

Adderley v Hines 499 Park LLC

2010 NY Slip Op 32862(U)

October 7, 2010

Supreme Court, New York County

Docket Number: 106617/09

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 106617/2009
ADDERLEY, NICOLE
VS.
HINES 499 PARK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

~~3, 4, 5, 6, 7~~

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion & cross-motion for,

inter alia, summary judgment are decided in accordance with the attached memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/7/10

JUSTICE DORIS LING-COHAN 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: IAS PART 36

-----X
Nicole Adderley,

Plaintiff,

Index No. 106617/09

-against-

Hines 499 Park LLC
and the City of New York,

Motion Seq. No.: 002

Defendants.

-----X
Hines 499 Park LLC,

Third-Party Plaintiff,

-against-

American Building Maintenance Co.,

Third-Party Defendant.

-----X
Doris Ling-Cohan, J.:

In this negligence action, Hines 499 Park LLC (Hines) moves, pursuant to CPLR 3212, for an order dismissing the complaint and all cross claims against it and directing third-party defendant American Building Maintenance Co. (ABM a/k/a ABM Janitorial-Northeast, Inc.) to defend and indemnify Hines pursuant to a contract between Hines and ABM. Plaintiff Nicole Adderley (Adderley) cross-moves, pursuant to CPLR 1001, for an order granting permission to amend her complaint by adding ABM as a necessary party and direct defendant in the main action.

On January 11, 2009, at approximately 9:30 A.M., Adderley was allegedly injured when she slipped and fell on ice on the sidewalk in front of the premises owned by Hines, identified as 499 Park Avenue (the project). ABM, which had been clearing the sidewalk of precipitation since 1:00 P.M. the previous day, stopped clearing the sidewalk at 4:00 A.M. on the date of the

UNFILED JUDGMENT
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accident. Meteorological statistics indicate that very minimal precipitation had occurred during ABM's snow removal activity and had totally stopped approximately three hours prior to her accident.

The Motion

The April 8, 2008 Contract

On November 19, 2009, Hines's counsel sent a letter to "ESIS Chicago AGL," an insurer, informing it that its client, ABM, was obligated to defend and indemnify Hines in the *Adderley* action. Hines alleges that, pursuant to an April 1, 2008 five-year building services contract (the contract), ABM's duties under the contract, which included specific maintenance duties for the sidewalk in front of the project (*see* Notice of Motion, Exhibit E, Schedule 1 of Exhibit A), also included snow removal, thus obligating ABM to defend and indemnify Hines for any claims resulting from negligent performance of those "alleged" duties.

While ABM concedes that it was obligated to perform certain maintenance activity in the sidewalk area under the contract, it claims that the sidewalk maintenance activities listed in Schedule 1 of the contract did not include snow removal (*see* June 14, 2010 Affirmation in Opposition, Exhibit C; June 14, 2010 Affirmation in Partial Opposition, Exhibit A). Though it does not deny that it did do snow removal for Hines, it nonetheless argues that it is not obligated to defend or indemnify Hines for any snow removal as snow removal (1) was not a part of the April 1, 2008 contract; (2) was a separate service performed aside from the April 1, 2008 contract; and (3) was remunerated for through a separate bill submitted to Hines for additional snow removal services (*id.* June 14, 2010 Affirmation in Opposition, paragraph 3; *see also* June 14, 2010 Affirmation in Partial Opposition, Exhibit A [ABM's attached billing ticket work order

0477 for snow removal done on January 10 and January 11, 2009])).

Pertinent sections 1, 4, 7, 9, 10 and Exhibits A and B of the contract address ABM's duty to defend and indemnify. Section 1 of the contract, entitled "Services," indicates that the Contractor agrees to provide the delineated services as set forth in the contract and to "insure that each of the contractor's employees and subcontractors complies with the cleaning activities delineated in Exhibit A attached to the contract."

Section 9 entitled "Hold Harmless" provides that ABM as the Contractor "shall indemnify, defend and hold harmless" the Owner and Manager from any claim which "arises out of or results from or is in any way related to ... any act or omission of contractor or contractor's employees, agents, licensees or sub-contractors."

Section 10, entitled "Limit of Liability," further provides: "Notwithstanding any other provisions in this Contract to the contrary, Contractor specifically agrees to look solely to the owner's interest in the project for the payment or performance of any owner's obligations hereunder, and ... Owner shall never be personally liable for such payment or performance."

The contract had two additional schedules attached as part of the contract: "Schedule 1 of Exhibit A" (Schedule 1), and "Exhibit B" (Schedule 2). Schedule 1 listed very detailed cleaning specifications for different areas of the project, including maintenance of the sidewalk areas under the "Exterior" subsection. However, there was no specific reference to snow removal in the Exterior subsection of Schedule 1. Schedule 2 has two subsections entitled "Description of Fees" and "Additional Work." The "Description of Fees" subsection provides that Hines will pay ABM for its services as outlined in Schedule 1. However, more on point, the "Additional Work" subsection provides, in pertinent part, that: "Manager [Hines Interests

Limited Partnership] shall pay Contractor for all Additional Work *subject to the same terms and conditions for Contractual Work* as defined in the following page” [emphasis added]. The court notes that the contract did not contain a following page with definitions, per se, but only contained a series of initialized and non-initialized forms which were apparently used for recording and billing purposes.

Schedule 1 of the contract did not list snow removal as a service to be provided. However, the language in the Additional Work subsection of Schedule 2 implies that ABM would be obligated to defend and indemnify Hines for any additional work it does for Hines, just as it is obligated to defend and indemnify Hines for any services it provides for Hines under the contract, i.e., sections 9 and 10. ABM’s concession that snow removal was additional work which was “subject to the same terms and conditions for Contractual Work,” obligates ABM to defend and indemnify Hines for any lawsuit arising from any snow removal it did for Hines. Thus, the portion of Hines’ motion which seeks summary judgment on its claim for a declaration that ABM is required to defend and indemnify Hines in the underlying action commenced by plaintiff Adderley is granted. Furthermore, Hines is entitled to reimbursement from ABM for its “litigation expenses, including reasonable attorney’s fees, incurred in defending” this action to date (*ACP Servs. Corp. v St. Paul Fire & Marine Inc. Co.*, 224 AD2d 961, 962 [4th Dept 1996]; *see also New York Univ. v Royal Ins. Co.*, 200 AD2d 527, 528 [1st Dept 1994]).

Effect of the Storm in Progress Doctrine

In support of that portion of its motion for summary judgment dismissing the complaint, Hines argues that it had no duty to Adderley because her injury occurred while a storm was in progress; the court disagrees with this argument.

Generally, “the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended” (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]; see also *Thompson v Menands Holding, LLC*, 32 AD3d 622, 623-624 [3d Dept 2006]).

The “storm in progress” defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean the walkways. The rule is designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering the effort fruitless. Where the evidence in the record is clear that the accident occurred while the storm was still in progress, defendants may avail themselves of the rule as a matter of law. Indeed, evidence of a storm in progress presents a prima facie case for dismissal. Such evidence is especially persuasive when based upon the analysis of a licensed meteorologist

(*Powell v MLG Hillside Associates, L.P.*, 290 AD2d 345, 345 [1st Dept 2002] (internal citations omitted); see also *Valentine v City of New York*, 86 AD2d 381, 384 [1st Dept] [in some instances, a span of 30 hours to remove snow could be viewed as insufficient to establish negligence], *affd* 57 NY2d 932 [1982]).

“[I]f the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied” (*Powell v MLG Hillside Associates, L.P.*, 290 AD2d at 346). If only trace amounts fell during the two to three hours prior to plaintiff’s accident and defendant’s custodian was present, then it is reasonable to ask whether the custodian should have been shoveling the accumulated snow (*id.* at 346).

Here, according to certified meteorological records, there was nothing more than a total

of one inch of precipitation in the 24-hour period prior to Adderley's accident, and no more than a trace amount of precipitation during the four-hour period of sub-freezing temperatures prior to the accident (the accident occurred at 9:30 A.M.). Nevertheless, billing ticket work order 0477 reflects that the ABM custodial staff was continuously removing snow from the sidewalk in question during the time period of 1:00 P.M. on January 10, 2009 through 4:00 AM on January 11, 2009. They stopped clearing snow at 4:00 A.M. Climatological charts in the record reveal that by 7:00 A.M., precipitation had stopped (*see* Notice of Motion, Exhibit C).

In applying the storm-in-progress doctrine, the court "should be less concerned with what was happening at the very moment of the accident" and more concerned with "what was happening during the period immediately preceding the accident" (*Powell v MLG Hillside Associates, L.P.*, 290 AD2d at 346). Based on the aforesaid statistics and in particular that the precipitation had stopped approximately 2 ½ hours prior to plaintiff's fall, there is no basis to dismiss the complaint under the storm-in-progress doctrine.

