

Dominguez v 2520 BQE Assoc.

2013 NY Slip Op 30808(U)

April 17, 2013

Sup Ct, New York County

Docket Number: 113716/2009

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDGE DORIS LING-COHAN
Justice

PART 36

Index Number : 113716/2009
DOMINGUEZ, WILFRIDO
vs.
2520 BQE ASSOCIATES
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 7, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits + memo | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3, 4
Replying Affidavits (+ memo) | No(s). 5
interim orders dated 11/28/12 + 10/9/12 | 6, 7
Upon the foregoing papers, it is ordered that this motion is

for summary judgment
by defendant 2520 BQE Assoc. LLC is
granted in accordance with the attached
memorandum decision

(motion consolidated for disposition with
motion Sequence # 008)

FILED

APR 22 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/17/13

[Signature], J.S.C.
JUDGE DORIS LING-COHAN

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----X
Wilfrido Dominguez and Rosa
Dominguez,

Plaintiffs,

Index Number:

-against-

113716/2009

2520 BQE Associates, LLC and
Time Warner Cable,

FILED

Motion Seq.
007 & 008

Defendants.

APR 22 2013

-----X
Doris Ling-Cohan, J.:

**COUNTY CLERK'S OFFICE
NEW YORK**

2520 BQE Associates, LLC (BQE) moves, pursuant to CPLR 3212,
for summary judgment dismissing plaintiffs' complaint and any
cross claims against it or, alternatively, for summary judgment
on indemnity against Time Warner Cable (Time Warner). Time
Warner moves, pursuant to CPLR 3212, for summary judgment,
dismissing plaintiffs' complaint and any cross claims against it.
The motions are consolidated for disposition and decided as noted
below.

Parties

Wilfrido Dominguez (plaintiff) was a deliveryman working for
Iron Mountain, Inc. (Iron Mountain) and, on March 4, 2009, he was
making a scheduled delivery and pick up at a building (the
Building) located at 2520 Brooklyn Queens Expressway West,
Woodside, New York, when he slipped and fell (bill of
particulars, items 5-6, 28). Rosa Dominguez is plaintiff's wife
and she is suing for loss of services arising out of plaintiff's

accident (complaint, ¶¶ 45-46).

BQE was the owner of the Building and it leased the basement, half of the first floor, the entire second floor and the adjacent parking lot to Time Warner and separately leased the remainder of the first floor to a perfume bottling company (O'Connor EBT, at 8-10).

Time Warner was a triple net lessee of the Building and it was responsible for maintenance of the Building (*id.* at 13, 28; Azzaro EBT, at 15). Iron Mountain was a company responsible for long-term file storage for Time Warner and it arranged for pick up and delivery of files from the Building (*id.* at 30-31). On March 4, 2009, plaintiff was employed by it as a driver (plaintiff EBT dated June 8, 2011 [plaintiff 2011 EBT], at 21; bill of particulars, item 28).

Executive Snow Control (Executive) was a professional snow and ice removal company that entered into a contract with Time Warner (the Snow Removal Contract) in 2008 for snow and ice removal at various locations including at the Building (Azzaro EBT, at 21, 51, 69-70).

Parties' Allegations

Plaintiff contends that, on March 4, 2009, as part of a regular delivery, he went to the Building to drop off and pick up a shoe-box sized package, each weighing approximately 25-30 kilograms (55-65 pounds), from Time Warner (plaintiff January 4 and 5, 2012 EBT [plaintiff 2012 EBT], at 45, 51-52). He states

[* 4]

that it had snowed the night before and that he arrived at about 10:30-11 A.M., that he parked on the street in front of the Building, walked the 15-20 feet down a path to a four to five step staircase that leads to the Building's entrance and that he observed between 8 and 10 inches of snow on the ground and on the sides of the staircase pushed to each side (*id.* at 45, 50-51, 57-60).

Plaintiff also states that there was no sand or salt on the steps and that, as he was returning to his van after making the delivery, he slipped and fell on clear ice that was on the platform at the top of the staircase (*id.* at 61-62, 75-76, 163). He asserts that after he slipped, he fell on the ground, causing him to injure his right knee and right shoulder and, as a result, he was forced to undergo surgeries to repair his knee and shoulder (plaintiff 2011 EBT, at 55; plaintiff 2012 EBT, at 89, 92; bill of particulars, item 18).

BQE states that, on June 19, 1989, its predecessor, RMAQ Realty (RMAQ) entered into a lease with American Cablevision of Queens, Inc. (Cablevision) for the Building, that there were subsequent amendments (together, the Lease), that on December 12, 2007, RMAQ conveyed its ownership interest to BQE, that Cablevision was purchased by Time Warner and that Cablevision assigned its interest to Time Warner.

BQE contends that, under the Lease, it was an out-of-possession landlord without any responsibility for maintaining

the premises, that Time Warner actively maintained the premises, having numerous maintenance personnel at the Building and that Time Warner arranged for snow and ice removal with Executive, pursuant to the Snow Removal Contract (O'Connor EBT, at 8, 10, 15, 24, 28, 34, 37; Azzaro EBT, at 15, 21, 42, 51, 69-70).

Time Warner states that the steps and platform on the exterior stairs were made of concrete and that they were "common space" (Azzaro EBT at 18, 32). It further states that it hired Executive to perform snow and ice removal under the Snow Removal Contract, that it had more than 10 maintenance personnel at the Building with shovels and salt available and that its maintenance personnel might clear obstructions such as debris, snow and ice, if they observed such conditions (*id.* at 35, 42, 44-45, 99).

Time Warner asserts that, since the exterior steps were common space, it was not responsible for maintenance of that area and that five or six years prior to plaintiff's accident, the landlord had arranged for repairs of major cracking on the outside of the Building (*id.* at 32, 80-82, 104). It contends that, since there was black ice, there is no notice as a matter of law and that, consequently, plaintiff's complaint against it should be dismissed (Kaufman affirmation dated May 21, 2012, ¶ 14).

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law

[*6]

by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003][citations omitted]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d

836, 837 [1986]).

Moreover, "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Amendola v City of New York*, 89 AD3d 775, 775 [2d Dept 2011]; *Schiano v Mijul, Inc.*, 79 AD3d 726 [2d Dept 2010]).

Out of Possession Landlord

"An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or [the] right to re-enter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific safety provision'" (*Ross*, 86 AD3d at 420 [internal citation omitted]; *Kase v H.E.E. Co.*, 95 AD3d 568, 569 [1st Dept 2012]). Also, "snow or ice is not a significant structural or design defect" (*Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 414 [1st Dept 2012]).

Moreover, the Lease provides that the "Tenant shall make all non-structural repairs, ordinary and extraordinary, foreseen and unforeseen, in order to keep the [Building] in good order and repair" (Article 10.1 [a]).

[* 8]

Analysis

Applying the above principles to this case, the court must grant BQE's motion for summary judgment to dismiss plaintiffs' complaint against it. BQE was an out of possession landlord under a triple net lease that transferred responsibility for maintenance of the Building to Time Warner (O'Connor EBT, at 28, 34; Azzaro EBT, at 15). No evidence has been proffered to contest BQE's showing that it had no responsibility for day-to-day maintenance of the Building, while there is significant evidence that Time Warner performed maintenance at the Building, that it had at least 10 maintenance people at the Building and that it hired Executive to perform snow and ice removal from the area surrounding the Building, pursuant to the Snow Removal Contract (O'Connor EBT, at 34; Azzaro EBT, at 21, 25, 42, 69-70). BQE's repair to major cracking on the outside of the Building is the sort of structural repair (*id.* at 80-82) that is in sharp contrast to the removal of snow and ice from the steps and the platform leading to the entrance of the Building, which "is not a significant structural or design defect" (*Bing*, 94 AD3d at 414). Therefore, BQE's motion for summary judgment dismissing plaintiffs' complaint against it is granted.

Time Warner asserts that the allegedly defective condition of black ice can never provide notice, as a matter of law (Kaufman affirmation dated May 21, 2012, ¶ 14), citing *Christal v Ramapo Cirque Homeowners Assoc.*, 51 AD3d 846 ([2d Dept 2008]).

However, Time Warner has "failed to offer specific evidence as to [its] activities on the day of the accident, including evidence indicating the last time the staircase was inspected or maintained before plaintiff fell" (*Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 [1st Dept 2008]; *Romero v Morrisania Tower Hous. Co. Ltd. Partnership*, 91 AD3d 507, 507-508 [1st Dept 2012]; *Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept 2009]). In *Christal*, the court found that defendants had made the requisite showing "that they neither created nor had actual or constructive notice of the patch of 'black ice' on which the plaintiff ... allegedly slipped and fell" (51 AD3d at 846; see also *Sweeney v Doria*, 95 AD3d 1298, 1299 [2d Dept 2012]).

The condition of black ice is merely one type of dangerous condition where the defendant seeking dismissal of a plaintiff's complaint must "establish that it did not cause or create the condition [of a patch of black ice] or have actual or constructive notice of it" (*Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]).

Not only has Time Warner failed to present any evidence as to the last time the exterior steps and platform were inspected and maintained prior to plaintiff's fall, but plaintiff has presented evidence that there was snow and ice on the steps that had been pushed to the sides of the stairs and that neither the steps nor the platform had salt or sand on them to assist in melting any ice. Consequently, Time Warner has not shown its

