Verschleiser v American Water Enters., Inc.
2009 NY Slip Op 33371(U)
September 10, 2009
Supreme Court, New York County
Docket Number: 110709/2006
Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey PART 29
Justice

ELI VERSCHLEISER and JULIE VERSCHLEISER,

Plaintiffs,

-v-

AMERICAN WATER ENTERPRISES, INC., LONG ISLAND WATER CORPORATION, EQK GREEN ACRES, L.P., EQKGA, INC., GREEN ACRES MALL LLC, VORNADO REALTY L.P., VORNADO REALTY TRUST, NORTH SHORE UNIVERSITY HOSPITAL, JEFFREY RICHMOND, M.D., ORTHOPAEDIC ASSOCIATES OF MANHASSET, P.C., MEADOWLAND CONTRACTING INC., SECURITAS SECURITY SYSTEMS USA, INC., and PENINSULA HOSPITAL CENTER,

Defendants.

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Motion Sequence No.: 4 - 7

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DECISION & ORDER

The following papers, 1 - 101, were read on this motion by defendant Securitas Security Systems USA, Inc. for summary judgment dismissing the complaint, as well as any cross claims, as asserted against it; separate motion by defendants EQK Green Acres L.P., EQKGA, Inc., Green Acres Mall, LLC, Vornado Realty L.P. and Vornado Realty Trust for summary judgment dismissing the complaint, as well as any cross claims, as asserted against them; separate motion by defendants American Water Enterprises, Inc. and Long Island Water Corporation d/b/a Long Island American Water for summary judgment dismissing the complaint, as well as any cross claims, as asserted against them; and separate motion by defendant Meadowland Contracting Inc. for summary judgment dismissing the complaint, as well as any cross claims, as asserted against it.

Motion Sequence No. 4 (Securitas Security Systems USA, Inc.)

	Papers Numbered
Notice of Motion - Affidavits - Exhibits - Memo of Law	1 - 23
Affirmation in Partial Opposition by Co-Defendant Affidavits - Exhibits	24 - 26
Replying Affirmation - Exhibits	27 - 29

Motion Sequence No. 5 (EQK Green Acres L.P., EQKGA, Inc., Green Acres Mall, LLC, Vornado Realty L.P. and Vornado Realty Trust)

	Papers Numbered
Notice of Motion - Affidavits - Exhibits - Memo of Law	30 - 43
Affirmation in Opposition - Affidavits - Exhibits	44 - 53
Replying Affirmation -	54

Motion Sequence No. 6 (American Water Enterprises, Inc. and Long Island Water Corporation d/b/a Long Island American Water)

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	55 - 74
Affirmation in Opposition - Affidavits - Exhibits	75 - 83
Affirmation in Partial Opposition by Co-Defendant - Affidavits - Exhibits	(24 - 26)
Replying Affirmation -	84

Motion Sequence No. 7 (Meadowland Contracting Inc.)

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	85 - 93
Affirmation in Opposition - Affidavits - Exhibits	94 - 101

Cross-Motion: ☐ Yes ☒ No

Injured plaintiff, Eli Verschleiser, and his wife, Julie Verschleiser, commenced the instant action to recover damages sustained as a result of injured plaintiff's trip and fall accident on February 20, 2006. Injured plaintiff alleges that he tripped and fell on an uncovered water valve box in the parking lot of Green Acres Mall s/h/a as EQK Green Acres L.P., EQKGA, Inc., Green Acres Mall, LLC, Vornado Realty L.P. and Vornado Realty Trust (hereinafter collectively referred to as "Green Acres").[1] Injured plaintiff described the uncovered water valve box that caused the fall as a blue painted circular hole with a rusted pipe inside. American Water Enterprises, Inc. s/h/a American Water Enterprises, Inc. and Long Island Water Corporation (hereinafter "American Water") owned the water mains and pipes that run under and service Green Acres, and were responsible for the maintenance of same, as well as the water valve box that allegedly caused injured plaintiff's accident. Securitas Security Systems USA, Inc. (hereinafter "Securitas") provided security for Green Acres, and, pursuant to its own operations manual, acted as the "eyes and ears for mall management." Securitas was obligated to perform scheduled tours of the Green Acres property, including all common areas, such as the parking lot, and report hazardous conditions to mall management. Snow removal of the Green Acres parking lot was performed by Meadowland Contracting Inc. (hereinafter "Meadowland") for the winter season of 2005-2006. Meadowland, using heavy machinery, removed snow from the

[1] Subsequent to the filing of the instant motion, plaintiffs discontinued this action as against EQK Green Acres L.P., EQKGA, Inc., Vornado Realty L.P. and Vornado Realty Trust. As such, these entities are no longer defendants in this action.

Green Acre parking lot approximately five (5) times in the thirty (30) day period prior to the subject accident.

Discovery has been completed, a note of issue/ certificate of readiness has been filed and this case is now ready to proceed to trial. Defendants Securitas, Green Acres, American Water, and Meadowland presently move, respectively, for summary judgment dismissing the complaint, as well as any cross claims, as asserted against them. It is noted that following his fall, injured plaintiff developed compartment syndrome. Plaintiffs allege that defendants North Shore University Hospital, Jeffrey Richmond, M.D., as well as Dr. Richmond's practice, Orthopaedic Associates of Manhasset, P.C., failed to timely diagnose injured plaintiff's compartment syndrome, resulting in necrosis in his left forearm, which caused excruciating pain and left him without any use of his left arm. None of the aforementioned medical malpractice defendants have moved for summary judgment. Therefore, issues relating to the alleged medical malpractice of these defendants are not relevant to the instant motion.

"[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]. Initially, "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]. A failure by the movant in demonstrating, *prima facie*, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. See Alvarez v. Prospect, supra; Winegrad v. New York Univ. Med. Center, supra. Where a *prima facie* showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, supra; Zuckerman v. City of New York, supra.

"It is a well-established principle of law that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk." Smith v. Costco Wholesale Corp., 50 Ad3d 499 [1st Dept. 2008], citing Basso v. Miller, 40 NY2d 233 [1976]; see also Alexander v. New York City Transit, 34 Ad3d 312 [1st Dept. 2007]. In order to establish a *prima facie* case involving a defective or dangerous condition present on property, a plaintiff must demonstrate that the defendant created the defective condition, or had actual or constructive notice of this condition and failed to correct it. See Smith v. Costco Wholesale Corp., supra; Alexander v. New York City Transit, supra.

Defendant Green Acres moves for summary judgment arguing that despite plaintiffs' allegations that it was negligent, *inter alia*, in maintaining its parking lot by permitting the subject defect, *i.e.*, the uncovered water valve box, to exist on its premises, it did not create such condition or have notice, actual or constructive, of the condition, and, thus, it cannot be liable for plaintiffs' injuries. Green Acres contends that not only is there no evidence suggesting that it created the defective condition at issue, there is nothing to suggest that it had actual notice of the existence of this defective condition. According to Green Acres, the evidence

establishes that none of its own employees, the employees of co-defendants Securitas, American Water, or Meadowland, or anybody else observed the uncovered water valve box prior to injured plaintiff's accident. Green Acres further contends that since there is no indication that it created the defective condition, or an indication that it had actual notice of such defect, the plaintiffs must prove that the defendant had constructive notice of the defect. According to Green Acres, no evidence exists to create a triable issue as to whether it had constructive notice of the existence of the defective condition herein. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; see also Gutierrez v. New York City Transit Authority, 59 AD3d 260 [1st Dept. 2009]; George v. New York City Transit Authority, 41 AD3d 143 [1st Dept. 2007].

In opposition to Green Acres motion, plaintiffs sufficiently establish the existence of material issues of fact with respect to whether the defective condition was in existence for a long enough period of time so that Green Acres would have constructive notice of such defect. In addition to submitting evidence calling into question the sufficiency of Green Acre's parking lot inspections, plaintiffs have submitted the affidavit of an expert engineer that opines that the defective condition at issue was not suddenly created. Plaintiffs' expert sets forth that the evidence, which included photographs of the defect taken the day following injured plaintiff's fall, reveals erosion of the portion of asphalt adjacent to the defect. According to the expert, the appearance of such erosion in this area indicates that the cover had been missing from the water valve box, which resulted in a defective condition in the mall parking lot, for a lengthy period of time. Moreover, plaintiffs' expert points out that the water valve box was filled with dirt, silt and debris, which also establishes that a long period of time had elapsed since the cover had been removed. Based upon the affidavit of plaintiffs' expert, as well as photographs of the alleged defect, the Court finds that issues of fact exist as to whether Green Acres had constructive notice of such condition, and whether they should have effectuated a repair of this defect prior to the subject accident. See George v. New York City Transit Authority, supra; Alexander v. New York City Transit, supra. Accordingly, Green Acres motion is denied.

