

Busa v Costco Wholesale Corp.

2008 NY Slip Op 31066(U)

April 10, 2008

Supreme Court, New York County

Docket Number: 0117073/2005

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

PRESENT: _____

Justice

PART 12

Index Number : 117073/2005

BUSA, DANIEL J.

vs.

COSTCO WHOLESALE

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 117073/05

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

ad on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
APR 14 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/10/08

BARBARA R. KAPNICK *JSC*

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
DANIEL J. BUSA and ROSALIE BUSA, husband
and wife,

Plaintiffs,

-against-

COSTCO WHOLESALE CORPORATION, a Washington
corporation authorized to do business in the
State of New York, STATEN ISLAND PLAZA LIMITED
PARTNERSHIP, a New York limited partnership
and GENERAL SNOW SERVICE, INC., a New York
corporation,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 117073/05
Motions Seq. Nos. 001
and 002

FILED
APR 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

Motions sequence numbers 001 and 002 are consolidated for
disposition.

In this action, plaintiffs seek to recover damages for
personal injuries sustained by plaintiff Daniel J. Busa on January
26, 2004 at approximately 10:00 a.m., at a warehouse located at
2975 Richmond Avenue on Staten Island, New York ("the property")
which is owned by defendant Staten Island Plaza Limited
Partnership, a New York limited partnership ("Staten Island
Plaza"), and leased and operated by defendant Costco Wholesale
Corporation ("Costco"), a Washington corporation authorized to do
business in the State of New York.

Plaintiff, a truck driver making a delivery, allegedly slipped and fell on ice and snow in the loading dock area.

Defendant General Snow Service, Inc. ("GSS"), a New York corporation, was obligated pursuant to a Snow Plowing Service Agreement (the "Agreement") entered into on November 25, 2003 with Costco to "provide, upon verbal request from the management of Costco, snow plowing services and ice melt from the entrances and exits, parking lot, truck bays, loading docks, and gas station and sidewalks at the Property."

GSS was also obligated to "inspect the Property once per week during the winter season to monitor the weather conditions" and to review the property "more frequently during periods of sleet, wind, heavy snowfalls, or severe thawing and freezing." In the event of snowfall of 2" to 12", snow plowing and walkway service was to "occur within hours of 11:00 p.m. and 9:00 a.m. Snow plowing will begin when a total of 2" of snow has fallen. Walkway clearing will begin when at a 1" accumulation."

In addition, GSS ("Provider") agreed to

indemnify, defend and hold Costco ... harmless from and against all claims, actions, liabilities, damages, losses, fines, penalties, costs and expenses, including attorneys' fees, arising out of:

- (a) any act, activity or omission of Provider or its contractors, licensees, agents, representatives or employees, including activities on the Property and the use of any vehicle, equipment, fixture or material in connection with any Work provided by Provider while on the Property;
- (b) any actual or alleged death of or injury to any person, damage to any property, or any other damage or loss, by whomsoever suffered, claimed to result in whole or in part, from the Work provided under this Agreement;

* * *

- (e) any breach or default by Provider under this Agreement.

The foregoing provision shall not be construed to make Provider responsible for any loss, damage, liability or expense to the extent resulting from injuries to third parties or damage to property caused by the sole negligence of Costco or its agents or employees.

Mr. Busa testified that there was a 'light dusting' of snow on the ground although it had not snowed that day. GSS claims that plows were not used on that day or during the preceding week because there was not sufficient snowfall to warrant their usage but James Virga, the President of GSS, testified that he did apply salt to the parking lot, truck bays, loading docks and sidewalk at 2975 Richmond Avenue between 6 and 6:30 a.m. that morning. He did not recall whether or not he was specifically asked by Costco to come that day, and whether or not he observed ice in the area where plaintiff fell.

Plaintiff has submitted an affidavit from William Sherman, a Senior Forensic Meteorologist employed by Compu-Weather, who is of the opinion that at the time of plaintiff's accident, "approximately 2 inches of snow and ice existed on exposed, untreated, undisturbed outdoor surfaces in the vicinity" of the property.

Defendants Costco and Staten Island Plaza now move, under motion sequence number 001, for an order pursuant to CPLR § 3212:

(1) granting summary judgment dismissing plaintiffs' Complaint against them; or, in the alternative,

(2) granting summary judgment in favor of defendants Costco and Staten Island Plaza on their cross-claims against defendant GSS for contribution and for common law and contractual indemnification.

Defendant GSS moves, under motion sequence number 002, for summary judgment dismissing plaintiffs' Complaint and all cross-claims against it.

Discussion

That portion of defendants Costco and State Island Plaza's motion to dismiss plaintiffs' claims against Staten Island Plaza on the ground that Staten Island Plaza was an out-of-possession landlord, which maintained no responsibility under the Lease

agreement for snow and ice removal and retained no duty to maintain the premises, is granted without opposition. The Clerk may enter judgment dismissing plaintiffs' claims against defendant Staten Island Plaza only with prejudice and without costs or disbursements.

Defendant Costco next argues that plaintiffs' claims against it should also be dismissed on the ground that plaintiffs have not demonstrated that Costco had actual or constructive notice of the alleged condition.

Alternatively, defendant Costco argues that it is entitled to a defense and indemnification from co-defendant GSS under the terms of the Agreement.

Defendant GSS argues that plaintiffs' claims against it should be dismissed as well because it owed no independent duty of care to the plaintiff and neither created nor had notice of the alleged condition. It claims that the specific ice condition in question was never brought to its attention and argues that it had no obligation under its Agreement to patrol Costco's parking lot and truck bay area in search of icy conditions.

GSS also contends that nothing in its work created or exacerbated the condition, and claims that it applied salt to the

areas it was required to do under the contract, including the truck bay area, on the morning of plaintiff's accident.

GSS further argues that the cross-claims against it should be dismissed because Costco's active negligence was the sole proximate cause of plaintiff's injuries.

There is no dispute that Costco's employee, Gerard Ruggerio, whose responsibilities included walking throughout the store and surrounding premises two or three times a day to observe any safety issues, made notations on a January 23, 2004 'walk sheet' that was given to the manager that the "exterior walk had some patchy ice spots on walkways". He also noted on the 'walk sheet' for January 24, 2004 that there were "pallets by receiving, and some ice spots around," and that the "walkways of exterior are still some patches of ice."

GSS contends that Costco was thus aware of an icy condition in the truck bay area and failed to remedy that condition, although Costco denies that any of the references to ice in the "walk sheets" refer to the ice in the receiving area where plaintiff fell.

GSS also points to the testimony of Joanne Marachilian, Costco's Membership Marketing Manager in Staten Island, that

Costco's managers were responsible for the safety of the building, including the truck bays. She further testified that if it had been brought to her attention that there was snow-covered ice in the truck bay, she "would have gotten someone to contact the removal company, and [she] would have had someone take care of the situation." She further testified that she would have brought the matter to the attention of an assistant house manager.

In opposition to both motions, plaintiff has submitted an affidavit from Leslie N. Wilder, a Board Certified Diplomate Forensic Engineer and Professional Ergonomist, who is of the opinion that:

1. Ice was visibly present for 24 or more hours on the ground in the dock area, and remained on the ground for approximately 4 hours after a 6 a.m. salting operation by General Snow on January 26, 2004.
2. Mr. Virga had an incomplete and or erroneous understanding of the principles and processes involved in melting ice, and failed to remove or incompletely removed ice at the loading dock/truck bays area at the Costco site.
3. Costco did not oversee the activities of General Snow, nor did it *effectively address* the surface conditions in the loading dock/truck bays area with respect to ice.
4. There was minimal or no communication between Costco and General Snow with regard to hazardous ice conditions at the loading dock/truck bays area on the morning of January 26 or the days immediately preceding.
5. Based upon Mr. Busa's testimony, there may have been a surface defect, namely a depression, in the

vicinity of his fall, which could have affected ice removal operations. If such defect existed, its presence should have been known to Costco and to General Snow.

The Affidavit further states that the ice condition "could have been melted prior to Mr. Busa's fall on January 26, 2004 had appropriate and sufficient ice melting chemicals been utilized", and that "[i]n the absence of ice removal, the slipping hazard could and should have been substantially reduced by the application of sand, cinder, ash or the like."

Based on the papers submitted and the oral argument held on the record on January 30, 2008, this Court finds that there are triable issues of fact as to whether defendant Costco, which had a non-delegable duty to keep the premises safe and/or to warn plaintiff of a dangerous condition, had actual or constructive notice of the alleged ice condition, and as to whether defendant GSS created and/or exacerbated the alleged dangerous condition by their actions on the date of the accident. See, Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 140 (2002) in which the Court of Appeals held that "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, 'launche[s] a force or instrument of harm' (citations omitted)..."

Accordingly, that portion of motion sequence number 001 seeking to dismiss plaintiffs' claims against defendant Costco and the motion by defendant GSS (motion sequence number 002) for summary judgment are denied.

However, this Court finds that GSS is contractually obligated to indemnify, defend and hold Costco harmless to the extent that it is determined that plaintiff's accident resulted from GSS's work under its agreement.

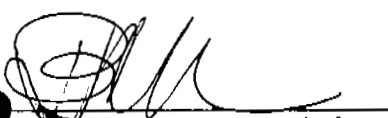
Accordingly, that portion of Costco's motion seeking summary judgment on its cross-claims against defendant GSS is granted to the extent of granting Costco a conditional judgment against GSS for contractual indemnification.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on May 7, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: April 10, 2008

FILED
APR 14 2008
COUNTY CLERK'S OFFICE
NEW YORK


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.