

<b>Kogan v North St. Community LLC</b>
2010 NY Slip Op 31202(U)
May 11, 2010
Supreme Court, New York County
Docket Number: 108255/2006
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN  
*Justice*

PART 17

Index Number : 108255/2006  
**KOGAN, STANLEY J.**  
vs.  
**NORTH STREET COMMUNITY**  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ in this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
MAY 19 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/11/10

**EMILY JANE GOODMAN** *J.S.C.*

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK I.A.S. PART 17

-----X  
STANLEY J. KOGAN and PENNY SNIFFEN-KOGAN,

Plaintiffs,

Index No. 108255/06

-against-

NORTH STREET COMMUNITY LLC.,  
311 NORTH STREET LLC., BETTINA EQUITIES  
CO., INC., GRUBB & ELLIS MANAGEMENT  
SERVICES, INC., and NINO TRIPICCHIO & SON  
LANDSCAPING, Et al,

Defendants.

**FILED**  
MAY 19 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
EMILY JANE GOODMAN, J.S.C.:

Plaintiffs, residents of Westchester County, bring an action in New York County against all Defendants, and move for summary judgment against each for personal injuries sustained in Westchester.

Plaintiff Stanley Kogan, M.D. was employed in a building on the premises of Defendant 311 North Street LLC ("311 North"), and was authorized to park his automobile in the rear of the lot in an area reserved for employees. On the morning of January 19, 2006, when he arrived for his work day, he allegedly slipped and fell on black ice, causing the injuries complained of which Plaintiff attributes to the negligence of Defendants. Plaintiff theorizes that hazardous conditions in the parking lot such as gravel and other materials along with pavement in disrepair allowed an accumulation of water to freeze and remain.

Co-Plaintiff Penny Sniffen-Kogan brings a derivative action, as Kogan's wife.

Defendants North Street Community LLC ("North Community") and 311 North and Bettina Equities Co. Inc. ("Bettina") are the owners of North Street Community and/or lessee and/or managing agent of 311 North, the premises where the claimed injury took place, i.e., an outdoor parking lot within a commercial development in Westchester County. Grubb & Ellis Management Services Inc. ("G & E") were managing agents until about four months before the incident in question. Nino Tripicchio & Sons Landscaping ("Landscaping") and Merchants Mutual Insurance Company ("Insurance"), move to dismiss claims Defendants have brought against them. Landscaping also moves for summary judgment against Plaintiffs, who served a supplemental summons and an amended complaint adding Landscaping.

The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law (Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1<sup>st</sup> Dept 2007]). If the movant establishes its prima facie burden, "the party opposing the motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (People v. Grasso, 50 AD3d 535 545 [1<sup>st</sup> Dept 2008], quoting (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980])). Summary judgment should be denied where there is even an arguable or debatable issue of fact

(International Customs Assoc. v. Bristol-Meyers Squibb Co., 233 AD2d 161, 162 [1<sup>st</sup> Dept. 1996]; (Baker v. Briarcliff School Dist., 205 AD2d 652, 653 [2<sup>nd</sup> Dept 1994]).

It is well settled that summary judgment is proper where there are no issues of fact for trial (CPLR 3212 [b] Zuckerman v. City of New York, supra. The movant on a motion for summary judgment must “make prima facie showing of entitlement to judgment as a matter of fact” (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Once the movant has made a prima facie showing, the burden shifts to the motion’s opposing party to lay bare its evidentiary proof and present a genuine, triable issue of fact (id.). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue of fact (Rotuba Extruders v. Ceppos, 46 NY2d 223, 231 [1978]).

Accepting that Dr. Kogan did fall and that he was injured, factual questions do exist as to liability, including notice, the presence of ice, the weather, what caused the ice to accumulate and who, was responsible for clearing the ground. Accordingly, Plaintiffs’ summary judgment motions against Community, 311 North and Bettina, and Landscaping are denied and Defendants’ summary judgment motions against Plaintiffs are also denied.

Plaintiffs’ motion for summary judgment is denied due to the basic factual questions raised, including whether Defendants had notice, and whether the injury was foreseeable, whether the Defendants had acted reasonably, whether their acts or

omissions constitute negligence. These questions cannot be answered as a matter of law in this motion practice and are reserved for a jury.

As set forth in regard to principal Defendants' motions for summary judgment against Landscaping, questions exist as to what the contract called for and what the practice was. However, Kogan's action against Landscaping is dismissed as no duty is owed by Landscaping to Plaintiff despite a contract between Landscaping and North Street. (See Espinal v. Melville Snow Contrs., 98 NY2d 136 [2002]), "Generally a snow removal's contractual obligation, standing alone, will not give rise to tort liability in favor of third parties unless: (1) the snow removal contractor, in failing to exercise reasonable care in the performance of its duties, launched a force or instrument of harm; (2) the plaintiff detrimentally relied on the continued performance of the snow removal contractor's duties; or (3) the snow removal contractor has entirely displaced the owner's duty to safely maintain the premises." (Lehman v. North Greenwich Landscaping, LLC, 65 AD3d 1291, 1292 [2<sup>nd</sup> Dept 2009]; (Espinal, supra). Landscaping's motion for summary judgment and dismissal are denied, and Plaintiff's action against Landscaping is dismissed. Landscaping's motion to sever action for breach of contractual obligation to maintain insurance is granted; though parties appears to agree that there was coverage, other insurance issues remain for trial. Accordingly, Insurance's motion granted in part and denied in part and action is severed.

G & E cross moves for summary judgment on the basis of the Premises had been terminated in July 2005, prior to the accident on January 16, 2006. The G & E motion for summary judgment was filed late, in contravention of an order of this order following a conference at which G & E's counsel was present. However, while no cause for lateness is proffered, in the interest of judicial economy and G & E's meritorious defense, and noting that the lateness of two weeks was not prejudicial to any party, the Court exercises its discretion to accept the motion.

A witness for 311 North testified at deposition that G & E had no duty with respect to the property at the time of the accident, and their management contract had ended. Therefore, any acts or omissions attributable to them during their tenure would be purely speculative in relation to this case. Accordingly, G & E's motion for summary judgment is granted.

North Community, 311 North & Bettina all move for summary judgment and dismissal of all claims. The claimed entitlement to summary judgment rests largely on lack of notice, lack of snow and absence of freezing weather on the day in question supported by an expert's affidavit. However, for the same reasons Plaintiffs' motion for summary judgment is denied, these motions are denied.

Landscaping is a third party defendant who, and also a direct Defendant by Plaintiffs' amended summons and complaint. Defendants who had a snow removal

contract with Landscaping allege that Landscaping was expected to do routine snow/ice checks. Landscaping claims they would not appear on site when it had not snowed without a phone call request.

Landscaping, an independent contractor did general maintenance on the property and performed a snow removal function. In addition, an agreement between Defendants and Landscaping required Landscaping to provide insurance coverage and indemnity in case of losses arising out of or resulting from the work. Landscaping agrees that the pavement was defective, but that was not within the scope of their work, and it was not a freezing day, and did not automatically visit the location without phoned request which was not received, and had no notice of the presence of ice. Landscaping also argues that it has no duty to Plaintiff. See Espinal, supra, “No failure to use reasonable care or launch a fact or instrument of harm, or has displaced owner’s responsibility.”

A jury must decide among other questions, whether ice had formed on the prior rainy day and whether Defendants had a reasonable expectation that it would, and, if so, which Defendant had a duty to remove ice. Plaintiff submits the opinion of an expert that ice formed between 2-3 A.M. but the submission is untimely as it is raised in Reply only.

At first deposition of Defendants, the testimony was that Landscaping was to do routine drive-by/check-ups, although how that is defined creates a question of fact. A later deposition said Landscaping’s presence was required if it snowed or if called and

that routine drive-by was in case of sub-freezing temperatures and when salt distribution was needed. These contradictions and questions cannot be resolved on motions for summary judgment and create questions for a jury.

Motion by G & E is granted and the action is dismissed.

Summary judgment by Landscaping is granted only as to Plaintiff. Landscape's motion to sever is granted but all motions for summary judgment are denied.

What is left for trial is Plaintiff's action against North Community, 311 North, and Bettina, and Defendants' action against Landscaping.

As to Insurance and Landscaping's motions, all Defendants oppose summary judgment and oppose motion for severance. Plaintiff does not oppose severance. In any case, in the interests of judicial economy, and to avoid juror confusion, motion to sever is denied except as to the insurance issues.

Accordingly, it is

ORDERED that, action against Grubb & Ellis Management Services, Inc. is dismissed; and it is further

ORDERED that, the trial of Kogan v. North Street Community LLC., 311 North Street LLC, Bettina Equities Co., Inc., and of North Street. 311 North & Bettina v Nino Trippicchio & Son Landscaping, Et al. shall commence with jury selection on June 2, 2010; and it is further

ORDERED that, insurance actions against Merchants Mutual Insurance Co. and Nino Trippicchio & Son Landscaping are severed. Trial to commence on July 6, 2010; and it is further;

ORDERED that, caption of action shall be amended to reflect Orders contained herein.

**This constitutes the Decision and Order of the Court.**

Dated: May 11, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
MAY 19 2010  
NEW YORK  
COUNTY CLERK'S OFFICE