Diamond v North Fork Bancorporation, Inc.
2008 NY Slip Op 30035(U)
January 9, 2008
Supreme Court, Nassau County
Docket Number: 0226-06/
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x TRIAL TERM PART: 48

GOLDIE DIAMOND,

INDEX NO.: 010226/06

Plaintiff,

MOTION DATE:1-7-08
SUBMIT DATE:1-7-08
SEQ. NUMBER - 001

-against-

NORTH FORK BANCORPORATION, INC., And ROBERT H. WHITCOMB LANDSCAPE GARDENING, INC., and TEMCO BUILDING MAINTENANCE, INC.,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 11-26-07.....1
Memorandum of Law, dated 11-26-07.....2

The motion of defendant Temco Building Maintenance, Inc., for summary judgment, CPLR §3212 and for costs 22 NYCRR 130-1.1 and CPLR §8303-a is granted, a hearing is necessary to assess the quantum of costs to be awarded to the moving defendant in accordance with this decision and order.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part

(CCP) for a hearing on February 7, 2008, at 9:30 A.M., to assess damages in accordance with this decision.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect the hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

On November 25, 2005, plaintiff slipped and fell on an ice-covered sidewalk at the premises occupied by defendant North Fork Bancorporation. At the time of the fall, the sprinklers were operating and wetting the area of the fall. On the date of the accident, Temco an independent contractor, had a contract to perform snow removal services at the premises when there was at least two inches of snowfall or in the event of icing conditions. There is no evidence that there was any snow fall or that Temco was summoned to allay any icing conditions on or before the day of the incident.

It is settled law that, in general, a snow removal contractor owes no duty to persons injured by a fall on snow and ice that occurs on the landowner's property *see Billotti v Above Average Landscaping Serv., Inc.,* 17 AD3d 495 (2d Dept. 2005); *Nobles v Procut Lawns Landscaping & Contr., Inc.,* 7 AD3d 768 (2d Dept. 2004); *Kamphefner v Allstate Sec.,* 284 AD2d 305 (2d Dept. 2001). However, there are exceptions to this general rule. A contractor can be said to have assumed a duty of care, and thus be potentially liable in tort, if one of the following circumstances can be shown: 1) the contracting party, by failing to exercise

reasonable care in the performance of its duties, "launches a force or instrument of harm"; or 2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties; or 3) the contracting party has entirely displaced the other landowner's duty to maintain the premises safely *Espinal v Melville Contrs.*, 98 NY2d 136, 140 (2002).

Here there is no duty from Temco to plaintiff and there is no evidence that Temco did not properly perform its duties, that plaintiff detrimentally relied on defendant's continued performance or that defendant entirely displaced the landowners duty to maintain the premises safely. Hence, there is no basis for liability as to Temco.

Finally, there are no facts to support any argument that aside from its contractual obligations to the occupant of the premises, Temco had any control thereof or notice or knowledge of the condition which plaintiff claims caused the fall, and if it did, that it had time to effect a remedy. *See Gordon v. American Museum of Natural History*, 67 NY2d 836 (1986).

Plaintiff does not dispute entitlement to summary judgment by movant and does not argue that the application for costs should be denied.

CPLR §8303-a provides in substance that if a claim such as this is commenced or continued and is found to be frivolous, the Court shall award costs and reasonable attorneys fees up to $10,000 to the successful party. In order to find the action to be frivolous the court must find that there was no reasonable basis in law or fact for the action or its continuance that it could not be supported by a good faith argument for a change of existing law CPLR §8303-a (c) (ii).

The rules of the Chief Administrator, 22 NYCRR 130-1.1 provide that an award of costs maybe made for frivolous conduct §130-1.1(c) (1), lack of merit in law or facts. *Yan v. Klein*, 35 AD3d 729 (2d Dept. 2006) and there is a duty upon the attorney to make an analysis of the case in the context of the entire record and make a determination of merit independent of the wishes of the client, *Heilbut v. Heilbut*, 18 AD3d 1 (1st Dept. 2005).

Although at times an evidentiary hearing is required to make a determination of whether costs should be imposed, *Walker v. Weinstock*, 213 AD2d 631 (2d Dept. 1995), that requirement is not necessary here because the request for costs was a separate and distinct prayer for relief on this motion, plaintiff has been afforded the opportunity to respond with reasons for its conduct, the parties have submitted documentary evidence, there are no factual disputes and plaintiff has not requested a hearing. Hence, in this instance it is not necessary to hold an evidentiary hearing on the issue of whether plaintiff's conduct was frivolous, *Gordon v. Marrone*, 202 AD2d 104 (2d Dept. 1994).

After discovery was completed, Temco's counsel made three written requests to defendant's counsel seeking a dismissal of this action as to Temco. The Court had not been directed to any response to these requests.

The Court finds that there came a time during this litigation, prior to the making of this motion when a cursory analysis of the well settled legal principles and rudimentary facts should have made apparent to plaintiff's counsel that there was no merit to the claims against Temco and thus the action should not have been continued as to that defendant. *Mitchell v. Herald Company*, 137 AD2d 213 (4th Dept. 1988). To continue this action and to require

Temco to make this motion was thus frivolous, within the meaning of the above statutes and regulations, thereby entitling Temco to recover costs from plaintiff's counsel.

Giving plaintiff every benefit of the doubt the Court finds that by August 6, 2007, after all depositions were complete and after Temco's counsel had made two requests for a dismissal, establishes that date as the date when plaintiff should have discontinued this action as to Temco and that Temco is entitled to recover from Plaintiff's attorneys named below, statutory costs, CPLR 8301(a), the reasonable and necessary expenses of this motion CPLR §8301(b) and all costs, expenses and reasonable attorneys fees (such fee not to exceed $10,000) incurred since the above mentioned date, CPLR §8303-a, 22NYCRR §130-1 *et seq*.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 9, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

JAN 10 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Scott J. Zlotolow, Esq.
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