

Villon v Town Sports Intl. LLC

2013 NY Slip Op 33514(U)

November 12, 2013

Supreme Court, New York County

Docket Number: 107201/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

SADYA VILLON,

INDEX NO. 107201/11

Plaintiff,

MOTION DATE _____

-against-

MOTION SEQ. No. 004

TOWN SPORTS INTERNATIONAL LLC, et al.,
Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

FILED
PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits 1, 3 NO 4 2013

Answering Affidavits- Exhibits _____

NEW YORK
COUNTY CLERK'S OFFICE

Replying Affidavits _____ 5, 6

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 11/12/13

Donna M. Mills
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION
DONNA M. MILLS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----X
SADYA VILLON,

Plaintiff,

-against-

Index No.: 107201-2011

TOWN SPORTS INTERNATIONAL LLC, TSI CLUB
LLC, NEW YORK SPORTS CLUBS, LAWN GUARD
INCORPORATED and BROADWAY-HAWTHORNE
LLC,

Defendants,

-----X
BROADWAY-HAWTHORNE LLC,

Third-Party Plaintiff,

-against-

FILED
NOV 14 2013
NEW YORK
COUNTY CLERK

Index No.: 590750-2011

LAWN GUARD, INC. d/b/a YORKTOWN
LANDSCAPING,

Third-Party Defendant

-----X

MILLS, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition. In this action, plaintiff Sadya Villon alleges that she suffered personal injuries as a result of a slip and fall on ice in a parking lot. In motion sequence 004, defendant Lawn Guard, Inc. d/b/a Yorktown Landscaping (Lawn Guard) moves, presumably pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as to it. In motion sequence 005, defendant Broadway-Hawthorne LLC (Hawthorne), moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as to it.

FACTUAL ALLEGATIONS

Plaintiff alleges that, on January 7, 2011, she slipped and fell on ice in a parking lot adjacent to the premises located at 24 Saw Mill River Road in Hawthorne, New York. Hawthorne is the owner of the premises where plaintiff fell. Plaintiff testified that after exercising at the New York Sports Club located at 24 Saw Mill Road, she was returning to her vehicle when she slipped on a piece of ice which was located near the rear driver's side of her car. Plaintiff testified that it was not snowing before or at the time of her accident, that the ice on which she slipped was dark and dirty, and that the last time it snowed prior to her accident was on December 26, 2010.

Jeffrey Zelekowitz (Zelekowitz), the managing member of Hawthorne, testified that Hawthorne maintains the parking lot adjacent to New York Sports Club, and that since 2005, it had contracted with Lawn Guard for the snow removal on the subject lot. Dominic Chiero (Chiero), the foreman for Lawn Guard, was deposed. Chiero testified that Lawn Guard conducts snow removal for the properties designated at 24 Saw Mill River Road, and that there is a written contract for snow removal and salting for icy conditions at that location. He testified that he recalled being at the subject parking lot on the day of plaintiff's accident and that, when he arrived at the premises, he was told that someone had slipped and fallen. Chiero testified that when he arrived, it had been snowing, with about ½ to 1 inch of snow on the ground.

Defendant Hawthorne submits an affidavit from Meteorologist Steven Roberts (Roberts). Roberts concludes that on January 7, 2011, approximately 3.5 to 4.0 inches of snow and ice were present on untreated, undisturbed, and exposed outdoor surfaces in the vicinity of 24 Saw Mill Road. Roberts states that at the time of plaintiff's accident, the sky was cloudy, snow was

falling, and the temperature was near 30 degrees.

DISCUSSION

Summary judgment is a “drastic remedy” which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

With regards to a contracting party's liability to a third party, the Court of Appeals has held that:

“a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.”

Espinal v Melville Snow Contrs., Inc., 98 NY2d 136, 140 (2002) (citations and quotations omitted).

Here, plaintiff fails to meet her burden to demonstrate that Lawn Guard, a party who entered into a contract with Hawthorne, should be held liable for plaintiff's accident. Plaintiff fails to demonstrate how Lawn Guard launched a force or instrument of harm or owed a duty of care to plaintiff under *Espinal*. There was a large gap of time between December 28, 2010, the last date in which Lawn Guard plowed at the premises, and January 7, 2010, the date of plaintiffs's accident. Chiero testified that Lawn Guard did not perform inspections after plowing following a storm and that they would have to be notified before returning to the premises.

With regards to whether the contract between Hawthorne and Lawn Guard created an exclusive duty of maintenance and displaced Hawthorne's common-law duty to maintain the premises, the contract does not provide that Lawn Guard provide continuing maintenance or inspect the premises on a regular basis. *See Tamhane v Citibank, N.A.*, 61 AD3d 571, 574 (1st Dept 2009) (holding that "[m]erely plowing snow and salting, after one inch falls or on request, as required by a contract, is insufficient for a factual finding that the work either created or exacerbated a dangerous condition and is also insufficient to impose a duty of care toward a third person").

Plaintiff also fails to present evidence which demonstrates that she detrimentally relied on the services of Lawn Guard. Plaintiff was not aware of Lawn Guard's work at the premises, and there is no evidence suggested that she even had any knowledge of the snow removal contract. *See Wheaton v East End Commons Assoc., LLC*, 50 AD3d 675, 677 (2d Dept 2008) (holding that plaintiff failed to raise a triable issue of fact as to her alleged detrimental reliance on defendant, since the injured plaintiff testified at her deposition that she had no knowledge of a snow removal contract).

Therefore, because plaintiff has failed to meet her burden and to demonstrate that Lawn Guard failed to exercise reasonable care in the performance of its duties, that Lawn Guard launched a force or instrument of harm, that plaintiff detrimentally relied on the continued performance of Lawn Guard or that Lawn Guard entirely displaced Hawthorne's duty to safely maintain the premises, Lawn Guard's motion for summary judgment must be granted.

In motion sequence 005, Hawthorne moves for summary judgment. Hawthorne contends that plaintiff's accident occurred during a snow storm which was in progress, and therefore,

pursuant to case law, Hawthorne is not liable for plaintiff's accident. Hawthorne contends that there is no duty to remove snow and ice until an adequate time period has passed following the cessation of a storm in order to allow the owner to ameliorate the hazards caused by that storm.

The Appellate Division, First Department, has held that:

“[t]he "storm in progress" defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean the walkways. The rule is designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering the effort fruitless. 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.”

Powell v MLG Hillside Assocs., L.P., 290 AD2d 345, 345 (1st Dept 2002) (citations and quotations omitted).

Here, there is a dispute as to whether there was a storm in progress at the time of plaintiff's accident. Although Hawthorne submits an affidavit from Roberts which states that on January 7, 2011, approximately 3.9 inches of snow fell, the affidavit is unclear as to how much new snow was on the ground at the premises at the exact time of plaintiff's accident. Furthermore, Hawthorne's assertion that there was a storm in progress is disputed by the testimony of plaintiff, who states that it was not snowing at the time of her accident, that snow was not on the ground, and that she believed that the ice on which she fell was from a storm which took place in December.

The Court of Appeals has held that "[o]n a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974); *see also*

Psihogios v Stavropoulos, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact). Here, as there is disputed testimony regarding whether there was a storm in progress at the time of plaintiff's accident, Hawthorne's motion for summary judgment must be denied.

Hawthorne also contends that there is no evidence that it had notice of the allegedly icy condition. Plaintiff conversely argues that Hawthorne had constructive notice of the condition on which plaintiff fell because the condition may have existed since December. The Court of Appeals has held that, in order to find that a defendant had 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 defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) (citation omitted).

Here, there exists a question of fact as to how long the condition of the ice existed at the premises, and whether Hawthorne had constructive notice of the condition. Plaintiff testified that next to where she fell was a pile of snow which was two to three feet high, and that it extended from a planter in the parking lot onto the pavement in the parking lot. Plaintiff testified that she fell in between her car and the pile of snow, that the pile of snow was about three feet from her car, and that the ice patch on which she fell was about two feet wide and three feet long. Therefore, it remains unclear from the testimony as to whether the ice on which plaintiff fell was from the runoff from the pile of snow which was adjacent to plaintiff's vehicle and which was allegedly there since a December storm. *See Blair v Richards*, 63 AD3d 610, 610 (1st Dept 2009) (holding that defendant failed to meet its burden and demonstrate that the runoff from melting piles of snow formed by shoveling did not create or exacerbate the conditions which

caused plaintiff's accident); *Knee v Trump Village Constr. Corp.*, 15 AD3d 545, 546 (2d Dept 2005) (holding that plaintiff raised a triable issue of fact regarding whether the ice upon which plaintiff slipped was formed when the snow pile which defendant created melted and refroze).

Furthermore, it is unclear from Zelekowitz's testimony who took care of ice in the parking lot if the accumulation of snow was less than two inches. Zelekowitz testified that Hawthorne did not have anybody putting out salt in the event that there was melting and refreezing. Zelekowitz stated that there was employees of a nearby hotel who put salt in front of their own building, but not in front of the location where plaintiff fell.

Therefore, because questions of fact exist as to whether it was snowing at the time of plaintiff's accident and whether Hawthorne had notice and should have addressed the condition on which plaintiff fell, Hawthorne's motion for summary judgment must be denied.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that defendant Lawn Guard, Inc., d/b/a Yorktown Landscaping's motion for summary judgment (sequence 004), is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Broadway-Hawthorne, LLC's motion for summary judgment (sequence 005), is denied.

Dated: 11/12/13

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED

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