

Bowman v MPCA Senior Citizens Holding Corp.

2007 NY Slip Op 31420(U)

May 23, 2007

Supreme Court, Queens County

Docket Number: 0019829/2004

Judge: David Elliot

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

-----	Index
RICHARD BOWMAN AND	No. 19829/04
MICHAELINE BOWMAN,	
	Motion
Plaintiffs,	Date March 6, 2007
-against-	
	Motion
MPCA SENIOR CITIZENS HOLDING	Cal. No. 7
CORPORATION, ROBERT COUCHE	
SENIOR CENTER, INC., AND	Motion
ABBO CONTRACTING CORP.,	Seq. No. 1
Defendants.	

PAPERS
NUMBERED

Notice of Motion-Affid-Exhib.....	1-4
Cross-Motion-Affid-Exhib.....	5-18
Reply.....	19-20

Plaintiffs commenced this action seeking to recover damages for personal injuries alleged to have been sustained on March 14, 2003 due to a slip and fall due to an ice condition in the parking lot of premises known as 137-57 Farmers Boulevard, in the County of Queens, City and State of New York.

Defendant MPCA Senior Citizens Holding Corporation (MPCA), moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims as against it on the ground that no liability for the occurrence of the underlying accident can be attributed to any negligence on its part.

Defendant Robert Couche Senior Center Inc. (Center), cross-moves for an order granting summary judgment in its favor dismissing the complaint and all cross-complaints as against it on the ground that no triable issue of fact exists.

Contentions of the Parties

Defendant MPCA asserts that there is no evidence to support a finding of negligence as against it. It asserts that it owns the premises which are leased to defendant Center. Its Chairman of the Board, Thomas Leach, testified at his deposition that the tenant was authorized to use the parking lot and maintain the control over it. He, or someone else from the board, would be at the property everyday. Prior to March, 2003 until March 14, 2003, the tenant was responsible for the general maintenance of the parking lot including the removal of snow and ice. His company never hired an independent company to do snow removal for the parking lot. He knew that defendant Center did hire such a company because he paid the bills. Defendant MPCA paid such bills because it wanted to make sure that the senior citizens could attend the center without any kind of inconvenience. It undertook the burden and paid the bills. Defendant Center actually hired the snow removal company. He has seen the parking lot after it has been plowed and there would be piles of snow up against the side of the building or away from where people would be walking. Sand or salt was available at the Center for ice removal. The tenant was responsible for putting down the salt and sand.

Defendant MPCA also submits the deposition testimony of Eleanor Gibson Kelly, Executive Director of defendant Center. She testified that Bobby Harris was the full time custodian at the premises. He would do general routine cleaning. The landlord was responsible for the removal of snow in the parking lot. An arrangement had been made with the landlord that he would find someone who would come in and remove the snow. If there was a snowfall defendant Center would be reimbursed for payment of the bill if it had paid it. The custodian had a regular routine with respect to salting, sanding and shoveling although he didn't do a lot of shoveling. She would purchase the salt and sand or whatever was used and be reimbursed. An outside contractor would do the shoveling in the parking lot. Mr. Harris would put down salt or sand in the parking lot if he felt that there was an icy condition.

Defendant MPCA also submits the deposition testimony of plaintiff. He testified that he parked his car in the parking lot. As he stepped out of the car, he slipped on the ice. The parking lot appeared to have been plowed. His fall was a couple of days after it had snowed. There was all ice where he fell. It was about 1/4 inch thick and it was clear.

Defendant MPCA argues that the evidence established that it was the responsibility of defendant Center, or its employee, to salt and sand the parking lot. The lease clearly establishes that the tenant was given permission to use the parking lot with the understanding that the landlord, defendant MPCA, would have no maintenance responsibilities with respect thereto. It was the tenant's responsibility. There is no evidence that defendant MPCA had either actual or constructive notice of the alleged icy condition.

Defendant Center argues that the evidence shows that it had no obligation to repair or maintain the parking lot or to provide snow removal operations. The parking lot was specifically excluded from the lease and does not impose any snow removal or maintenance obligations upon the tenant. Article XXX of the lease shows that the tenant did not own the parking lot but was merely granted a license to use it. Mr. Leach testified that the tenant maintained the parking lot pursuant to the terms of the lease but the lease does not, in fact, provide for any such maintenance obligations. He further testified that sometimes defendant Center would hire an outside contractor to clean the parking lot but that defendant MPCA would actually pay for same. The landlord would either directly pay for snow removal operations or would reimburse the Center for any such operations. All snow removal was performed by outside contractors. There is no evidence that this defendant created the condition or undertook any activity which launched a force or mechanism of harm so as to be subject to liability in tort.

Plaintiffs oppose the motion and cross-motion and assert that, here, both the landlord and the tenant, their agent and employees were present nearly every day to observe a condition that existed for at least eight days prior to the occurrence. According to the tenant, the tenant's custodian and the landlord were responsible for inspecting and clearing snow and ice in the parking lot. Plaintiff testified that there did not appear to be salt or sand in the parking lot during that period of time. Plaintiff's uncontradicted testimony showed that there was an icy unsalted surface reflecting poor, if any, snow and ice removal. As to defendant MPCA, it owns the subject premises and is not an absentee landlord. It also paid the bills for snow and ice removal. His testimony is in conflict with that of defendant Center's Executive Director as to whose responsibility it was for snow and ice removal. As to the tenant, the evidence showed that the full time custodian put

down salt or sand in the parking lot if he felt there was an icy condition. There is further confusion and ambiguity between the landlord and the tenant concerning the language in the lease. As to notice, weather records show that the last snow of any substance was eight days earlier and the weather during that period was clement enough so that proper maintenance of the parking lot could have been performed. Plaintiff testified that there was snow or ice on the surface of the lot and that it had been plowed but plowed improperly. The landlord and the tenant were aware or should have been aware of the hazardous condition especially as they were dealing with a vulnerable senior population.

As to defendant Center, plaintiff also argues that Ms. Kelly testified that her full time custodian salted or sanded the lot if he felt that there was an icy condition. He was also responsible for making sure that the paths were clear so that the senior citizens could enter and exit the building safely. She testified that she did not look at the parking lot at any time during the day of the accident.

In reply, defendant MPCA asserts that the evidence shows that the terms of the lease exclude the parking lot from the demised premises but make it clear that the tenant had permission to use it and that the landlord had no maintenance responsibilities with respect thereto. Ms. Kelly testified that although it was her understanding that the landlord was responsible for the maintenance, she acknowledged that all snow removal arrangements were made by defendant Center. The Center's custodian was responsible for the salting and sanding of the walkways and the parking lot. There is no evidence as to how long the icy patch in question was present and, therefore, no evidence of notice either actual or constructive. There is no evidence that it had been notified of any icy patch in the parking lot nor that the ice patch was the result of the prior snowstorm.

Decision of the Court

The motion by defendant MPCA is denied. The cross-motion by defendant Center is denied.

It is well settled that: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see, Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404, NE2d 718; Sillman v Twentieth

Century-Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649, 444 NYS2d 305; Greenberg v Manlon Realty, 43 AD2d 968, 969, 352 NYS2d 494)." (Winegrad v New York University Medical Center, 64 NY2d 851 at 853).

In support of the motion and cross-motion, evidence was submitted which requires denial of summary judgment to defendant MPCA and defendant Center. The lease shows that the parking lot was not part of the demised premises and that the landlord retained no responsibility with respect to its maintenance. However, there was no specific exclusion of responsibility with respect to snow and ice removal. The testimony of Thomas Leach showed that defendant MPCA paid the bills for the company hired to perform snow and ice removal in the parking lot while defendant Center actually hired the snow removal company. As noted by the court in Olivieri v. GM Realty Company, LLC, 37 AD3d 569: "Although, as a general rule, a property owner is not responsible for conditions created by an independent contractor, the defendant may be held vicariously liable for the negligence of its independent contractor if such negligence violated defendant's nondelegable duty as the property owner to provide safe ingress and egress. [citations omitted]."

As to defendant Center, testimony showed that defendant Center's custodian would salt or sand the walkways or parking lot. Further, evidence was submitted to show that there was several days from the last snow fall to the time of plaintiff's fall. Testimony showed that representatives of defendant MPCA and defendant Center were present on a regular basis at the premises. A question of fact therefore arises as to whether said defendants had notice of the alleged condition.

Accordingly, the motion by defendant MPCA is denied. The cross-motion by defendant Center is denied.

Dated: May 23, 2007

.....
HON. DAVID ELLIOT