Greis v Eckerd Corp.
2007 NY Slip Op 34422(U)
April 9, 2007
Supreme Court, Queens County
Docket Number: 11112/05
Judge: Orin R. Kitzes
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: HON. ORIN R. KITZES **PART 17**
Justice

----------X

SUSANNE GREIS,

Plaintiffs,

Index No.11112/05
Motion Date: 3/28/07
Motion Cal. No. 27 & 28

-against-

ECKERD CORPORATION and MANDARIN REALTY COMPANY and CREATIVE SNOW PLOWING, INC.,

Defendants.

----------X

The following papers numbered 1 to 34 read on this motions by defendants Mandarin Realty Company (hereinafter, "Mandarin") and Creative Snow Plowing, Inc. for an order granting it summary judgment and dismissing the complaint as against Mandarin, and cross-motion by plaintiff for an order pursuant to CPLR 8106, awarding costs. Motions numbered 27 and 28 are consolidated for purposes of disposition.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1- 4
Memorandum of Law.....	5-6
Affirmation in Support.....	7-8
Affirmation in Opposition-Exhibits.....	9-11
Affirmation.....	12-13
Reply Affirmation-Exhibits.....	14-16
Notice of Motion - Affirmation - Exhibits.....	17- 20
Affirmation in Opposition.....	21-22
Affirmation in Opposition-Exhibits.....	23-25
Notice of Cross-Motion & Opposition-Affirmation-Exhibits..	26-29
Reply Affirmation & Opposition-Exhibits.....	30-32
Reply Affirmation.....	33-34

Upon the foregoing papers it is ordered that the motions by defendants Mandarin Realty Company (hereinafter, "Mandarin") and Creative Snow Plowing, Inc. for an order granting it summary judgment and dismissing the complaint as against Mandarin, and cross-

motion by plaintiff for an order pursuant to CPLR 8106, awarding costs are decided as follows:

In this action, plaintiff seeks damages stemming from her personal injuries allegedly sustained on January 24, 2005, when she fell after slipping on snow and or ice on the premises located at 61-29 Springfield Boulevard, Bayside, New York. Plaintiff alleges, *inter alia*, that defendants were negligent in failing to properly remove snow and ice and such condition caused her accident and injuries. According to plaintiff's Bill of Particulars, the fall occurred on the ramp leading to the entrance of the Eckerd Corporation (hereinafter, "Eckerd") store located at the premises. The premises are owned by Mandarin and the store is leased to Eckerd.

Defendant Mandarin now moves for summary judgment claiming that it was an out-of-possession landlord at the premises at the time of the accident. Defendant has submitted a copy of its lease with Eckerd that provides "tenant and not Landlord shall be responsible for the removal of snow and ice from sidewalks immediately in front of and to the rear of the demised premises." Mandarin also has submitted plaintiff's deposition testimony and her Bill of Particulars wherein she states that the accident took place as she was walking up the rear entrance ramp to the store. Mandarin has also submitted the deposition testimony of its managing partner, Mr. Alfredo Li, who stated that the ramp and sidewalk outside of the store's rear entrance were part of Eckerd's leasehold and Eckerd was responsible for removing snow and ice from these areas. Finally, defendant has also submitted the deposition testimony of Ms. Bejarno, the subject Eckerd's assistant manager, who indicated that only Eckerd's employees had removed the snow and ice from the subject ramp and sidewalk prior to the plaintiff's accident. Based on the above, Mandarin claims it did not owe any duty of care to plaintiff.

Defendant Eckerd opposes this motion claiming that the accident took place on a portion of the sidewalk that Mandarin was obligated to keep clear of snow and ice. Eckerd has submitted portions of plaintiff's deposition testimony wherein she indicates that the accident occurred on the sidewalk, right near the ramp. It has also submitted plaintiff's husband's deposition testimony wherein he identifies the location of the accident on photographs, even though he admits to not having seen her fall. Finally, Eckerd relies upon a portion of the lease that defines Mandarin's responsibilities for maintaining common areas at the premises. Under this section, Mandarin was responsible for the removal of snow and ice from the Common Areas.

Initially, the court notes that it is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. See, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987). Finally, as stated by the court in Daliendo v. Johnson, 147 AD2d 312, 317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

The branch of the motion by defendant Mandarin for an order granting summary judgment in its favor pursuant to CPLR § 3212 and dismissing the complaint as against it on the ground that it was an out of possession owner is granted. "It is well settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair or maintain the premises." (Dalzell v McDonald's Corp., 220 AD2d 638, (2d Dept 1995.)

