Kerns v The Great Atl. & Pac. Tea Co., Inc.
2012 NY Slip Op 30171(U)
January 9, 2012
Supreme Court, Suffolk County
Docket Number: 08-23889
Judge: W. Gerard Asher
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SHORT FORM ORDER

COPY

INDEX No. 08-23889
CAL. No. 10-1845OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 10-12-10 (#003)
MOTION DATE 1-18-11 (#004)
ADJOURN DATE 9-26-11
Mot. Seq. # 003 - MG
004 - MD

---X
ANTHONY KERNS,

Plaintiff,

- against -

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. d/b/a/ WALDBAUMS INC., STALLER ASSOCIATES, INC., CENMOR HOLDING CORP., CENMOR ASSOCIATES, and BERNIE'S COMPLETE LANDSCAPING, INC.,

Defendants.
---X

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Upon the following papers numbered 1 to 36 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 19 ; Notice of Cross Motion and supporting papers (002) 20-23 ; Answering Affidavits and supporting papers 24-30; 31-32 ; Replying Affidavits and supporting papers 33-34; 35-36 ; Other __ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the defendant, Bernie's Complete Landscaping, Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that this motion (004) by the defendants, Staller Associates, Inc., Cenmor Holding Corp. and Cenmor Associates, pursuant to CPLR 3212 for summary judgment dismissing the complaint and cross claims asserted against them, and for summary judgment against Bernie's Complete Landscaping for indemnification on their cross claims is denied.

This is an action to recover damages for injuries allegedly sustained by the plaintiff, Anthony Kerns, on February 15, 2007, at 812 Montauk Highway, Center Moriches, New York when he slipped and fell in the parking lot located at the premises. It is claimed that Bernie's Complete Landscaping, Inc. (Bernie's) plowed snow, and sanded and salted the subject parking lot on February 14, 2007. Staller Associates, Cenore Holding Corp. and Cenmore Associates, have asserted a cross claim against Bernie's Complete Landscaping, Inc. for an apportionment of liability, indemnification and to be held harmless.

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Pursuant to the so ordered Stipulation of Discontinuance dated October 29, 2009, this action was discontinued against The Great Atlantic & Pacific Tea Company, Inc., The Great Atlantic & Pacific Tea Company, Inc. d/b/a Waldbaums, Inc., and Waldbaums, Inc.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (003), Bernie's has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the defendants' respective answers with cross claims, and the plaintiff's verified bill of particulars; the affidavit of Bernard Newberg with the proposal and work orders annexed; a copy of a letter/agreement dated November 1, 1991; a partial, unsigned copy of the examination before trial of Anthony Kerns dated July 10, 2009, and the unsigned copy of the transcript of the examination before trial of Raquel Rodriquez on behalf of Staller Associates, Inc. dated October 5, 2009.

In support of their motion (004) for summary judgment, Staller Associates, Inc., Cenmor Holding Corp., and Cenmor Associates (Staller/Cenmor) have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answers with demands for discovery, plaintiff's response to those demands for discovery, and the plaintiff's verified bill of particulars; copies of the unsigned transcripts of the examinations before trial of Anthony Kerns dated July 10, 2009, Raquel Rodriquez dated October 5, 2009, and Joseph Licata dated October 5, 2009; the signed transcript of the examination before trial of Bernard Newberg dated September 11, 1009; and various invoices, work orders and a copy of a letter/agreement dated November 1, 1991.

The unsigned copies of the deposition transcripts submitted by the moving parties as set forth above are not in admissible form as required by CPLR 3212 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered on this motion. The deposition transcript of Raquel Rodriquez, on behalf of Staller Associates, Inc. is considered as adopted by the moving defendant as accurate (*see*, ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

To prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (***Stumacher v Waldbaum***, 274 AD2d 572, 716 NYS2d 573 [2d Dept 2000]). 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 the defendant or it's employees to discover and remedy it (***Stumacher v Waldbaum,*** *supra*; *see,* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]).

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, the plaintiff must show that the defendant's negligence was a substantial factor in bringing about the injury. If the defendant's negligence was a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (***Spiegel v Fine Paint Co.*** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]).

Bernard Newberg set forth in his affidavit sworn to in the State of Utah and dated July 20, 2010, that he was the president of Bernie's Landscaping, a New York corporation which ceased doing business in the latter part of 2007. He states that he performed landscaping services and that during winter months, he provided snow plowing and related services to various clients. He continues that he no longer has any records, including those which might show the date that Bernie's last performed services at the Waldbaums Shopping Center in Center Moriches, New York. He states that when he learned of the accident, he was able to locate a work order from Staller and a corresponding invoice from his company regarding snow plowing services rendered on February 2, 2007. He continues that at his deposition he testified based upon those documents that Bernie's last did snow plowing and salting/sanding on February 2, 2007. Mr. Newberg further states that Staller Associates has produced other work orders and invoices corresponding to snow plowing and salting/sanding performed on February 14, 2007 and February 15, 2007, for which his company was paid without complaint.

In addition, Mr. Newberg avers that he has a better recollection of being called by Mike LeMay, Staller's representative at this location, on February 15, 2007 requesting that he salt and sand the parking lot as someone had fallen on ice earlier that day. He states that he salted and sanded the parking lot on that date after the plaintiff's fall that morning and that he was paid without complaint. He continues that he personally performed the services on February 14, 2007 in a good, workmanlike manner, and that he received no phone calls from Mike LeMay or anyone else about any problems after he performed his services at the shopping center on that day. He also sets forth that he had obtained an additional insured endorsement for Staller Associates that was in effect on February 15, 2007, providing the coverage set forth in the November 1, 1991 letter.

The letter dated November 1, 1991 sets forth the agreement entered into between Cary F. Staller and Bernard Newberg providing for Newberg to indemnify and hold harmless Staller Associates, Inc., its subsidiaries and affiliates, and all companies managed by Staller Associates, Inc. from and against any and all loss, inter alia, for claims for damages resulting from injury or death of any person or damage to any property arising out of the operations as contractor or subcontractor except that arise from the sole gross negligence of Staller Associates, Inc., its subsidiaries and affiliates and all companies managed by Staller Associates. The indemnification shall remain in full force and effect as to all future contracts, agreements or work until revoked by the written agreement of Staller Associates, Inc. and Bernard Newberg.

Pursuant to the certificate of liability insurance, Cenmor Associates as owner, and Staller Associates as Managing Agent, were named as additional insureds under the policy issued to Bernie' Complete Landscaping, Inc.

At his examination before trial, Bernard Newberg testified to the effect that his business had been in existence for about twenty years. During that time, he performed snow removal for Staller Associates during the wintertime pursuant to a written contract renewed every year. Michael LeMay from Staller Associate's office made the determination whether or not he was to plow on any given day. Terry Smith was also a contact person with Staller Associates. If he could not get in touch with either of them, and there was over two inches of snow, he would then make the determination concerning whether or not he would plow. The custom and practice was that after he plowed, Staller would fax him a work order a day or two later. He would then submit a bill for payment for the work and services provided. He did not know if Mike or Terry had to inspect the area before faxing the work order to him. Mike would tell him whether or not he was to salt or sand, and he never decided to salt or sand if Mike did not request it. He did not attend the premises unless there was two inches or more of snow. He continued that if there was only ice on the premises, Mike would call him to salt or sand. Sometimes he was told to spot sand rather than sand the entire parking lot to enable Staller to save money. With spot sanding, he had to look for snow or ice spots on the parking lot and sand them. If ice was thick, he would scrape it down. Any icy spot would be covered with premix, which is the mixture used on highways. Staller Associates never provided equipment or materials to him. It was his general practice that he would not leave the parking lot at the shopping center unless it was perfect. He never received any complaints from tenants at the shopping center or from Staller Associates about his plowing. Mike was present on occasion to inspect the parking lot after he plowed, and he stated Mike told him that if everybody "plowed like me", he would be very happy. He stated that he would salt and sand immediately following the plowing and go back and check all of the centers before he went home to make sure everything was done right. If he saw any areas of ice, he would sand again. He additionally stated that he took the "shoes" off the plow blade to get the blade down to pavement. He continued that he would rather pay $300 for the steel blade every year than not to plow down to pavement.

Racquel Rodriguez testified to the effect that she has been employed by Staller Associates, Inc. since 1996 as an administrative assistant. She stated that Cenmore is the landlord for the property located on Montauk Highway, Center Moriches, and that Staller Associates is the managing agent for Cenmore Associates. They do not have a written agreement. She continued that Staller Associates was notified by the insurance carrier for Waldbaums concerning the slip and fall incident involving Mr. Kerns, and that Bernie's provided all the appropriate and required certificates of insurance. She is not aware of any witnesses to the accident. She testified that she reviews lease agreements to determine who is responsible to maintain a certain area at a premises, and that Bernie's Complete Landscaping was hired by Staller for snow plowing and sanding of the parking lot of the Center Moriches property.

Rodriguez testified that Staller Associates has a maintenance department which existed in 2007 and that all members of the maintenance department had responsibility to deal with Bernie's Complete Landscaping. She made sure that the insurance requirements were up to date and sent letters to the contractors to inform them what they require of them as far as insurance is concerned. Members of the maintenance department, who answer directly to Carrie F. Staller, send work orders to the contractors and deal directly with the snow removal issues. She typed a letter dated September 11, 2009, signed by Terry Smith from the maintenance department, to Bernie's Complete Landscaping, which was a contract with

Staller Associates, which provided for snow plowing of the entire parking lot at the Center Moriches property, and which was in effect in 2007. Bernie's was the only snow removal company for the Center Moriches parking lot in 2006/2007. A contractor would be sent a work order by computer, or be called by Staller maintenance, or would use its judgment when to remove snow from the subject property if they do not get a call from Staller. However, she was not sure if there were any guidelines given to the snow removal contractors in the event no call was made and the contractor had to use its own judgment.

Rodriquez continued that the Staller maintenance department staff does not inspect the site where the snow removal was done. She did not know of any complaints made about the Center Moriches property prior to February 15, 2007 concerning snow removal services in the parking lot. She indicated that snow removal services were provided by Bernie's on February 2, 2007, and on other dates in February, but she did not have copies of those bills with her. She then testified about work provided on February 14th and 15th, 2007, and that there were no written complaints or phone calls received about the work performed by Bernie's. The fee for plowing starts at two inches, with no automatic requirement that Bernie's show up other than that criteria. She stated that Bernies was responsible for salt and sanding the parking lot when the conditions require the salt and sanding, but the agreement did not state that. However, she was not sure if Bernie's was required to go to the parking lot to see if there was ice and snow and to apply sand or salt, and did not know of the custom and practice. She was aware of a contract or lease agreement between Cenmore and/or Staller Associates with Waldbaums, which provided for Staller Associates to be responsible for snow removal in the parking lot, and that Waldbaums has no responsibility for snow removal in the parking lot.

In ***Espinal v Melville Snow Contractors***, 98 NY2d 136, 746 NYS2d 120 [2002], the Court of Appeals set forth three instances in which a party to a contract to render services is considered to have assumed a duty of care and thus, are liable to third persons:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" (*citation omitted);* (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*citation omitted)*; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*citation omitted)*. These principles are firmly rooted in our case law, and have been generally recognized by other authorities.

In opposition to the motion, the plaintiff submits, inter alia, an attorney's affirmation, a copy of the transcript of the examination before trial of Bernard Newberg dated September 11, 2009, and copies of the proposal and various work orders. A signed copy of the plaintiff's transcript has not been submitted to this court. The Staller/Cenmor defendants oppose this motion with, inter alia, an attorney's affirmation, the signed transcript of the examination before trial of Bernard Newberg, dated September 11, 2009; a work order for February 15, 2007; an invoice for snow plowing, salting and sanding of the premises on February 14, 2007; and a proposal dated September 5, 2006.

In applying the first element set forth in ***Espinal,*** *supra* regarding the assumption of liability by a

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contractor, no evidence has been submitted to demonstrate Bernie's launched a force or instrument of harm causing or creating the condition alleged to have caused the plaintiff's injury. Moreover, although the contract provided for snow removal services, this does not, standing alone, trigger a duty of care running to the plaintiff, a non-contracting third party. By merely plowing the snow, as required by the contract, defendant Bernie's actions cannot be said to have created or exacerbated a dangerous condition (*see*, ***Fung v Japan Airlines Company, Ltd.***, 9 NY3d 351, 850 NYS2d 359 [2007]). No evidence to the contrary has been submitted by the plaintiff or co-defendants. In view thereof, the first prong has not been satisfied.

In applying the second element of liability set forth in ***Espinal,*** *supra*, neither the plaintiff nor the Staller/Cenmor defendants have demonstrated that there was detrimental reliance by the plaintiff on the contractor's continued performance and that the contractor failed to perform its duty, thus affirmatively causing injury. The adduced testimony supports that Bernie's was instructed on each occasion as to whether to salt or sand, and plowing was premised upon the depth of the snow with approval by Staller. Bernie's plowed the premises on February 14, 2007, and neither Mike LeMay, nor anyone on behalf of the co-defendants or the plaintiff, complained that the condition of the parking lot was not satisfactory. The plaintiff has not demonstrated that he detrimentally relied on Bernie's continued performance on February 15, 2007. It has been established that Bernie's was not called by the co-defendants to plow the premises on February 15, 2007 until after the plaintiff fell.

In applying the last element of liability, it has not been demonstrated that the contract was comprehensive and exclusive as to maintenance. Due to the lack of broadness of the contract, and the course of conduct of the parties, it has not been demonstrated that Bernie's displaced, or, in fact, assumed, the owner or possessor's duty to safely maintain the premises (*see*, ***Lehman v North Greenwich Landscaping, LLC***, 2011 NY Slip Op 746 [NY 2011]). Here, the adduced testimony establishes that neither Staller nor the Cenmor defendants relinquished the duty to inspect and safely maintain the premises.

In view of the foregoing, it is determined that neither the plaintiff nor the Staller/Cenmor defendants has raised a factual issue to preclude summary judgment being granted to Bernie's. Only conclusory, unsupported assertions have been presented which amount to no more than speculation. The climatological date submitted by the Staller/Cenmor defendants is not supported by an affidavit from an expert interpreting the data for this court and opining based upon a reasonable degree of climatological certainty that Bernie's in some way bears liability for the occurrence of the accident or caused an ice condition in the parking lot.

Accordingly, motion (003) for summary judgment dismissing the complaint and cross claims against Bernie's Complete Landscaping, Inc. is granted, and motion (004) by the Staller/Cenmore defendants for summary judgment dismissing the complaint and cross claims asserted against them is denied, and for summary judgment against Bernie's Complete Landscaping for indemnification on their cross claims is denied.

Dated: Jan 9, 2012

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION