Aberman v Retail Prop. Trust
2010 NY Slip Op 32457(U)
September 1, 2010
Supreme Court, Nassau County
Docket Number: 9762/09
Judge: Antonio I. Brandveen
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[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

KATHRYN ABERMAN and RAYMOND ABERMAN, Plaintiffs, - against - RETAIL PROPERTY TRUST, CONTROL BUILDING SERVICES, INC. and CONTROL CONSTRUCTION CO., INC., Defendants.	TRIAL / IAS PART 29 NASSAU COUNTY Action No. 1 Index No. 9762/09 Motion Sequence No. 001

RETAIL PROPERTY TRUST, CONTROL BUILDING SERVICES, INC and CONTROL CONSTRUCTION CO., INC.,

Third Party Plaintiffs,

- against -

GUY PRATT, INC.,

Third Party Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1
Answering Affidavits	2, 3
Replying Affidavits	4
Briefs: Plaintiff's / Petitioner's	
Defendant's / Respondent's	

The third party defendant corporation moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against the third party defendant, as well as the third party

plaintiffs' complaint against the third party defendant along with all cross claims, counterclaims against the third party defendant. The third party defendant argues it is not bound to indemnify Retail Property Trust, Control Building Services, Inc. and Control Construction Co., Inc. because the third party defendant had nothing with the February 16, 2007 incident.

The attorney for the third party defendant states, in an April 19, 2010 affirmation supported by other papers, this motion involves a personal injury action commenced by the plaintiff Kathryn Aberman, who claims injury on February 16, 2007, from a slip and fall on ice in a parking lot at Roosevelt Field Mall, Nassau County, New York, owned and managed by the defendants Retail Property Trust, Control Building Services, Inc. and Control Construction Co., Inc. The attorney for the third party defendant points to the Kathryn Aberman's October 2, 2009 testimony which indicated the plaintiff arrived at the subject premises after noon that day to shop for an upcoming trip. The plaintiff testified observing thick, ruddy, hard and uneven ice covering the parking areas, but never reported the ice condition in the parking field prior to the incident. The plaintiff testified the accident happened closest to Macy's Department Store entrance at approximately 3:30 P.M., when the plaintiff slipped next to the driver's side door of the plaintiff's parked vehicle. The plaintiff testified observing ragged gray ice under foot right before the fall, but not remembering the fall, and testified one minute standing and the next moment was on the ground.

The attorney for the third party defendant points to the plaintiffs' October 18, 2008 verified bill of particulars, and states the plaintiffs allege Kathryn Aberman fell on ice which accumulated since the cessation of the last snow storm. The attorney for the third party

defendant notes Retail Property Trust, Control Building Services, Inc. and Control Construction Co., Inc. had notice of the condition, and states the plaintiffs indicate there was freezing rain, ice pellets and snow on February 14, 2007, followed by two inches of snow on February 15, 2007, and another inch of snow on February 16, 2007. The attorney for the third party defendant mentions the third party plaintiffs allege common law indemnification, contractual indemnification and contribution based upon the January 1, 2007 contract between Control Construction Co., Inc. and the third party defendant.

The attorney for the third party defendant directs attention to rider A of that contract, specifically paragraph 4.6.1 regarding the subcontractor holding harmless the owner, contractor, architects and their consultants, agents and employees. The attorney for the third party defendant also points to article eight of that contract which lists the equipment to be furnished by the third party defendant. The attorney for the third party defendant asserts the plain meaning of that latter provision is that Control Construction Co., Inc. controls and supervises the employees of the third party defendant, and is responsible for determining how, where and when the employees of the third party defendant perform their duties. The attorney for the third party defendant points to the February 8, 2010 testimony of James J. Pratt, III, the owner of the third party defendant, and states the third party defendant performed snow removal services at Roosevelt Field Mall in February 2007 when contacted by a Mall representative to bring equipment to the site. The third party defendant owner testified a time sheet was generated after the snow removal service to show the work performed at the site, and a bill would be generated for payment of the work. Roosevelt Field Mall testified the manager of Roosevelt Field Mall directed snow be removed from

areas adjacent to the mall, and pushed to Ring Road. The third party defendant owner testified only the third party defendant removed ice from the top deck of the parking garage, and the third party defendant did not perform salting the sanding services at Roosevelt Field Mall, rather Control Construction Co., Inc. performed those salting the sanding services. The third party defendant owner testified the last time the third party defendant performed snow removal there was in the Spring 2007.

The attorney for the third party defendant points to the February 8, 2009 testimony of Vincent Dantone, the assistant mall manager employed since July 2008 by Simon Property Group, the management agent for Roosevelt Field Mall. Dantone testified he was employed as the assistant operations director by Control Construction Co., Inc. prior to the current position. Dantone testified, during employ by Control Construction Co., Inc. the snow removal policy was if there was snowfall under two inches, the Control Construction Co., Inc. would remove the snow, and if more snowfall Control Construction Co., Inc. used a snow removal contractor. Dantone conceded he did not personally know the snow removal policy of Control Construction Co., Inc. at the time of the February 16, 2007 incident, and was unaware of the procedures for salting and sanding the parking areas in February 2007.

The plaintiffs' attorney states, in a June 5, 2010 opposing affirmation, contention of the third party defendant is wrong regarding the verified bill of particulars, and points to the May 2010 affidavit by Thomas E. Downs, V, a meteorologist. Downs states, based upon climatological records, with a reasonable degree of meteorological certainty all of the snow and ice observed at the premises was a result of the wintry precipitation event of February 13-14, 2007, over 40 hours prior to the incident. The plaintiffs' attorney argues the third

party defendant cannot rely on an independent contractor contractual relationship with Control Construction Co., Inc. because there was no contract between those parties, so the third party defendant liability to the plaintiffs is clear. The plaintiffs' attorney contends the third party defendant admits performance of snow removal on February 16, 2007, so the issue of negligence by the third party defendant is a material issue of fact for a jury. The plaintiffs' attorney asserts Kathryn Aberman relied to her detriment on those individuals with responsibility for snow removal who did not fulfill their obligations.

