

Mungin v Pepe-Fareri One, LLC

2007 NY Slip Op 31452(U)

May 29, 2007

Supreme Court, New York County

Docket Number: 0113824/2003

Judge: Michael D. Stallman

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.

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

PRESENT. **HON. MICHAEL D. STALLMAN**

PART 7

Index Number : 113824/2003

MUNGIN, GLORIA

vs

PEPE-FARERI ONE

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE

2/7/07

MOTION SEQ. NO.

02

MOTION CAL. NO.

76

The following papers, numbered 1 to 2 were read on this motion to/for SJ

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

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

FILED
JUN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

5/29/07



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: IAS PART 7**

-----X
GLORIA MUNGIN and BENJAMIN HENDERSON,

Plaintiff,

Index No. 113824/03

- against -

PEPE-FARERI ONE, LLC and GREEN GRASS
LANDSCAPING AND CONTRACTING, INC.,

Defendants.

Decision and Order

FILED
JUN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff Gloria Mungin alleges that, on February 24, 2003, she slipped and fell on an allegedly dangerous ice condition in the parking lot in front of 19 Bradhurst, the premises known as the Medical Arts Atrium of Westchester Medical Center. Mungin worked as a credit and collections analyst at the Westchester Medical Center. Plaintiff commenced this action on July 10, 2003, against defendant Pepe-Fareri One, LLC (Pepe-Fareri), the alleged owner of the parking lot, and against defendant Green Grass Landscaping & Contracting, Inc. (Green Grass), a snow removal and landscaping company which had a contract for snow and ice control with the Westchester Medical Center.

Green Grass moves for summary judgment dismissing the complaint as against it. Defendant Pepe-Fareri One, LLC also moves for summary judgment dismissing the complaint. This decision addresses both motions.

I.

As a preliminary matter, the Court must discuss the procedural posture of these summary

judgment motions, which were originally returnable on May 22, 2006. Defendants agreed to adjourn the return date of their motions six times, ultimately to February 7, 2007, to accommodate plaintiffs' counsel. The final stipulation of adjournment provides, in pertinent part:

"IT IS FURTHER STIPULATED AND AGREED that the adjourned return date of February 7, 2007 is final and no further adjournments will be granted, regardless of whether plaintiffs fail to submit opposition papers either by the current attorney, David Dambroff, Esq., or other/substituted counsel

* * *

IT IS FURTHER STIPULATED AND AGREED that plaintiffs' opposition papers to the aforesaid motions are to be served by overnight delivery or personal service on or before January 16, 2007. Defendants' respective reply papers are to be served by overnight delivery or personal service on or before February 6, 2007."

It is undisputed that plaintiffs' counsel did not serve opposition papers by January 16, 2007. Instead, plaintiffs' counsel mailed opposition papers to the Court via overnight mail on February 6 and February 12, 2007.

The extreme lateness of plaintiffs' opposition is not excusable. The defendants' counsel generously accommodated plaintiffs' counsel, and the Court conducted several telephone conferences with the parties' counsel to extend the final submission date. Although the Court is not unsympathetic to the hurdles that plaintiffs' counsel has faced, he has been given more than adequate time to plan for and to manage these obstacles. Plaintiffs' counsel may not unilaterally amend a stipulation. Neither may the Court disregard the parties' bargained-for agreement, where the last adjournment was agreed to only on the proviso that it was to be final. Accordingly, the Court rejects plaintiffs' opposition papers as late. As indicated in Part II, even if the papers had been considered, they would not have changed the result.

II.

The standards for summary judgment are well settled.

“[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.”

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

Green Grass establishes a prima facie case for summary judgment dismissing the complaint as against it. As it indicates, the contract that Green Grass has with Westchester Medical Center did not give rise a duty owed to Mungin, so as to be liable to her for allegedly negligent snow and ice removal. See Espinal v Melville Snow Contr., 98 NY2d 136 (2002). Nothing in the record indicates that this action falls within an exception giving rise to a duty in tort based on the alleged negligent performance of a contract. Green Grass’s contract did not amount to comprehensive and exclusive property maintenance that displaced the landowner’s duty. This Court also agrees with Justice Nastasi’s analysis of Green Grass’s contract in a decision granting summary judgment to Green Grass in another slip and fall case, Lattimore-Clanton v Standard Parking Corp. and Green Grass Landscaping, Sup Ct, Westchester County, Jan. 26, 2006, Nastasi, J., Index No.10183/04. See Mondelli, Affirm., Ex O, at 3-4.

Were the Court to consider plaintiffs’ arguments in opposition, the Court would find them unavailing. Green Grass’s allegedly negligent snow and ice removal does not amount to launching a force or instrument of harm.

The branch of Green Grass’s motion for summary judgment dismissing Pepe-Fareri’s cross claims is granted without opposition. In the absence of a duty owed to any third parties for allegedly

negligent snow removal, Pepe-Fareri may not pursue a claim against Green Grass for common-law indemnification or contribution. Neither is Pepe-Fareri entitled to contractual indemnification from Green Grass, based on Green Grass's contract with Westchester Medical Center. Pepe-Fareri is not among the persons that Green Grass agreed to indemnify. Paragraph 3.13 of the General Conditions from Green Grass's contract requires Green Grass to indemnify and hold harmless "OWNER [Westchester County Health Care Corp.], OWNER's Consultants, and the officers, directors, partners, employees, agents, and other consultants and subcontractors of each . . ." Mondelli Affirm., Ex M at 17.

Pepe-Fareri's motion for summary judgment is also granted. The record indicates that Pepe-Fareri leased the parking lot to the County of Westchester, pursuant to a 1996 lease. See Mondelli Affirm., Ex J.

"Generally, an out-of-possession landlord cannot be held liable for a third party's injuries on the premises unless it had notice of the defect and consented to be responsible for repairs or maintenance. Notice can be constructive, when the landlord 'reserves a right under the terms of a lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists.' However, in that case, 'only a significant structural or design defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord.'"

Gomez v 192 E. 151st St. Assoc., L.P., 26 AD3d 276, 277 (1st Dept 2006) (citations omitted); Sangiorgio v Ace Towing & Recovery, 13 A.D.3d 433, 433-434 (2d Dept 2004). Nothing in the record indicates that Pepe-Fareri had notice of any allegedly icy or snowy ground conditions at the lot which posed a danger to those traversing the parking lot, and the lease required the County of Westchester to maintain parking areas, parking spaces, and adjacent property leased to it in "good repair and safe condition for use by the Lessee, Lessee's employees, and visitors . . ." See Mondelli

Affirm., Ex J.

Were the Court to consider plaintiffs' arguments, they would be insufficient to raise an issue of fact as to whether Pepe-Fareri retained a sufficient degree of control over the premises to provide a basis for liability. Salgado v Ring, 21 AD3d 362, 363 (2d Dept 2005).

Accordingly, it is hereby

ORDERED that the motions for summary judgment by defendant Green Grass Landscaping & Contracting, Inc. and Pepe-Fareri One, LLC (Motion Seq. Nos. 002 and 003) are granted, and the complaint and all cross claims are dismissed.

Dated: May 29, 2007
New York, New York

ENTER:



J.S.C.

FILED
JUN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE