

Pawelko v Ellis

2009 NY Slip Op 32366(U)

October 9, 2009

Supreme Court, Suffolk County

Docket Number: 06-5447

Judge: Denise F. Molia

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SHORT FORM ORDER

INDEX No. 06-5447
CAL. No. 08-02441-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 3-13-09 (#001)
MOTION DATE 4-14-09 (#002)
MOTION DATE 4-9-09 (#003)
MOTION DATE 4-24-09 (#004)
MOTION DATE 5-5-09 (#005)
ADJ. DATE 7-10-09
Mot. Seq. # 001 - MD # 002 - MG
003 - MD # 004 - MG
005 - MG

-----X
PATRICIA PAWELKO :
Plaintiff, :
- against - :

KEEGAN & KEEGAN, ROSS & ROSNER, LLP
Attorneys for Plaintiff
147 North Ocean Avenue, P.O. Box 918
Patchogue, New York 11772

CB RICHARD ELLIS, VETERANS MEMORIAL :
LLC, RBR SNOW CONTRACTORS and BUILDING :
PERFECTION, INC., :
Defendants. :

MORENUS, CONWAY, GOREN & BRANDMAN
Attorneys for CB Richard Ellis
58 South Service Road, Suite 350
Melville, New York 11747

-----X
CB RICHARD ELLIS, :
Third-Party Plaintiff, :
- against - :

ANDREA G. SAWYERS, ESQ.
Attorneys for Veterans Memorial, LLC
3 Huntington Quadrangle, Suite 102S, P.O. Box 9028
Melville, New York 11747

RBR SNOW CONTRACTORS, :
Third-Party Defendant. :

AHMUTY, DEMERS & McMANUS
Attorneys for RBR Snow Contractors
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Albertson, New York 11507

-----X
RBR SNOW CONTRACTORS, :
Second Third-Party Plaintiff, :
- against - :

TONETTI & AMBROSINO
Attorneys for Building Perfection
548 West Jericho Turnpike
Smithtown, New York 11787

BUILDING PERFECTION, INC., :
Second Third-Party Defendant. :

-----X
CB RICHARD ELLIS, :
Second Third-Party Plaintiff, :
- against - :

CHRISTINE MALAFI, ESQ., Suffolk County Attorney
By: Susan A. Flynn, Esq.
Attorneys for County of Suffolk
H. Lee Dennison Building
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Hauppauge, New York 11788-0099

COUNTY OF SUFFOLK, :
Second Third-Party Defendant. :
-----X

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Upon the following papers numbered 1 to 1 - 157 read on these motions for summary judgment; Notice of Motion/ Order to Shew Cause and supporting papers 1 - 14; 23 - 63; 70 - 104; 114 - 127; 130 - 144; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15 - 18; 64 - 67; 105 -106; 128 -129; 145 - 150; Replying Affidavits and supporting papers 19 - 22; 68 - 69; 107 - 113; 151 - 157; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions by defendants CB Richard Ellis, RBR Snow Contractors, Inc., Veterans Memorial, LLC, and Building Perfection, Inc. and the motion by third-party defendant County of Suffolk are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant CB Richard Ellis is denied; and it is further

ORDERED that the motion by defendant RBR Snow Contractors, Inc. is granted; and it is further

ORDERED that the motion by defendant Veterans Memorial, LLC is denied; and it is further

ORDERED that the motion by defendant Building Perfection, Inc. is granted; and it is further

ORDERED that the motion by second third-party defendant County of Suffolk is granted.

Before the court are five separate motions consolidated herein for determination. The first motion, brought by defendant CB Richard Ellis ("Ellis"), seeks a court order striking the answer of second third-party defendant County of Suffolk ("Suffolk") for failure to produce a witness for deposition or striking the case from the trial calendar and directing Suffolk to produce the requested witness. It further asks that the court extend the time for it to move for summary judgment until 120 days after completion of all additional discovery. Ellis provides, among other things, the pleadings and an affirmation by counsel. Suffolk has submitted an affirmation in opposition and requests sanctions. Ellis has replied. The second motion, brought by defendant RBR Snow Contractors, Inc. ("RBR"), seeks an order dismissing the underlying complaint and any cross claims or third-party actions asserted against it and provides, among other things, copies of the pleadings; various pretrial deposition testimony including that given by plaintiff Patricia Pawelko's ("plaintiff"), by Patrick Feehan ("Feehan") on behalf of RBR, by Maureen Ruisi ("Ruisi") on behalf of Ellis, by Kyle Fulk ("Fulk") on behalf of Veterans Memorial LLC ("Veterans"), by Brian Brooks ("Brooks") on behalf of Building Perfection Inc. ("Building Perfection"), and by Paul Morano ("Morano") on behalf of Suffolk; a "Service Contract" executed by Ellis and RBR; a "Property Questionnaire"; an agreement dated December 4, 2003; and various invoices. Plaintiff has submitted an affirmation in opposition and RBR has replied. The third motion, brought by Veterans, seeks an order dismissing plaintiff's complaint and any cross claims asserted against it and submits, among other things, the pleadings; pretrial depositions; a lease dated May 29, 2001 between Ronkonkoma Realty Venture I, LP and Suffolk; a CBRE "Service Contract"; and a "Management Agreement" dated September 1, 2003. Ellis has submitted an affirmation in opposition and Veterans has replied. The fourth motion, brought by Building Perfection, seeks an order dismissing plaintiff's complaint and any cross claims asserted against it and submits among other things, the pleadings; excerpts from pretrial depositions; an affidavit by Feehan, and an agreement dated December

4, 2003. Plaintiff has submitted an affirmation in opposition. The final motion, by Suffolk, asks that the action against it, as an impleaded second third-party defendant, be dismissed and submits among other things, the pleadings, a copy of a lease between Ronkonkoma Realty Venture, I, LP (“Ronkonkoma”) and Suffolk dated May 29, 2001; plaintiff’s deposition testimony and an affidavit by an investigator from the County Attorney’s office. Ellis has submitted an affirmation in opposition and Suffolk has replied.

According to plaintiff’s pretrial deposition, on January 26, 2004, while employed by the Suffolk County Department of Social Work, she fell in an unpaved parking area located adjacent to her place of employment located at 3455 Veterans Highway, Ronkonkoma, New York. Plaintiff testified that on that day she was late for work and, at about 8:48 a.m., she parked her car in an unmarked spot approximately 150 feet from one of the building entrances. She testified that the dirt surface of the lot where she parked was covered with snow over ice. Plaintiff also testified that she did not know how long the ice had been present, but that it was “absolutely” more than a day and that “[i]t was there the proceeding [sic] week.” Plaintiff stated that she received an email granting permission to park in the area, and that she “commented” to a “coworker” whom she could not recall about the ice. She further testified that while carrying objects in her hands and after traversing the approximately twenty feet from her car toward her office building, her foot “slipped” and she fell. Eventually plaintiff was transported from the scene to Brookhaven Hospital in Patchogue, where she was treated. Plaintiff testified that, as a result of the accident, she suffered injuries and received prescriptions for pain medication and physical therapy for her right knee and shoulder.

By its motion, Ellis, the property manager for the building which was the site of plaintiff’s alleged accident, asks that the answer by Suffolk be stricken for failure to produce a witness with knowledge of the facts surrounding the underlying complaint or striking the matter from the court’s calendar and directing the production of such witness. Suffolk leased a portion of the building which housed the offices for the Department of Social Services. A witness appeared for deposition on behalf of Suffolk, who was unable to provide information with respect to its lease agreement for the property particularly with respect to indemnification. It is also claimed that Suffolk failed to produce for deposition James Farrell, the Assistant Division Administrator of Family and Children’s Services, who allegedly issued emails to county employees concerning parking in the unpaved portion of the parking lot. Suffolk counters that Ellis has failed to demonstrate, in any fashion, its “willful failure to produce a witness with knowledge of the facts and circumstances concerning” the incident.

Ellis has not made the requisite showing that Suffolk willfully and contumaciously failed to comply with its discovery demands entitling it to the drastic remedy of striking a pleading (CPLR 3126[3]; see *Novikov v Maimonides Medical Center*, 50 AD3d 987 [2008]). Further, with respect to Ellis’s request for further depositions, a note of issue and a certificate of readiness in connection with the underlying complaint were filed with the court on December 8, 2008. The deposition of the county’s witness took place in November 2008. Ellis does not dispute the assertion by Suffolk that the certification for trial was opposed by the county. Nor does Ellis deny that it failed to move to reargue the order directing certification or to vacate the note of issue (22 NYCRR § 202.21). Such motions must be made “[w]ithin 20 days after service of a note of issue . . .” (22 NYCRR § 202.21[e]). The fact that Ellis seeks the relief requested as to a co-defendant does not bar the application of the rule (see *Levy v*

Wexler, 16 AD2d 688 [1962]). Further, review of the emails submitted in support of the motion reveals that only one, dated February 4, 2004, nine days after plaintiff's fall, mentions ice on the parking lot. The motion by Ellis, therefore, is without basis. However, the request for sanctions by Suffolk is denied inasmuch as it has failed to demonstrate that the conduct by Ellis constitutes frivolous conduct as that term is defined in 22 NYCRR Part 130-1.1.

By its motion, RBR, the snow removal service with which property manager Ellis contracted, seeks dismissal of plaintiff's underlying complaint and all cross claims and third-party actions asserted against it. RBR was named as a third-party defendant in an action brought by Ellis. RBR claims, among other things, that Ellis was responsible for maintaining the property where the accident allegedly occurred. RBR notes that, according to her testimony, plaintiff parked in an unpaved area of the premises, an area RBR claims it was not obligated to plow, pursuant to the terms of its snow removal contract with Ellis. RBR also claims that it did not perform the actual snow plowing, but subcontracted the work out to Building Perfection. It contends that the parking lot was plowed on January 21, five days prior to plaintiff's fall, and that it was not requested by Ellis to return. RBR points to its contract with Ellis, which requires the latter to inspect the snow removal work and contends that it was not requested to conduct further snow removal after January 21. RBR argues that the facts support its contention that it did not owe plaintiff a duty of care and that the indemnification claim asserted against it by Ellis, therefore, must fail.

Summary judgment is, of course, a drastic remedy which should be granted only when no material facts are sufficiently disputed to warrant a trial (*see Herrin v Airborne Freight Corp.*, 301 AD2d 500 [2003]). The movant in such motion bears the initial burden of establishing its right to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The court, in making such determination, must view the evidence "in a light most favorable to the party opposing the motion, giving [it] every favorable inference" (*Cortale v Educational Testing Serv.*, 251 AD2d 528 [1998])

RBR, as the contractor hired by the building owner to provide snow removal services to the subject premises, had no duty to plaintiff inasmuch as it did not engage in affirmative conduct which made the area where she fell less safe than before the snow removal began (*see Church v Calanan Indus.*, 99 NY2d 104, 112 [2002]). Further, any contractual obligation which may have existed, even if breached, will only give rise to a duty to a noncontracting third party when: (1) the contracting party, in failing to exercise reasonable care in the performance of its duties "launches a force or instrument of harm"; (2) the plaintiff detrimentally relies upon the continued performance of the contracting party's duties; and (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

Plaintiff, by her opposition to RBR's motion simply ". . . incorporates by reference herein the arguments set forth by [Ellis's counsel] . . ." and contends that the unpaved area which was the site of her fall "was covered with a thick layer of ice." She does not otherwise refute the arguments proffered by RBR. RBR's motion insofar as it seeks dismissal of plaintiff's complaint against it and all cross claims asserted against it, therefore, is granted.

Veterans, by its motion, seeks summary judgment as to claims asserted by plaintiff and all cross claims asserted against it. Essentially Veterans claims that it owned only the physical building at 3455 Veterans Memorial Highway and that the land upon which it stands was owned by defendant Ronkonkoma, thus any claims asserted against it must fail. Alternatively, Veterans argues that Ellis contracted to manage the entire premises pursuant to a written agreement and that no liability can attach to Veterans for injuries sustained after it had divested itself of possession and control. In support, Veterans points to both the pretrial deposition testimony of the various witnesses and the documentary evidence including various contracts. Specifically, it alleges that plaintiff testified that she fell on an unpaved area approximately 150 feet from the building entrance; that Fulk, on behalf of Veterans, testified that he worked for Pitcairn Properties (“Pitcairn”), the managing agent for Veterans and that his testimony revealed that Veterans owns the building located at the site but not the land and that he believed that the land was owned by Ronkonkoma; that Ruisi testified, on behalf of Ellis, that it was the property manager for the property and that it hired RBR to do snow removal and that she had never heard of Veterans; that Morano testified on behalf of Suffolk and that he had not dealt with Veterans; that Feehan testified on behalf of RBR and that he was not familiar with Veterans; and that Brooks testified on behalf of Building Perfection, with which RBR subcontracted for snow removal, and that he did not know who owned or managed the property. Veterans also notes that the lease between Ronkonkoma and Suffolk is signed by Ronkonkoma, as landlord and Suffolk as tenant, and that Veterans is not a party to the lease. Similarly, the snow removal contract between RBR and Ellis is provided, in part, because of its terms which define “owner” as Ronkonkoma and which does not include Veterans as a party. In addition, a management agreement between Ellis and Pitcairn lists Pitcairn as owner and Ellis as manager. Veterans is not a party to the agreement. In short, Veterans contends that there is no evidence to establish that it owned the property where plaintiff is alleged to have fallen.