On a motion for summary judgment, the role of the court is that of issue finding, not issue determination (*Insurance Co. of New York v Central Mutual Insurance Co.*, 47 AD3d 469, 472 [1st Dept 2008]). While the storm-in-progress doctrine does not appear to be applicable based upon the submissions, defendant Hines also argues that Administrative Code of the City of New York § 16-123, entitled "Removal of snow, ice and dirt from sidewalks" is applicable (*see* Reply Affirmation, ¶ 2). Administrative Code § 16-123 (a) provides, in relevant part as follows:

Every owner, lessee, tenant, occupant, or other person, having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall, within four hours after the snow ceases to fall, or after the deposit of any dirt or other material upon such sidewalk, remove the snow or ice, dirt, or other material from the sidewalk and gutter, the time between nine post meridian and seven ante meridian not being included in the above period of four hours.

Hines' reliance on Administrative Code § 16-123 for the position that it was not obligated to remove any snow or ice prior to Adderley's accident is also misplaced. While, pursuant to § 16-123, Hines may not have been obligated to remove snow until 11:00 A.M. under that statute (*see Rodriguez v New York City Housing Auth.*, 52 AD3d 299, 300 [1st Dept 2008]; *Prince v New York City Housing Auth.*, 302 AD2d 285, 285 [1st Dept 2003]), Adderley's claim of negligence is based upon ABM's snow removing activity prior to its cessation of that activity at 4:00 A.M. Adderley alleges, in paragraph 20 of the main complaint, and in paragraphs 20 and 44 of the amended complaint, that Hines's and ABM's negligence was

“in failing to remove snow and/or ice existing thereat; in failing to place a non-slip substance on said pedestrian sidewalk; in failing to properly remove snow and/ or ice existing thereat; in failing to spread salt and/or sand, and, in failing to take any and all preventative measures to melt and/or remove snow and/or ice existing thereat; ... ; in causing, permitting and allowing a trap, hazard and nuisance to be and exist for an excessive and unreasonable period of time, despite actual and constructive notice.”

Thus, there is a factual issue as to any alleged negligence in the snow removal activity at the project and whether during such removal a more dangerous condition was created i.e., the existence of the icy patch upon which Adderley allegedly slipped. The record does not reflect what ABM's snow removal activity consisted of, only that it occurred. If there is evidence that the attempts at snow removal made the sidewalk more hazardous, the owner may be exposed to tort liability (*see Rios v Acosta*, 8 AD3d 183, 184 [1st Dept 2004]; *see also Bell v New York City Housing Auth.*, 6 Misc 3d 1018(A), 2005 NY Slip Op 50117[U], *2 [Sup Ct, NY County 2005]; *compare Mosley v General Chauncey M. Hooper Towers Housing Dev. Fund Co.*, 48 AD3d 379, 380 [1st Dept 2008]). This record calls for a determination of negligence, if any, by a trier of facts.

Adderley's Cross Motion

Adderley's motion includes a copy of the proposed amended complaint and the amended caption. Leave to amend an answer should be freely granted, pursuant to CPLR 3025 (b), in the absence of prejudice to the non-moving party (*Eighth Avenue Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]), and upon an evidentiary showing that the proposed amendment has merit (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 181 [1st Dept 2003]). As a question of fact exists regarding the alleged negligence of ABM in its removal of snow in the area where Adderley was injured, and as ABM is obligated to defend and indemnify Hines for additional work pursuant to the contract, and as it appears that there is no prejudice to any of the parties, Adderley's cross motion should be granted and the caption should be amended as proposed.

Accordingly, it is

ORDERED that that portion of the summary judgment motion by Hines 499 Park LLC to dismiss the complaint and all cross claims is denied; and it is further

ORDERED, ADJUDGED AND DECLARED that American Building Maintenance Co. is directed to defend and indemnify Hines 499 Park LLC; and it is further

ORDERED, that within 60 days of entry of this decision, order and judgment, the Hines is directed to submit an accounting of the costs incurred in defending this action, and ABM is directed to review and, should they agree with such costs, satisfy such defense costs incurred by the Hines within 45 days from receipt of Hines accounting or provide specific reasons for its disagreement within such time. If the parties are unable to agree on the amount of the defense costs owed to the Hines, either side shall file a motion to set such costs with a copy of this

