

Tamhane v Citibank, N.A.

2008 NY Slip Op 32521(U)

September 15, 2008

Supreme Court, New York County

Docket Number: 0110136/2006

Judge: Milton A. Tingling

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PRESENT: HON. MILTON A. TINGLING
J.S.C.

PART 44

Index Number : 110136/2006
TAMHANE, RAVINDRA
vs.
CITIBANK, N.A.
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/30/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in 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 is decided in accordance
with the annexed decision.

FILED
SEP 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/15/08 mat
J.S.C.

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 : IAS PART 44

----- X

RAVINDRA TAMHANE and USHA TAMHANE,

Plaintiffs,

INDEX NO.
110136/06

-against-

CITIBANK, N.A., ANTONIA GIBNEY CAMPBELL
as Executrix of the ESTATE OF FREDRIC J.
WARMERS, ONESOURCE FACILITY SERVICES,
INC., and TEMCO SERVICE INDUSTRIES, INC.,

Defendants.

----- X

CITIBANK, N.A.

Third-Party Plaintiff,

INDEX NO.
590825/06

-against-

ONE SOURCE FACILITY SERVICES, INC.,

Third-Party Defendant.

CITIBANK, N.A.

Second Third-Party Plaintiff,

INDEX NO.
590939/06

-against-

TEMCO SERVICE INDUSTRIES, INC.,

Second Third-Party Defendant.

----- X

TEMCO SERVICE INDUSTRIES, INC.,

Third Third-Party Plaintiff,

INDEX NO.
590329/07

-against-

L.I.S.R., INC.,

Third Third-Party Defendant.

----- X

FILED
SEP 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

----- X
CITIBANK, N.A.

Fourth Third-Party Plaintiff,

INDEX NO.
590541/07

-against-

TEMCO BUILDING MAINTENANCE, INC.,

Fourth Third-Party Defendant.

----- X

MILTON A. TINGLING, J.:

Motions seq. nos. 004, 005 and 007 are consolidated herein for disposition.

In this negligence action, plaintiff Ravindra Tamhane ("plaintiff") seeks to recover damages for personal injuries he allegedly suffered on Saturday, March 4, 2006, when he slipped on ice and fell on the walkway at the entrance to business premises in East Meadow, Long Island, leased by defendant Citibank, N.A. ("Citibank") and owned by Fredric J. Warmers ("Warmers"), deceased. Plaintiff's wife, Usha Tamhane, sues for loss of services and consortium. In turn, Citibank brought cross-claims and third-party actions against defendants Temco Service Industries, Inc. ("Temco"), Temco Building Maintenance, Inc. ("Temco Building") and One Source Facilities Services, Inc. ("One Source"), the entities it hired to clear and maintain the premises walkways. Temco also brought a third-party action, against L.I.S.R., Inc. ("LISR"), its snow removal subcontractor.

In the motions now at bar, Temco (mot. seq. no. 004), LISR (mot. seq. no. 007), Citibank and Warmers' estate (mot. seq. no. 005) all seek summary judgment dismissing the claims and cross-claims against them. Citibank also seeks summary judgment on its indemnification claims against Temco.

WARMERS' ESTATE

Warmers' estate argues that it cannot be liable for plaintiff's accident because Warmers was an out-of-possession landlord and Citibank had sole responsibility for the maintenance and repair of the premises, which housed a Citibank bank branch.

"It is well-settled law that an out-of-possession owner-lessor is not liable in negligence for conditions upon the land after transfer of possession and control" (Del Giacco v. Noteworthy Co., 175 AD2d 516, 516-518 [3d Dept 1991]; Estes v. New York State Saddle Horse Association Inc., 188 AD2d 857, 858-859 [3d Dept 1992]). Plaintiff has not opposed dismissal of his claims against Warmers' estate, and Citibank joins Warmers' estate in the motion.

Based on the foregoing, plaintiffs' claims against Warmers' estate will be dismissed.

CITIBANK

Citibank argues that plaintiff cannot make a *prima facie* case against it because it had no notice of the icy condition which occasioned plaintiff's fall, and if anyone is to blame it is Temco, which had sole responsibility for snow removal.

The general rule is that "a party in possession or control of real property may be held liable for a hazardous condition created on its premises as the result of the accumulation of snow or ice during a storm only after the lapse of a reasonable time for taking protective measures subsequent to the cessation of the storm" (Newsome v. Cservak, 130 AD2d 637 [2d Dept 1987], citations omitted; Chapman v. Pounds, 268 AD2d 769, 770 [3d Dept 2000]). However, this is clearly not a "storm in progress" situation (compare, Kay v. Flying Goose, 203 AD2d 332 [2d Dept 1994]).

On March 2, 2006, two days before plaintiff's accident, there was an all-day storm of rain and snow, with accumulations of approximately one inch of snow. LISR performed snow removal services on that day during the storm, and again after the storm, on the morning of March 3. It did not snow again before plaintiff's accident. As detailed in the bill of particulars, the icy condition which caused plaintiff's fall was created as a result of melting snow dripping off the roof and refreezing on the ground at the entrance to Citibank's premises.

"A New York landlord may also be held liable for accumulations of ice, even though smooth, if they are promoted by a dangerous condition which the landlord allows to persist. For example, ... [if] melted snow was permitted to drip from a porch roof onto the front steps of the house" (Klein v. U.S., 339 F2d 512, 515-516 [2d Cir 1964], citing Clapper v. Zubres, 261 AD2d 850 [3d Dept 1941], *affd* 285 NY 770 [1941]). The failure to address refrozen accumulations of melted snow which have dripped from a roof is enough to impose liability for the injuries of those who slip on the icy patch on the party in control of the property (see, e.g., Pugliese v. D'Estrada, 259 AD2d 743, 743-744 [2d Dept 1999]; Clapper v. Zubres, *supra*; see also Schnur v. City of New York, 298 AD2d 332, 332-333 [1st Dept 2002]; Crumb v. Fallon, 156 AD2d 949, 950 [4th Dept 1989]). If plaintiff establishes that the iced drippings were "a recurrent [situation] in times of inclement winter weather, an inference could be drawn that defendant had actual knowledge of a recurrent dangerous condition and therefore could be charged with constructive notice of each specific reoccurrence of the condition" (Padula v. Big V Supermarkets, 173 AD2d 1094, 1096 [3d Dept 1991]; Colt v. Great Atlantic & Pacific Tea Co., Inc., 209 AD2d 294, 295 [1st Dept 1994]).

To satisfy his burden of proving Citibank had notice of the recurring dripping condition, plaintiff need not prove that Citibank "had actual knowledge of the accumulation of rain water on the date of her accident, but merely that the condition was reoccurring over a period of time ..., thereby putting the defendant on constructive notice of the condition" (David v. New York City Housing Authority, 284 AD2d 169, 171 [1st Dept 2001]). Plaintiff may meet this burden "by evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by [Citibank]" (O'Connor-Miele v. Barhite & Holzinger, Inc., 234 AD2d 106, 106-107 [1st Dept 1996], citations omitted; Lemonda v. Sutton, 268 AD2d 383, 384 [1st Dept 2000]).

Plaintiff proffers the testimony of two expert witnesses who will testify that the design of the roof, while not defective, is such that dripping of melted snow will occur unless the roof is shoveled, and that the problem has been recurring for a long period of time. In addition, LISR's invoice to Temco for work it performed on March 6, 2006 states: "Provide salting of sidewalk at front door due to refreeze of snow and ice dripping off roof. We will not assume any liability for time period from last service provided on a.m. of 3/3/06" (LISR's exhibit C). Although this may not be enough to help plaintiff prevail at trial, it is enough to raise a material question of fact precluding summary judgment (see Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]).

Citibank's reliance on the testimony of the witness who said he saw plaintiff fall in the parking lot two feet from his car and return to the car without getting anywhere near the bank entrance does not warrant summary dismissal of plaintiff's claims. Conflicting accounts of the ice conditions and plaintiff's fall, including any discrepancies in plaintiffs' own version of the

events, pose triable issues of fact (Mosley v. General Chauncey M. Hooper Towers Housing Development Fund Co., Inc., 48 AD3d 379, 380 [1st Dept 2008]).

"The strength of plaintiff's case is a matter to be resolved at trial, and not on a motion for summary judgment" (David v. New York City Housing Authority, *supra*, 284 AD2d at 171). "A defendant's motion for summary judgment opposed by the plaintiff must be decided on the version of the facts most favorable to the plaintiff" (Mullin v. 100 Church LLC, 12 AD3d 263, 264 [1st Dept 2004], citing Henderson v. City of New York, 178 AD2d 129, 130 [1991]); Kesselman v. Lever House Restaurant, 29 AD3d 302, 303-304 [1st Dept 2006]). Where "competing inferences may reasonably be drawn as to whether defendant's conduct constituted negligence" the jury must be the ones to draw them (Myers v. Fir Cab Corp., 64 NY2d 806, 808 [1985]).

Citibank's argument that if there is any liability for plaintiff's accident it should attach to Temco, the party responsible for maintenance and snow removal, is also unavailing, particularly since the property in question was a commercial establishment.

"When a property owner or an operator invites the participation of the public in his operation, necessarily he must recognize and be ready to discharge a heightened duty arising out of the dangers reasonably to be expected from that participation" (Padula v. Big V Supermarkets, Inc., *supra*, 173 AD2d at 1096). "New York courts have long imposed a special duty on property owners to keep the entrances and passageways of a public building safe for tenants, their visitors, and their employees, all classes of people who come onto the premises for reasonably foreseeable purposes.... [T]he Court of Appeals formulated an even broader standard of care to conform with the mores of a modern society and held that 'whenever the general public is invited into stores,

office buildings, and other places of public assembly' it is entitled to a safe and reasonable means of entry and exit from the premises" (Backiel v. Citibank, N.A., 299 AD2d 504, 506-507 [2d Dept 2002], citations omitted). The fact that Temco and LISR were responsible for removing the snow from the premises does not abate Citibank's liability to plaintiff. "Summary judgment dismissing the complaint is not warranted even assuming, in favor of [Citibank that it] ... did not have notice of any defect..., and that fault for the accident can be ascribed only to [Temco or LISR].... For this building that was open to the public, [Citibank] had a nondelegable duty to provide the public ... with reasonably safe means of ingress and egress, and can be held vicariously liable for any negligence by [Temco or LISR] that caused the entrance to become unsafe" (Logiudice v. Silverstein Properties, Inc., 48 AD3d 286, 286-287 [1st Dept 2008]). "It does not avail the bank that its contractor was responsible for cleaning up since an owner of premises open to the public cannot delegate to a contractor its duty to the public to keep its premises safe" (Milligan v. Banco Popular, 6 AD3d 272, 272-273 [1st Dept 2004]).

TEMCO

Temco argues that it too lacked notice of the icy condition, that its contractual responsibilities were not triggered by the circumstances that existed at the time of plaintiff's accident, and that if anyone is to blame it is Citibank. Finally, Temco argues that it cannot be held liable to anyone for plaintiff's injuries because Citibank's contract is with Temco's subsidiary, Temco Building, and not with Temco.

As discussed below, there is an issue as to whether Temco's subcontractor LISR aggravated the icy condition on which plaintiff fell. "Given this issue, for present purposes it

[* 9]

does not avail the contractor to argue that it owed no duty of care to plaintiff..., or that it lacked notice of the patch.... [A]ny negligence by the contractor in removing the snow cannot be imputed to [Citibank]..., and any contention that the patch was caused by [Citibank]'s own negligence, or that [Citibank] had constructive notice of the patch, is too speculative" (Yery Suh v. Fleet Bank, N.A., 16 AD3d 276, 276-277 [1st Dept 2005], citations omitted).

Temco's contention that any contractual liability would attach to its subsidiary, Temco Building, rather than Temco itself is also unavailing. It is well established that corporate parents are generally not held liable for the acts of their subsidiaries (Port Chester Electrical Construction Corp. v. Atlas, 40 NY2d 652 [1976]). "[C]ourts disregard the separate legal identities of the parent and subsidiary corporation [only] if the parent intervenes in the subsidiary's management so thoroughly as to ignore the subsidiary's paraphernalia of incorporation, directors and officers" (Dempsey v. Intercontinental Hotel Corporation, 126 AD2d 477 [1st Dept 1987], citing Billy v. Consolidated Machine Tool Corp., 51 NY2d 152 [1980], rearg den 52 NY2d 829 [1980]). The "parent's control over the subsidiary's activities 'must be so complete that the subsidiary is, in fact, merely a department of the parent'" (Porter v. LSB Industries, Inc., 192 AD2d 205, 213 [4th Dept 1993]).

Temco argues that no evidence has been introduced to show that it is Temco Building's *alter ego*. This argument misses the point. Although at trial Citibank will have to produce such evidence to prevail against Temco, at this juncture, as the party moving for summary judgment based on this argument, it is Temco which has the burden of proof on the issue. Yet, it has failed to proffer any evidence that it is separate and distinct from Temco Building. If anything, Temco has shown itself fungible with Temco Building in this litigation by

bringing the third-party action against LISR in its own name. In addition, Citibank has introduced evidence showing that LISR invoices were sent to Temco rather than Temco Building, and that Temco Building's invoices to Citibank requested payment be made to Temco. Finally, Temco's own general manager testified that Temco (not Temco Building) had a written contract to do general maintenance and clear the snow from Citibank's branches in Nassau County (Taylor EBT, pp 12-15, at exhibit R to Temco's moving papers).

LISR

LISR had an oral contract with Temco for LISR to do the snow removal work for Citibank. "[A]lthough 'a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party,' ... an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so as to have 'launched a force or instrument of harm.'... Thus, in order to make a *prima facie* showing of entitlement to judgment as a matter of law, [LISR is] required to establish that [it] did not perform any snow removal operations with respect to the condition that caused this plaintiff's injury, or, alternatively, that if [it] did perform such operations, those efforts did not create or exacerbate a dangerous condition" (Prenderville v. International Service Systems, Inc., 10 AD3d 334, 337 [1st Dept 2004], citations omitted).

LISR last performed snow removal services on March 3, after the March 2 storm had passed. That after-storm clean-up was performed 24 hours prior to plaintiff's accident, with no new precipitation in the interim. It has not yet been established whether the icy condition developed after LISR's cleanup on March 3 or whether it there all along and LISR missed it or,

even worse, aggravated it. "[T]he mere failure to remove all snow and ice from a sidewalk or parking lot does not constitute negligence and does not constitute creation of a hazard" (Wheeler v. Grande'vie Sr. Living Community, 31 AD3d 992, 992-993 [3d Dept 2006], citations omitted). However, if the condition was aggravated by LISR's work, it could be liable for plaintiff's injuries (see Prenderville v. International Service Systems, *supra*, 10 AD3d at 337). Whether LISR "created or heightened the icy hazard on the sidewalk that is alleged to have cause plaintiff to slip and fall" is a triable issue of fact (Saitta v. City of New York, 281 AD2d 333 [1st Dept 2001]).

Accordingly, Temco's motion for summary judgment (seq. no. 004) is denied in its entirety.

Motion seq. no. 005 is granted only to the extent that the Clerk is hereby directed to enter judgment dismissing all claims against Warmers' estate, and is otherwise denied.

LISR's motion for summary judgment (seq. no. 007) is denied in its entirety.

Upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office (Room 158) shall restore this action to its former place on the trial calendar. In this context, the court notes that the case is scheduled for mediation on Friday, September 19, at 9:30 a.m.

This decision constitutes the order of the court.

DATED: 9/16/2008

FILED
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