Nicholas v Realty Income Corp.
2008 NY Slip Op 33363(U)
December 9, 2008
Supreme Court, Richmond County
Docket Number: 101389/06
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No. 101389/06
Motion No.:001, 002 & 003

MARY NICHOLAS,

Plaintiff

against

REALTY INCOME CORP.,
M.J. & T. CORP., ***and***
CONTROL BUILDING SERVICES, INC.,

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion for a default.

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Notice of Cross-Motions	**2, 3**
Answering Affidavits	**4**
Replying Affidavits	**5, 6, 7, 8, 9**
Exhibits	**Attached to Papers**

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

The defendants M.J.&T. Corp. (MJT), Realty Income Corp. (RIC), and Control Business Services Inc.(CBS) move this court for summary judgment dismissing all claims and cross-claims pursuant to *CPLR* §3212. The motions of MJT and CBS are granted in their entirety. The motion of RIC is denied in its entirety.

Facts

This action arises out of a slip and fall accident that occurred on January 10, 2004 at approximately 4:45pm in a parking lot on 2485 Richmond Avenue, Staten Island, New York ("the premises"). The plaintiff claims she slipped and fell on an icy condition in the premises,

owned by RIC. RIC had an agreement with CBS to periodically inspect the premises on behalf of RIC. RIC had hired MJT to remove snow at the premises.

The plaintiff testified that although it had not snowed around the time of the accident, she remembered that the temperature was above freezing. She also stated that she had not noticed the icy patch, which measured approximately two feet long by two fee wide, until after she fell. During an Examination Before Trial, Marshall's former manager testified that there was an ongoing problem with ice in the parking lot and that she had previously complained to the mall's management about this condition.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."[1] Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issue of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."[2] 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.[3]

MJT's & CBS's Duty to Plaintiff

MJT and CBS argue that, as outside vendors, they do not have a duty towards the plaintiff. "A contract obligation does not generally give rise to tort liability."[4] The Appellate

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[1] *CPLR* § 3212[b].

[2] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept. 1990].

[3] *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [1st Dept 1994].

[4] *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136, 141 [2002].

Division, Second Department has held that "[w]here a snow removal contract is not a comprehensive and exclusive property maintenance obligation intended to displace a landowner's duty to maintain the property, the contractor owes no duty of reasonable care to prevent foreseeable harm to an injured plaintiff."[5] Under their service contract, MJT is responsible for plowing the premises when there is a snow fall, which excludes it from liability arising out of a non-snowfall condition. MJT argues that it is not responsible for general maintenance of the premises. RIC's senior manager confirmed that MJT is only responsible for snow plowing. Similarly, CBS's only responsibility is to conduct monthly inspections, which it performed less than a month before the plaintiff's accident. CBS does not have the responsibility to repair or maintain the premises or call any outside contractors if snow removal is needed. RIC, as the landowner, has the duty to safely maintain the premises.

Assuming that MJT and CBS had a duty of care to the plaintiff, they did not breach that duty because they did not create the condition upon which the plaintiff fell. The Court of Appeals in *Espinal v. Melville Snow Contractors, Inc.* held that contractors are liable to third parties under three situations: (1) when the contractor launches a force or instrument of harm; (2) when the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) when the contractor has displaced another party in terms of responsibility.[6] No evidence has demonstrated that by act or omission MJT or CBS created or exacerbated the ice condition. If such ice patch existed, MJT claims, it was caused by a depression outside of the scope of MJT.

In opposition to MJT's motion for summary judgment, the plaintiff argues that questions of negligence should be left to the trier of fact. Plaintiff cites *Prenderville v. International Service, Inc.*,[7] where the court held that questions remained whether a contractor hired to remove

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[5] *Donahue v. Petracca & Co.*, 277 AD2d 346 [2d Dept 2000].

[6] *Espinal,* 98 NY2d 136 at 141.

[7] 10 AD 334 [1st Dept].

snow made a prima face showing that it did not create or exacerbate the condition. The facts in *Prenderville* are different from the facts in the present case. Unlike the plaintiff in *Prenderville*, the plaintiff in this case was not walking around snow. In fact, she affirmed that it had not snowed around the time of the accident. Hence, there is no inference that MJT had not properly removed snow on the premises.

The Indemnity Clause in the RIC/MJT Agreement

RIC claims that under its contract with MJT, the latter is required to indemnify RIC for this accident. Section 1 of the Agreement's Article 7 states:

> Indemnity. Contractor shall indemnify Owner, it's [sic] respective partners, officers, agents and employees, against all loss, damage, expense and liability resulting from injury to, or death of, persons including, but not limited to, employees of Owner, or Contractor, or injury to property including, but not limited to, property of Owner or Contractor, arising out of or in any way connected with the performance of this Agreement, however caused, regardless of any negligence of Owner whether active or passive, except for such injury or death as may be caused by the sole negligence or willful misconduct of Owner.

The indemnity provision requires that MJT's performance results in personal injury. Since the contract calls only for snow plowing and removal in the event of snow, the defendant is not liable because there is no evidence that the ice patch from which plaintiff fell originated from snow. Moreover, the indemnity provision is void as a matter of law. The Court of Appeals in *Itri Brick v. Concrete Corp*. held "that when the agreements in question contemplate full, rather than partial indemnification, they are unenforceable under the General Obligations Law Section 5-322.1."[8] The indemnity clause in this contract places full liability to MJT, irrespective of RIC's possible negligence, violating the cited General Obligations Law.

[8] 89 NY2d 76 [1997].

In opposition, RIC argues that dismissal of the contractual indemnification is premature because MJT fails to address partial indemnification. RIC also cites *Itri Brick & Concrete Corp.*, by maintaining that the proportion of fault is to be assessed to each party.[9] As it was in *Itri*, this case's indemnity provision provides for full indemnification, negating any argument for partial indemnification. As defendant MJT is not partly negligent for the plaintiff's accident, RIC's partial indemnification argument is also inapplicable.

In sum, this court grants MJT's and CBS's motions for summary judgment on the finding that they did not owe a duty of care to the plaintiff. Several factors point to this conclusion: (1) as outside vendors they are not liable to the plaintiff; (2) their contracts were not comprehensive, making them liable only for inspecting and plowing after snow removal; (3) and the indemnity clause in the MJT-RIC contract is invalid.

RIC's Duty to Maintain the Premises

RIC, as property owner and manager, owed a duty of care to plaintiff to properly maintain the premises. A property owner is liable in a slip and fall accident involving snow when it creates or has notice of the dangerous condition.[10] Thus, "in order to prevail in its motion for summary judgment dismissing the compliant, the defendant . . . is required to demonstrate that it did not create the ice condition and had neither actual nor constructive notice of it."[11] There is no evidence, RIC argues, that it caused or had notice of the condition upon which the plaintiff fell. RIC says that no reports indicate that CBS notified RIC of any icy conditions in the parking lot. Furthermore, RIC maintains that the failure to remove an isolated patch of ice does not mount to a negligent omission.

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[9] *Id.*

[10] *Olivieri v. GM Realty Co.*, 37 AD3d 568 [2d Dept 2007].

[11] *Id.*

As a last resort, RIC claims that the alleged ice condition was open and notorious; therefore, RIC had no duty to warn or protect. "[A] landowner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous."[12] RIC argues that because plaintiff was able to see the ice *after* she fell, the condition was open and obvious. For all the above reasons, RIC argues that is entitled to summary judgment.

The plaintiff states that questions of fact exist as to whether RIC had either actual or constructive notice of the defect. As cited by RIC, the Court of Appeals in *DeVivo v. Sparago* established that "the plaintiff must come forward with more than mere speculation to establish how long the ice condition was allegedly present prior to the accident."[13] The plaintiff brings forth the testimony of Marshall's manager, who admitted that there was an ongoing problem with ice in the parking lot, specifically in the area where the accident took place. The manager further testified that she frequently called the mall management to complain about the ice problem. Thus, the plaintiff raises a triable issue of fact as to whether the icy condition existed before the accident to permit RIC to have notice of it and eliminate it.

This court points out that RIC first alleges that the iced patch was an isolated condition, to later argue that the condition was open and obvious, without the need of a warning. The presentation of both arguments within one motion is, at best, inconsistent.

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[12] *Lee v. Oh*, 3 AD3d 473 [2d Dept 2004].

[13] 287 AD2d 535 [2d Dept 2001].

Conclusion

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.[14] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[15] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion. 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.[16]

The Court holds that MJT and CBS, as outside contractors, have successfully proven that there are no issues of fact when it comes to their duty of care toward the plaintiff. They did not create the condition that led to the plaintiff's fall, and consequently are not liable. On the other hand, issues of fact continue to exist whether RIC had actual or constructive notice regarding the icy condition in the parking lot.

Accordingly, it is hereby:

ORDERED, that M.J.& T. Corp.'s motion for summary judgment is granted in its entirety; it is further

ORDERED, that Control Building Services, Inc.'s motion for summary judgment is granted in its entirety; it is further

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[14] *Rotuba Extruders v. Ceppos,,* 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept 2003].

[15] *Weiner v. Ga-Ro Die Cutting,* 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

[16] *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [1st Dept 1994].

ORDERED, that Realty Income Corp.'s motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the plaintiff and Realty Income Corp. return to DCM Part 3 on Wednesday, January 7, 2009 for a pre-trial conference.

ENTER,

DATED: December 9, 2008

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Joseph J. Maltese
Justice of the Supreme Court