Sarisohn v 341 Commack Road, Inc.
2009 NY Slip Op 30507(U)
March 3, 2009
Supreme Court, Suffolk County
Docket Number: 06-8430
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 06-8430
CAL. No. 08-01306-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 10-15-08 (001 & 002)
MOTION DATE 11-20-08 (003)
ADJ. DATE 11-26-08
Mot. Seq. # 001 - MotD
002 - MotD
003 - MG

---X

STEVEN SARISOHN, as parent and natural guardian of KATIE SARISOHN, and STEVEN SARISOHN, individually,

Plaintiff,

- against -

341 COMMACK ROAD, INC., and CVS PHARMACY,

Defendant.

---X

341 COMMACK ROAD, INC.,

Third-Party Plaintiff,

- against -

PLAZA REALTY SERVICES, INC.,

Third-Party Defendant.

---X

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Upon the following papers numbered 1 to 31 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; 5 - 8; 9 - 12; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13 - 21; 22 - 23; Replying Affidavits and supporting papers 24 - 25; 26 - 31; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendant, CVS BDI, Inc., sued herein as CVS Pharmacy, for an order pursuant to CPLR 3212 granting summary judgment in its favor, is determined as hereinafter set forth; and it is further

ORDERED that the motion (002) by defendant, 341 Commack Road, Inc., for an order pursuant to CPLR 3212 granting summary judgment in its favor, is determined as hereinafter set forth; and it is further

ORDERED that the motion (003) by defendant, Plaza Realty Services, Inc., for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing plaintiffs' complaint and the third-party action, is granted.

In this negligence action, plaintiff, Steven Sarisohn, as parent and natural guardian of the infant plaintiff, Katie Sarisohn, and individually, seeks damages for personal injuries allegedly sustained by Katie, on the afternoon of January 15, 2006, in the parking lot outside defendant, CVS BDI, Inc., s/h/a CVS Pharmacy (hereinafter referred to as "CVS"), located at 341 Commack Road in the Town of Commack. The record reveals that defendant/third-party plaintiff, 341 Commack Road, Inc. (hereinafter referred to as "341 Commack"), owns the premises and leases the store building to CVS. In addition, 341 Commack contracted with third-party defendant, Plaza Realty Services, Inc. (hereinafter referred to as "Plaza"), to perform snow removal and landscaping services. Plaintiff alleges that Katie slipped and fell after exiting the store, causing injury to her left ankle. Three motions for summary judgment are as follows: CVS moves for summary judgment in its favor dismissing the action and all cross claims and for summary judgment in its favor on its cross claim as against 341 Commack for contractual indemnification; 341 Commack moves for summary judgment in its favor dismissing the action and all cross claims and for summary judgment in its favor in the third-party action for indemnification; and Plaza moves for summary judgment in its favor dismissing the plaintiff's action and the third-party action.

In support of their motions, 341 Commack and CVS submit, among other things, the pleadings, bill of particulars, a copy of the ground lease agreement between non-parties John Brandesma and Brian Madden, a copy of the sublease agreement between 341 Commack and CVS, copies of the invoices from Plaza to 341 Commack dated January 15 and 16, 2006, and copies of the examination before trial transcripts of Katie Sarisohn, Francis Joseph McCarthy, George G. Ciurleo, Christopher Bryant and Michael Sozio. In the bill of particulars, plaintiff alleges that 341 Commack was negligent, careless and reckless in plowing and/or allowing the plowing of the snow and ice of the travel area of the parking lot and into the parking spaces which they knew or should have known customers would use. Plaintiff also alleges that defendant had actual and constructive notice of the dangerous condition which was a patch of ice and hardened snow which existed for an unreasonable time before being remedied. Plaintiff further alleges that CVS had actual and constructive notice of the slippery condition. In addition, plaintiff alleges that CVS was negligent in carelessly and negligently maintaining, supervising, managing and controlling the premises, and in failing to keep the area safe.

The ground lease, dated December 8, 1997, reveals that John Brandesma leased the land to Brian Madden, President of 341 Commack Road, Inc. The ground lease provided that the lessee would maintain the sidewalks and areas adjoining the sidewalks in a clean and orderly condition, free of dirt, rubbish, snow, ice and unlawful obstructions. The sublease agreement between 341 Commack and CVS, dated

December 22, 1997, made pursuant to the above stated ground lease, provided in paragraph 9 that the landlord would maintain and repair all structural and external portions of the building, as well as maintain all parking and exterior areas to include snow and ice removal. The sublease further provided that the tenant would maintain all interior portions of the building. In addition, in paragraph 47, the sublease provided for indemnification of the tenant by the landlord for the landlord's failure to perform or comply with any of the covenants or agreements contained in the sublease. In case of any action or proceeding is brought against the tenant by reason of any such claim, the landlord, upon written notice from the tenant, shall, at landlord's expense, resist or defend such action or proceeding.

