Mauro v 780 Broadway, LLC

2012 NY Slip Op 33083(U)

December 24, 2012

Sup Ct, Suffolk County

Docket Number: 10-27013

Judge: Thomas F. Whelan

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SHORT FORM ORDER

INDEX No. 10-27013
CAL. No. 12-00383OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-25-12
ADJ. DATE 10-15-12
Mot. Seq. # 002 - MD

CAROL P. MAURO,

Plaintiff,

- against -

780 BROADWAY, LLC, CARPENTIER PROPERTIES CORP., LAWRENCE LABS, INC. d/b/a TOTAL PET CARE and LOUIS MONACO,

Defendants.

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers __ ; Answering Affidavits and supporting papers 14 - 17; 18 - 22 ; Replying Affidavits and supporting papers 23 - 24; 25 - 26 ; Other __ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Lawrence Labs, Inc. d/b/a Total Pet Care for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims against it or, in the alternative, for summary judgment on its cross claims for common-law indemnification against defendants 770-780 Broadway, LLC and Carpentier Properties Corp. is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on December 22, 2009 when she slipped and fell on ice in the parking lot of a shopping center located at 780 Broadway Avenue, Holbrook, New York. The shopping center was owned by 770-780 Broadway, LLC (770-780 Broadway) and the property manager was defendant Carpentier Properties, Inc. (Carpentier). Total Pet Care was a tenant of the shopping center pursuant to a lease with defendant Carpentier.

Plaintiff asserts a third cause of action in her complaint against defendant Lawrence Labs, Inc. d/b/a Total Pet Care (Lawrence Labs) for negligence in, among other things, the maintenance and control of the premises. By her bill of particulars, plaintiff alleges that defendant Lawrence Labs was negligent in, among other things, allowing the parking lot to become full of snow and ice, failing to inspect the parking lot, and failing to clean the snow and ice. In addition, plaintiff alleges that defendant had actual notice of the dangerous condition inasmuch as it created or allowed said condition, and received notice of the condition from various parties, and that defendant had constructive notice of said condition as it existed for such a period of time that defendant should have discovered and remedied it.

Defendant Lawrence Labs now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that the landlord and property manager retained exclusive responsibility to remove snow and ice from the premises pursuant to the lease agreement. In the alternative, defendant Lawrence Labs seeks common-law indemnification from the landlord and property manager. In support of the motion, defendant Lawrence Labs submits the summons and complaint, its answer with a cross claim against its co-defendants for contribution and/or indemnification, the answer of defendant Louis Monaco (Monaco) and the answer of defendants 770-780 Broadway and Carpentier with a cross-claim against their co-defendants for contribution or indemnification, plaintiff's bill of particulars, the deposition transcripts of plaintiff, of Richard Carpentier on behalf of defendant Carpentier, of Joseph Manzi on behalf of defendant Lawrence Labs and of defendant Monaco, the note of issue, the lease between defendant Carpentier and defendant Lawrence Labs, a rider to the lease, and an invoice to defendant Carpentier for defendant Monaco's services on the subject date.

In opposition to the motion, defendants 770-780 Broadway, LLC s/h/a 780 Broadway, LLC and Carpentier Properties Corp. contend that there are issues of fact as to who was responsible for inspecting for the existence of ice and for applying sand and salt to the parking lot inasmuch as the lease only mentions snow removal as the responsibility of the landlord. They note that based on the deposition testimony of Richard Carpentier, it was the tenant's responsibility to inspect the parking lot in front of its store for ice and to contact Louis Monaco to salt and sand the area whereas Mr. Manzi indicated at his deposition that if he determined a dangerous condition existed in front of his store, he would contact Richard Carpentier who would then contact defendant Monaco to salt and sand the area. According to defendants, there was an oral agreement between the landlord and tenant concerning ice removal from the parking lot. They argue that plaintiff fell very close to and almost directly in front of the entrance of Total Pet Care, that defendant Lawrence Labs had at least constructive notice of the ice condition, and was negligent in its inspection and its failure to have salt and sand applied to the area. Defendants submit copies of three still photographs from the Total Pet Care store outdoor video camera, one depicting plaintiff walking towards her vehicle and the other two depicting her lying on the ground after she fell, as well as a copy of the lease.

In her opposition to the motion, plaintiff agrees with the assertions of defendants 770-780 Broadway and Carpentier that numerous issues of fact exist as to the defendants' respective liability warranting denial of the motion. She submits the unsworn report of a meteorologist to show that there was sufficient time between the storm and her accident for a dangerous condition to occur and then be corrected.

In reply, defendant Lawrence Labs argues that defendant Monaco's failure to entirely remove the snow from the parking lot surface resulted in a hard crust of ice and that said snow removal from a shared parking lot was the sole responsibility of defendants 770-780 Broadway and Carpentier pursuant to the lease, which responsibility could not be displaced upon defendant Lawrence Labs based on a purported oral agreement the moment the remnant snow turned to ice.

Plaintiff's deposition testimony of June 27, 2011 reveals that the accident occurred on a Tuesday at approximately 1 p.m. in the afternoon, the weather was cold, and plaintiff was wearing slacks, a jacket and sneakers. Plaintiff testified that it had snowed more than a foot the previous weekend. She described the condition of the parking lot upon her arrival as plowed in certain areas while other areas had packed ice and snow. In addition, plaintiff testified that she walked very carefully on ice and snow from her vehicle to the store and remained in the store for approximately 10 minutes. Plaintiff stated that she left the store with a small bag in her hand and began walking back to her vehicle, which was 20 or 30 feet to the right of the store entrance, taking the same route as she took to get to the store. Plaintiff further stated that when she was near the store entrance the parking lots's asphalt was observable but as she walked farther away, the asphalt was covered and plaintiff was walking on solid ice. When plaintiff was a few feet away from the rear of her vehicle she slipped and fell on her back.

Richard Carpentier testified at his deposition on July 14, 2011 that he is an officer and shareholder of defendant Carpentier, which manages the property, and that he is also an officer and shareholder of defendant 770-780 Broadway, which owned the subject premises on the date of the accident. Mr. Carpentier testified that he personally took care of the management of the property. In addition, he testified that defendant Lawrence Labs was one of three tenants of a brick and block building located at 780 Broadway Avenue that shared a parking lot. Mr. Carpentier also testified that defendant Carpentier was responsible for the snow and ice removal on the parking lot on the date of the subject accident. He explained that defendant Carpentier would hire a snow plow company, that of defendant Monaco, to plow, that there was no contract for his services, and that defendant Carpentier did not supply the salt or sand. Mr. Carpentier identified the invoice to defendant Carpentier for defendant Monaco's services on the subject date. Mr. Carpentier stated that he inspected the property once a week, that during the winter of 2009 prior to the accident, there were bags of salt by the entrance and exit door within Total Pet Care's unit.

At his deposition on July 14, 2011, Joseph Manzi testified that he is an officer of defendant Lawrence Labs which is in the wholesale and retail pet supply business and that he has been at the subject address since 1997. In addition, he testified that he was not present at the premises at the time of said accident. He explained that 780 Broadway is a 15,000 square foot building divided into three areas for three tenants and that he occupied the front of the building, he sublet the middle of the building to a dog training facility, and that there may have been a tenant in the rear. In addition, Mr. Manzi explained

that the parking lot in front of the building was a shared parking lot that was used by tenants of his building as well as tenants of the adjacent building, 770 Broadway. He also testified that his employees would remove snow from the cement area directly in front of the entrance/exit door that was difficult for the snow contractor to access. Mr. Manzi further testified that his employees had also swept or shoveled snow or put ice melt on the black asphalt parking lot but that he had no knowledge if they did so prior to plaintiff's fall. Mr. Manzi stated that on occasions prior to the subject accident he had observed defendant Monaco removing snow but never saw him applying salt or sand. He added that Lawrence Labs "would never ever use salt because we're in the pet business and people bring their pets into our store and that's not healthy for their pads" and that they would possibly use sand.

Louis Monaco testified at his deposition on January 30, 2012 that the first snowstorm of the season was significant, 16 to 18 inches of snow, and it began on December 20, 2009 and ended the following day early in the morning. He performed snow removal services on the subject parking lot that was empty of any vehicles with his brother using two trucks to plow, that is, push the snow to one side, until approximately 4:30 a.m. on December 21, 2009, one day prior to plaintiff's fall. Neither truck was equipped with a salt or sand spreader. Defendant Monaco stated that during such a significant snowstorm he probably used parts of the some of the parking areas to pile the snow instead of pushing it all the way to the rear. In addition, he testified that he had a verbal agreement with Mr. Carpentier for snow plowing and did not receive any directions from anyone who worked for Total Pet Care. Defendant Monaco explained that he had no agreement to salt or sand because Mr. Carpentier did not like the cost of having to clean up the sand at the end of the year and it was his understanding from speaking with Mr. Carpentier that the pet stores did not like sand or salt because neither is "paw friendly." He added that he did salt or sand the parking lot once the year prior to the subject accident at the request of Mr. Carpentier after a "terrible ice storm." Mr. Monaco also testified that when he completed plowing in the early morning of December 21, 2009 there was less than a quarter of an inch of snow left that was ice. He explained that sometimes the snow cannot be scraped down to the black asphalt because of a crust of ice or hard packed snow. Defendant Monaco continued that he did not contact Mr. Carpentier about the ice because he knew that unless he received a call for that purpose "they" did not want any salt or sand on the parking lot.

Paragraph 38 of the rider to the lease dated October 14, 1997 provides "Tenant shall pay a common area fee" ... "This charge shall be applied by Landlord for but not limited to maintenance of lawn and parking lot, which shall include such items as snow removal, sweeping and pot hole repairs."

Paragraph 48 of the same rider indicates "Parking spaces are in common with the other tenants in the building."

Paragraph 20 of the lease provides "... This instrument may not be changed, modified, discharged or terminated orally."

"To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff" (***Nappi v Incorporated Vil. of Lynbrook***, 19 AD3d 565, 566, 796 NYS2d 537 [2d Dept 2005]). "[L]iability for a dangerous condition on property is generally predicated upon ownership,

occupancy, control or special use of the property" (*id.*; *see* ***Quick v G.G.'s Pizza & Pasta, Inc.***, 53 AD3d 535, 536, 861 NYS2d 762 [2d Dept 2008]). A tenant has a common-law duty to remove dangerous or defective conditions from the premises it occupies, even though the landlord may have explicitly agreed in the lease to maintain the premises and keep them in good repair (*see* ***Sarisohn v 341 Commack Road, Inc.***, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 2011]; ***Reimold v Walden Terrace, Inc.***, 85 AD3d 1144, 926 NYS2d 153 [2d Dept 2011]; ***Cohen v Central Parking Sys.***, 303 AD2d 353, 756 NYS2d 266 [2d Dept 2003]; ***McNelis v Doubleday Sports***, 191 AD2d 619, 595 NYS2d 118 [2d Dept 1993]; ***Chadis v Grand Union Co.***, 158 AD2d 443, 550 NYS2d 908 [2d Dept 1990]).

To impose liability upon a defendant in a slip-and-fall action, there must be evidence that the defendant either created the condition which caused the accident, or had actual or constructive notice of the condition (*see* ***DeLeon v Westhab, Inc.***, 60 AD3d 888, 875 NYS2d 589 [2d Dept 2009]; ***Sloane v Costco Wholesale Corp.***, 49 AD3d 522, 523, 855 NYS2d 155 [2d Dept 2008]). A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837-838, 501 NYS2d 646 [1986]; ***Cusack v Peter Luger, Inc.***, 77 AD3d 785, 786, 909 NYS2d 532 [2d Dept 2010]; ***McCormick v Patriot Assoc.***, 292 AD2d 573, 739 NYS2d 443 [2d Dept 2002]).

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that it did not create the dangerous or defective condition or have actual or constructive notice of its existence (*see* ***Starling v Suffolk County Water Auth.***,63 AD3d 822, 823, 881 NYS2d 149 [2d Dept 2009]).

Here, the adduced evidence shows that the area where plaintiff fell was part of the common parking area shared by tenants of 780 Broadway, maintenance of which was the responsibility of the landlord, defendant Carpentier, pursuant to the terms of the lease (*see* ***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *cf.* ***Sarisohn v 341 Commack Road, Inc.***, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 2011][store did not share parking lot with other stores so parking lot was part store's occupied premises]). Notably, the color photographs from the Total Pet Care store's video camera clearly depict plaintiff as having fallen in the parking lot right next to the parking stalls where vehicles were parked and across from, but not adjacent to or near, the store's entrance (*cf.* ***Saraceno v First Natl. Supermarkets, Inc.***, 246 AD2d 638, 668 NYS2d 234 [2d Dept 1998] [Court unable to determine on the record whether plaintiff fell on part of the common area of the shopping center, for which maintenance and snow removal were the responsibility of the landlord and manager, or fell on a sidewalk adjacent to the building occupied by tenant for which tenant was responsible for snow and ice removal pursuant to the lease]). However, defendant Lawrence Labs failed to demonstrate its entitlement to judgment as a matter of law. The proffered deposition testimony reveals that its officer, Mr. Manzi, acknowledged that defendant Carpentier's snow maintenance was limited to snow removal

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and plowing and Mr. Manzi expressly stated that he did not want any salt or sand applied to the parking lot because those materials were not healthy for customers' pets. The deposition testimony also reveals that said desire or request on the part of defendant Lawrence Labs was known to and honored by defendant Monaco unless he was expressly directed to apply salt or sand by Mr. Carpentier. Moreover, the deposition testimony of Mr. Manzi reveals that Total Pet Care's employees had, on occasion, prior to said accident, shoveled or put ice melt on the parking lot. The proffered proof indicates that defendant Lawrence Labs had some involvement in the maintenance of the parking lot and may have restricted its maintenance with respect to the removal of ice thereby raising issues of fact as to whether defendant Lawrence Labs created, allowed or made possible the creation of the icy condition that caused plaintiff to fall (*see* ***Healy v Bartolomei***, 87 AD3d 1112, 1113, 929 NYS2d 866 [2d Dept 2011]). Therefore, the request by defendant Lawrence Labs for summary judgment dismissing the complaint as against it is denied.

The principle of common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party (*see* ***Arrendal v Trizechahn Corp.***, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81[2d Dept 2009]). An award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties (*see* ***Aragundi v Tishman Realty & Constr. Co., Inc.***, 68 AD3d 1027, 891 NYS2d 462 [2d Dept 2009]; ***Coque v Wildflower Estates Developers, Inc.***, 31 AD3d 484, 818 NYS2d 546 [2d Dept 2006]).

Inasmuch as there are issues of fact as to whether any negligence on the part of defendant Lawrence Labs caused the icy condition of the parking lot, the request by defendant Lawrence Labs for summary judgment dismissing the cross claims against it for common-law indemnification and contribution is denied as premature (*see* ***Powell v CVS Jerusalem N. Bellmore, LLC***, 71 AD3d 655, 896 NYS2d 139 [2d Dept 2010]; ***Aragundi v Tishman Realty & Constr. Co., Inc.***, 68 AD3d 1027, 891 NYS2d 462; ***Watters v R.D. Branch Assocs., LP***, 30 AD3d 408, 816 NYS2d 193 [2d Dept 2006]). The alternate request of defendant Lawrence Labs for summary judgment on its own cross claims for common-law indemnification is denied as premature for the same reason (*see* ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]).

Accordingly, the instant motion is denied.

Dated: 12/24/12

THOMAS F. WHELAN, J.S.C.