

Stambler v Incorporated Vil. of Cedarhurst
2011 NY Slip Op 31767(U)
June 17, 2011
Supreme Court, Nassau County
Docket Number: 15405/09
Judge: Thomas Feinman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

LAURIE STAMBLER,

Plaintiff,

- against -

INCORPORATED VILLAGE OF CEDARHURST,
CEDARHURST REALTY, LTD. and GOURMET
COOKIES & PASTRIES, INC.,

Defendants.

TRIAL/IAS, PART 13
NASSAU COUNTY

INDEX NO. 15405/09

MOTION SUBMISSION
DATE: 4/28/11

MOTION SEQUENCE
Nos. 3, 4

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Notice of Cross-Motion and Affidavits..... X
- Affirmations in Opposition..... X
- Reply Affirmation..... X

The defendant, Gourmet Cookies & Pastries, Inc., (hereinafter referred to as "Cookies"), moves for an order pursuant to CPLR §3212 granting summary judgment to the defendant. The defendant, Cedarhurst Realty, Ltd., (hereinafter referred to as "Realty"), cross-moves for an order pursuant to CPLR §3212 granting summary judgment to the defendant, Realty. The plaintiff submits opposition to Cookie's motion. The defendant, the Incorporated Village of Cedarhurst, (hereinafter referred to as the "Village"), submits opposition to Cookie's motion and Realty's cross-motion. The defendant, Cookies, submits partial opposition to Realty's cross-motion. The moving defendants each submit a reply affirmation.

Motion for Summary Judgment by Defendant, Cookies

The plaintiff initiated this action to recover for personal injuries sustained on December 21, 2008 when plaintiff slipped and fell on an icy sidewalk adjacent to a handicapped ramp located in front of the moving defendant's premises at the southwest corner of Prospect Avenue and Central Avenue, Village of Cedarhurst, Town of Hempstead, County of Nassau, State of New York.

It is well established that in order to impose liability upon the defendant, there must be evidence tending to show the existence of a dangerous or defective condition, and that the defendant either created the condition, or had the actual knowledge of it. (*Gordon v. American Museum of Natural History*, 501 NYS2d 646). In order for there to be constructive notice, the defect must be visible for a sufficient period to allow for discovery and inspection. (*Id.*) The Court must decide, as a matter of law, whether the evidence, viewed in the most favorable light to plaintiff, will support a negligence verdict against the owner or possessor of land. (*Akins v. Glens Falls City School Dist.*, 441 NYS2d 644). If varying inferences are permissible, the case must go the jury. (*Quinlan v. Cecchini*, 394 NYS2d 872).

On a motion for summary judgment to dismiss the complaint upon lack of notice, the defendant is required to make a *prima facie* showing affirmatively establishing the absence of notice as a matter of law. (*Goldman v. Waldbaum, Inc.*, 248 AD2d 436). 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 NY2d 836).

In order to demonstrate entitlement to summary judgment in the instant matter, the defendant must make a *prima facie* showing that the defendant did not create the condition that allegedly caused the plaintiff to fall, and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it. (*Gregg v. Key Food Supermarket*, 50 AD3d 1093; citing *Musso v. Macray Movers, Inc.*, 33 AD3d 594; *Yioves v. TJ Maxx, Inc.*, 29 AD3d 572, and *Ulu v. IIT Sheratan Corp.*, 27 AD3d 554). "This burden cannot be satisfied merely by pointing to gaps in plaintiff's case." (*Id.*, citing *DeFalco v. BJ's Wholesale Club, Inc.*, 38 AD3d 824; *Cox v. Huntington Quadrangle No. 1 Co.*, 35 AD3d 523; and *Pearson v. Parkside Ltd. Liab. Co.*, 27 AD3d 539).

Here, the defendant, Cookies, has failed to meet its initial burden on this summary judgment motion. The defendant does not demonstrate, or argue, that the defendant did not have constructive notice of the condition for a sufficient length of time to remedy the situation. Rather, the defendant argues that the injury sustained by the plaintiff was caused by the co-defendant, the Village, and that the defendant does not owe the plaintiff a duty. The defendant merely pokes holes at the plaintiff's action and argues that "the plaintiff failed to establish a *prima facie* case of negligence by this moving defendant." As already provided, the defendant's "burden cannot be satisfied merely by pointing out gaps in the plaintiff's case". (*Stroppel v. Wal-Mart Stores, Inc.*, 53 AD3d 651).

Additionally, while the defendant submits it did not owe a duty to the plaintiff, the defendant is responsible for snow removal of the subject municipal sidewalk. (§224-3 of the Village of Cedarhurst Code).

A movant in a summary judgment motion is required to set forth a *prima facie* showing of its entitlement to summary judgment, regardless of the sufficiency of the opposing papers (*see, Arma Textile Printers, Inc. v. Spectrachem, Inc.*, 254 AD2d 382). Where the movant fails to meet his or her burden, the motion for summary judgment must be denied (*id.*).

In light of the foregoing, the defendant, Cookie's, motion for summary judgment is denied.

Cross-Motion for Summary Judgment by Defendant, Realty

The defendant, Realty, cross-moves for summary judgment pursuant to CPLR §3212 dismissing plaintiff's complaint, and alternatively, granting Realty's cross-motion for summary judgment with respect to its cross-claims for breach of contract and contractual indemnification against the defendant Cookies. Realty adopts the arguments set forth by the defendant, Cookies, in Cookies' motion for summary judgment dismissing plaintiff's complaint. The defendant, Cookies, submits partial opposition, opposing only that branch of Realty's motions seeking summary judgment with respect to its cross-claims for breach of contract and contractual indemnification against the defendant Cookies. The plaintiff does not oppose Realty's motion. The defendant, the Village, does not oppose that branch of Realty's motion seeking summary judgment with respect to Realty's cross-claims for breach of contract and contractual indemnification against the defendant Cookies.

As already provided, Cookies's motion for summary judgment is denied, and therefore, that branch of Realty's motion seeking summary judgment dismissing plaintiff's complaint is denied.

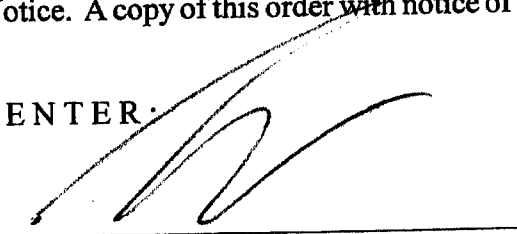
However, the defendant, Realty, has made a *prima facie* showing of entitlement to summary judgment with respect to its cross-claims for breach of contract and contractual indemnification against the defendant Cookies. The defendant, Realty, an out-of-possession landlord, has demonstrated that it delegated its responsibility for maintenance of the subject property, including the removal of snow and ice, to Cookies. (*Ingargiola v. Waheguru Management*, 5 A.D.3d 732; and *Morel v. City of New York*, 192 A.D.2d 428). The defendant, Realty, has demonstrated that Cookies breached the contract between Realty and Cookies, *to wit* the lease, when Cookies failed to procure the agreed upon liability insurance in favor of Realty, as Cookies failed to procure insurance naming Realty as an additional insured. (*Kinney v. G.W. Lisk Co., Inc.*, 76 N.Y.2d 215; and *Schumacher v. Lutheran Community Services*, 177 A.D.2d 568). It has been held that the court may render a conditional judgment on the issue of indemnity pending the determination of the primary action in order that the indemnitee may obtain the earliest possible determination to the extent that the party may expect to be reimbursed. (*Masciotta v. Morse Diesel International*, 303 A.D.2d 309).

The plaintiff, in opposition, has failed to raise an issue of fact to warrant denial of the Realty's motion for summary judgment with respect to its cross-claims for breach of contract and contractual indemnification against the defendant Cookies.

In light of the foregoing, Realty's motion for summary judgment with respect to its cross-claims for breach of contract and contractual indemnification against the defendant Cookies is granted. Therefore, this court need not address Realty's remaining contentions.

The defendant, Realty, shall Settle Order on Notice. A copy of this order with notice of entry shall accompany the proposed order.

ENTER



J.S.C.

Dated: June 17, 2011
cc: Siben & Siben
Morris, Duffy, Alonso & Faley
Callahan & Fusco, LLC
Ahmuty, Demers & McManus

ENTERED
JUN 22 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE