

Liantonio v Slater Group Inc.

2010 NY Slip Op 33004(U)

October 20, 2010

Sup Ct, Richmond County

Docket Number: 102819/05

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

BARBARA LIANTONIO and CHARLES LIANTONIO,

Calendar Nos.: 648-006
838-007
839-008
1021-009

Index No.: 102819/05

Plaintiffs,

against

**DECISION
HON. JOSEPH J. MALTESE**

**SLATER GROUP INC., YUKON LIMITED, INC. a/k/a
ISLAND PRETZEL, FRANKLIN STUCCO SUPPLY
OF STATEN ISLAND INC., N.Y.C. MERCHANDISE
d/b/a BUY INFLATABLES.COM, RAPID WEBSITE,
INC., TIMOTHY ROSARIO and J&K LANDSCAPING,**

Defendant(s).

J&K LANDSCAPING,

Index No.: A102819/05

Third-Party Plaintiff,

against

**ISLAND ALL STARS, INC.
and ISLAND ALL-STAR CHEERLEADING, INC.**

Third-Party Defendants.

SLATER GROUP, INC.,

Index No.: B102819/05

Second Third-Party Plaintiff,

against

**ISLAND ALL STARS, INC.
and ISLAND ALL-STAR CHEERLEADING, INC.**

Second Third-Party Defendants.

The following papers numbered 1 to 11 were fully submitted on the 10th day of September 2010.

Notice of Motion for Summary Judgement
by Defendants NYC Merchandise d/b/a Buy Inflatables.com, Rapid Website, Inc.
and Timothy Rosario, with Supporting Papers and Exhibits
(dated February 9, 2010) _____ 1

Notice of Cross Motion for Summary Judgment by Defendant/Third-Party Plaintiff J&K Landscaping, with Supporting Papers, Exhibits and Memorandum of Law (dated February 27, 2010)	2
Notice of Cross Motion for Summary Judgment by Defendant/Second Third-Party Plaintiff Slater Group, Inc., with Supporting Papers and Exhibits (dated March 1, 2010)	3
Notice of Cross Motion for Default Judgment by Defendant/Second Third-Party Plaintiff Slater Group, Inc., with Supporting Papers and Exhibits (dated March 19, 2010)	4
Affirmation In Opposition to Slater Group Inc.'s Cross Motion for Summary Judgment by Defendant/Third-Party Plaintiff J&K Landscaping, with Supporting Papers, Exhibits and Memorandum of Law (dated June 18, 2010)	5
Reply Affirmation by Defendant/Second Third-Party Plaintiff Slater Group, Inc. (dated July 13, 2010)	6
Affirmation in Opposition by Plaintiffs (dated July 15, 2010)	7
Affirmation in Opposition and Reply by Defendants NYC Merchandise d/b/a Buy Inflatables.com, Rapid Website, Inc. and Timothy Rosario, with Supporting Papers and Exhibits (dated August 13, 2010)	8
Reply Affirmation by Defendant/Second Third-Party Plaintiff Slater Group, Inc., with Supporting Papers and Exhibit (dated September 7, 2010)	9
Reply Affirmation by Defendant/Third-Party Plaintiff J&K Landscaping, with Supporting Papers, Exhibits and Memorandum of Law (dated September 9, 2010)	10
Stipulation to Withdraw cross claims for contribution and/or indemnification between Defendants NYC Merchandise d/b/a Buy Inflatables.com, Rapid Website, Inc., Timothy Rosario and Defendant/Third-Party Plaintiff J&K Landscaping (dated September 9, 2010)	11

Upon the foregoing papers, the respective motions (No. 648-006 and 839-008) for summary judgment by (1) defendants N.Y.C. Merchandise, d/b/a Buy Inflatables.com, Rapid Website, Inc. and

Timothy Rosario (collectively, hereinafter “Rapid”) and (2) defendant/third-party plaintiff J&K Landscaping (hereinafter “J&K”) are granted, as is the cross motion (No. 1021-009) for a default judgment by Slater Group, Inc. (hereinafter “Slater”) as against third-party defendants Island All Stars, Inc. and Island All-Star Cheerleading, Inc. (collectively, hereinafter “Island All Stars”). The cross motion (No. 838-007) for summary judgement by defendant Slater is denied.

To the extent relevant, plaintiff Barbara Liantonio (hereinafter “plaintiff”) alleges that she sustained personal injuries when she was caused to slip-and-fall in the parking lot of the premises known as 115 Industrial Loop, Staten Island, New York on February 4, 2005. In the complaint, plaintiff alleges that defendants were negligent, *inter alia*, (1) in their failure to properly remove ice and snow from the surface of said parking lot, (2) their like failure to repair and maintain proper lighting in the same area and (3) by allowing empty wooden pallets to lie haphazardly about the subject premises (*see also* Plaintiffs’ Bill of Particulars).

More specifically, it is alleged that on the evening in question, plaintiff parked her vehicle on the subject premises where her “cheerleading business” is located (*see* August 13, 2007 EBT of Barbara Liantonio, pp 40-43) and, upon exiting her vehicle, her foot became caught on a wooden pallet that was partially obscured by the snow (*id.* at 43-50). As a result, plaintiff lost her balance, and when she attempted to steady herself with her other foot, she slipped on ice, which caused her to fall (*id.* at 44). The weather at the time was described by plaintiff as being “freezing cold, icy, and snowy” (*id.* at 41).

It is undisputed that the property in question is a commercial building with five “bays”, each of which is approximately 25 feet by 55 feet of open “warehouse space” (EBT of Frank Forte, pp 10, 13, 16-17). According to plaintiff, her business, Island All Stars operated in bay areas “C” and “D” (*id.* at 69-70). The remaining defendants apparently operated out of the balance of bay areas, “A”, “B” and “E” (*id.*). It is undisputed that plaintiff’s accident occurred in one of the bay areas which she rented, *i.e.*, bay area “D” (*see* August 13, 2007 EBT of Barbara Liantonio, p 42), the surface of which at the time of the purported accident was only indirectly lit by a light in her adjacent bay area, “C” (*id.* at 47-48). There was alleged to be no lighting in bay area “D” (*id.*).

At her deposition, plaintiff testified that she had previously made complaints to her co-tenants regarding the abandonment of empty pallets in front of her bay areas, including Tim Rosario, “Warren” from “Franklin Stucco”, and “John” from Yukon Limited, Inc. a/k/a Island Pretzels (hereinafter “Yukon”) (*see* August 13, 2007 EBT of Barbara Liantonio, pp 53-60). She also made

identical complaints to Slater in the person of “Joe DePaolo, William DePaolo, Joseph, Jr. and Carol” (*id.* at 61-63). Plaintiff maintains that she had also complained about the “broken light” in bay area “D” (*id.* at 67-68).

There is no doubt that the subject premises was owned at the time in question by Slater, which was deposed through Frank Forte, who helps run the business on behalf of his wife who was its president at the time of plaintiff’s accident (EBT of Frank Forte, p 9-10, 15). The vice-president at the time was Joseph Depaolo Sr., a nonparty, who is now deceased (*id.* at 9-10). Another nonparty, William DePaolo, was stated to be in charge of the day-to-day operations and the only representative of Slater who dealt with tenant issues since the demise of Joseph Depaolo Sr., who had personally handled tenant complaints and was alleged to have made monthly visits to the premises (*id.* at 16, 30, 52). According to the witness, each of the tenants was responsible for maintaining the cleanliness of their own respective bay areas, including snow removal (*id.* at 26-28, 61). While the witness recalled that J&K had performed snow removal at the subject premises in the past, he denied that Slater had ever performed such work, or that it had contracted with any third parties to do so (*id.* at 43, 46, 54-55, 63).

The owner of J& K, Jeffrey Schaffer, testified on behalf of his company that it had been hired by Yukon to perform snow removal work at the subject premises, which he performed himself on January 24, 2005 (*id.* at 13-14, 20-21, 26). According to the witness, a plow was used to push the snow along the perimeter of the bays; a bobcat was then used to clear the remaining snow located in smaller places; and a “push spreader” was used to put down calcium chloride in front of all of the bay doors (*id.* at 33-34, 54). When asked if there were any vehicles in the bay areas at the time of his efforts, the witness stated that “[t]he only stuff that was there were the vehicles that couldn’t be moved and the pallets” (*id.* at 35).

Defendant Rapid’s president, individual defendant Timothy Rosario, testified on behalf of these defendants that the shipments which they received at the subject building were unloaded by hand and placed onto pallets in order to move them from the delivery trucks into the actual bay (EBT of Timothy Rosario, pp 13-14, 21-24, 35-40). The products were then re-packaged for pick-up by UPS (*id.* at 37). When completed, “[t]he pallets were stacked up and put back into the place where they were [sic]” (*id.* at 40). According to this witness, the pallets behind the building belonged to co-defendant Yukon (*id.* at 24-25, 29, 46-47), from which he rented both shelving space and pallets (*id.* at 24-29, 68). As Rapid’s business was seasonal in nature, (*i.e.*, Halloween and Christmas), their shipments and deliveries were most numerous between the months of June and December (*id.* at 36-

37). As a result, their business was “slow” at the time of plaintiff’s fall in February of 2005 (*id.*). This witness also denied performing snow removal at the subject premises (*id.* at 52).

Finally, plaintiff Charles Liantonio testified at his deposition that he maintains the inside of the gym used by his wife’s cheerleading business, and that he has shoveled snow from the parking lot in order to clear a path for the cheerleading students to enter the gym (EBT of Charles Liantonio, pp15-17).

In support of its motion for summary judgment, Slater maintains that it is an out-of-possession landlord which does not control the business activities of its tenants, including their use of pallets or their snow removal efforts.

It is well settled that a property owner or a party in possession or control of premises will be held liable for a slip-and-fall involving snow and ice on its property only if it created the alleged dangerous condition or had actual or constructive notice of it and failed to ameliorate the situation in a timely fashion (*see Crosthwaite v. Acadia Realty Trust*, 62 AD3d 823 [2nd Dept 2009]). Contrariwise, an out-of-possession landlord is not liable for injuries sustained on the premises unless it retains control of the premises or is contractually obligated to repair unsafe conditions (*see Seney v. Kee Assocs*, 15 AD3d 383, 384 [2nd Dept 2005]). Thus, the reservation of a right of entry for purposes of inspection and repair may constitute sufficient control to impose liability for injuries caused by a defective or dangerous condition on the premises, but only where the liability is based upon a significant structural or design defect that violates a specific statutory provision (*id.*). No such issue is presented here. However, control may also be shown by the presence of lease provisions making the landlord responsible for repairs to the property, or by a course of conduct demonstrating that the landlord has assumed the duty to maintain that particular portion of the premises which precipitated the injury (*see Taylor v. Lastres*, 45 AD3d 835 [2nd 2007]).

In this case, since Forte testified on behalf of Slater that its owner at the time, Joe Sr., “had a specific agreement or a verbal understanding that [the tenants] would keep the pallets inside the[ir] premises” (*see* EBT of Frank Forte, p 49-50), said defendant has failed to establish a prima facie case that it did not retain some measure of control over the retention of pallets in the parking lot where the accident occurred. Additionally, triable issues of fact exist as to whether Slater was chargeable with or had notice of its tenants’ failure to properly store the pallets which contributed to plaintiff’s fall, and/or was otherwise negligent in failing to repair or maintain proper lighting in the bay area where plaintiff fell. Therefore, Slater’s motion for summary judgment is denied.

Turning to J&K, it is the opinion of this Court that it has demonstrated its prima facie entitlement to judgment as a matter of law by showing that it did not have any ongoing service agreement for snow removal with either the tenants or the owner of the subject property. Moreover, our Court of Appeals has identified only three circumstances in which a party who enters into e.g., a snow removal contract, is deemed to have assumed a duty of care towards third-persons not in privity with the contracting parties: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, “launches a force or instrument of harm” which causes plaintiff’s injury; (2) where the third-party is injured as a direct result of his or her detrimental reliance on the continued performance of the duties undertaken by the contracting party; and (3) where the contracting party has entirely displaced the other’s duty to maintain the premises in a reasonably safe condition (*see Espinal v. Melville Snow Contrs.*, 98 NY2d 136 [2002]). Here, none of these exceptions apply. Nor have plaintiffs come forward with any contrary evidence sufficient to rebut J&K’s prima facie showing and raise a triable issue of fact as to its liability (*see Foster v. Herbert Slepoy Corp*, __AD3d__, 905 NYS2d 226, 229 [2nd Dept 2010]). Accordingly, the motion for summary judgment by defendant J&K is granted and the complaint as against it is dismissed.

In its cross motion for summary judgment motion, defendant Rapid argues, in effect, that since its business is seasonal, it did not receive any shipments requiring the utilization of pallets during the time period preceeding plaintiff’s injury. In support, this defendant has submitted copies of invoices for shipments received by it to demonstrate its relative inactivity during the relevant time period (*see* Rapid Website’s Exhibit “U”).

It is familiar law that liability for a dangerous condition existing upon property is generally predicated upon proof of ownership, occupancy, control or a special use (*see Quick v. G.G.’s Pizza & Pasta, Inc.*, 53 AD3d 535, 536 [2nd Dept 2008]), any one of which may be sufficient to give rise to a duty to exercise reasonable care (*id.*). Where one or more of these elements is present, liability may be imposed upon a landowner or lessee who either creates the defective condition allegedly giving rise to a plaintiff’s injury, or had actual or constructive notice of said condition and a reasonable time to cure (*see Gover v. Mastic Beach Prop Owners Assn*, 57 AD3d 729 [2nd Dept 2008]). Here, it is the opinion of this Court that Rapid has sufficiently established that it did not own, control or make any special use of the subject property at or about the time of plaintiff’s accident to demonstrate its prima facie entitlement to summary judgment. In opposition, plaintiff has again failed to demonstrate the existence of a triable issue of fact through the introduction of admissible evidence. Mere conjecture, suspicion, or speculation is insufficient to defeat summary judgment (*see Fotiatitis*

v. Cambridge Hall Tenants Corp, 70 AD3d 631, 632 [2nd Dept 2010]). Accordingly, the complaint as against Rapid must also be dismissed.

Finally, Slater's motion for a default judgment against Island All Stars is granted as unopposed. A like motion by J&K was granted against this same entity in a Decision and Order of this Court dated January 8, 2010.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendant Slater Group Inc. is denied; and it is further

ORDERED that the cross motions for summary judgment by defendants J&K Landscaping and N.Y.C. Merchandise d/b/a Buy Inflatables.com, Rapid Website, Inc. and Timothy Rosario are granted; and it is further

ORDERED that the complaint and any cross claims against the above defendants are hereby severed and dismissed; and it is further

ORDERED that the action shall continue as to the remaining defendants; and it is further

ORDERED that the cross motion for a default judgment by Slater Group Inc. against Island Allstars, Inc. and Island All-Star Cheerleading, Inc. is granted as unopposed; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

Remaining parties shall appear in DCM Part 3 for a pre-trial conference on **November 29, 2010 at 9:30 a.m.**

ENTER,

DATED: October 20, 2010

Joseph J. Maltese
Justice of the Supreme Court