

Stubis v Port Auth. of N.Y. & N.J.

2011 NY Slip Op 30850(U)

April 7, 2011

Supreme Court, New York County

Docket Number: 102449/2006

Judge: Saliann Scarpulla

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

SALIANN SCARPULLA

PART 19

Justice

Index Number : 102449/2006
BARD, ANN MARIE
 vs.
PORT AUTHORITY
 SEQUENCE NUMBER : 001
 DISMISS

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

FILED
RECEIVED
 APR 08 2011 APR 8 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK COUNTY CLERK'S OFFICE
 MOTION SUPPORT OFFICE
 SUPREME COURT - CIVIL

18
~~motion and cross-motion~~ decided in accordance
 with accompanying memorandum decision.

This constitutes the decision and order of the Court.

Dated: 11/7/11

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----- X
ANN MARIE AND FRANK STUBIS,
Plaintiff,

Index Number 102449/2006
Submission Date 1/19/2011
Mot. Seq. No. 001
DECISION and ORDER

-against-

PORT AUTHORITY OF NEW YORK &
NEW JERSEY AND THE CITY OF NEW YORK,

Defendants.

----- X

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Third-Party Plaintiff

FILED

-against-

APR 08 2011

FIVE STAR PARKING,

NEW YORK
COUNTY CLERK'S OFFICE
Third-Party Defendant
----- X

Appearances: For Plaintiff:
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By Seth Fields, Esq.
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West Babylon, New York 11704

For Defendant Port Authority:
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For Defendant the City:
New York City Corporation Counsel
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New York, New York 10007

For Third-Party Defendant Five Star:
Morris Duffy Alonso & Faley
By Suzanne J. Adams, Esq.
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New York, New York 10006

Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion/Affid/Memo. in Supp. of Mot.....	1
Plaintiff's Affirm. in Opp. to Defendant's Mot.....	2
Five Star Affirm in Opp.....	3
Reply Affirm. in Further Supp.....	4

HON SALIANN SCARPULLA, J.:

This action arises out of a May 16, 2005 trip-and-fall accident at the parking Lot 10E (“Lot 10E”), located at Laganrdia Airport. Defendant Port Authority of New York and New Jersey (“Port Authority”) is the owner of the land covering the parking lot. Third-party defendant Five Star Parking (“Five Star”) operated Lot 10E on the day of plaintiff’s accident pursuant to a contract between it and Port Authority.

Port Authority moves for summary judgment on the ground that it did not have either actual or constructive notice of the complained-of defect. In the alternative, Port Authority argues that there is no issue of fact that the pavement condition causing the accident was trivial in nature and, therefore, non-actionable, citing in support *Trincere v County of Suffolk*, 90 N.Y.2d 976, 977 (1997). Port Authority also moves for summary judgment on its third-party action against Five Star, arguing that Five Star is contractually bound to indemnify Port Authority pursuant to its contract and that Five Star breached the contract by failing to procure liability insurance naming Port Authority as insured.

Plaintiffs oppose summary judgment, relying on the deposition testimony of non-party witness Elizabeth Rivera (“Rivera”), who testified that she visited the parking lot on numerous occasions and witnessed the subject defect, among numerous pavement defects. Rivera also testified that on the day in question, she witnessed plaintiff Ann Marie Bard (“Bard”) fall over what Rivera characterized more as “a pothole” rather than simple

indentation. Further, Rivera stated that her day-of-the-accident report was not correctly transcribed by the Port Authority and was inaccurately drafted.¹

To dispute Port Authority's description of the subject defect as "trivial," plaintiffs also offer Bard's deposition testimony and Bard's accident report filled out by Police Officer Denunzio on the day of the accident ("the police report"). The police report describes the pavement's condition as "dry roadway w/shallow pot hole." (Pl. Opp. Ex. D). Bard described the defect as being six to eight inches deep in the circumference. (Pl. Opp. Ex. B, 55: 11-13, 18-24).

On the issue of constructive notice, plaintiffs offer the deposition testimony of Dennis Rohan, Port Authority's parking lot supervisor, who testified it was his duty to continuously monitor the pavement roadway condition on Lot 10E, including on the day of the accident, and that if he noticed any condition requiring repair, he would have notified his superiors at Port Authority. (Pl. Opp. Ex. C, 29, 30, 32, 34:5-14).

Five Star opposes Port Authority's summary judgment motion to the extent of arguing that Port Authority may not get summary judgment on the issue of indemnification if the Court finds a genuine issue of fact with respect to whether the subject defect was trivial, in which case the right to indemnification would be dependent

¹Port Authority correctly points out that while plaintiff's counsel quotes from Rivera's deposition transcript, the transcript itself was not attached to the opposition papers. Port Authority, however, does not dispute plaintiff's characterization of Rivera's testimony, but disputes the accuracy of Rivera's testimony. Therefore, the Court considers the omission of the transcript to be unintended.

on the outcome of the trial. With respect to the claim of failure to name Port Authority as additional insured, Five Star submits as Exhibit B in opposition a copy of the declaration page of policy issued by Clarendon America Insurance Company, which Five Star argues, names Port Authority as additional insured.

In reply, Port Authority argues that under Paragraph 20 of Part II of the Contract, Five Star is obligated to indemnify Port Authority “from and against all claims and demands . . . arising out of or in any way connected with the Contract .” (P.A. Reply Brief, ¶ 28). Further, Port Authority points out that Exhibit B does not mention Port Authority by name and, thus, Port Authority is entitled to summary judgment on the breach of contract cause of action.

Discussion

Under CPLR 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” To warrant a court’s directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1st Dep’t 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a material issue of fact for trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep’t 2002). Conclusory allegations or denials are insufficient to

either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

Trivial Defect

The possessor or owner of real property bears a duty at common law to maintain the property in a reasonably safe condition, and may be held liable for injuries caused by a dangerous condition on the property, if the owner or possessor created, or had actual or constructive notice of, the hazard. *Trujillo v Riverbay Corp.*, 153 A.D.2d 793, 794 (1st Dep't 1989). However, "the owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes or a trip over a raised projection." *Morales v Riverbay Corp.*, 226 A.D.2d 271, 271 (1st Dep't 1996) (granting defendant summary judgment on the one-inch sidewalk projection).

Here, the parties have submitted conflicting evidence regarding the extent, gravity and the description of the defective condition in the roadway, which precludes grant of summary judgment. While Port Authority relies heavily on the pictures of the defect, they do not conclusively establish the depth of the defect. The police report, Rivera's testimony, and Bard's description of the subject defect raise an issue of fact as to whether the defect was trivial. *See Nin v Burton Bernard*, 257 A.D.2d 417, 417 (1st Dep't 1999);

see also Cohen v Cayre Synergy 73rd LLC, 2008 N.Y.Slip. Op. 32798U, * 14 (Sup. Ct., New York County, October 8, 2008).

Constructive Notice

"A defendant seeking summary judgment dismissing the complaint based upon lack of notice must make a prima facie showing affirmatively establishing the absence of notice as a matter of law." *Carrillo v PM Realty Group*, 16 A.D.3d 611, 612 (2nd Dep't 2005). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986); *see also Piacquadio v Recine Realty Corp.*, 84 N.Y.2d 967, 969 (1994) (dismissing a "general awareness argument" as legally insufficient to establish constructive notice, the Court of Appeals ruled that liability attaches only when a landowner has actual or constructive notice of the specific condition at issue).

Plaintiffs have also raised a genuine issue of fact as to the existence of constructive notice by submitting Bard's and Rivera's testimony that the defect had been there for a sufficient period of time to give Port Authority notice of it. Therefore, the Court denies the branch of Port Authority's summary judgment motion seeking dismissal of the complaint.

With respect to the remainder of Port Authority's motion, Port Authority has established as a matter of law that it is entitled to the indemnification and defense by Five

Star pursuant to Paragraph 20 of Part Two of the operating agreement. The language in indemnification is clear that Five Star must “indemnify and hold harmless . . . against any claims and demands, *just or unjust* . . . arising out of or *in any way* connected . . . with the Contract . . . whether they arise from the acts of omissions of the Contractor, of the Port Authority, of third persons . . .”(emphasis added). Accordingly, Five Star’s duty is not dependent on the outcome of the trial, because this indemnification clause does not limit Five Star’s liability to its own acts or omissions. Instead, Five Star must indemnify Port Authority even if Port Authority is adjudicated to have itself caused Bard’s injury. *See Vey v Port Authority of New York*, 54 N.Y.2d 221, 226 (1981) (enforcing a broad contractual indemnification clause negotiated by sophisticated parties). Because Five Star has not raised any objection to the enforceability of this indemnification clause, Port Authority is entitled to summary judgment.

Five Star also failed to raise an issue on Port Authority’s breach of contract cause of action, because the insurance policy declaration page does not expressly mention Port Authority as additional insured. While Port Authority might fall under the additional insured coverage clause by reason of the existence of the operating agreement, that is not sufficient to meet Five Star’s contractual duty to add specifically Port Authority as insured on the policy.

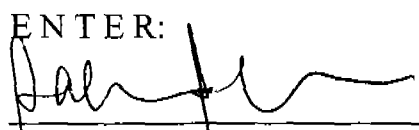
In accordance with the foregoing, it is

ORDERED that the branch of Port Authority’s motion for summary judgment under CPLR 3212 to dismiss plaintiffs’ complaint in its entirety is denied; and it is further

ORDERED that the branch of Port Authority motion for summary judgment under CPLR 3212 on its third-party complaint against Five Star Parking is granted, and the amount of recovery is to be determined and entered as judgment at the conclusion of the action.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 7, 2011

ENTER:

Hon. Saliann Scarpulla, J.S.C.

FILED

APR 08 2011

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