

Berberich v Double G. Realty Corp.

2008 NY Slip Op 31698(U)

June 16, 2008

Supreme Court, Suffolk County

Docket Number: 0000152/2002

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/23/08
ADJ. DATES 4/11/08
Mot. Seq. # 003 - Mot D;
Mot. Seq. # 004 - MD;
Mot. Seq. # 005 - MG.

-----X

MARIE BERBERICH and WILLIAM BERBERICH, :
 :
 :
 Plaintiffs, :
 :
 -against- :
 :
 DOUBLE G. REALTY CORP., MADISON COPY & BLUE PRINT CENTER, INC., CAFÉ ANGELINA'S and THE GLORIA, INC., :
 :
 Defendants. :
 -----X

DOUBLE G. REALTY CORP., :
 :
 Third-Party Plaintiff, :
 :
 -against- :
 :
 SKILLS UNLIMITED, INC., MADISON COPY & BLUEPRINT CENTER, INC., CAFÉ ANGELINA'S LTD. And THE GLORIA INC. :
 :
 Third-Party Defendants. :
 -----X

SKILLS UNLIMITED, INC., :
 :
 Fourth-Party Plaintiff, :
 :
 -against- :
 :
 COMPLETE QUALITY LANDSCAPING, LTD., :
 :
 Fourth-Party Defendant. :
 -----X

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Upon the following papers numbered 1 to 26 read on this motion by defendant Madison Copy & Blue Print Center, Inc., for summary judgment and other relief interposed by Notice of Motion (#003) and supporting papers 1 - 4; and the separate Motion by defendant Double G Realty Corp interposed by Notice of Motion (#004) and supporting papers numbered 5-7; and the Cross Motion (#005) and supporting papers numbered 8-10 interposed by Fourth Party Defendant, Complete Quality Landscaping; all of which are consolidated for purposes of this order; and upon all Answering Affidavits and supporting papers 11-20; Replying Affidavits and supporting papers 21-26; Other and after hearing counsel in support and opposed to the motion) it is,

ORDERED that those portions of this motion (#003) by defendant, Madison Copy & Blue Print Center, Inc., for summary judgment dismissing all claims interposed in this action against it are considered under CPLR 3212 and are granted while the remaining portions of said motion wherein this moving defendant seeks an order imposing sanctions against the plaintiffs and the third-party plaintiff, Double G Realty, Corp., are denied; and it is further;

ORDERED that the separate motion (#004) by defendant Double G for summary judgment in its favor is considered under CPLR 3212 and is denied; and it is further

ORDERED that the cross motion (#005) by fourth-party defendant, Complete Quality Landscaping, LTD., for summary judgment dismissing all claims interposed in this action against it is considered under CPLR 3212 and is granted.

Plaintiffs commenced this personal injury action to recover damages, both direct and derivative, for the personal injuries sustained by the plaintiff, Marie Berberich (hereinafter "plaintiff"), in a fall in the parking lot of a commercial building which housed the offices of her employer, Skills Unlimited, Inc. The plaintiff's fall occurred on the morning of January 8, 2001, after she parked her car in the rear of the subject building in the common parking lot shared by all tenants. The plaintiff attributes her fall and resulting injuries to an accumulation of ice on the surface of the subject parking lot.

The premises on which the plaintiff fell were owned by defendant, Double G Realty Corp. (hereinafter "Double G"). The other named defendants and third and fourth-party defendants occupy separate units within the building under the terms of separate leases executed by them, as tenants, and Double G, as landlord.

Skills Unlimited, Inc. (hereinafter "Skills"), is a provider of counseling and other services to handicapped adults with mental and other disabilities. By virtue of its specialized clientele and its pre-existing contractual relationship with fourth party defendant, Complete Quality Landscaping, LTD. (hereinafter "Complete Landscaping"), Skills undertook, with the consent of the landlord, Double G, the retention of Complete Landscaping for purposes of performing snow removal activities in the common parking lot in the rear of the building shared by all tenants. Under the contract, Complete Landscaping obligated itself to "automatically" remove snow from the common parking lot following a storm that left more than two inches on the surface of said parking lot. It appears from the record that Complete Landscaping was not obligated to clear the parking lot of snow following a winter precipitation event of less than two inches nor to provide salting or sanding services unless it received a telephonic request therefor.

Pursuant to Articles 8 and 38 of the leases executed by Madison and Skills Unlimited, additional rent in the form of "impositions" were due the landlord, Double G, by reason, inter alia, of the cost incurred for the performance of snow removal activities in common areas, such as the parking lot. After its retention of Complete Landscaping, Skills Unlimited paid Complete Landscaping for the work it performed on the parking lot. After such payment, Skills Unlimited collected a proportionate share of the bill from each of the other tenants based upon the size of their demised premises as contemplated by the subject leases.

On December 20, 2000, a significant snow event of more than ten inches occurred. In response thereto, Complete Landscaping plowed the common parking lot, including the area where the plaintiff fell some eighteen days later. On December 30, 2000, a wintery mix of precipitation totaling .47 inches was

recorded. A snow event of less than two inches occurred on January 5, 2001. Three days later, the plaintiff fell in the parking lot on an accumulation of ice on the surface of the said lot. Complete Landscaping did not return to the premises on or after snow storm of December 20, 2000.

In its moving papers, defendant, Madison Copy & Blue Print Center, Inc. (hereinafter "Madison"), claims that under the terms of its lease, no part of the rear parking lot where the plaintiff's fall occurred was part of the premises demised to Madison and that Double G was obligated to maintain the rear parking lot, including the salting and sanding thereof and other snow removal activities. In support of these claims, Madison points to Articles 8 and 38 of the its lease with Double D. Therein, Madison was required to pay additional rent in the form of "impositions" to cover certain expenditures incurred by Double such as taxes assessments, repair and "common area maintenance charges, including snow removal."

Defendant Madison also moves for dismissal of all counterclaims and cross claims interposed in this action against it by all co-defendants. In so moving, Madison contends that it is not obligated to defend or indemnify defendant Double G or any other defendants with respect to the claims interposed against it in this action and that it is not liable to Double G for any breach of the provisions of the lease wherein Madison agreed to procure insurance affording coverage to Double G.

For the reasons set forth below, the court grants those portions of the instant motion wherein Madison demands summary judgment dismissing all claims interposed in this action against it.

It is well established that liability for a dangerous condition on real property will not generally attach to a defendant in the absence of said defendant's ownership, occupancy, control or special use of the property (*see Franks v G&H Real Estate Holding Corp.*, 16 AD3d 619 793 NYS2d 61 [2d Dept 2005]). Where a moving defendant demonstrates by proof in admissible form that it did not have exclusive possession or control of a parking lot adjacent to its demised premises, that it had no obligation to maintain said parking lot, and that it did not cause or create the dangerous condition which purportedly caused the plaintiff's fall said defendant has established a prima facie entitlement to summary judgment dismissing liability claims interposed against it as a result of a fall in said parking lot (*see Casale v Brookdale Med. Assoc.*, 43 AD3d 418, 841 NYS2d 126 [2d Dept 2007]; *Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619, 793 NYS2d 61 [2nd Dept. 2005], *supra*; *DePompo v Waldbaums Supermarket, Inc.*, 291 AD2d 528, 737 NYS2d 646 [2nd Dept. 2002]; *Welwood v Association for Children with Down Syndrome, Inc.*, 248 AD2d 707, 670 NYS2d 556 [2d Dept 1998])).

Here, the submissions of moving defendant Madison were sufficient to establish, prima facie, its non-liability in tort to the plaintiff or to any of the defendants. Madison's obligation with respect to the parking lot under the terms of the lease was limited to its payment of its proportional share of the cost of snow removal and landscaping and there is no evidence that Madison caused or created the icing condition at issue in this action (*see Warren v Wilmorite, Inc.*, 211 AD2d 904, 621 NYS2d 184 [3rd Dept. 1995]); *Cf. Zilberman v Caesar's Bay Bazaar Limited Partnership*, 24 AD3d 542, 807 NYS2d 110 [2nd Dept. 2005]). Review of the opposing papers submitted by the plaintiffs and others opposing the motion failed to raise any genuine questions of fact regarding the existence of tort liability on the part of Madison. Since Madison's prima facie showing of its entitlement to summary judgment dismissing all liability claims sounding in tort was not controverted, partial summary judgment dismissing said claims is granted to defendant Madison.

The court further grants those portions of Madison's motion wherein it demands summary judgment dismissing the cross-claims for indemnity and damages interposed against it by Double G. The court rejects as unmeritorious Double G's claim that Madison is, under the terms of its lease, obligated to defend

and indemnify it with respect to the claims interposed in this action and that Madison is liable to Double G for damages by reason of any failure by Madison to procure liability insurance affording coverage to Double G with respect to any recovery had herein by the plaintiff or others.

Under the terms of its lease with Double G, Madison's obligations to indemnify, defend and to procure insurance in favor of Double G were limited to claims and liability for damages arising from personal injuries that occur on the premises demised to Madison "or to adjoining sidewalks, curbs, vaults and vault spaces, if any, streets or ways, or appurtenances thereto". Although Double G claims that the terms "street" or "way" in the indemnity and insurance clauses contained in the lease included the rear parking lot where the plaintiff's fall occurred, the court disagrees for the reasons set forth below.

A plain reading of the subject lease reveals that the parking lot was described therein as a common area, with respect to which, the landlord, Double G, exacted additional rent in the form of impositions to cover the cost of snow removal. The court thus finds that the parking lot in which the plaintiff's fall occurred was beyond the terms of the indemnity and insurance clauses contained in the lease (see *Greater New York Mutual Insurance Company v Mutual Marine Office, Inc.*, 3 AD3d 44, 769 NYS2d 234 [1st Dept. 2003]; *National Union Fire Insurance Company of Pittsburgh, PA., v Port Authority of New York and New Jersey*, 261 AD2d 259, 690 NYS2d 260 [1999]; *Rensselaer Polytechnic Inst. V Zurich American Insurance Co.*, 176 AD2d 1156, 575 NYS2d 598 [3d Dept. 1991]; *Commerce & Industrial Insurance Company v Admon Realty, Inc.*, 168 AD2d 321, 562 NYS2d 655 [1st Dept. 1990]). Accordingly, Madison has no liability to Double G for breach of either the indemnity or insurance provisions contained in said lease. Madison is thus awarded summary judgment dismissing Double G's cross claims for indemnification and for damages by reason of Madison's purported breach of the indemnity and insurance provisions set forth in Articles 13 and 14 of the subject lease.

The remaining portion of this motion by Madison wherein it seeks the imposition of sanctions against the plaintiffs and Double G by reason of their purported engagement in frivolous conduct due to their interposition of claims against Madison in this action is denied. The moving papers failed to establish that the conduct on the part of the plaintiffs and Double G about which Madison complains constitutes frivolous conduct as that term is defined in 22 NYCRR Part 130-01. Accordingly, Madison's demand for the imposition of sanctions is denied.

The court next considers the separate motion (#004) by defendant Double G. Therein, Double G demands summary judgment dismissing the tort claims interposed in this action against it by the plaintiffs and the defendants; summary judgment on its claims for contractual and common-law indemnification against defendants Madison and Skills Unlimited; and damages from said defendants by reason of their purported breaches of the indemnity and insurance provisions of their respective leases with Double G. For the reasons set forth below, the motion is denied.

It is well established that an out-of-possession landlord is not liable for injuries that occur on its leased premises unless it retains a legally sufficient modicum of control over said premises (see *Ritto v Goldberg*, 27 NY2d 887, 317 NYS2d 361 [1970]). Control of the premises may be established by proof of the landlord's promise, written or otherwise, to keep the premises in repair or by a course of conduct demonstrating that the landlord assumed responsibility to maintain a particular portion of the premises (see *Winby v Kustas* 7 AD3d 615, 775 NYS2d 906 [2004]; *Ever Win, Inc., v 1-10 Industry Associates*, 33 AD3d 845, 827 NYS2d 63 [2nd Dept. 2002]; *Gelardo v ASA Realty Corp.*, 137 A2d 787, 525 NYS2d 334 [2nd Dept. 1998]).

Here, the moving papers submitted by defendant Double G were insufficient to establish that no sufficient modicum of control over the parking lot whereat the plaintiff fell was retained by Double G

under the terms of its leases with the tenant defendants or was otherwise assumed so that liability in tort may not attach to it or that it lacked actual or constructive notice of the icy condition which caused the plaintiff's fall. Genuine questions of fact regarding liability on the part of Double G for the plaintiff's fall were not eliminated by the proof adduced on its motion for summary judgment (*see Pearson v Parkside Ltd. Liability Company*, 27 AD2d 637, 810 NYS2d 357 [2nd Dept. 2006]; *Coyle v Long Island Savings Bank*, 248 Ad2d 350, 669 NYS2d 628 [2nd Dept. 1998]). Those portions of its motion for summary judgment wherein it seeks dismissal of all tort claims, including those sounding in contribution, interposed in this action against it is denied (*see Fleming v Custom Building Systems Inc.*, 21 AD3d 929, 800 NYS2d 643 [2nd Dept. 2005]; *Duenas v North Harbor Company*, 278 Ad 2d 193, 717 NYS2d 216 [2nd Dept. 2000]). Likewise denied is Double G's demand for summary judgment on its claims against defendants, Madison and Skills Unlimited, for recovery of damages under principles of common-law indemnity (*see Curreri v Heritage Property Investment Trust*, 48 AD3d 505, 852 NYS2d 278 [2nd Dept. 2008]; *Corely v Country Squire Apartments, Inc.*, 32 AD3d 978, 820 NYS2d 900 [2nd Dept. 2006]; *Murphy v M..B. Real Estate Development Corp.*, 280 AD2d 175, 720 NYS2d 175 [2nd Dept. 2001]).

Also denied are the remaining portions of the motion by defendant Double G wherein it seeks summary judgment on its contractual indemnity and damages claims against defendants Madison and Skill Unlimited by reason of said defendants' breach of their obligations under Articles 13 and 14 of their respective leases with Double G. This court has already found that the parking lot in which the plaintiff's fall occurred was beyond the terms of the indemnity and insurance clauses contained in defendant Madison's lease and as result Madison has no liability to Double G for its purported breaches of Articles 13 and 14 of said lease (*see Greater New York Mutual Insurance Company v Mutual Marine Office, Inc.*, 3 AD3d 44, 769 NYS2d 234 [1st Dept. 2003], *supra*; *National Union Fire Insurance Company of Pittsburgh, PA, v Port Authority of New York and New Jersey*, 261 AD2d 259, 690 NYS2d 260 [1st Dept. 1999], *supra*; *Rensselaer Polytechnic Inst. v Zurich American Insurance Co.*, 176 AD2d 1156, 575 NYS2d 598 [3d Dept. 1991], *supra*; *Commerce & Industrial Insurance Company v Admon Realty, Inc.*, 168 AD2d 321, 562 NYS2d 655 [1st Dept. 1990], *supra*). Since the material terms of the lease between Skills Unlimited and Double G are the same as those contained in the Madison lease, Skills Unlimited has no liability to Double G for breach of either the indemnity or insurance provisions contained in its lease with Double G.

The motion by Double G for summary judgment is thus denied. Pursuant to CPLR 3212 (e), Skills Unlimited is awarded reverse partial summary judgment dismissing Double G's contractual claims for indemnity and damages by reason of Skills Unlimited's purported breaches of Articles 13 and 14 of its lease. All claims for contribution and common-law indemnity asserted by and against Double G and Skills Unlimited remain viable and shall continue herein since the issue of liability on the part of Double G and Skills unlimited have yet to be determined (*see Wheaton v East End Commons Association, LLC*, 50 AD3d 675, 854 NYS2d 528 [2nd Dept. 2008]).

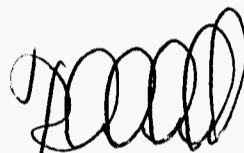
Left for consideration is the cross motion (#005) by fourth-party defendant Complete Landscaping for summary judgment dismissing all claims for recovery of damages interposed against it in this action. The moving papers established, *prima facie*, that Complete Landscaping breached no duty owing to the plaintiff as there is no evidence Complete assumed a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff (*see Espinal v Melville Snow Contractors*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Romeo v Ronald McDonald House*, 25 AD3d 681, 811 NYS2d 694 [2nd Dept. 2006]). Nor does the record contain evidence that Complete's snow removal contract with Skills Unlimited constituted a comprehensive maintenance obligation that it displaced the duties of Skills Unlimited and/or Double G to safely maintain the premises (*see Mitchell v Fiorini Landscape, Inc.*, 284 NYS2d 313 726 NYS2d 673 [2nd Dept. 2001]; *Cochrane v Warwick Associates, Inc.* 282 AD2d 567, 723 NYS2d 506 [2nd Dept. 2001]). The record is also devoid of evidence that the injured plaintiff detrimentally relied on the performance by

Complete Landscaping of its contractual obligations or that it launched a force or instrument of harm during the performance of such duties (see *Flynn v Hewlynn Nurseries, Inc.*, 289 AD2d 524, 735 NYS2d 620, [2nd Dept. 2001]; *Pavlovich v Wade Associates*, 274 AD2d 382, 710 NYS2d 615 [2nd Dept. 2000]). The court thus finds that Complete Landscaping established a prima facie showing of its entitlement to the summary judgment dismissing all claims of liability interposed in this action against it by the plaintiffs.

The cross moving papers likewise established that all claims sounding in contribution and/or common-law indemnity asserted against Complete Landscaping are without merit (see *Baratta v Home Depot*, 303 AD2d 434, 756 NYS2d 605 [2nd Dept. 2003]; *Peycke v Newport Media Acquisiton II, Inc.*, 17 AD3d 338, 793 NYS2d 92 [2nd Dept. 2005]).

With respect to the cross motion by Complete Landscaping, the court is in receipt of opposing papers only from Skills Unlimited. Review thereof reveals that said papers were insufficient to rebut the prima facie showing made by Complete Landscaping of its entitlement to summary judgment dismissing all claims sounding in contribution and common-law indemnification. No genuine questions of facts were raised by opposing counsel's assertions that Complete Landscaping is liable to Skills Unlimited for contribution in as much as there was no evidence tending to establish Complete owed Skills a duty independent of its contractual obligations or that a duty was owed to the plaintiff and that a breach thereof caused or contributed to the injuries sued upon herein (see *Baratta v Home Depot*, 303 AD2d 434, 756 NYS2d 605 [2nd Dept. 2003], *supra*; *Flynn v Hewlynn Nurseries, Inc.*, 289 AD2d 524, 735 NYS2d 620 [2nd Dept. 2001] *supra*; *Mitchell v Fiorini Landscape, Inc.*, 284 NYS2d 313 726 NYS2d 673 [2nd Dept. 2001], *supra*). Nor was there any proof that Complete Landscaping may be liable to Skills Unlimited under theories of common-law indemnification, as there was no evidence that the plaintiff's injuries were attributable to the non-performance of an act that was solely within the province of Complete Landscaping (see *Peycke v Newport Media Acquisiton II, Inc.*, 17 AD3d 338, 793 NYS2d 92 [2nd Dept. 2005], *supra*; *Baratta v Home Depot*, 303 AD2d 434, 756 NYS2d 605 [2nd Dept. 2003], *supra*; *Cf., Hites v Toys "R" Us, Inc.*, 33 AD3d 759, 822 NYS2d 624 [2nd Dept. 2006]). Under these circumstances, the cross motion by Complete Landscaping for summary judgment dismissing all claims interposed in this action against is granted.

DATED: 6/16/08



THOMAS F. WHELAN, J.S.C.