Johnson v Inner Spirit Tri Yoga Ctr., Inc.
2008 NY Slip Op 31071(U)
April 1, 2008
Supreme Court, Suffolk County
Docket Number: 0013442/2005
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-13442
CAL. No. 07-01511-OT

SUPREME COURT - STATE OF NEW YORK
POST NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-9-07
ADJ. DATE 12-7-07
Mot. Seq. # 002 - MD

REBECCA JOHNSON,

Plaintiff,

- against -

INNER SPIRIT TRI YOGA CENTER, INC. and VERNON VALLEY CORPORATION,

Defendants.

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Upon the following papers numbered 1 to 45 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 27 - 30; 31 -35 ; Replying Affidavits and supporting papers 36 - 39; 40 - 45 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant Inner Spirit's motion for summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Rebecca Johnson on March 3, 2005 when she slipped and fell on ice while walking on a brick walkway leading to the entrance of a building leased by her employer, defendant Inner Spirit Tri Yoga Center Inc. ("Inner Spirit"). Plaintiff commenced this action against Inner Spirit and the owners of the building, defendant Vernon Valley Corporation ("Vernon Valley"), alleging that they were negligent in creating or causing the icy condition to exist on the walkway and in failing to provide warning of the alleged hazardous condition.

Inner Spirit now moves for summary judgment dismissing plaintiff's complaint on the grounds that it did not owe a duty to maintain the walkway, and that it neither created nor had actual or

constructive notice of the alleged dangerous condition. In support of its motion Inner Spirit submits, inter alia, copies of the pleadings, a copy of its lease with Vernon Valley and transcripts of the parties deposition testimony. Inner Spirit also submits an affidavit from its president and sole shareholder, Diana Ross. Plaintiff and Vernon Valley oppose Inner Spirit's motion, arguing that triable issues of fact exist as to whether the walkway was among the demised property included in the lease between the parties, and whether Inner Spirit assumed the duty to keep the walkway free of ice by customarily de-icing the area. More specifically, Vernon Valley argues that under the terms of the lease agreement between the defendants Inner Spirit was responsible for the removal of snow and ice from the walkway.

During her deposition testimony, plaintiff testified that on the day of the incident she observed piles of snow and patches of ice while on the walkway. Plaintiff testified that she walked almost the full length of the walkway when her feet suddenly slipped on ice, causing her to fall to the ground. She also testified that she was aware that water was leaking onto the walkway from a drain pipe that ran from the building's roof. Plaintiff testified that she made several complaints about the leaking pipe to Inner Spirit's owner, Diana Ross, who acknowledged the problem and said she would inform the landlord.

Diana Ross testified at deposition that she spread deicer on the walkway on the morning of plaintiff's accident. She testified that she applied more deicer to the walkway before she left at 3:00 p.m., because water continued to leak from the pipe. She testified that she began to spread deicer in the walkway two winters before plaintiff's accident because water drained into the walkway and froze after the landlord opened holes in the pipe in order to decrease the amount of water draining to the rear parking lot. Ms. Ross testified that her students complained about ice forming on the walkway prior to plaintiff's accident. She testified that she submitted complaints about the condition to Vernon Valley and John M. Connolly, Inc., who managed the building on its behalf. Ms. Ross testified that she observed people from the neighboring building use a snow blower to remove snow from the walkway, and that she recalled one occasion when her students helped her to remove snow and ice from the walkway. Ms. Ross testified that the walkway had not existed at the time she entered the lease with Vernon Valley, and that she could not recall if the drain pipe had been installed.

In her affidavit, Diana Ross stated that Inner Spirit's responsibilities under the lease were not modified or amended after the walkway was installed. Ms. Ross explained that whenever snow needed to be removed from the walkway she or the property manager, George Haddow, would remove it. She stated that although Inner Spirit was not responsible for clearing snow or ice from the walkway, she would apply deicer whenever the ice developed. Ms. Ross stated that on the day of the accident she applied deicer after observing ice on the walkway at approximately 2:00 p.m.

In his examination before trial the president of Vernon Valley, John M. Connolly, testified that he employed George Haddow as property manager for Inner Spirit's building. He testified that Mr. Haddow was expected to take care of any physical problems at the building relating to maintenance issues. Mr. Connolly further testified that he was not aware of any complaints regarding the walkway, but that he recalled that a drain had been installed on the roof of the building in 1998 in response to drainage problems they were experiencing with water that gathered on the building's roof. Mr. Connolly testified that brick walkway was installed in 2002, and that the cost of construction was shared between himself and the owner of the neighboring building.

Paragraph 5 of the lease between Inner Spirit and Vernon Valley states that "the tenant accepts the Premises in their existing condition on the date of the commencement of the term except that the Landlord shall make the repairs and improvements listed on Exhibit B hereto." Among other things, Exhibit B, entitled "Landlord's Work," states that the landlord will "remove weeds and install walkway and a gate on the north side of the building." Further, paragraph 5.2 of the lease states as follows:

> The tenant shall at its own expense keep the premises in a clean and orderly condition and keep all sidewalk curbs, entrances, passageways, walkways and parking lots on the premises in a clean and orderly condition, free from snow, ice, rubbish and obstructions and shall not permit or suffer any overloading of the floors of any building on the Premises.

In order for a plaintiff to establish a prima facie case in a slip and fall accident involving snow and ice, plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*see*, ***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2005]; ***Tsivitis v Sivan Assocs., LLC***, 292 AD2d 594, 741 NYS2d 545 [2002]). A plaintiff may establish constructive notice by proffering evidence that defendant or his employees either observed the transient condition or received complaints about it or were aware of an ongoing and recurring dangerous condition that they routinely left unaddressed (*see*, ***Segretti v Shorenstein Co., E.***, 256 AD2d 234, 682 NYS2d 176 [1998]; ***O'Connor-Miele v Barhite & Holzinger***, 234 AD2d 106, 650 NYS2d 717 [1991]). Parties other than the landlord may be held liable for the plaintiff's injuries where they undertake to maintain the premises and exacerbate an already dangerous condition , or where the plaintiff suffers injury as a result of reasonable reliance upon the defendant's continued performance (*see*, ***Church v Callanan Indus***., 99 NY2d 104, 752 NYS2d 254 [2002]; ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]). Moreover, where, as in this case, the accident occurs in an area of common use, liability for the dangerous condition on property must be predicated upon ownership, occupancy, control, or a special use of the property (*see,* ***Figueroa v Tso***, 251 AD2d 959, 674 NYS2d 868 [1998]; ***Turrisi v Ponderosa, Inc.***, 179 AD2d 956, 578 NYS2d 724 [1992]; ***McGill v Caldors, Inc.***, 135 AD2d 1041, 522 NYS2d 976 [1987]).

Here, defendant Inner Spirit failed to meet its initial burden on the motion. Inner Spirit failed to establish that it did not owe plaintiff a duty of care, or that it did not have notice of the recurring icy condition in the walkway (*see generally*, ***Church v Callanan Indus***., *supra*; ***Espinal v Melville Snow Contrs.***, *supra*; *see also*, ***Segretti v Shorenstein Co., E.***, *supra*). Furthermore, plaintiff and Vernon Valley have both submitted evidence demonstrating the existence of a triable issue of fact as to whether Inner Spirit owed plaintiff a duty of care to keep the walkway free of snow and ice (*see*, ***Zuckerman v New York***, 49 NYS2d 557, 427 NYS2d 595 [1980]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]). Although the walkway was not installed at the time the lease was executed, the language in the agreement raises a triable issue of fact as to whether the parties agreed that Inner Spirit would bear the responsibility for keeping the walkway free of snow and ice (*see*, ***Pearson v Parkside Ltd. Liab. Co.***, 44 AD3d 833, 843 NYS2d 442 [2007]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2007]). Diana Ross's testimony that she routinely spread deicer in the walkway, and that her students helped her to remove ice and snow from that area, also raises an issue of fact as to whether she assumed the duty and whether plaintiff reasonably relied on her continued performance of that duty (*see*, ***Church v Callanan Indus***., *supra*; ***Espinal v Melville Snow Contrs.***, *supra*). A triable issue of fact

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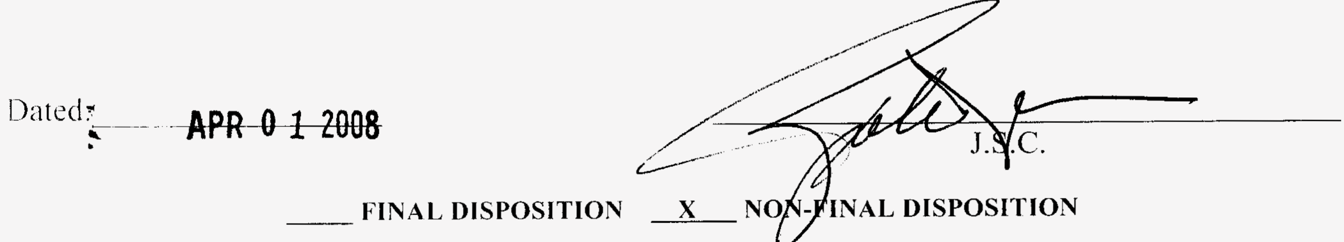
also exists as to whether Inner Spirit had constructive notice that the icy condition that formed in the walkway was a recurring danger related to the defective drain pipe (*see*, ***Diaz v Silver Bell Co., Ltd Partnership***, 18 AD3d 219, 749 NYS2d 354 [2005]; ***Welch v Riverbay Corp***., 273 AD2d 66, 709 NYS2d 58 [2000]; ***O'Connor-Miele v Barhite & Holzinger Inc***., *supra*; ***Segretti v Shorenstein Co., East, L.P.***, *supra*).

Accordingly, Inner Spirit's motion for summary judgment dismissing plaintiff's cause of action is denied.



Dated: APR 0 1 2008

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION