

Grant v Skyline Mgt. Corp.

2007 NY Slip Op 33699(U)

November 8, 2007

Supreme Court, Nassau County

Docket Number: 3586-05/

Judge: Ute W. Lally

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SCA

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

ALICE GRANT and JAMES GRANT,

Plaintiff(s),

MOTION DATE: 9/25/07
INDEX NO.: 13586/05
SEQ. NO. 4, 5
CAL. NO. 2007H2189

-against-

SKYLINE MANAGEMENT CORP., SHELVIN PLAZA
ASSOC. and MANTA CONTRACTING, INC.,

Defendant(s)

- The following papers read on this motion for summary judgment:
- Notice of Motion/ Order to Show Cause..... 1-3
 - Notice of Cross Motion..... 4-6
 - Answering Affidavits..... 7-12
 - Replying Affidavits..... 13-16
 - Briefs:

Upon the foregoing papers, it is ordered that this motion by defendant Manta Contracting Incorporated (hereinafter "Manta") for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims against it and motion by defendants Skyline Management Corp. and Shelvin Plaza Associates (hereinafter collectively "Skyline") for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them and all cross-claims by Manta Contracting Incorporated against them are denied.

This is an action to recover money damages for personal

injuries allegedly sustained by plaintiff Alice Grant as a result of the negligence of the defendants in the design, construction and maintenance of an "exterior stairway" located at the southeasterly corner of 600 Old Country Road, Garden City, New York. It is claimed that on the morning of July 7, 2003, she lost her balance and fell while ascending the aforesaid steps. It is uncontroverted that the building in question is a multiple story, commercial office building with retail stores on the first floor. The rear of the building faces Old Country Road and the front entrance to the building faces southeast. A bituminous concrete (asphalt) parking area was constructed along the front of the building and an asphalt parking area was constructed along the right side of the building and contained a valet parking area. A one-way single lane vehicle access aisle separated the parking area from two concrete walkways which intersected approximately 25 feet from the front right corner of the building. The first walkway was constructed parallel to the front of the building and measured 5 feet, 3 inches in width. The second walkway was constructed parallel to the right side of the building and measured 5 feet, 4 inches in width. A series of landings were constructed in the vicinity of the intersection of the concrete walkways. A concrete curb separated the vehicle access aisle from the lower landing and measured 4 inches in height. The lower landing measured 4 feet, 5 inches in width by 4 feet, 1 inch in depth. A single riser separated the aforementioned lower landing from an upper landing and measured 4-3/4 inches in height. The upper landing measured 4 feet, 6 inches in width by 3 feet, 2 inches in depth. A single riser separated the aforementioned upper landing from the walkways and measured 5-1/2 inches in height. The slope of the lower landing was measured to be 1.1° downward from the upper landing toward the vehicle and the slope of the upper landing was measured to be 1.1° degree downward from the concrete walkway toward the lower landing.

The series of landings and stairs were constructed by defendant Manta at the specific request of Skyline, the managing agent of the subject premises, in May or June of 2003. Skyline had a management agreement with Shelvin, the owner of the subject premises. Skyline had offices at the subject premises. It is claimed that the agreement with Manta to perform work for Skyline was limited to a request for the construction of a cement step, in an area designed by defendant Skyline with no instructions

given as to height, slope or the necessity for the work performed to comply with any building codes. The agreement between Manta and Shelvin provided for the following work:

Additional concrete repair.

- 1) Construct 2 areas of concrete steps on east side of building, extending out to curb. Approx. 150 sq. ft.
- 2) Re-set 3 "STOP" signs in concrete.
- 3) Re-set 2 bollards.

The plaintiffs' attorney, Brandon M. Cruz, alleges in his affirmation in opposition to these motions dated September 10, 2007 that the construction of the "steps and platform" violated NYCRR Title 9 Volume B, Subtitle S Division of Building Code, Subchapter B Building Construction, § § 650, 765.4(a); (9); (10); (11); Table IV-765.

It must be noted that in the first instance, it has not been established by either counsel that the aforesaid codes were in effect on the date of the subject accident. An exhaustive search by this court has found that the aforesaid Codes may have in fact been repealed and superceded by a subsequent "Building Code of New York State." Assuming *arguendo* that the aforesaid codes are controlling, since there is no factual dispute regarding the configuration and location of the walkway and stairs, whether a particular code applies is a question of law, not fact (**Gaston v New York City Housing Authority**, 258 AD2d 220). However, the court is constrained from ruling on the issue of law presented since neither counsel cited to the applicable section of "the building code" in effect at the time of the subject accident or when the construction work was performed (**Elliott v City of New York**, 95 NY2d 730; **Roman v Parkash**, 4 AD3d 408; **Gaston v New York City Housing Authority**, *supra*; **Sparrock v City of New York**, 219 AD2d 705; see also **Nikolaidis v La Terna Restaurant**, 40 AD3d 827).

Robert L. Schartzberg, P.E., the expert engaged by the plaintiffs states in his affidavit sworn to the 10th day of September, 2007, that The American Society for Testing and Materials Standard, Designation F 1637 entitled Standard Practice for Safe Walking Surfaces (American Society for Testing and

Materials, 100 Bar Harbor Drive, West Conshocken, PA 19428) is applicable to the stairways at which it is alleged the plaintiff fell and had the guidelines been in place, the accident may have been avoided.

The Standard Practice for Safe Walking Surfaces states as follows: "Section 1 Scope This practice covers design and construction guidelines and minimum maintenance criteria for new and existing buildings and structures." "Section 1.2 Application The practice addresses elements along and in walkways including floors, and walkway surfaces, sidewalks, short flight stairs, gratings, wheel stops and speed bumps." "Section 6.2 Short Flight Stairs (Three or Fewer Risers) Short flight stairs shall be avoided where possible." Paragraph 6.2.2 provides that "In situations where a short flight stair or single step transition exists or cannot be avoided, obvious visual cues shall be provided to facilitate improved step identification. Handrails, delineated nosing edges, tactile cues, warning signs, contrast in colors, and accent lighting are examples of some appropriate warning cues."

Plaintiffs' expert concludes that the defendants were negligent in maintaining the safety of the subject building for the following reasons: lack of handrails at the subject short flight stairway; "insufficient warning cues and means in place at the location to identify the stairway location and the conditions in place at the stairway necessary to avoid an accident."

The law in this jurisdiction is clear that a defendant who negligently creates a dangerous condition while performing services pursuant to a contract may be liable for injuries sustained by a third party (**Collins v Laro Service Systems of New York, Inc.**, 36 AD3d 746). There is no dispute that defendant Manta performed the construction work pursuant to a contract with defendants. There is an issue of fact as to whether the work was performed by defendant Manta in a negligent manner, thereby creating an unsafe condition (**Church v Callanan Industries**, 99 NY2d 104).

Whether or not Skyline was out of possession owner or lessor may not by itself be determinative of the issue of its liability. An out-of-possession owner is not liable for injuries that occur on the premises unless the owner or lessor retained control over the

premises or is contractually obligated to repair or maintain the premises (**Bouima v Dacomi, Inc.**, 36 AD3d 739). Plaintiffs allege that since Skyline maintained its offices at 600 Old Country Road, there is a question of fact as to whether it is an out-of-possession owner. With respect to the question of notice, if it is demonstrated that the defendants created the alleged dangerous condition, notice need not be established as an element of the plaintiff's case (**Keyes v James A. Jennings Co., Inc.**, 150 AD2d 758, 759).

Moreover, where, as here the premises are open to the public, the owner has a non-delegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress. This duty may not be delegated by the owner or its agents or employees to an independent contractor (**Backiel v Citibank, N.A.**, 299 AD2d 504). It would be inequitable to permit a property owner to escape liability by merely delegating the obligation to repair or maintain the premises to an independent contractor. The underlying policies of public safety and building owner responsibility provide a reasonable basis for imposing liability (**Thomassen v J & K Diner**, 152 AD2d 421). New York courts have long imposed a special duty on property owners to keep the entrances and passageways of a public building safe for tenants, their visitors, and their employees, all classes of people who come onto the premises for reasonably foreseeable purposes (see e.g. **Ancess v Trebuhs Realty Co.**, 18 AD2d 118, aff'd. 16 NY2d 1031; **Hume v Ten Eyck**, 245 AD 794; **Murphy v Broadway Improvement Co.**, 189 AD2d 692).

Applying these principles to the within action, defendants Skyline and Shevlin owe a non-delegable duty to provide a safe means of ingress and egress to all persons lawfully on the premises, including the plaintiff, employee of a tenant in the building. Skyline may not avoid liability to the plaintiff for their alleged failure to provide adequate handrails and/or markings on the stairs by having delegated the maintenance and repair work to an independent contractor, the defendant Manta herein. There are issues of fact as to whether the alleged dangerous condition was created by the action of the independent contractor and whether Skyline may be vicariously liable pursuant to its non-delegable duty to maintain the premises in a safe condition. (**Alvarez v**

Prospect Hospital, 68 NY2d 320; Zuckerman v City of New York, 49 NY2d 557).

Therefore the motions for summary judgment must be denied.

Dated: NOV 08 2007

U. Hol...
J.S.C.

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NOV 14 2007
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