

**Fay v First Med Immediate Med. Ctr.**

2008 NY Slip Op 31068(U)

April 11, 2008

Supreme Court, Queens County

Docket Number: 0013131/2006

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

PETER FAY

Plaintiff

-against-

FIRST MED IMMEDIATE MEDICAL CENTER,  
BAYWOOD, INC., DONALD J. ANZALONE, SR.,  
DONALD J. ANZALONE JR., CATHERINE A.  
ANZALONE, and DAVID J. ANZALONE

Defendant

Index No: 13131/06

Motion Date: 3/26/08

Motion Cal. No.: 9, 10

Motion Seq. No.: 1, 2

Motions bearing calendar numbers 9 & 10 are combined for disposition.

The following papers numbered 1 to 16 read on the motion bearing Cal. #9 by defendants, ANZALONES, for summary judgment as to liability and dismissing the complaint, or in the alternative for summary judgment on its cross-claim for indemnification and for failure to procure insurance; and motion bearing Cal. #10 by defendant, FIRST MED IMMEDIATE MEDICAL CENTER, for summary judgment in its favor as to liability and dismissing the complaint and all cross-claims

PAPERS  
NUMBERED

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Upon the foregoing papers it is ordered that these motions are determined as follows.

The defendants', Anzalones', motion for summary judgment is denied in all respects. The, defendant's, First Med's, motion for summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against it is granted. The remainder of the action is severed.

This is an action to recover for personal injuries the plaintiff allegedly sustained on June 10, 2003 in the parking lot of a strip mall, owned by the ANZALONE defendants, when he slipped/tripped on dirt, rocks and/or debris that was present due to the ongoing repaving of the parking lot. The accident occurred in front of the portion of the premises leased to the defendant, FIRST MED IMMEDIATE MEDICAL CENTER (hereinafter First Med).

The defendants, Anzalones move for summary judgment dismissing the complaint on the ground that they cannot be held liable for a condition which is open and obvious and not inherently dangerous. In the alternative, the Anzalones move for summary judgment against co-defendant, First Med, on their cross-claim for indemnification and for failure to obtain insurance in accordance with the lease. First Med separately moves for summary judgment in its favor dismissing the complaint and all cross-claims asserted against it on the ground that it had no duty to the plaintiff arising out of the lease because it did not own or control the parking lot, that it did not have the obligation to repair or maintain it under the lease and had not assumed to do so, and that it did not hire the contractor to perform the repaving of the parking lot.

The duty to exercise reasonable care to maintain the property in a reasonably safe condition is imposed only on those who own, occupy, or control property, or who put the property to a special use or derive a special benefit from it (see Basso v. Miller, 40 NY2d 233 [1976]; Guzov v. Manor Lodge Holding Corp., 13 AD3d 482 [2004]; Gilbert Properties v. City of New York, 33 AD2d 175,178 [1969] aff'd 27 NY2d 594 [1970]). A party who does not own, occupy control or make special use of the property cannot be held liable for injuries caused by a dangerous or defective condition on the property (see, Palsgraf v. LIRR, Co., 248 NY 339,342 [1928], rehearing den. 249 NY 511 [1928]; Balsam v. Delma Engineering Corp., 139 AD2d 292 [1988], app dismissed in part denied in part 73 NY2d 783 [1988]). While the duty to maintain property in a reasonably safe condition includes the duty to warn of a dangerous condition, there is no duty to warn of an open and obvious danger (see Tagle v. Jakob, 97 NY2d 165, 169 [2001]; Cupo v. Karfunkel, 1 AD3d 48, 51 [2003]). The open and obvious nature of the condition, however, will not relieve a defendant from liability unless it is determined that the condition is not inherently dangerous (see Gibbons v. Lido & Point Lookout Fire Dist., 293 AD2d 646 [2002]). The open and obvious nature of a condition is relevant on the issue of plaintiff's comparative fault where the dangerous or defective condition which the defendant had the duty to remedy (see Cupo v. Karfunkel, 1 AD3d at 52 [2003]).

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v. City of New York, 49 NY2d 55 [1980]).

The Anzelone defendants' claim that no dangerous condition existed in the parking lot, but rather that the condition was the natural result of the repaving which was an open and obvious condition for which they cannot be held liable is without merit. Whether a dangerous or defective condition exists on the property and whether such condition is open and obvious and not inherently dangerous is generally a question of fact for the jury (see Trincere v. County of Suffolk, 90 NY2d 976, 977 [1997]; Ruiz v. Hart Elm Corp., 44 AD3d 842 [2007]). On the facts of this case, it cannot be said as a matter of law that no dangerous condition existed or that the condition was not inherently dangerous.

The branch of the Anzelone defendants' motion seeking contractual indemnification is also denied. A party seeking contractual indemnification has to establish that it is free from any negligence and that its liability is solely vicarious arising from a non-delegable duty imposed by law (Brown v. Two Exch. Plaza Partners, 76 NY2d 172 [1990]; Correia v. Professional Data Management, Inc., 259 AD2d 60, 65 [1999]). The defendants failed to establish as a matter of law, that they were not negligent and that their liability, if any, is solely vicarious. The lease between First Med and the defendants provides in pertinent part that the owner is responsible for the repair of all common areas inside and outside (¶ 4) and First Med was to responsible for its proportional share of the cost (¶¶ 51, 69, 69). Donald J. Anzelone, Sr. testified at his deposition that he obtained bids for the work from various contractors, that he chose the contractor and that he and his son spoke with the supervisor as to what they wanted done. Such evidence is sufficient to raise a triable issue of fact as to whether the defendants were negligent, precluding granting summary judgment on their claim for contractual indemnification.

The branch of the Anzelone defendants' motion for summary judgment on its alleged breach of contract claim for failure of First Med to obtain insurance is denied. An agreement to purchase insurance coverage is distinct from and treated differently from the agreement to indemnify (see, Kinney v. Lisk Co., 76 NY2d 215 [1990]; McGill v. Polytechnic Univ., 235 AD2d 400 [1997]; Mathew v. Crow Constr. Co., 220 AD2d 490 [1995]). However, there is no cross-claim for "breach of contract" asserted in the defendants' answer.

The defendant First Med has established, prima facie, its entitlement to summary judgment by submitting, inter alia, the lease, the deed and the deposition testimony of the defendant Anzelone Sr., which demonstrate that it did not own or have exclusive right to use the parking lot, that it did not have the obligation to repair or maintain the parking lot and that it did not hire, direct or control the contractor who was repaving the parking lot (see Casale v. Brookdale Medical Associates, 43 AD3d 418 [2007]; Franks v. G & H Real Estate Holding Corp., 16 AD3d 619 [2005]). In opposition, the plaintiff and the Anzelone defendants, failed to raise a triable issue of fact.

The fact that First Med had use of specifically designated spaces in the parking lot is insufficient to raise a triable issue of fact (Welwood v. Association for Children With Down Syndrome, Inc., 248 AD2d 707 [1998]). The Anzelone defendants' claim that they were not obligated to maintain or repair the parking lot because First Med and the other tenants entered into an agreement amending the lease in 1999 whereby they took over the entire maintenance of the premises, including repair of the sidewalk and parking lot is insufficient to raise a triable issue of fact as to whether First Med voluntarily assumed a duty to the plaintiff. The defendants have presented no evidence of such an agreement, and such claim is directly contradicted by Mr. Anzelone's deposition testimony regarding his involvement in the project. Inasmuch as First Med had no duty to the plaintiff, and there is no evidence that it had voluntarily assumed any duty, it cannot be held liable for the plaintiff's injuries.

Accordingly, First Med's motion for summary judgment dismissing the complaint and all cross-claims asserted against it is granted.

Dated: April 11, 2008  
D# 34

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J.S.C.