

Gushin v Whispering Hills Condominium I

2010 NY Slip Op 33547(U)

December 15, 2010

Sup Ct, Orange County

Docket Number: 11783-2008

Judge: Lewis Jay Lubell

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Status Conference: January 19, 2010 @9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK COUNTY OF ORANGE

-----X
NATASHA GUSHIN,

Plaintiff,

-against -

WHISPERING HILLS CONDOMINIUM I,
WHISPERING HILLS HOMEOWNERS
ASSOCIATION, INC. and HUDSON VALLEY
LANDSCAPING M&P, INC.,

Defendants.

-----X
LUBELL, J.

DECISION/ORDER

Index No. 11783-2008

Motion Date: 9-24-10

The following papers were considered in connection with this motion by (I) defendants Whispering Hills Condominium I and Whispering Hills Homeowners Association, Inc. (hereinafter collectively "Whispering Hills") for an Order pursuant to CPLR §3212 granting summary judgment in favor of Whispering Hills and (a) dismissing the complaint against them, and (b) in favor of Whispering Hills' cross-claims against defendant Hudson Valley Landscaping M&P, Inc. ("Hudson Valley") for contractual defense and indemnification, breach of contract, failure to procure insurance, and for such other and further relief as this Court deems just and proper; and (II) the motion by defendant Hudson Valley for an Order pursuant to CPLR §3212 granting summary judgment (a) dismissing plaintiff's complaint against the defendant, Hudson Valley, and (b) dismissing all cross-claims of the co-defendants, and for such other and further relief as the Court may deem appropriate, together with the costs and disbursements of this motion:

PAPERS	NUMBERED
Motion I/Affidavits/Exhibits A-N	1
Memorandum of Law	2
Affirmation in Opposition/Affidavit/Exhibit A	3
Affirmation in Opposition/Exhibits A-H	4
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Memorandum of Law	6
Reply Affirmation/Exhibits A-B	7
Reply Affidavit/Exhibit A	8

Plaintiff, Natasha Gushin, brings this action to recover for injuries she sustained in a slip and fall accident that occurred on December 24, 2007, at approximately 11:30 P.M. in the roadway of the landscape circle situated between the 1900 and 2000 condominium units at Whispering Hills Condominium, Chester, New York. At the time of the incident, plaintiff was walking by the area when she allegedly slipped and fell on ice which allegedly formed from frozen water runoff from a nearby mound of earlier plowed snow. Among other injuries, plaintiff sustained a fractured right ankle requiring surgery.

Defendants Whispering Hills is sued herein as the property owner; defendant Hudson Valley as the snow removal contractor.

MOTION I(a)

Whispering Hills Motion for Summary Judgment as Against Plaintiff

"[The] owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition" (Bolloli v. Waldbaum, Inc., 71 A.D.3d 618, 619, 896 N.Y.S.2d 400 [internal quotation marks omitted]). To permit a finding of constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time [for the defendant] to discover and remedy it" (Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774).

(Wolf v. Fairfield Inn, 77 A.D.3d 927 [2d Dept., 2010]).

Here, the Court is satisfied that defendant Whispering Hills has met its initial burden of establishing prima facie entitlement to summary judgment in its favor as a matter of law. Among other things, Whispering Hills has come forward with the deposition testimony of plaintiff and others establishing that the weather was dry on the date of the incident, that it had last snowed approximately one week before, that the roadways were clear at the time of the incident, that plaintiff had not noticed any snow or ice on the roadway or ground earlier in the evening nor did her mother or sister, and that plaintiff has no recollection of anyone

commenting on the presence of snow or ice in the outdoor parking area. In fact, plaintiff's deposition testimony further reveals that she did not see any ice until after she fell, and had not made any prior complaints about the existence of ice or snow. Defendant has also come forward with the deposition of Eugene Collins, Vice-President of Whispering Hills and a member of the Condominium Board of Managers, who attests to the absence of any complaints of dangerous snow or icing conditions at or near the place of the accident. In addition, and even though not pertinent to the disposition of the instant motion (see, infra), Mr. Collins also testified to the absence of any complaints regarding the lighting conditions at or near the place of occurrence.¹

Having established entitlement to judgment in its favor, defendant Whispering Hills has shifted the burden to plaintiff to raise a triable issue of fact (see Brown v. Haylor, Freyer & Coon, Inc., 60 A.D.3d 1188, 1189 [2009]; Candelario v. Watervliet Hous. Auth., 46 A.D.3d at 1074, 847 N.Y.S.2d 298; Martin v. RP Assoc., 37 A.D.3d 1017, 1018-1019 [2007]). This, however, plaintiff has failed to do. This is especially so when properly disregarding plaintiff's expert affidavit due to the failure of plaintiff to have disclosed said expert during pretrial disclosure and for having elicited said expert opinion merely to oppose the instant motion (see, Gerard v. Verizon New York, Inc., 66 A.D.3d 960 [2d Dept., 2009]; Wartski v. C.W. Post Campus of Long Island University, 63 A.D.3d 916, 917 [2d Dept., 2009]), and upon recognizing that neither does the complaint nor bill of particulars make reference to inadequate lighting (see, Wright v. South Nassau Communities Hospital, 254 A.D.2d 277 [2d Dept., 1998]).

MOTION II(a)

Motion by Hudson Valley for an Order Dismissing Plaintiff's Complaint Against It.

Even when assuming, without so finding, that defendant Hudson Valley owed a duty of care to plaintiff, the Court hereby grants Hudson Valley's motion for an Order dismissing plaintiff's complaint against it for the reasons set forth in connection with the dismissal of the action as against Whispering Hills. Not only has Hudson Valley come forward with sufficient facts establishing its lack of actual or constructive notice of the asserted dangerous condition or facts establishing that same existed for such a sufficient period of time for Hudson Valley to have discovered and

¹ While plaintiff deposition testimony characterized the place of the accident as "poorly lit", plaintiff neither alleges inadequate lighting in her summons and complaint nor in her bill of particulars.

remedied it (Murphy v 136 Northern Boulevard Associates, 304 AD2d 540 [2d Dept., 2003]), Hudson Valley has also established as a matter of law that it did not fail to exercise reasonable care in the discharge of its contractual obligations and thereby create an unreasonable or increased risk of harm to others (Church ex rel. Smith v. Callanan Industries, Inc., 99 N.Y.2d 104, 111-112 [2002]). In response, plaintiff has failed to properly raise any factual issues to the contrary.

MOTION I(b)

Motion by Whispering Hills on its Cross-claims Against Defendant Hudson Valley Landscaping M&P, Inc.

- and -

Motion II(b)

Motion by Defendant Hudson Valley Inc. for Summary Judgment Dismissing All Cross-claims of Whispering Hills

Having ruled as it did in Motion I(a), supra, the only viable aspect of Whispering Hills cross-claims against Hudson Valley is for common law indemnification and contractual defense and indemnification for Hudson Valley's alleged failure to have procured insurance on behalf of Whispering Hills so as to allow for the recovery of costs, disbursements and attorneys' fees incurred in defense of this litigation.

As to the claim for common law indemnification, the Court finds that there are questions of material fact as to whether the subject snow removal contract, as implemented by the parties, was so comprehensive and exclusive in nature as to have entirely displaced Whispering Hills' duties to maintain the premises in a safe condition (see, Foster v. Herbert Slepoy Corp., 76 A.D.3d 210 [2d Dept., 2010]). In this regard, the Court notes that, while the contract calls for Hudson Valley's presence upon the accumulation of one inch of snow, Peter Nilsestuen, on behalf of Hudson Valley, testified at his deposition that Hudson Valley is usually on site before Whispering Hills even realizes that it's snowing.

In that same regard, the Court finds that whether Hudson Valley may be deemed liable under the "Indemnification" clause of the parties July 1, 2004, contract cannot be resolved absent a factual determination as to whether the underlying incident can be said to have arisen out of Hudson Valley's "duties, obligations and responsibilities under [the] Contract", as may have been modified by the parties' practice.

The Court grants that aspect of Whispering Hills motion for summary judgment in its favor on its claim that Hudson Valley failed to "provide . . . [Whispering Hills], at its own cost and

expense, insurance coverage . . . " The Appellate Division has consistently held that a certificate of insurance does not establish an issue of fact as to whether there exists insurance coverage (Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage, Inc., 18 A.D.3d 590, 593 [2d Dept., 2005]). As such, the Court gives no weight to the certificate of insurance annexed to Hudson Valley's papers. A contrary result is not dictated by the fact that the Insurance Clause contains a reaffirmation of Hudson Valley's duty to indemnify and hold Whispering Hills harmless "against any and all liability for injuries to property or person, which may be attributable, directly or indirectly, to the performance of this Contract by [Hudson Valley] . . . regardless of whether such insurance is applicable and regardless of the [terms thereof]."

Based upon the foregoing, it is hereby

ORDERED, that the motions for summary judgment by defendants Whispering Hills and Hudson Valley dismissing the complaint be and is hereby granted; and, it is further

ORDERED, that the motions by Whispering Hills and Hudson Valley as against one another be and is hereby denied, except summary judgment is hereby granted in form on Whispering Hills and against Hudson Valley on its breach of contract cause of action; and, it is further

ORDERED, that Whispering Hills and Hudson Valley are directed to appear before the Court at 9:30 A.M. on January 19, 2011, for a Status Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Goshen, New York
December 15, 2010

S/_____
HON. LEWIS J. LUBELL, J.S.C.

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