you know – hole itself of the sprinkler would come out that sprinkler so, ultimately, every sprinkler has some mist. (Deposition of Ronnit Bendauid-Val, Page 39 lines 3-21)
- A: Well, one of the Pacific Lawn lawn crew goes downstairs with a member of the museum staff then works the system from downstairs. I’m not sure where they hook up the air pump to, but the system works from downstairs. You can access a number of different zones without walking around a lot. We move from zone to zone blowing each out.
- Q: When you say you move from zone to zone, did you physically move in the park?
- A: Me with the Pacific Lawn lawn person who is outside. We go from each lawn and make sure everything happens collectively inside. They don’t move that much. You can access a number of zones from the same location.
- Q: When you moved outside, you yourself with the Pacific Lawn person, what did you do when you moved from zone to zone; what did you do?
- A: I didn’t do much. I watched.
- Q: What was he doing; the Pacific Lawn employee?
- A: Just making sure everything was blowing out. Probably most were popped up sprinklers as air is going in. You want to make

sure each one is activated so water can blow up.(Deposition of Ronnit Bendauid-Val, page 40, line12 through page 41, line 16)

Again, the purpose of winterizing earlier in the year, was simply to prevent the underground pipes from bursting and causing major damage.

Q: What, if anything, did you say to the museum employees when you were having difficulty setting up the winterization process at the appropriate time?

...

A: It's very important to take care of it before the freeze happens.

Q: Why would it have been very important to take of it before the freeze?

A: When water freezes and it's not taken out of the pipes it expands and breaks the pipe and major damage can be caused. (Ronnit Bendauid-Val Deposition Page 20, Lines 8-24)

The only "negligent" act plaintiff and City attribute to AMNH on December 4, 2002, is what City characterizes as a delay in scheduling the winterization process of the sprinkler system. City agreed to the date and time, supervised the outdoor work as it progressed, was fully cognizant of the weather conditions and what if any water was accumulating and freezing on the pathway and remained solely responsible for the safety of that pathway. During this process, Ms. Bendauid-Val undertook to clear the nearby dog park while its sprinkler heads were flushed so people in that area would not get wet (Deposition of Ronnit Bendauid-Val, pages 42-44). The remote responsibility associated with facilitating the joint activities of the City and Pacific and providing access to the underground pipes through the museum does not serve to demonstrate that AMNH assumed a duty to maintain or make safe the park sidewalks.

The City's cross motion is rendered moot in its entirety.

Based on the foregoing, AMNH's cross claims are also rendered moot.

Wherefore it is hereby

ORDERED that defendant the American Museum of Natural History's motion for summary judgment dismissing the action as against it is granted; and it is further

ORDERED that the City's cross motion is denied as moot; and it is further
ORDERED that all other relief requested is denied; and it is further
ORDERED that the case in all other respects continues.

DATED: May 3, 2007


EILEEN A. RAKOWER, J.S.C.

FILED
MAY 09 2007
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NEW YORK