

Checo v Sentralle Constr. Corp.

2013 NY Slip Op 30484(U)

February 25, 2013

Supreme Court, New York County

Docket Number: 102219/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

RAMON CHECO and JUSTA CHECO,

Plaintiff,

- against -

INDEX NO. 102219/10

MOTION SEQ. NO. 003

SENTRALLE CONSTRUCTION CORPORATION,

Defendant.

The following papers, numbered 1 to 3, were read on this motion by defendant for summary judgment pursuant to CPLR 3212.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

FILED
MAR 11 2013
NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

This is an action for personal injuries allegedly sustained by Ramon Checo (plaintiff) and his wife Justa Checo derivatively, on December 31, 2009, when he slipped and fell on premises located at 810 Yonkers Avenue, Yonkers, New York, commonly known as Yonkers Raceway/Empire City Casino. The plaintiff, who was an employee of Yonkers Raceway, claims that he slipped on an accumulation of snow and ice. The defendant Sentrale Construction Corporation (Sentrale) is a snow removal contractor that was hired by Yonkers Raceway to clear snow from certain specified portions of the premises. Plaintiff alleges that Sentrale was negligent in failing to adequately remove or remedy the snow and icy condition upon which he fell. Now before the Court is a motion by Sentrale for summary judgment, pursuant to CPLR 3212, dismissing the complaint. Plaintiff is in opposition to the motion.

BACKGROUND

The complaint alleges that on December 31, 2009, plaintiff was caused to slip and fall on snow and/or ice at Yonkers Raceway. At the time of the accident plaintiff worked for Yonkers Raceway in the housekeeping department (Affirmation of Lelia Cardo, Esq. [Cardo

Aff.], Exhibit D). He works five days a week from Wednesday through Sunday, from 2 a.m. to 10 a.m. When arriving at or leaving work, the plaintiff entered the building through a lower level asphalt ramp that was used exclusively by employees (*id.*). On the date of the accident, the plaintiff had just exited a van and was walking down the ramp towards the building so that he could clock out and leave at the end of his shift (*id.*). Plaintiff maintains that he took six to ten steps before he slipped and fell on snow. There was no debris on the ramp and it was not cracked or broken (*id.*).

At the time of the accident, there were six to seven inches of snow on the ramp, and plaintiff testified at his deposition that it had been snowing since prior to his reporting to work at 2 a.m. on that day, and the storm was still in progress at the time of his accident (*id.*). Between 2 a.m. and 10 a.m. on the date of the accident, no one had shoveled or plowed the area from the time he arrived at 2 a.m. until the time of the accident (*id.*).

Sentrale was an outside snow removal contractor hired to clean certain designated areas of Yonkers Raceway (Cardo Aff., exhibit E). On the day of the accident, Sentrale was called to Yonkers Raceway at 8 a.m. to perform snow removal but, allegedly because of the poor weather, the crew did not arrive at the Raceway until 10 a.m. (*id.*). The parties do not dispute that Sentrale had not performed any snow removal at the site prior to the plaintiff's fall. Sentrale goes to the site only when called by Yonkers Raceway, it does not go with any regular frequency and is not permitted to go to the site unless it is called (*id.*). Sometimes, Yonkers Raceway would do its own snow removal with its own crew. Additionally, Sentrale has the responsibility to remove snow and ice only from certain designated areas of the casino and Yonkers Raceway reserves the maintenance of certain areas to its own crew. The specific areas assigned to Sentrale are detailed in a written scope of work prepared by Yonkers Raceway's Director of Operations (*id.*, exhibits E, G, H).

Sentrale moves for summary judgment dismissing plaintiff's complaint, on the grounds

* 3]

that it owed no duty to the injured plaintiff and thus cannot be held liable for negligence. Sentrale claims it did not create or exacerbate any risk or defective condition nor did it cause plaintiff to detrimentally rely on its removing the snow and ice from the ramp. Sentrale also argues that it lacked a comprehensive and exclusive obligation to maintain the property and therefore can not be held liable to the plaintiff. Finally, Sentrale argues that it had no duty to remove snow while a storm was still in progress.

Plaintiff argues that the motion should be denied because there is a question of fact as to whether there was a storm in progress at the time of the accident and also as to whether Sentrale owed a duty to the plaintiff.

STANDARD

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if

any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well established that a defendant can only be held liable for negligence if it owed a duty of care to the injured party (*see Espinal v Melville Snow Contr., Inc.*, 98 NY2d 136, 138 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001]). A duty can arise from a contractual relationship but a contractual obligation standing alone generally will not give rise to tort liability in favor of a third party (*Espinal*, 98 NY2d at 139). More specifically, a snow removal contractor's contractual obligation will not give rise to tort liability in favor of third parties unless: (1) the snow removal contractor, in failing to exercise reasonable care in the performance of its duties, launched a force or instrument of harm; (2) the plaintiff detrimentally relied on the continued performance of the snow removal contractor's duties; or (3) the snow removal contract has entirely displaced the landowner's duty to safely maintain the premises (*see Espinal* 98 NY 2d at 140; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578, 579 [2nd Dept 2008]; *Castro v Maple Run Condominium Assn.*, 41 AD3d 412, 413 [2nd Dept 2007])

Storm in Progress

In New York, there is no duty to remove snow caused by a storm while the storm is in progress, and the duty does not commence until a reasonable time after the storm has ended (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]; *see also Thompson v Menands Holding LLC*, 32 AD3d 622, [3d Dept 2007] [defendants entitled to summary judgment where plaintiff fell in an icy parking lot during an ongoing ice storm]; *Baum v Knoll Farm*, 259 AD2d 456 [2nd Dept 1999]). This is known as the "storm in progress" defense (*Powell v MGL Hillside*

Assoc., L.P., 290 AD2d 345, 345 [1st Dept 2002]). Where the evidence in the record is clear that the accident occurred while the storm was still in progress, defendants may avail themselves of the rule as a matter of law (*id.*). Evidence of a storm in progress presents a prima facie case for dismissal (*id.*).

DISCUSSION

In its initial motion papers, Sentrale has demonstrated its *prima facie* entitlement to summary judgment. Sentrale has established that the contract was not a comprehensive and exclusive property maintenance obligation intended to displace Yonkers Raceway's duty to maintain the premises in a reasonably safe condition (see *Castro* 41 AD3d at 413; *Cochrane v Warwick Assoc.*, 282 AD2d 567, 568 [2nd Dept 2001]; *Pavlovich v Wade Assoc.*, 274 AD2d 382, 383 [2nd Dept 2000]). The fact that Yonkers Raceway reserved the right to remove snow and ice, as well as sanded and salted the premises and also supervised Sentrale's performance, establishes that there was not a comprehensive and exclusive property maintenance obligation that displaced all of the safety related obligations of Yonkers Raceway (see *Torella v Benderson Development Co., Inc.*, 307 AD2d 727 [4th Dept 2003]; *Kozak v Broadway Joe's*, 296 AD2d 683 [3rd Dept 2002]). Sentrale also established that the injured plaintiff did not detrimentally rely on the continued performance of Sentrale's contractual duties. Sentrale was not responsible for removing the snow and ice unless and until it was called to the property by Yonkers Raceway and the plaintiff testified that he was fully aware that the area had not been shoveled prior to his walking down the ramp (Cardo Aff., exhibit D). For the same reasons, there is no evidence that Sentrale created or exacerbated any risk or defective condition or launched a force of harm. Sentrale did not begin snow removal operation until after the plaintiff's accident. Additionally, given that the storm was still in progress during plaintiff's accident, Sentrale had no duty to commence snow removal operation until a reasonable time after the storm had dissipated (see *Smith*, 50 AD3d at 500; *Powell*, 290 AD2d

at 345 ["evidence of a storm in progress presents a prima facie case for dismissal"].

In opposition to the motion, plaintiff suggests that the motion should be denied because there are question of fact as to whether the storm was still in progress at the time of the accident and whether Sentrale owed a duty to the plaintiff to remove the snow and ice from the ramp. There is no question that a storm was still in progress given that the plaintiff himself testified that it was snowing at the time of his fall, and that it had been snowing since prior to his reporting to work at 2 a.m that day. There are also photographs taken by Yonkers Raceway and introduced at their deposition that show snow falling while the plaintiff was being attended to by EMS personal (*id.*, exhibits D, L). Plaintiff does not offer any evidence which rebuts the showing that snow was still falling at the time of his accident. Since there is no duty to remove snow while a storm is in progress (*see Pippo*, 43 AD3d at 304), Sentrale's motion for summary judgment should be granted.

Additionally, Sentrale as a snow removal contractor did not owe a duty to the injured plaintiff, who was a third party not in privity of contract with Sentrale. The plaintiff claims the accident happened because Sentrale showed up at the site two hours late and thus failed to remove the snow and ice from the ramp before the plaintiff's fall. This claim, even if true, is completely immaterial. There is nothing in the contract between Sentrale and Yonkers Raceway which mandates a particular response time and even if there were such a provision, it would not confer any benefit upon the plaintiff who was a stranger to the agreement. Sentrale did not take any action which created or exacerbated any risk or defective condition. As detailed above, Sentrale did not begin snow removal at the location of the accident until after the plaintiff's accident occurred. The fact that Sentrale was not onsite when the accident occurred hardly can be said to have created an unreasonable risk of harm or exacerbating the risk to the plaintiff.

While the plaintiff's counsel speculates that there may have been ice underneath the

snow which Sentrale failed to remove during a previous storm, such an assertion is mere speculation and cannot be used to defeat a motion for summary judgment (see *Zuckerman*, 49 NY2d at 563). Accordingly the motion for summary judgment is granted and the complaint dismissed.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed in its entirety with costs to defendant, as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

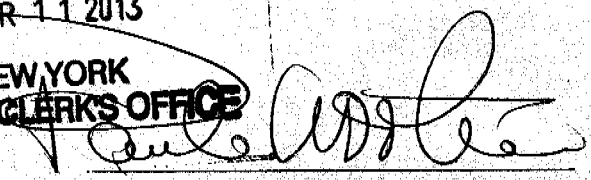
ORDERED that defendant is directed to serve a copy of this Order, with Notice of Entry, upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED

MAR 11 2013

NEW YORK COUNTY CLERK'S OFFICE



PAUL WOOTEN, J.S.C.

Dated: 2-25-13

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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