American Water similarly moves for summary judgment, arguing that they may not be liable to plaintiffs because there is no evidence suggesting that it created the defective condition at issue, nor is there any evidence indicating that it had actual notice of the existence of this defective condition. American Water further argues that there is no evidence that it had constructive notice of the defective condition, as there is nothing to suggest that the defect existed for a sufficient length of time prior to the accident to permit its employees to discover and remedy it. Despite American Water's contention to the contrary, plaintiffs, in opposing American Water's motion, has demonstrated the existence of a triable issue of fact with respect to whether American Water had actual notice of the existence of the defective condition of the subject water valve box.

According to the deposition testimony of injured plaintiff, the uncovered water valve box in which he fell was marked with blue paint at the time of the accident. Plaintiffs' engineering expert, upon review of the photographs taken the day following the incident, opined that such blue paint was placed upon the open water valve box after the valve box and the surrounding asphalt was damaged. The expert sets forth that "[t]he blue-color paint is present upon both

the cracked upper sections of the valve box pipe and upon the damaged asphalt surface. The blue paint coverage is physical evidence that the painting was done after the damage to the water pipe and adjacent asphalt had occurred." Additionally, plaintiffs have submitted evidence that indicates that American Water is the only entity that would have the responsibility and authority to paint its equipment, such as the water valve box at issue. The evidence further demonstrates that the color blue is typically used by American Water when marking its equipment. Plaintiffs also note that the evidence also shows that American Water employees were performing work approximately 100 to 120 feet from the subject water valve box on February 8th and February 9th 2006, and may have inspected and marked off the valve box at that time. Such evidence raises an issue of fact as to whether an American Water employee painted the uncovered water valve box subsequent to the time it was damaged, but prior to the time of the injured plaintiff's fall, and, thus, whether American Water had actual notice of this dangerous and defective condition prior to the time of the subject accident.

In addition to raising a question of fact as to whether American Water had actual notice of the defective condition, plaintiffs have demonstrated the existence of an issue of fact with respect to whether American Water had constructive notice of such defect. As set forth above, plaintiffs have submitted the affidavit of an expert engineer that opines that the defective condition at issue was not suddenly created. Plaintiffs' expert sets forth in an affidavit that the evidence indicates that the cover had been missing from the water valve box for a lengthy period of time prior to the subject accident. Based on such evidence, the Court finds that issues of fact exist as to whether American Water had constructive notice of such condition, and should have remedied such defect prior to the injured plaintiff's fall. See George v. New York City Transit Authority, supra; Alexander v. New York City Transit, supra. Accordingly, American Waters motion is denied.

Meadowland moves for summary judgment arguing that it owed no duty of care to injured plaintiff. It is well settled that "a contractual obligation, standing alone will generally not give rise to tort liability in favor of a third party." Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 [2002], citing Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 76 NY2d 220 [1990]. Therefore, it is argued by Meadowland that it may not be held liable in tort to the injured plaintiff herein simply based upon its contractual obligation to Green Acres to remove snow from the mall parking lot. Three exceptions to this general rule have been recognized, however, and a party who enters into a contract may assume a duty of care to persons outside the contract "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." Espinal v. Melville Snow Contractors, Inc., supra (citations omitted). According to Meadowland, none of these exceptions apply to the instant action. Meadowland contends that its contract with Green Acres was simply for snow removal, as opposed to a comprehensive and exclusive contract that was so broad that it displaced Green Acres in carrying out maintenance and became the sole provider of a safe premises. Meadowland further contends that the evidence does not establish that it launched an instrument of harm or that injured plaintiff detrimentally relied upon continued performance of its duties.

In opposition to Meadowland's motion, plaintiffs argue that in the instant action triable

issues of fact exist with respect to whether Meadowland caused and created the hazardous condition of the damaged and uncovered water valve box as a result of its negligent snow removal operations. As set forth above, a party who enters into a contract may assume a duty of care to persons outside the contract where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm. Espinal v. Melville Snow Contractors, Inc., supra; Renjifo v. Bay Shore Estadio Restaurant, Inc., 55 Ad3d 485 [1st Dept. 2008]; Prenderville v. International Service System, Inc., 10 AD3d 334 [1st Dept. 2004]. In support of this argument, plaintiffs rely upon, *inter alia*, the affidavit of a snow removal operations expert. This expert, based upon his inspection of photographs taken the day following the incident, opined that the subject water valve box came into direct contact with Meadowland's snow removal equipment, causing the dangerous and defective condition. According to this expert, the pattern, size and depth of the damage and gouge marks to asphalt surface around the water valve box, as well as the damage to the cast iron valve box, indicate such damage was caused by direct contact with Meadowland's snow removal equipment. Based upon this expert's affidavit, as well as evidence indicating that Meadowland, using heavy machinery, removed snow from the Green Acre parking lot approximately five (5) times in the thirty (30) day period prior to the subject accident, the Court finds that triable issues of fact exist with respect to whether Meadowland caused and created the hazardous condition of the damaged and uncovered water valve box as a result of its negligent snow removal operations. Therefore, Meadowland's motion for summary judgment is denied.

Lastly, Securitas moves for summary judgment, arguing that it owed no duty to injured plaintiff, as he was not a third-party beneficiary to the Security Services Agreement entered into between Securitas and Green Acres. It is noted that plaintiffs have not opposed the Securitas' motion for summary judgment. However, such motion was opposed by co-defendant Green Acres. In opposition to Securitas' motion, Green Acres contends that if a triable issue of fact exists with whether it had constructive notice of the defective condition, then the contractual obligation of Securitas' to inspect and report hazardous conditions in the Green Acre's parking lot is also implicated. According to Securitas' operations manual, it is to act as "the eyes and the ears of the mall" and its security officers are expected to, among other things, detect safety hazards, inspect potholes, as well as perform vehicle patrols of the property. The manual acknowledges that its security officers are in the best position to identify problems at the mall, including maintenance needs and property damage. Additionally, according to the Security Services Agreement entered into between the parties, Securitas is to conduct regularly scheduled tours of the shopping center, including all common areas, and report hazardous conditions to mall management.

Based upon the foregoing it appears that Securitas had a contractual obligation to conduct regularly scheduled tours of the Green Acres' parking lot, and detect and report problems, such as maintenance needs and property damage. As issues of fact exist as to whether the defendants herein, including Securitas, had constructive notice of the defective condition in the Green Acres parking lot prior to the incident, issues of fact also exist as to whether Securitas was negligent in fulfilling its obligation to conduct tours of the parking lot, and detect and report property damage. As a result, it appears that Green Acres has a viable cross-claim for contribution as against Securitas. Therefore, Securitas' motion for summary judgment must be denied with respect to the cross claims asserted against it by Green Acres, but is granted in all other respects. As plaintiffs' direct claims against Securitas are dismissed, Green Acre's cross claims against it are deemed converted to third-party claims.

Based upon the foregoing, it is

ORDERED that the motion by defendant Securitas Security Systems USA, Inc. for summary judgment dismissing the complaint, as well as any cross claims, as asserted against it is denied with respect to the cross claims asserted against it by Green Acres Mall, LLC, but is granted in all other respects; and it is further

ORDERED that the motion by defendants EQK Green Acres L.P., EQKGA, Inc., Green Acres Mall, LLC, Vornado Realty L.P. and Vornado Realty Trust for summary judgment dismissing the complaint, as well as any cross claims, as asserted against them has been rendered moot as to defendants EQK Green Acres L.P., EQKGA, Inc., Vornado Realty L.P. and Vornado Realty Trust, and is denied with respect to Green Acres Mall, LLC; and it is further

ORDERED that the motion by defendants American Water Enterprises, Inc. and Long Island Water Corporation d/b/a Long Island American Water for summary judgment dismissing the complaint, as well as any cross claims, as asserted against them is denied; and it is further

ORDERED that the motion by defendant Meadowland Contracting Inc. for summary judgment dismissing the complaint, as well as any cross claims, as asserted against it is denied.

Dated: 9/10/2009

J.S.C.

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