Bernal v 60 Arkay Dr. Realty LLC

2008 NY Slip Op 30410(U)

February 6, 2008

Supreme Court, Suffolk County

Docket Number: 0010257/2004

Judge: Arthur G. Pitts

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[* 1]

SHORT FORM ORDER

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INDEX No. 04-10257

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 11-8-07
ADJ. DATE 12-6-07
Mot. Seq. # 002 - MD
003 - MG

---X

PATRICIA YAMILETH BERNAL,

Plaintiff,

- against -

60 ARKAY DRIVE REALTY LLC and ABC CORPORATION, the latter being fictitious and intended to represent entity designated to orchestrate removal of ice and snow,

Defendants.

---X

60 ARKAY DRIVE REALTY LLC,

Third-Party Plaintiff,

- against -

MCF & SONS/SNOW FORCE,

Third-Party Defendant.

---X

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Upon the following papers numbered 1 to 32 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 22 - 30 ; Replying Affidavits and supporting papers 31 - 38 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) for summary judgment by 60 Arkay Drive Realty LLC dismissing plaintiff's complaint is denied.

ORDERED that the motion (#003) for summary judgment by MCF&Sons/Snow Force dismissing plaintiff's complaint and all cross-claims against them is granted.

This is an action to recover damages for personal injuries sustained by plaintiff when she slipped and fell on ice in the parking lot of 60 Arkay Drive, Hauppauge, New York on March 5, 2003 at approximately 12:30 a.m. At the time, plaintiff was an employee of LNK International ("LNK") the tenant located in the building adjacent to the parking lot. The parking lot and adjacent building are owned by defendant/third-party plaintiff, 60 Arkay Drive Realty, LLC ("Arkay") and its tenant LNK. LNK, who is not a party to this action, was responsible to retain the services of a snow plow removal contractor to service the lot during the winter months. At the time of the incident, defendant/third-party defendant MCF & Sons/Snow Force ("Snow Force") was retained by LNK for the purpose of snow removal/plowing.

Defendant Arkay has moved for summary judgment (#002) on the grounds that no triable issues of fact exist as to any negligence on their part. In support, they rely on the pleadings and plaintiff's deposition testimony.

Defendant Snow Force has moved for summary judgment(#003) on the grounds they did not create the allegedly dangerous condition nor did they owe any duty to plaintiff. In support, they rely on the pleadings, and the deposition testimony of plaintiff and defendants.

Plaintiff Patricia Bernal testified that when she arrived for work at 4:00 p.m. on March 5, 2003 there was precipitation in the form of a combination of snow and rain. During her dinner break at 6:30 p.m. she noticed it was drizzling outside. She completed her usual shift of employment at approximately 12:30 a.m. As she was walking through the parking lot at 60 Arkay Drive, she slipped on ice and fell to the ground. After she fell, she noticed smooth ice on either side of her. She testified it was lightly drizzling outside at the time but could not recall whether the precipitation she felt was comprised of rain or snow. Plaintiff testified that when it did snow, employees would be asked to shovel so they would be able to get into the building. She did not remember whether she had ever seen those employees shovel the area in which she fell. She does not recall ever complaining about conditions in the parking lot.

Michael Carrano, owner of Snow Force testified that he was not familiar with 60 Arkay Realty, LLC and did not speak or contract for services with them. Snow Force was retained by LNK to plow and sand the lot pursuant to a verbal contract. He testified there was no minimum amount of snowfall to trigger Snow Force's obligation to plow the lot at 60 Arkay Drive. If it snowed, they came. Otherwise, LNK would call Snow Force to come to the premises to perform services, if needed absent a snowfall. The invoices from Snow Force to LNK demonstrate that the last time Snow Force performed snow removal services for the subject property was on February 17, 2003, about three (3) weeks before plaintiff's fall.

A defendant will only be held liable in a slip-and-fall accident involving snow and ice when it created the dangerous condition or had actual or constructive notice thereof (***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2005]). Landowners owe "a duty to exercise reasonable care maintaining their property under all the circumstances, including the likelihood of injury to others, the

seriousness of potential injuries, the burden of avoiding the risk and foreseeability of a potential plaintiff's presence on the property" (***Perrelli v Orlow***, 273 AD2d 533, 708 NYS2d 742 [2000]). Questions of foreseeability are ordinarily questions of fact and summary judgment may only be granted when a single inference can be drawn from undisputed facts (***Id***). Further, "a party in control of real property may be held liable for accidents occurring as a result of a hazardous condition created on the premises because of an accumulation of snow and ice only if an adequate period of time has passed following the cessation of a storm to allow the party to remedy the condition" (***Russo v 40 Garden Street Partners***, 6 AD3d 420, 420-421, 775 NYS2d 327 [2004]) and only if the owner has notice of the defect, or, in the exercise of due care, should have had notice (***Arcuri v Vitolo***, 196 AD2d 519; 601 NYS2d 173 [1993]); *see*, ***McCabe v Easter***, 128 AD2d 257, 258-259, 516 NYS2d 515 [1987]).

With regard to defendant 60 Arkay Drive's motion for summary judgment, defendant's invocation of the "storm in progress" rule is unavailing. The certified weather reports and affidavit of meteorologist Brett E. Zweiback offered by plaintiff demonstrate that on March 3, 2003, March 4, 2003 and up to and through the time of plaintiff's fall, no precipitation was reported in and around Hauppauge, New York. According to Zweiback, a major winter storm brought 14 to 24 inches of snowfall to the area from February 16-18, 2003, which was followed by periods of heavy rain and/or sleet and snow. By March 4, 2003, Zweiback affirms, there was about two inches of snow remaining in the area. Thereafter, a period of fluctuating temperatures from the teens to the thirties on March 4, 2003, combined with any melted snow and/or ice resulted in ice accumulations in the parking lot at least six hours before plaintiff's fall. Further, there is no evidence that any agent or employee of the 60 Arkay Drive ever inspected the parking lot that day. Accordingly, there exists an issue of fact as to whether defendant maintained its property in a reasonably safe condition. Defendant 60 Arkay's motion for summary judgment dismissing the plaintiff's complaint is, therefore, denied.

Summary judgment dismissing the complaint against Snow Force is granted. Ordinarily, "a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries" (***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]; *see*, ***Church v Callanan Industries, Inc.***, 99 NY2d 104, 752 NYS2d 254 [2002]); ***Port Chester Elec. Constr. Co. v Atlas***, 40 NY2d 652, 389 NYS2d 327 [1976]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Thus, tort liability for injuries to a third person may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.,*** 98 NY2d 136 at 140, 746 NYS2d 120 [2002]), thereby creating an unreasonable risk of harm to others or increasing the existing risk (***Church v Callanan Industries, Inc.*** *supra*, at 111; (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see*, ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, *supra*); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see*, ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

[* 4]

The submissions by Snow Force in support of the motion establish prima facie that its contractual obligations ran only to LNK, and not to any third parties. The testimony of Michael Carrano, owner of Snow Force demonstrates that Snow Force undertook only a limited maintenance obligation with respect to the subject parking lot (*see*, ***Espinal v Melville Snow Contrs.***, *supra*; ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2006]; ***Mahaney v Neuroscience Ctr.***, *supra*). The terms of the oral contract were only the general instruction that Snow Force would plow "when it snowed". There is no evidence of snowfall on the date in question. The certified weather reports indicate only rain for that day. LNK never called Snow Force that day or in the days preceding plaintiff's fall. Clearly, the snow removal contract did not constitute an exclusive and comprehensive agreement so as to displace the duty of the property owner to maintain the premises safely (*see*, ***Espinal v Melville Snow Contrs.***, *supra;* ***Mahaney v Neuroscience Center***, 28 AD3d 432 [2006]; ***Capestany v C&S Properties***, 17 AD3d 502, 793 NYS2d 492 [2005]).

Accordingly, the third-party action is severed and dismissed, and the main action shall continue against Arkay only.

Dated: February 6, 2008

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**