Davis v T.U.C.S. Cleaning Serv., Inc.

2008 NY Slip Op 31532(U)

May 27, 2008

Supreme Court, Richmond County

Docket Number: 0100622/2005

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK **Index No. 100622/05**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:002**

SHARON DAVIS,

Plaintiff

against

T.U.C.S. CLEANING SERVICE, INC.,

Defendant

AMENDED
DECISION & ORDER
HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion to dismiss.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Affidavits	**3**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant's motion for summary judgment pursuant to *CPLR* § 3212 is denied.

Facts

This action arises out of injuries allegedly sustained out of a slip and fall accident that occurred on January 20, 2004. This motion was previously decided in favor of the defendant due to lack of opposition papers filed by plaintiff on April 14, 2008. By a so ordered stipulation dated April 23, 2008 the parties agreed to vacate that decision and allow plaintiff to file opposition papers with the court.

Plaintiff argues that defendant in the course of its executing its contractual obligation to remove snow from the Bayonne Bridge toll house breached its duty of care owed to plaintiff in failing to remove "beads" placed on the ground to melt ice. Defendant argues that as an independent contractor of the Port Authority of New York and New Jersey ("Port Authority") it owed no such duty to plaintiff.

This court finds that based on the record before it issues of fact exist warranting a trial.

Discussion

Both plaintiff and defendant correctly assert that *Espinal v. Melvill Snow Contractors, Inc.* applies in this situation.[1] In that case the Court of Appeals held that in limited situations the general rule that a contractual obligation standing alone will not give rise to tort liability to a third party may be obviated. The court articulated three specific exemptions to this general rule which are:

> (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'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely . . .[2]

Plaintiff argues that she falls within the purview of these exemptions. The court specifically finds the first exemption persuasive. Plaintiff argues that defendant's failure to remove the deicing agent that caused plaintiff's injuries. In this case the contract between the parties specifically states:

> When and as directed by the Manager, the Contractor shall completely and expeditiously remove any snow, ice or sleet from such exterior areas of the Site of the Work as the Manager may designate and he shall keep such area free from further accumulations . . . . Sand/or deicing materials shall be applied by the Contractor to such exterior of areas as the Manager may direct. . .[3]

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[1] *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002].

[2] *id.* [internal citations omitted]

[3] Defendant's Exhibit F

Defendant argues that liability is prevented from passing to it by virtue of the fact that the contractual language purportedly granted defendant the authority to remove snow based on a direction from the manager. In addition, defendant further argues that the Court of Appeals rejected this argument in *Espinal.*

Plaintiff however points to additional contractual language between the parties that states:

> In the performance of the Contract, the Contractor shall exercise every precaution to prevent injury to workers and the public or damage to property.
>
> The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and supervising all safety precautions and programs in connection with the work. The Contractor shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss, including but not limited to all employees on the work, the public and other persons and entities who may be affected thereby . . . [4]

Additionally, plaintiff submits the deposition testimony of Antonio Boscana a supervising employee from defendant. In his testimony Boscana states:

> Q. Does anybody ever sweep the salt away?
> A. Yes, we do.
> Q. Is there a period of time after the salt is applied that it is swept away?
> A. It would be swept the same night or the following day. When the guy in the morning comes in, he will sweep it away, but every time we throw the salt, it is usually like no residue or nothing.
> Q. But if there is residue, it is supposed to be swept away?
> A. Yes.
> Q. Is that supposed to be swept away within a particular period of time, like twelve hours or three days or three years, whatever it may be?
> A. No.
> Q. Who decides when the salt is to be swept away?

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[4] *id.*

> A. Who decides?
> Q. Yes.
> A. If it stops snowing, if it is not cold, sometimes it freezes, sometimes it don't.
> Q. In your experience now, is that u p to the individual who applies the salt or would it be up to a supervisor like yourself to direct somebody to remove it?
> A. Well, yes, I will tell them to remove it.[5]

These facts distinguish the current matter before the court from that presented to the Court of Appeals in *Espinal.* In rejecting plaintiff's argument in *Espinal* the Court of Appeals specifically found that:

> [Defendant] did not entirely absorb [landowner's] duty as a landowner to maintain the premises safely. Indeed, the contract stated that '[i]t is the responsibility of the property manager or owner to decide whether an icy condition warrants application(s) of salt-sand by [defendant]. Owner must inspect property within 12 hours of work. Any defect in performance must be communicated immediately.'[6]

In the current case defendant had the contractual duty to "take all necessary precautions" to ensure the safety to third parties. In addition, based on testimony provided by an employee of defendant it appears that the removal of instrumentality that caused plaintiff's injury was within the scope of the contract between the defendant and the Port Authority.

Plaintiff's assertion of the third exemption under *Espinal* is unpersuasive. Based on the record before the court there are no facts that indicate that the Port Authority ceded its entire duty to maintain the premises to defendant.

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[5] Boscana Transcript pages 13-14.

[6] *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002] [internal citations omitted].

Conclusion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."[7] Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."[8] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[9] Whether the contractual language between the Port Authority and defendant required defendant to remove the deicing "beads" from the premises is a question of fact best answered at trial.

Accordingly, it is hereby:

ORDERED, that defendant's motion for summary judgment is denied in its entirety; it is further

ORDERED, that the Decision and Order of this court dated April 14, 2008 is amended; and it is further

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[7] CPLR §3212[b].

[8] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dep't 1990].

[9] *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [1st Dep't. 1994].

ORDERED, that all parties return to DCM 3 at **9:30 A.M. on June 23, 2008** for a pre-trial conference.

ENTER,

DATED: May 27, 2008

Joseph J. Maltese
Justice of the Supreme Court