Katie Sarisohn testified that she was at the CVS store on the afternoon of January 15, 2006. She was stepping over a mound of snow and ice from the sidewalk to the parking lot and fell. She stated that it had snowed earlier that day and that the parking lot appeared to be plowed. She also stated that the portion of the sidewalk closest to the building which was situated beneath an overhang was clear. Her father filed a report with CVS the next day and also took pictures of the area.

Mr. McCarthy testified that he is the president of 341 Commack and owns the lot upon which a major portion of the CVS store was constructed and leases from John Brandesma an adjoining lot upon which a portion of the CVS store, sidewalk and parking lot are situated. Although Brian Madden originally executed the lease with Mr. Brandesma, Mr. McCarthy stated that he bought out Mr. Madden's interest and developed the property. Prior to constructing the CVS store, 341 Commack entered into a lease agreement with CVS in December, 1997. The building was completed some time in 2000. Subsequently, Mr. McCarthy entered into an oral agreement with Plaza to remove snow and ice in the winter and to maintain the landscaping around the premises. He stated that Plaza had full discretion regarding when to plow the snow, to apply sand and salt and to shovel the sidewalks. He stated that he also orally contracted with Plaza to perform site maintenance which included picking up litter, cleaning the parking lot, and all the landscape maintenance. He visits the property four or five times per year to check the property, however, it is not his regular practice to inspect the snow removal performed by Plaza during the winter months.

Mr. George Ciurleo testified that he is president of Plaza Realty Services, a property management service. He had a verbal agreement with 341 Commack which provided that Plaza would perform litter removal twice per week and landscaping maintenance. In addition, Plaza would plow the parking lots and shovel snow and ice from the sidewalks which faced Commack Road and Wicks Road, as well as apply sand and salt to the parking lot and calcium chloride to the sidewalk. He stated that he received no complaints regarding his snow removal efforts. He had no formal policy to inspect the work after it was completed. He verified that his company performed snow removal at the premises sometime before noon on January 15, 2006, however, the sidewalks were not cleared until the next morning, which he conceded was an oversight.

Christopher Bryant testified that he was employed at CVS as a store manager in Commack for approximately one year. He stated that he transferred to another store in January, 2006 and could not recall if he was working on the date of the accident. Prior to his transfer, however, he was training an assistant manager, Mike Sozio, to become the manager. In general, he stated that there was no policy for employees to shovel the walkways outside the store, and that he was told by his district manager that the landlord was responsible for snow removal. He heard no complaints from the customers

regarding snow or ice outside the store. He was unaware of plaintiff's accident. Although there was a shovel in the receiving area, it was used only at the receiving entrance if the area became icy and slippery. He did remember one occasion at the Commack CVS when the parking lot was covered with heavy snowfall and he called the CVS Fixx Line, which took care of repairs and maintenance. He was told by the Fixx Line operator that the landlord would be contacted. He did not notice when the snow was cleared that day and did not inspect the area. He has never personally contacted the landlord regarding snow removal. He further stated that he had never heard of Plaza Realty and had never contacted them.

The invoices reveal that Plaza performed snow plowing services on January 15, 2006, and also performed snow shoveling services of the sidewalks on January 16, 2006. Mr. Sozio testified that he was the store manager of the subject CVS store in January, 2006. He received training to become a manager from Christopher Bryant for approximately two weeks beginning in January, 2006. Although he knew that CVS leased the premises, he was unaware of the terms contained in the lease regarding snow removal. He also did not recall whether he was working on the date of the accident. However, he did recall speaking with plaintiff the next day and calling in a telephone report of the incident to the risk management department for CVS. He was not aware of a time that CVS notified the landlord about snow on the sidewalks and he personally did not notify the landlord. He was not trained to call the Fixx Line for maintenance problems. The Court finds that 341 Commack has demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it had no notice of the snow on the sidewalk and that it delegated all responsibility for outdoor maintenance to Plaza. By the same token, CVS has also demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it was not contractually responsible for clearing snow or ice from the sidewalks or the parking lots and that there was no requirement in the lease to call the landlord regarding snow in the parking lot or on the sidewalks.

In opposition, plaintiff submits, among other things, an affidavit of Thomas E. Downs, V, and the personal affidavit of Katie Sarisohn. Mr. Downs avers that he is a forensic meteorologist and that it is his opinion that there was heavy snowfall on the morning of January 15, 2006 with freezing temperatures and low visibility. He opined that the approximate time accumulating snow ended was at 9:22 a.m. He further concluded that there was an accumulation of two to three inches of snow and ice on undisturbed ground surfaces. By 11:02, no additional precipitation was detected by the radar to the west of Commack. He opined that at the time of the incident, at approximately 4:30 p.m. on January 15, 2006, the skies were mostly sunny, the temperature was 24 degrees and the winds were out of the northwest around 15 miles per hour gusting to 30 miles per hour.

Katie Sarisohn avers that she was injured while exiting the CVS store at approximately 4:15 to 4:30 p.m. on January 15, 2006. She states that the accident occurred because there was snow and ice covering the sidewalk outside the store, which caused her to slip and fall, sustaining an injury to her ankle. The accident occurred as she attempted to walk from the sidewalk toward the parking lot where her mother was waiting in the family car. She slipped on a portion of the sidewalk to the right of a white pillar and slid across the remainder of the sidewalk down into the parking lot.

The threshold question in any negligence action is whether defendant owed plaintiff a duty of care. Ordinarily a breach of a contractual obligation will not be sufficient in and of itself to impose a

duty owed to third parties, which would result in tort liability (***Church v Callanan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]). Only three sets of circumstances create exceptions to this general rule. First, tort liability may ensue if the promissory to the contract, through his affirmative actions, creates or exacerbates a dangerous condition. Second, if a plaintiff reasonably relies upon defendant's continuing performance of a contractual obligation to her detriment, tort liability might be imposed. Third, liability could be imposed if a comprehensive maintenance contract is such that the contracting party entirely assumes the duty of another to maintain the premises safely (*id.*, 99 NY2d 104, 752 NYS2d 254; ***Espinal v Melville Snow Contrs., Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]). In order to prove a prima facie case of negligence in a slip and fall action, plaintiff is required to show either that defendant created the condition which caused the accident, or that defendant had actual or constructive notice of the condition (*see*, ***Goldman v Waldbaum, Inc.***, 248 AD2d 436, 669 NYS2d 669 [2d Dept 1998], *lv den* 92 NY2d 805). On a motion for summary judgment to dismiss a complaint based on a lack of notice, defendant is required to make a prima facie showing of an absence of notice of the condition as a matter of law (*see*, ***Colt v Great Atl. & Pac. Tea Co.***, 209 AD2d 294, 618 NYS2d 721 [1st Dept 1994]).

Here, the Court finds 341 Commack did not owe plaintiff a duty of care inasmuch as it had no notice and had delegated its contractual duty to Plaza, a property maintenance company, to perform landscape maintenance and snow removal services to the outside areas. Likewise, CVS has offered clear proof that it had no contractual duty to maintain the sidewalk in front of the store where plaintiff, Katie Sarisohn, concedes she fell. In addition, the evidence sufficed to show, prima facie, that neither defendant attempted to remove ice from the area of the sidewalk where plaintiff fell, and therefore cannot be held liable for negligence (***Bisontt v Rockaway One Co., LLC***, 47 AD3d 862, 850 NYS2d 621 [2d Dept 2008]). Thus, defendants have demonstrated their prima facie entitlement to judgment as a matter of law.

In opposition, plaintiffs failed to raise an issue of fact. Further, plaintiffs conceded that CVS had no duty to clear the sidewalk where Katie fell. Plaintiffs also concede that the time, method and manner of performing snow and ice removal was left entirely to the discretion of Plaza, thereby absolving 341 Commack of liability. Accordingly, the motions by 341 Commack and CVS for an order granting summary judgment in their favors dismissing plaintiffs' complaint are granted. The Court finds that 341 Commack is not entitled to indemnification from CVS as a matter of law, therefore, that branch of its motion is denied and the motion by CVS dismissing the cross claim by 341 Commack is granted. However, CVS has failed to establish its prima facie entitlement to summary judgment in its favor for indemnification from 341 Commack pursuant to the terms of the sublease, therefore, those branches of the motions by CVS requesting partial summary judgment in its favor on the cross claim and by 341 Commack requesting partial summary judgment dismissing the cross claim by CVS are denied.

Turning to the motion by Plaza for summary judgment dismissing the third-party action for common law indemnification, which is described as: '[The] rule of law under which a person guilty of negligence is charged with the responsibility for his wrongful act, not only directly to the person injured, but indirectly to a person who is legally liable therefor' (***Dunn v Uvalde Asphalt Paving Co.***, 175 NY 214, 217, 1903 NY LEXIS 970 [1903]). Here, however, inasmuch as 341 Commack has established that it was not negligent and was also not vicariously liable for any alleged negligence by

Plaza. 341 Commack is not entitled to common law indemnification from Plaza. Accordingly, the motion by Plaza for an order granting summary judgment in its favor dismissing the third-party action is granted.

In summary, CVS's motion for summary judgment in its favor dismissing the plaintiffs' complaint and summary judgment on its cross claim for contractual indemnification over and against 341 Commack, is granted to the extent that the plaintiffs' complaint is dismissed, and is otherwise denied; 341 Commack's motion for summary judgment dismissing the plaintiffs' complaint, summary judgment on its cross claim for contractual indemnification over and against CVS, and summary judgment on its third-party complaint seeking common-law indemnification over and against Plaza, is granted to the extent that the plaintiffs' complaint is dismissed, and is otherwise denied; and Plaza's motion for summary judgment in its favors dismissing the third-party complaint is granted.

The plaintiffs' complaint, the third-party complaint, and 341 Commack's cross claim for contractual indemnification over and against CVS, dismissed herein, are severed and CVS's cross claim for contractual indemnification over and against 341 Commack shall continue.

Dated: 2/3/09

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**