

Griffin v Magnolia Assoc., Ltd.
2011 NY Slip Op 31859(U)
June 7, 2011
Supreme Court, New York County
Docket Number: 102756/2007
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 102756/2007

GRIFFIN, KEITH

vs

MAGNOLIA ASSOCIATES, LTD.

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

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

FILED

JUL 11 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/7/11

SALIANN SCARPULLA S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

----- X

KEITH GRIFFIN,

Plaintiff,

Index No. 102756/07
Submission Date: 3/9/2011
Sequence Numbers: 005

-against-

MAGNOLIA ASSOCIATES, LTD., RECKSON
ASSOCIATES REALTY CORP., MY MOST
FAVORITE 45TH ST. CORP., and MY MOST
FAVORITE 45TH ST. CORP. D/B/A MY MOST
FAVORITE FOOD,

DECISION AND ORDER

Defendants.

----- X

MAGNOLIA ASSOCIATES, LTD., and RECKSON
ASSOCIATES REALTY CORP.,

Third-Party Plaintiffs,

-against-

A&L CESSPOOL SERVICE CORP. D/B/A A&L
RECYCLING,

FILED
JUL 11 2011
NEW YORK
COUNTY CLERK'S OFFICE

Third-Party Defendant.

----- X

For Third-Party Plaintiff:
Hoey, King, Toker & Epstein
55 Water Street, 29th Floor
New York, New York 10041

For Third-Party Defendants:
Bruce A. Bendix
926 RXR Plaza
Uniondale, New York 11556

Papers considered in review of this motion for change of venue:
Notice of Motion..... 1
Supp. Reply App..... 2

HON. SALIANN SCARPULLA, J.:

This action arises out of an accident which occurred on May 10, 2006. Plaintiff
Keith Griffin ("Griffin") alleges that on that date he tripped into a gap in a grate located

in the delivery area of the restaurant My Most Favorite Food ("My Most Favorite Food"). My Most Favorite Food is in a building owned by defendant Reckson Associates Realty Corporation ("Reckson") and is operated by defendant Magnolia Associates ("Magnolia").

Griffin, an employee of non-party Seacrest Linen, arrived at My Most Favorite Food between 11:30 and 12:00 to deliver clean linens and pick up the restaurants dirty linens. Griffin parked on the street and went through the garage's delivery door. Griffin alleges that he walked through an open area and tripped into an opening in the drain grate. Griffin estimated that the opening was between five and eight inches.

The grate into which Griffin allegedly tripped covered a trough. If the trough got backed up with debris, Magnolia would contact third-party defendant A&L Cesspool Service Corp. d/b/a A&L Recycling ("A&L") and A&L employees would come and clean out the trough. A&L last cleared out the trough on April 4, 2006, more than one month before Griffin's accident.

After his accident, Griffin commenced an action against Reckson and Magnolia alleging a negligence cause of action. Magnolia then commenced a third-party action against A&L for common law indemnification and contribution. A&L now moves for summary judgment dismissing the third-party complaint and all cross-claims against it on the ground that there is no probative evidence to show that A&L created the alleged dangerous condition which caused Griffin's accident.

Discussion

One may be held liable for a dangerous condition on property if one occupies, owns, controls or has special use of the property and has either actual or constructive notice of the dangerous condition, or if one causes or create the dangerous condition. *See Gibbs v. Port Authority of New York*, 17 A.D.3d 252, 254-255 (1st Dep't 2005). Here, it is undisputed that A&L did not own or possess the subject property. A&L has also made out a prima facie case that it did not cause or create the dangerous condition that resulted in Griffin's accident.

It is undisputed that more than one month had elapsed between the date on which A&L serviced the trough and the date of the accident. Mr. James Hollywood ("Hollywood"), chief engineer of the building and a Reckson Employee, testified that he, or another Reckson employee, always watched A&L clear out the trough and replace the grates to ensure that it was done correctly. Hollywood also testified that "the restaurant people are the ones who work over there and probably would have been the ones to open [the grate] up." *See Bendix Aff., Exh. M.* There is absolutely no testimony or documentary evidence to show that A&L caused the gap in the grate on or before May 10, 2006, the date when Griffin was injured.

In opposition, Magnolia and Reckson have failed to raise a material issue of fact. They proffer only the testimony of Luei Elsheikh ("Elsheikh"), a chef at Most Favorite Foods. At his deposition, Elsheikh testified that the gap in the grating is commonly there. However, Elsheikh did not connect the gap in the grate to any work done by A&L more

than a month before Griffin's accident. Elsheikh's bare testimony, therefore, fails to raise a material issue of fact with regard to A&L's liability.

Accordingly, A&L's motion for summary judgment dismissing the third-party complaint and all cross-claims against it is granted.

In accordance with the foregoing, it is hereby

ORDERED that the motion of third-party defendant A&L Cesspool Service Corp. d/b/a A&L Recycling for summary judgment dismissing the third-party complaint and all cross-claims asserted against it is granted, and it is further

ORDERED that the Clerk of the Court is directed to sever and enter judgment dismissing the third-party complaint and all cross-claims asserted against third-party defendant A&L Cesspool Service Corp. d/b/a A&L Recycling.

This constitutes the decision and the order of the Court.

Dated: New York, New York
July 7, 2011

ENTER:

Saliann Scarpulla
Saliann Scarpulla, J.S.C.

FILED

JUL 11 2011

**NEW YORK
COUNTY CLERK'S OFFICE**