Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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JOSEPH FARRELL and THERESA FARRELL,

Plaintiff(s),

-against-

860 FRANKLIN ASSOCIATES, INC., 860 FRANKLIN AVENUE ASSOCIATES, INC., VICTORY, L.I., INC., VICTORY, L.I., INC., d/b/a NOVITA and A.V.F. DEVELOPMENT CORP.,

Defendant(s).

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Index No. 17564/06

Motion Submitted: 8/5/08
Motion Sequence: 005, 006

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....XXXX
Reply.....XXX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants 860 Franklin Associates, Inc., 860 Franklin Avenue Associates, Inc., Victory L.I., Inc., and Victory L.I. Inc. d/b/a/ Novita (collectively referred to hereinafter as the Novita defendants) move pursuant to CPLR §3212 for an order granting summary judgment dismissing the complaint. Plaintiffs oppose the requested relief.

Co-defendant A.V.F. Development Corporation [hereinafter AVF], similarly moves pursuant to CPLR §3212 and seeks an order granting summary judgment dismissing the complaint, as well as any and all cross-claims asserted against them by the Novita defendants.

The underlying negligence action was commenced by plaintiffs to recover damages for personal injuries plaintiff Joseph Farrell allegedly sustained on March 20, 2006, when he tripped and fell in a municipal parking lot located in Garden City, New York. This parking lot abuts the rear portion of a building located at 860 Franklin Avenue. The Novita defendants operate a restaurant at said location, under the name of Novita. On March 20, 2006, the restaurant was not as yet open for business and was undergoing significant renovation, as a result of which a dumpster, provided by AVF, was positioned in the parking lot to the rear of the subject premises.

The plaintiffs allege that the dumpster utilized during the course of the renovation was improperly enclosed and that debris from said dumpster escaped, winding up in the area where the accident took place. With regard to the particular circumstances surrounding his accident, plaintiff Joseph Farrell testified at his deposition that as he was traversing the parking lot his feet were jerked out from under him due to packing or boxing tape and plastic, that was blowing on the ground and that allegedly emanated from the dumpster being utilized by Novita during the renovation.

In support of the instant application the Novita defendants argue that plaintiffs have not demonstrated that they were possessed of the actual or constructive knowledge of the defective condition purported to have caused the accident and as a result they have failed to demonstrate a *prima facie* case warranting dismissal of the within complaint. These defendants further argue that even assuming they possessed a general awareness of litter, such awareness is legally insufficient to charge them with constructive knowledge.

As evidentiary support for these contentions, the defendants rely principally upon the deposition of Joseph Mendolia, who appeared on behalf of the Novita defendants. Mr. Mendolia testified that while he was aware that people would go inside the dumpster "garbage picking" and to place their own garbage therein, he never observed any debris blowing out of the dumpster and that neither he nor his partners in business were ever made cognizant of such a situation.

In opposition, plaintiffs argue that there are numerous questions of fact, the existence of which necessarily precludes the granting of summary judgment. With particularity, counsel posits that there are unresolved material issues as to the following: whether the Novita defendants actually created the dangerous condition that allowed for debris to emanate from the dumpster and were thereby charged actual knowledge thereof; whether the Novita defendants possessed constructive notice that debris was blowing out of the dumpster prior to the plaintiff's accident; and whether the debris involved in the plaintiff's accident came from the dumpster in issue.

In addition to the foregoing, and in the alternative, plaintiffs argue that even if this Court were to determine that the moving defendants have demonstrated their entitlement to relief, the plaintiffs have raised a triable issue of fact that the defendants failed to properly manage, control and operate an uncovered, debris-laden dumpster, which was being employed thereby in a public area for their own "special benefit." In so arguing, the plaintiffs make particular reference to the deposition testimony of non-party witness Patrick Grande, who testified that he observed various forms of debris blowing out of the dumpster prior to the plaintiff's accident. This debris included shrink wrap, pieces of paper and tape, but was primarily comprised of the shrink wrap.

In support of it's cross-motion, counsel for AVF initially argues that AVF owed no duty to the plaintiff inasmuch as it was not the owner or occupier of the subject premises and did not exercise any control over the condition of the parking lot in which the plaintiff fell. AVF challenges the plaintiffs' assertion that the debris originated from the dumpster and stresses that even assuming same emanated therefrom, liability may still not attach given that AVF's responsibilities under the circumstances, were specifically circumscribed to delivering said dumpster and did not extend to supervising or maintaining conditions as existed in the parking lot. In support of these contentions counsel relies upon the deposition testimony of Chris Mwrik, who appeared on behalf of AVF, and testified that AVF delivered three dumpsters over the course of the renovation project. He further testified that upon delivery, AVF would be directed by the Novita defendants as to where to place the dumpster and that AVF would return to retrieve the receptacles only after being notified by the Novita defendants that it was full to capacity. Counsel further relies upon annexed copies of the relevant invoices, which recite that AVF was to provide a dumpster to the Novita defendants for the purposes of depositing demolition related debris.

AVF additionally argues that the entirety of the cross claims asserted against it by the Novita defendants are not legally sustainable and should be dismissed as a matter of law. With regard to that cross-claim seeking contribution, counsel reiterates that AVF did not owe a duty to the plaintiff herein and further posits that pursuant to the business arrangement between AVF and the Novita defendants, AVF did not owe a separate independent duty to the co-defendants herein beyond that of providing the dumpster.

As to the cross-claim sounding in common law indemnification, counsel argues, *inter alia,* that same is unavailable to the Novita defendants as the plaintiffs' theory of liability is predicated upon negligence and not that of strict liability, the latter of which is a necessary basis for the invocation of common law indemnification. Finally, as to the remaining cross-claim sounding in contractual indemnification, counsel for AVF contends that no such agreement providing for indemnification was in existence between the Novita defendants and

AVF and even assuming such an agreement had been executed, inasmuch as plaintiffs' theory of liability against the Novita defendants is grounded in negligence, such an agreement for indemnity in their favor would contravene the statutory provisions as codified in General Obligations Law §5.122.

AVF's motion is opposed by plaintiffs, as well as the Novita defendants. As to the plaintiffs' opposition, counsel argues AVF did not exercise reasonable care in failing to provide a cover for the dumpster and that there exists questions of fact as to whether AVF launched an instrument of harm thereby causing the plaintiff to sustain injury. The Novita defendants oppose the instant application and similarly argue that there are questions of fact as to whether AVF was negligent in failing to provide a cover for the dumpster.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the Court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

Turning initially to the Novita defendants application, the Court finds that they have failed to demonstrate their *prima facie* showing to the relief herein requested as a matter of law (***Sillman v. Twentieth Century Fox, supra***).

In the absence of a particular statute or governing ordinance, an abutting landowner or lessee may not be held liable for a defective or dangerous condition in a public area unless the owner created the alleged dangerous condition or caused it's occurrence due to some special use of the public way (***Lattanzi v. Richmond Bagels, Inc***. 291 A.D.2d 434, 737 N.Y.S.2d 391 [2d Dept., 2002]). A special use "is a use different from the normal intended use of the public way, and thus, 'the special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use'"(***Schreiber v. Goldlein Realty Corp***., 251 A.D.2d 315, 673 N.Y.S.2d 723 (2d Dept., 1998) quoting ***Poirier v. City of New York*** , 85 N.Y.2d 310, 648 N.E.2d 1318, 624 N.Y.S.2d 555 [1995]).

In the instant matter, the Novita defendants have failed to demonstrate the absence of material issues of fact with respect to whether or not they created the condition alleged to

have caused plaintiff's accident (see ***Lattanzi v. Richmond Bagels, Inc., supra***). Mr. Mendolia, who appeared on behalf of Victory, testified the dumpsters utilized during the renovation were located in the municipal parking lot located just behind the restaurant, the "normal intended use" of which is for the public to park their vehicles. Therefore, the Novita defendants were employing the municipal lot for something beyond its intended use and deriving a benefit thereby triggering the application of the special use exception and potentially exposing these defendants to liability (***Schreiber v. Goldlein Realty Corp., supra; Minott v. City of New York,*** 230 A.D.2d 719, 645 N.Y.S.2d 879 [2d Dept., 1996]). Since the Novita defendants failed to meet their burden of proof, the burden does not shift to the plaintiff and it is not necessary to consider whether the plaintiff's papers in opposition to the instant motion were sufficient to raise a triable issue of fact. (***Tavarez v. Jackson***, 41 A.D.3d 833, 837 N.Y.S.2d 581 [2d Dept., 2007]). Thus, the motion interposed by the Novita defendants for an order granting summary judgment dismissing the plaintiff's complaint against them is hereby denied.

Addressing AVF's motion for summary judgment dismissing the plaintiff's complaint, the Court finds that AVF has demonstrated its entitlement to judgment as a matter of law (***Winegrad v. New York University Medical Center***, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). In opposition, neither the plaintiff nor the Novita defendants have provided admissible evidence to raise a material issue of fact (***Alvarez v. Prospect Hospital,*** 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]).

In order for premise liability to attach to a particular defendant, there must be competent evidence, which illustrates that said defendant owned, occupied or controlled the subject premises (***Minott v. City of New York, supra***). The record herein is devoid of any evidence from which it can reasonably be inferred that AVF owned, occupied or controlled either the subject premises where the plaintiff met with his accident or any aspect of the renovation project underway at the site. Therefore AVF cannot be held liable to the plaintiff herein. Rather, the only obligation undertaken by AVF was to deliver to the Novita defendants a series of dumpsters over the course of the renovation project, including that which was present on the day of the plaintiff's accident. However, notwithstanding this business obligation owed to the Novita defendants, there is nothing to indicate that AVF assumed a duty of care by virtue of it's business agreement therewith (***Espinal v. Melville Snow Contractors, Inc.***, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 [2002]).

The existence of contractual obligations between two entities, without more, is legally insufficient for tort liability to be extended for the benefit of unintended third parties. (*Id.*) Three exceptions where such liability would potentially exist occur: [1] where the alleged tortfeasor "launched a force or instrument of harm"; [2] "where the plaintiff detrimentally

relies on the continued performance of the contracting party's duties" or; [3] "where the contracting party has displaced the other party's duty to maintain the premises safely." (***Id.***) In the instant matter, the record herein does not support and neither the plaintiff nor the Novita defendants have provided any competent, probative evidence to demonstrate that any of these recognized exceptions are applicable to the facts as adduced herein.

With respect to those branches of AVF's motion seeking summary judgment dismissing the entirety of the cross claims asserted against it by the Novita defendants, the Court finds that AVF has again demonstrated its entitlement to judgment as a matter of law (***Winegrad v. New York University Medical Center, supra***).

A claim for contribution may be based upon a breach of duty owed either to the plaintiff or to the defendants seeking the contribution, in this case the Novita defendants (***Grossman v. Franklin Hospital Medical Center***, 222 A.D.2d 403, 635 N.Y.S.2d 43 [2d Dept., 1995]). As noted above, AVF cannot be held liable to the plaintiff inasmuch as it did not own, occupy or control the site of the plaintiff's accident. Additionally, defendant AVF has supplied evidence, both documentary and testimonial, in the form of the deposition testimony of Chris Mrwik, as well as copies of the relevant invoices, which indicate that it's obligation herein was limited to delivering the dumpsters. The Court also notes that Mr. Mwrik testified that the only request made to them by the Novita defendants was that the dumpsters provided should be equipped with wood to be placed under the wheels so that the wheels would not scratch the pavement.

In opposition, the Novita defendants have failed to proffer any evidence which indicates that the AVF owed to it a separate duty of care, which extended beyond it's commitment to deliver a series of dumpsters as requested (***Torchio v. New York City Housing Authority***, 40 A.D.3d 970, 836 N.Y.S.2d 674 (2d Dept., 2007); ***Taylor v. Gannett Co., Inc.***, 303 A.D.2d 397, 760 N.Y.S.2d 47 [2d Dept., 2003]).

As to the cross-claim for contractual indemnification, the only documents submitted to the Court that are in any respect probative as to the substance of the agreement between AVF and the Novita defendants are the heretofore referenced invoices annexed to AVF's motion papers. A review thereof reveals that no such indemnification agreement is acknowledged in these documents.

As to the remaining cross-claim for common law indemnification, the party so seeking must demonstrate that they are without fault and the liability to which they may potentially be exposed is that of vicarious liability (***Kagan v. Jacobs***, 260 A.D.2d 442, 687 N.Y.S.2d 732 [2d Dept., 1999]). In the instant matter no such showing has been made and a review of

the relevant pleadings reveals that the plaintiff's complaint is predicated upon negligence and not that of strict or vicarious liability.

Based upon the forgoing, AVF's motion made pursuant to CPLR §3212 that seeks an order granting summary judgment dismissing the plaintiff's complaint, as well as the cross-claims asserted against it by the Novita defendants is hereby granted in all respects.

All applications not specifically addressed herein are hereby Denied.

The foregoing constitutes the Order of this Court.

Dated: December 5, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
DEC 12 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE