

<b>Miller v Serota Prop., LLC</b>
2013 NY Slip Op 32761(U)
March 22, 2013
Sup Ct, Nassau County
Docket Number: 5199/11
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

DANIELLE MILLER,

Plaintiff,

- against -

SEROTA PROPERTIES LLC, WILLIAM  
FLOYD PLAZA LLC, SOUND GARDENS, INC.,  
and LOUIS LEFKOWTIZ REALTY INC.,

Defendant.

TRIAL / IAS PART 29  
NASSAU COUNTY

Index No. 5199/11

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits . . . . .	<u>1, 2</u>
Answering Affidavits . . . . .	<u>3, 4, 5</u>
Replying Affidavits . . . . .	<u>6, 7</u>
Briefs: Plaintiff's / Petitioner's . . . . .	<u>          </u>
Defendant's / Respondent's . . . . .	<u>          </u>

The defendant Sound Gardens, Inc. moves (motion sequence #1) pursuant to 22 NYCRR § 212.17(c) to strike this case from the trial calendar, to strike the note of issue and to allow the parties sufficient time to complete discovery, including any discovery necessary after the plaintiff's service of a supplemental bill of particulars. Sound Gardens, Inc. contends the matter is not yet ready for trial, and Sound Gardens, Inc. would be irreparably prejudiced in adequately defending the case.

The plaintiff opposes the motion (motion sequence #1). The plaintiff contends this

motion is based solely on Sound Gardens, Inc.'s failure to take notice of the plaintiff's injuries together with the plaintiff's submission of a medical life care plan. The plaintiff asserts discovery is complete, and Sound Gardens, Inc. and the plaintiff agreed another independent medical examination can be done by Sound Gardens, Inc.

Sound Gardens, Inc. replies to the plaintiff's opposition to the motion (motion sequence #1). Sound Gardens, Inc. asserts the plaintiff for the first time claims additional injury by a supplemental/amended bill of particulars, and that circumstances requires examination. Sound Gardens, Inc. questions the plaintiff's delay.

The Court determines Sound Gardens, Inc. fails to satisfy the requirements of 22 NYCRR § 212.17(c) to strike this case from the trial calendar and to strike the note of issue. Any additional time for discovery cannot be handled in conference.

Sound Gardens, Inc. moves (motion sequence #2) pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims and counterclaims against it. Sound Gardens, Inc. contends there are no triable issues regarding it in this litigation. Sound Gardens, Inc. asserts it had no duty nor authority to come to the property unless specifically directed by the codefendant Serota Properties LLC.

The plaintiff opposes the motion (motion sequence #2), and adopts the opposition affirmation of the other defendants. The plaintiff contends there are triable issues of fact. The plaintiff points to the contract for Sound Gardens, Inc. to provide snow removal and to inspect the parking lot where the accident occurred. The plaintiff alleges a dangerous

icy parking lot condition resulted from the extreme neglect and breach of contract by Sound Gardens, Inc. performed the day before the accident. The plaintiff indicates there was no precipitation from the time Sound Gardens, Inc. was at the premises until the time of the accident.

The other defendants oppose the motion (motion sequence #2). The other defendants contend there are triable issues of fact, and point to deposition testimony and an August 20, 2010 agreement between Serota Properties LLC and Sound Gardens, Inc. The other defendants claim Sound Gardens, Inc. piled the snow poorly in the parking lot, re-freezing resulted, but Sound Gardens, Inc. failed to notify the landlord as orally agreed. The other defendants submit the cross claim for indemnification against Sound Gardens, Inc. should not be dismissed because Sound Gardens, Inc. may be liable to the defendants, even in the absence of a duty to the plaintiff.

Sound Gardens, Inc. replies to the opposition by plaintiff and the other defendants. Sound Gardens, Inc. contend the evidence establishes it did not have any comprehensive nor exclusive snow removal agreement for 413 William Floyd Parkway which was maintained by Serota Properties LLC. Sound Gardens, Inc. asserts the reliance by the others upon unsworn statements by the plaintiff's co-employees is inadmissible and cannot defeat a summary judgment motion. Sound Gardens, Inc. notes there is no expert proffer to establish any negligence by it causing the alleged condition. Sound Gardens, Inc. points out the testimony proffered by the codefendants confirms the codefendants had

the responsibility to contact Sound Gardens, Inc. if they were dissatisfied with the snow plowing results, and especially if there was an icy condition, but there is no evidence anyone contacted Sound Gardens, Inc. Sound Gardens, Inc. adds it was not authorized to sand/salt unless it was specifically directed to so by a representative of Serota Properties LLC. Sound Gardens, Inc. points to the snow removal agreement which clearly covers any re-freezing circumstance by stating the application of sand/salt is on a "need be" basis based on the request of a representative of Serota Properties LLC. Sound Gardens, Inc. remarks neither the plaintiff nor Serota Properties LLC ever complained about the parking lot condition; Serota Properties LLC never received any complaints about the parking lot; and Serota Properties LLC never contacted Sound Gardens, Inc. to return to sand/salt as expressly agreed.

Deposition testimony shows a large storm happened in the early morning of January 27, 2011, and two workers were sent to plow the parking lot. The testimony states the parking lot was plowed for three hours until the snow ceased at 7:30 A.M. on January 27, 2011. The plaintiff's verified bill of particulars states the accident occurred on January 28, 2011, some 25 hours later, at approximately 8:50 A.M., at a parking lot located at 413 William Floyd Parkway, Shirley, New York. The plaintiff alleges she was caused to slip and fall there because of a dangerous, defective, icy, slippery, snowy and unsafe condition.

Under the August 20, 2010 agreement between Serota Properties LLC and Sound

Gardens, Inc., the latter was obligated to “clear, by means of truck and plow snow from roadways, parking and loading areas, entrances and exits of the property of the subject businesses...and not until all accumulations have cease, on a one time plowing per snow fall basis.” That contract indicated Sound Gardens, Inc. would not be responsible for carting and removal off the property of any mounds or piles of snow and ice which accumulated from its plowing. The contract stated Sound Gardens, Inc. would not be liable for any loss or damage sustained by the roadway surfaces and parking areas surfaces resulting from its normal plowing and salting operations and after leaving the job site or grounds. Serota Properties LLC agreed, in a separate August 9, 2010 letter that Sound Gardens, Inc. would be paid \$50.00 per snowfall of two inches to eight inches commencing on November 1, 2010 to March 31, 2011 for snow removal, and accumulations over eight inches would be billed at \$45.00 per one inch of snow. Serota Properties LLC also agreed the cost of sand/salt mix would be priced at \$85.00/yard, and such an application would be on a “need be” basis based on the request of a representative of Serota Properties LLC.

This Court determines the express contract terms obligated Sound Gardens, Inc. to work under a “comprehensive and exclusive” property maintenance obligation which meant Sound Gardens, Inc. did not absorb the property owner’s duty as a property owner to safely maintain the premises (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 611 N.Y.S.2d 817 [1994]; *Landon v. Kroll Laboratory Specialists, Inc.*, 91 A.D.3d

79, 934 N.Y.S.2d 183 [2d Dept 2011]).

“Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party” (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120, 773 N.E.2d 485). In addition, “‘a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party’” (*Stiver v. Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 257, 848 N.Y.S.2d 585, 878 N.E.2d 1001, quoting *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d at 138, 746 N.Y.S.2d 120, 773 N.E.2d 485; see *Church v. Callanan Indus.*, 99 N.Y.2d 104, 111, 752 N.Y.S.2d 254, 782 N.E.2d 50). An exception to the general rule exists where the contractor “launches an instrument of harm or creates or exacerbates a hazardous condition” (*Wheaton v. East End Commons Assoc., LLC*, 50 A.D.3d 675, 677, 854 N.Y.S.2d 528; see *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d at 140, 746 N.Y.S.2d 120, 773 N.E.2d 485)

*Benavides v. 30 Brooklyn*, LLC, 96 A.D.3d 889, 890, 946 N.Y.S.2d 513 [2d Dept 2012].

This Court determines Sound Gardens, Inc. established its *prima facie* entitlement to judgment as a matter of law. Sound Gardens, Inc. demonstrates it neither created nor exacerbated a dangerous condition which allegedly caused the plaintiff to slip and fall causing injuries. In opposition, neither the plaintiff nor any of the other defendants raise a triable issue of fact regarding whether Sound Gardens, Inc.’s alleged negligence created or exacerbated a hazardous condition which was a substantial factor of the plaintiff’s injuries. There does not appear to be any evidentiary proffer for the assertions of the plaintiff and the other defendants that Sound Gardens, Inc.’s snow removal created a dangerous icy condition or somehow exacerbated a snow-related hazard causing the plaintiff to slip and fall. “Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of

care to the injured party (*see Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001]; *Pulka v Edelman*, 40 NY2d 781, 782 [1976])” (*Espinal v Melville Snow Contrs.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120 [2002]). Hence, here there is no establishment of Sound Gardens, Inc.’s duty to the plaintiff. The plaintiff and the other defendants do not show Sound Gardens, Inc. failed to exercise reasonable care in the performance of its duty. The plaintiff and the other defendants fail to establish the plaintiff detrimentally relied on the continued performance of Sound Gardens, Inc.’s duty. Moreover, there is no showing by the plaintiff nor the other defendants that Sound Gardens, Inc. entirely displaced any of the other defendants duty to maintain the premises safely (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d at 140).

Accordingly motion (motion sequence #1) is denied, and motion (motion sequence #2) is granted.

So ordered.

Dated: **March 22, 2013**

ENTER:

J. S. C.

NON FINAL DISPOSITION

**ENTERED**

**MAR 28 2013**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**