Ellis counters that Veterans has failed to meet its burden, as movant, of establishing through the submission of evidence, in admissible form, that it was not an owner of the property at the time of plaintiff’s accident. Specifically, it notes that Veterans did not submit a deed for the property. Ellis also alleges that the submissions reveal that Pitcairn was retained by Veterans to manage the property. It claims that Fulk’s testimony was somewhat equivocal with respect to the ownership of the property where plaintiff fell. In fact, review of same reveals that when asked if Veterans owned the property, Fulk replied, “I don’t believe so,” and that he was “not sure” who did. Further, when shown the lease which Veterans claims supports its position, Fulk indicated that he had never seen it prior to his deposition. In fact, upon review of the document at the deposition, he testified that he was unsure as to whether Ronkonkoma owned the property. In addition, Ellis notes that the lease upon which Veterans in part relies describes the premises as “the Suffolk County Social Services Bldg, located at the corner of Alexander Boulevard, Ocean Avenue and Veterans Highway, Ronkonkoma, New York, consisting of the land, buildings, and other improvements on each of the properties.”

Ellis also notes that the manager’s agreement contains a hold harmless clause requiring the owner to “indemnify, defend and save [Ellis] from all loss, damage, cost, expense (including attorney’s fees), or claims arising out of: (1) any person injury or property damage incurred in, on, or about the Premises . . .” Based upon the foregoing, a question of fact exists as to the ownership of the property. The motion by Veterans, therefore, is denied.

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Building Perfection, by its motion, asks that plaintiff's complaint and that all cross claims asserted against it be dismissed. It notes that it subcontracted with RBR to perform snow removal services at the premises and claims that RBR has not asserted a breach of contract claim against Building Perfection. Plaintiff counters that the contract is "irrelevant" and that the parking lot "had evidence of prior plowing, to wit, snow mounds/piles." The court has determined *infra* that RBR had no legal duty as to plaintiff; the same analysis holds true for the entity retained by RBR to perform snow removal services despite plaintiff's conclusory statements to the contrary (*see Mitchell v Fiorini Landscape, Inc.*, 284 AD2d 313 [2001]). The motion by Building Perfection, therefore, is granted.

The final motion, by Suffolk, seeks dismissal of plaintiff's complaint and cross claims asserted against it. Suffolk argument is threefold: that it did not own or maintain the parking lot where the accident occurred; that there has been no pleading or proof that it had prior written notice of the conditions which are alleged to have caused plaintiff's fall; and that plaintiff's claim is barred by the applicable terms of the Worker's Compensation Law.

Suffolk has supplied a copy of its lease which describes the area that it occupies as "space in the building." Although plaintiff notes that the landlord provided parking spaces for Suffolk, the agreement does not allude, in any fashion, to an obligation on the part of the county to maintain those spaces. Plaintiff also argues, without legal support, that the long-standing requirement of requiring that Suffolk receive prior written notice of a defective or dangerous condition at a county facility does not apply to parking lots (County Charter of the County of Suffolk, Article 8, § 2). In fact, as noted by Suffolk, the contrary is true (*see Demant v Town of Oyster Bay*, 23 AD3d 333 [2005]). Finally, plaintiff does not respond, in any fashion, to Suffolk's position that it is liable only for grave injuries pursuant to Worker's Compensation Law § 11. Suffolk's motion for summary judgment, therefore, is granted.

Dated: 12-1-09

DENISE F. MOLIA

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION