

Bezmalinovic v Home Depot USA, Inc.

2008 NY Slip Op 32949(U)

October 23, 2008

Supreme Court, New York County

Docket Number: 116713/04

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: _____

PART 55

Justice

Index Number : 116713/2004
BEZMALINOVIC, CHRISTINE
 vs.
HOME DEPOT, USA
 SEQUENCE NUMBER : 008
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 8/4/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-7
4-8B
4-12

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 together with motion of in accordance with the annexed Memoranda decision and order.

FILED

OCT 28 2008

COUNTY CLERK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/23/08

JANE S. SOLOMON
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
CHRISTINE BEZMALINOVIC and PETER K.
BEZMALINOVIC,

Plaintiffs,

-against-

HOME DEPOT USA, INC.,
LG COMMACK ASSOCIATES, LLC,
SAUL LERNER MANAGEMENT CORP.,
MED-MAC REALTY CO., INC.,
MEADOWLAND CONTRACTING, INC.,
FUNCH ASSOCIATES, INC., and
MEADOWBROOK PARKING AREA
CONTRACTORS, INC.,

Defendants.

FILED

OCT 28 2008

COUNTY CLERK'S OFFICE
NEW YORK

-----x
JANE S. SOLOMON, J.:

Plaintiff Christine Bezmalinovic (Bezmalinovic) alleges that she sustained a serious injury when she fell in an icy parking lot in Commack, New York. Defendants Home Depot USA, Inc. (Home Depot), LG Commack Associates, LLC (LG Commack), Saul Lerner Management Corp. (SLM), and Med-Mac Realty Co., Inc. (Med-Mac) move and cross-move for summary judgment dismissing the complaint and on their respective cross-claims. Defendants Meadowbrook Parking Area Contractors, Inc. and Funch Associates, Inc. (together Meadowbrook) did not move for summary judgment.

Med-Mac initially cross-moved to a motion for summary judgment by former defendant Meadowlark Contracting, Inc., under motion sequence 07. That motion was denied as moot because the parties stipulated to discontinue the lawsuit against it. Med-

Mac's cross-motion is deemed made to the motion by LG Commack and SMI, under motion sequence 08, and decided herewith. A trial date of October 30, 2008 was agreed to by counsel when these motions were submitted on August 4.

Bezmalinovic fell in the parking lot of a shopping center on Long Island on January 23, 2004. She parked her vehicle, stepped out and started walking toward a store. Snow had fallen several days earlier. The parking lot was plowed, and salt and sand was applied. Bezmalinovic claims that she fell next to her vehicle on a combination of ice, salt, sand and gravel that was applied too thick.

Defendants contend that Bezmalinovic has not established a claim for negligence, but the motions also are substantially directed to the duties and relationships between defendants arising from leases, subleases and other contracts.

LG Commack is alleged to be the fee owner of the property; SLM is alleged to be LG Commack's managing agent; Med-Mac is alleged to be the net lessee of an adjoining commercial property that shares a parking lot with LG Commack's property; Home Depot is alleged to be the sub-lessee of an adjoining property that was obligated to keep the subject parking area free of snow and ice; and Meadowbrook is a contractor hired by Home Depot to clear snow and ice from the parking area and to apply salt or sand as appropriate.

[*4]

The shopping center was owned by a group of individuals who, in 1965, leased a portion of the shopping center to William Modell (Lease annexed as Ex. E to Affirmation of Allyson Avila, Esq. in support of Med-Mac's cross-motion for summary judgment). In 1982, that lease was modified to substitute Med-Mac as lessee (Avila Aff., Ex F). Under the lease, Med-Mac is obligated to maintain the common areas of the shopping center, including common areas outside the demised premises. In a sublease from Med-Mac to Home Depot, Home Depot agreed to promptly clear snow and ice from all common parking areas in the shopping center (*id.*, at Ex G, section 5[w][i]). At the time of plaintiff's accident, Home Depot had contracted with Meadowbrook to clear snow and ice from the parking lot and apply salt and sand as needed.

Home Depot produced its operations manager of the Commack store for deposition. The manager testified that he had been directed to inspect the parking lot on a daily basis by his superior at Home Depot, and it was his practice to do so several times a day (EBT Trans. of Frank Carlick, annexed as Ex. E to Home Depot motion, 11-14). It also was his practice to inspect the parking lot after the contractor had cleared the snow (*id.* at p 20). Meadowbrook's witness testified that it had put salt and sand down on January 18, 19 and 20, five to three days before the accident (EBT Trans. of Paul Munch, annexed as Ex. H to

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Affirmation in Opposition of Nicholas Tzaneteas, Esq., 47). He said that sand and salt was not swept up during the winter season, and, in his opinion, an accumulation of sand or salt could create a dangerous condition for pedestrians (id., at 61-62).

Motion and Cross-Motion by LG Commack, SLM and Med-Mac.

As a threshold matter, LG Commack argues that it is not properly a party to this action because it has no interest in the shopping center. Its controller, Daisy Rodriguez, testified at deposition that the owners of the property were an entity called LGK Associates and Med-Mac (Rodriguez EBT Trans, annexed as Ex. C to Affirmation in Support of Patricia Zincke, Esq., 10-11). This testimony is contradicted by documentary evidence, including title documents obtained from the Suffolk County Clerk which are not disputed, showing that LG Commack was the successor in interest to the owner that leased part of the property to Med-Mac. Indeed, it appears that Rodriguez's contention regarding ownership is unsupported by any documentary evidence. Accordingly, LG Commack is not entitled to summary judgment as a matter of law on this basis.

However, LG Commack has shown that it did not have actual notice of the allegedly defective condition. It was an out of possession landlord that had no duty to clear sand and salt from the parking area (cf. Pasqua v Handels-En

[*6]
Productiemaatschappij De Schouw, B., 43 AD3d 647 [1st Dept 2007]
[shopping center property owner liable where plaintiff alleges injury arose from hazardous condition created as result of violation of specific provision of Uniform Fire Prevention and Building Code, 9 NYCRR § 903.2]). Plaintiff submits an affidavit of an expert who alleges that defendants failed to maintain the parking lot in good working order, in violation of section 102 of the Property Maintenance Code of New York State (PMCNYS) (see, 19 NYCRR § 1226.1, which incorporates by reference to a separate publication titled the 2007 PMCNYS). However, section 102 of the PMCNYS makes no reference to any specific standard applicable to this lawsuit. Therefore, no code violation is alleged that would impose a non-delegable duty on LG Commack, and it is undisputed that it delegated applying sand and salt to Med-Mac and Home Depot. With respect to SLM, the managing agent, there is no evidence that it undertook any obligation beyond those of its principal. Accordingly, they are entitled to summary judgment dismissing the complaint and cross-claims as against them.

Med-Mac's cross-motion also is granted, because it too had no actual notice of a dangerous condition, and it had assigned the duty to clear the parking area and apply sand and salt to Home Depot. Moreover, the area where plaintiff fell was outside its demised premises under the leases, so it had no duty as a landowner.

[* 7]

Home Depot's Motion

Home Depot contends that plaintiffs fail to allege facts to support their claim that it had actual or constructive notice of a hazardous condition. This argument fails because there is a triable issue of fact as to whether the condition complained of existed prior to the accident and for how long. Meadowbrook applied sand and salt three to five days before the accident. There is no dispute that Home Depot was obligated to provide for snow and ice clearance in the subject parking area, and to have sand and salt applied as necessary. Its employee inspected the parking area each day. Although he did not see the pile where Bezmalinovic alleges she fell, she alleges sufficient facts upon which a jury could conclude that sand and salt had been permitted to accumulate excessively, and the condition existed for sufficient time to permit Home Depot to discover the problem and remedy it. Accordingly, it hereby is

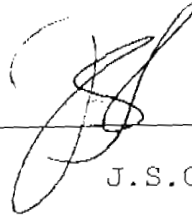
ORDERED that the motion for summary judgment by LG Commack and SLM is granted, and the complaint and all cross-claims by and against them are severed and dismissed, with costs and disbursements as taxed by the Clerk of the Court; and it further is

ORDERED that Med-Mac's cross-motion for summary judgment is granted, and the complaint and all cross-claims by and against it are severed and dismissed; and it further is

ORDERED that Home Depot's motion for summary judgment is denied.

Dated: October 23, 2008

ENTER



J.S.C.

JANE S. SOLOMON

FILED
OCT 28 2008
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