In this case, Mandarin was the owner of the premises and it leased the property to Eckerd. As mentioned above, the lease had a specific provision whereby Eckerd was obligated to remove snow and ice from the sidewalk immediately in front of and to the rear of the store. There is also evidence that plaintiff fell on the ramp that is immediately adjacent to the store's rear entrance, which is under Eckerd's control and duty to keep clear of snow and ice. Therefore, Mandarin's evidence establishes that it had no duty to undertake to remove any dangerous condition presented by the accumulation of snow and ice in the area of the accident. Vijayan v Bally's Total Fitness, 289 AD2d 224 (2d Dept 2001.) As such, Mandarin has presented competent evidence, including the lease agreement demonstrating its entitlement to summary judgment as a matter of law. Consequently, the burden shifts to those parties opposing the motion to demonstrate the existence of a triable issue of fact. *Id*. Defendant Eckerd has failed to meet this burden. First, Eckerd's evidence does not present an issue of fact as to the location of the accident. A clear reading of plaintiff' deposition testimony indicates that plaintiff fell when she had at least one foot on the store's ramp. Pursuant to the lease, an area Eckerd had the duty to keep clear of snow and ice. Moreover, the lease provision relied upon by Eckerd is not controlling of the instant accident since that provision involves the common areas of the premises, not the area immediately next to the

store, as is the ramp or the sidewalk adjacent to the store. The distinction between the two types of areas is evident in considering Mandarin's contract with co-defendant Creative Snow Plowing, Inc., for snow removal. This contract did not include the area of the instant accident; whether it happened on the ramp or the sidewalk next to the ramp and store. Furthermore, based upon Eckerd's own witness' testimony regarding snow and ice removal, it is clear that any contractual ambiguity is resolved by assigning Eckerd the responsibility for removal of snow and ice. Accordingly, Mandarin did not owe any duty to the plaintiff or Eckerd and it did not create any condition that caused the plaintiffs' injuries. Carvano v Morgan, 270 AD2d 222 (2d Dept 2000.) Consequently, the motion by Mandarin is granted and the complaint and any cross-claims against it are dismissed. *Id*.

The court shall now address the motion by Creative, for an order of summary judgment dismissing the plaintiff's complaint. As noted above, Plaintiff contends that she slipped and fell on the entrance ramp to defendant Eckerd Corporation's store. Although the complaint fails to set forth the nature of the negligence that caused her to fall, it is assumed it was a slippery condition resulting from snow. Defendant Creative now seeks dismissal of the complaint as against it, claiming that there it cannot be found liable of plaintiff's accident. Defendant Eckerd opposes this motion.

At the time of the accident, defendant Mandarin Realty Corp. had contracted with defendant Creative for snow plowing and sand-salting of parking lots, loading areas and sidewalks accessible to trucks. Shoveling and sidewalks were optional and were to be done at the request of the owner (Mandarin.) This contract, dated August 18, 2004, was silent as to Creative's responsibility to clear the entrance ramp or sidewalk adjacent to the Eckerd store, where plaintiff allegedly fell. As noted above, prior to the accident date, only Eckerd employees had performed snow and ice clearing from the area where plaintiff fell. Moreover, at their depositions, plaintiff and her husband both testified that they did not know if a snow plow went into the parking lot and cleaned it. No description of any hazardous condition at the entrance ramp was described. The Court finds that Creative's evidence establishes that it had no duty to undertake to remove any dangerous condition presented by the accumulation of snow and ice in the area of the accident. Vijayan v Bally's Total Fitness, 289 AD2d 224 (2d Dept 2001.) Furthermore, plaintiff fails to demonstrate that defendant Creative in any way created or contributed to any hazardous condition causing plaintiff to fall.

In opposition to this motion, defendant Eckerd and plaintiff have failed to raise an

issue of fact as to whether or not Creative had a duty to clear snow and ice from the area where plaintiff fell. Moreover, they offer nothing but speculation that Creative performed its snow clearing negligently or created a hazard. Moreover, regarding any claims by plaintiff and cross-claims by Eckerd against Creative that involve contractual liability, the Court finds that these must be dismissed as well, due to a lack of privity.

Negligence is based on the breach of a duty, and a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party. The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations. As noted in Espinal v. Melville Snow Contrs., 98 N.Y.2d 136 (2002.), a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. However, under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract. As a general rule, a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries. Tort liability has been found where performance of contractual obligations has induced detrimental reliance on continued performance and the defendant's failure to perform those obligations "positively or actively" works an injury upon the plaintiff. A party who enters into a contract to render services may be said to have assumed a duty of care -- and thus be potentially liable in tort -- to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launches a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to safely maintain the premises. These principles are firmly rooted in New York case law, and have been generally recognized by other authorities. Espinal v. Melville Snow Contrs., 98 N.Y.2d 136 (2002.)

Here, defendant Creative did not assume a duty of reasonable care to the injured plaintiff or Eckerd by virtue of its snow removal contract with the defendant Mandarin. Creative’s contractual undertaking was not a comprehensive and exclusive property maintenance obligation which the parties could have reasonably expected to displace Eckerd’s duty, as tenant, to maintain the property pursuant to its lease obligations. Additionally, plaintiff and Eckerd have failed to produce any evidence of their detrimental reliance on Creative’s performance of its snow removal obligation or that its actions had otherwise "advanced to such a point as to have launched a force or instrument of harm"

Keshavarz v Murphy, 242 AD2d 680 (2d Dept 1997) Riekers v. Gold Coast Plaza, 255 A.D.2d 373 (2d Dept 1998.) Consequently, the motion by Creative for summary judgment dismissing the complaint and all cross-claims as against it is granted.

Finally, plaintiff's cross-motion seeking costs is denied. The Court finds that there is no basis to impose such sanctions given the relative merit of all claims put forth in the subject motion papers.

Dated: April 9, 2007 **.....**

ORIN R. KITZES, J.S.C.