The defense attorney for the defendants/third party plaintiffs Retail Property Trust, Control Building Services, Inc. and Control Construction Co., Inc. states, in a June 8, 2010 opposing affirmation, the third party defendant contracted with Control Construction Co., Inc. to perform snow removal services at Roosevelt Field Mall, including its parking lots. The defense attorney for the defendants/third party plaintiffs challenges the contention of the third party defendant that it did not perform snow removal services in the parking lot on February 14, 2007 and February 15, 2007. The defense attorney for the defendants/third party plaintiffs asserts the third party defendant's snow removal performance is a material question of fact for a jury, and states the third party defendant failed to submit any evidence to support a showing it performed in a non-negligent manner. The defense attorney for the defendants/third party plaintiffs notes Article 8 of the January 1, 2007 contract states the third party defendant will not provide supervisory personnel, but the third party defendant overlooked Article 4 § 4.1.1 of that agreement which provides the third party defendant shall supervise and direct its work. The defense attorney for the defendants/third party plaintiffs states the indemnity clause in the January 1, 2007 contract does not violate any statute, and it

is fully enforceable. The defense attorney for the defendants/third party plaintiffs avers the third party defendant was negligent.

The attorney for the third party defendant reiterates, in an June 14, 2010 reply affirmation the opposition does not raise a issue of material fact for a jury. The attorney for the third party defendant contends the opposition's arguments are easily resolved on the uncontested facts. The attorney for the third party defendant claims the January 1, 2007 contract was a "call-in" arrangement, and the third party defendant was a subcontractor to Control Construction Co., Inc. which was the prime contractor for snow removal at Roosevelt Field Mall. The attorney for the third party defendant asserts the plaintiffs' argument no contract existed on February 16, 2007 is contradicted by the January 1, 2007 contract the third party litigants admit was back-dated by mutual agreement effective January 1, 2007. The attorney for the third party defendant, points to the deposition testimony, and argues it is irrelevant the January 1, 2007 contract may have been oral on the date of Kathryn Aberman's incident since the agreement was performed within one year, and even were it could be not performed within a year, partial performance of an oral contract gives it legal validity. The attorney for the third party defendant notes it is undisputed Control Construction Co., Inc. inspected the work of its subcontractors, including the third party defendant; reserved the right to call the third party defendant to remedy the work under § 3.4.1 of their contract; and Control Construction Co., Inc. had the authority to correct any dangerous condition in the parking lot by calling the third party defendant to re-plow it, but Control Construction Co., Inc. did not call the third party defendant. The attorney for the third party defendant contends the third party defendant did not owe a duty to Kathryn Aberman.

The Second Department holds:

> Where a cleaning services contract is not a comprehensive and exclusive property maintenance obligation intended to displace a landowner's duty to maintain the property, as is the case with the agreement herein, the contractor owes no duty of reasonable care to prevent foreseeable harm to an injured plaintiff (***see Espinal v Melville Snow Contrs.***, 98 NY2d 136 [2002]; ***Gaitan v Regional Maintenance Corp.***, 6 AD3d 495 [2004]; ***Raynor-Brown v Garden City Plaza Assoc.***, 305 AD2d 572, 573 [2003]; ***Baratta v Home Depot USA***, 303 AD2d 434 [2003]; Javurek v Gardiner, 287 AD2d 544 [2001]; ***Tuzzo v City of New York***, 286 AD2d 495 [2001]; ***Cochrane v Warwick Assoc.***, 282 AD2d 567, 568 [2001]; ***Murphy v M.B. Real Estate Dev. Corp.***, 280 AD2d 457 [2001]). An exception to this rule is where the contractor's actions have "advanced to such a point as to have launched a force or instrument of harm" (***Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168 [1928]; ***see Espinal v Melville Snow Contrs., supra*** at 140). A contractor who "creates or exacerbates" a harmful condition may generally be said to have "launched" it (***Espinal v Melville Snow Contrs***., supra at 142)

McCord v. Olympia & York Maiden Lane Co., 8 A.D.3d 634, 635-636, 779 N.Y.S.2d 542 [2nd Dept, 2004].

The Second Department also observed:

> "The Court of Appeals has recognized three situations in which a party such as the defendant may be said to have assumed a duty of care, and thus potentially may be liable in tort to third persons such as the injured plaintiff: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches 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" (***Conte v. Servisair/Globeground***, 63 A.D.3d 981, 982, 883 N.Y.S.2d 69, citing ***Espinal v. Melville Snow Contrs.***, 98 N.Y.2d 136, 140, 746 N.Y.S.2d 120, 773 N.E.2d 485)

Folkl v. McCarey Landscaping, Inc., 66 A.D.3d 825, 825-826, 887 N.Y.S.2d 239 [2nd Dept, 2009].

This Court determines the third party defendant makes a *prima facie* showing none of the situations in which liability may be imposed apply here (***Foster v. Herbert Slepoy Corp.***, 905 N.Y.S.2d 226 [2nd Dept, 2010]). In opposition, the plaintiffs and the defendants/third party plaintiffs fail to raise a triable issue of fact as to whether the third party defendant

created or exacerbated the alleged condition upon which she fell (***Foster v. Herbert Slepoy Corp.***, ***supra***).

Accordingly, the motion is granted.

So ordered.

Dated: **September 1, 2010**

ENTER:

J. S. C.

FINAL DISPOSITION NON FINAL DISPOSITION XXX

ENTERED
SEP 03 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE