

Martino v Kitridge Realty Co., Inc.

2014 NY Slip Op 32340(U)

September 3, 2014

Supreme Court, Suffolk County

Docket Number: 10-17535

Judge: Jr., Andrew G. Tarantino

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SHORT FORM ORDER

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CAL. No. 14-00787OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 12-20-13 (#003)

MOTION DATE 2-25-14 (#004)

MOTION DATE 3-25-14 (#005)

ADJ. DATE 5-13-14

Mot. Seq. # 003 - MG

004 - MD

005 - MD

-----X
DAVID MARTINO,

Plaintiff,

- against -

KITRIDGE REALTY CO., INC. and CATERING
BOSS, INC., d/b/a BAGEL BOSS, MULLER
LANDSCAPES, INC., s/h/a MULLER
LANDSCAPES LLC and BLDG. MANAGEMENT
CO., INC.,

Defendants.
-----X

SIBEN & SIBEN, LLP
Attorney for Plaintiff
90 East Main Street
Bay Shore, New York 11706

KRAL, CLERKIN, REDMOND, RYAN,
PERRY & VAN ETTEEN, LLP
Attorney for Defendants Kitridge Realty and
Bldg. Management Co
538 Broadhollow Road, Suite 200
Melville, New York 11747

MALAPERO & PRISCO LLP
Attorney for Defendant Catering Boss
295 Madison Avenue
New York, New York 10017

CONGDON, FLAHERTY,
O'CALLAGHAN, REID, DONLON,
TRAVIS & FISHLINGER, ESQS.
Attorney for Defendant Muller Landscapes
333 Earle Ovington Boulevard, Suite 502
Uniondale, New York 11553

Upon the following papers numbered 1 to 105 read on these motions for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 19; 20 - 41; 42 - 63; Notice of Cross Motion and supporting papers ___;
Answering Affidavits and supporting papers 64 - 72; 73 - 83; 84 - 93; Replying Affidavits and supporting papers 94 - 105;
Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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JK

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ORDERED that for the purpose of this determination these motions for summary judgment (# 003) by defendant Catering Boss, Inc. d/b/a Bagel Boss, (# 004) by defendant Muller Landscapes, Inc. s/h/a Muller Landscapes LLC, and (# 005) by defendants Kitridge Realty Co., Inc. and BLDG Management Co. Inc. are consolidated and decided together; and it is further

ORDERED that the motion (# 003) by defendant Catering Boss, Inc. d/b/a Bagel Boss for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (# 004) by defendant Muller Landscapes, Inc. s/h/a Muller Landscapes LLC for summary judgment dismissing the complaint and all cross claims against it and for summary judgment on its cross claim against Kitridge Realty Co., Inc. and BLDG Management Co. Inc. for contractual indemnification is denied; and it is further

ORDERED that the motion (# 005) by defendants Kitridge Realty Co., Inc. and BLDG Management Co. Inc. for summary judgment dismissing the complaint and all cross claims against them and for summary judgment on their cross claims against Muller Landscapes, Inc. is denied.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on February 27, 2010 at approximately 7:30 a.m. when he slipped and fell while returning to his vehicle in the parking lot after exiting a bagel store located at 1941 Jericho Turnpike in East Northport, New York, operated by defendant Catering Boss, Inc. d/b/a Bagel Boss ("Catering Boss"). Defendant Kitridge Realty Co., Inc. ("Kitridge Realty") is the owner of a strip mall where the store is located. The strip mall and its parking lot are maintained by defendant BLDG Management Co. Inc. ("BLDG Management"). Prior to the accident, Kitridge Realty and BLDG Management entered into a snow removal contract with defendant Muller Landscapes, Inc. s/h/a Muller Landscapes LLC ("Muller Landscapes").

Catering Boss moves (# 003) for summary judgment dismissing the complaint and all cross claims against it on the ground that since it did not own or control the parking lot where the plaintiff fell, it is not liable for the plaintiff's accident. Catering Boss contends that it is not responsible for maintaining the area of the accident, and that it did not create the alleged dangerous condition. In support, Catering Boss submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony given by the plaintiff, Jeffrey Grossfeld, a representative of Catering Boss, and Steven Maietta, a representative of Kitridge Realty and BLDG Management.

At his examination before trial, the plaintiff testified to the effect that on the morning of the accident, when he arrived at the strip mall where the subject bagel store is located, he parked his vehicle in the parking lot, approximately 100 feet away from the store. When he exited his vehicle, he observed that the accumulated snow in the "entire parking lot" was approximately five inches deep. He testified that the parking lot appeared not to have been plowed, and that he did not see any "sand or salt" on the surface of the parking lot. Approaching the store, he observed that the sidewalk in front of the store, approximately ten feet long by four feet wide, had been shoveled. He entered the store without incident. When exiting the store less than 10 minutes thereafter, he retraced the same route that he had taken as he entered the store. As he was walking towards his vehicle, he slipped on snow and fell backwards in the parking lot approximately 40 feet away from his vehicle. In addition, he testified that it had last snowed the evening before the accident, and that the snow had stopped sometime after midnight.

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At his deposition, Jeffrey Grossfeld, a representative of Catering Boss, testified to the effect that on the day of the accident, a lease agreement between Catering Boss and Kitridge Realty was in effect, and BLDG Management was a property manager for Kitridge Realty. He neither was at work that day nor did he witness the accident. He testified that while Catering Boss is responsible for the sidewalk adjacent to the store, BLDG Management is responsible for snow removal work in the parking lot. Although he had no contact with the snow removal company, Catering Boss paid a common area charge which included the snow removal service.

At his deposition, Steven Maietta testified to the effect that he is a property manager of BLDG Management, and that BLDG Management manages the mall and its parking lot where the subject bagel store is located. He testified that BLDG Management on behalf of Kitridge Realty entered into a snow removal contract with Muller Landscapes during the 2009 and 2010 period. BLDG Management did not inspect the subject premises prior to or during any snowfall or after the snow removal work was done by Muller Landscapes unless there was a complaint. He testified that if the tenants including Catering Boss would contact him, he would contact Muller Landscapes during a snow event, and that at the time of the accident, Catering Boss was responsible for the sidewalk, but not for the parking lot. He also testified that Muller Landscapes responds early and quickly to a snow event at the subject premises because Catering Boss opens early, and he "request[s] the vendors go earlier."

Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*see Seaman v Three Vil. Garden Club*, 67 AD3d 889, 889 NYS2d 231 [2d Dept 2009]; *Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 884 NYS2d 143 [2d Dept 2009]; *Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 865 NYS2d 674 [2d Dept 2008]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that he or she did not create the defective condition (*see Noia v Maselli*, 45 AD3d 746, 846 NYS2d 326 [2d Dept 2007]; *Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619, 793 NYS2d 61 [2d Dept 2005]).

Here, Catering Boss has established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not own, occupy, possess, or put to a special use the subject parking lot where the plaintiff fell, and that it had no obligation to maintain the area where the plaintiff fell (*see Casale v Brookdale Med. Assoc.*, 43 AD3d 418, 841 NYS2d 126 [2d Dept 2007]; *Franks v G & H Real Estate Holding Corp.*, *supra*).

In opposition, the plaintiff contends that Catering Boss has failed to establish its entitlement to judgment as a matter of law because Jeffrey Grossfeld did not witness the subject accident and had no personal knowledge of the accident. The plaintiff submits the pleadings, the bill of particulars, and the transcripts of the deposition testimony of the plaintiff, Jeffrey Grossfeld, Steven Maietta, and David Muller, a representative of Muller Landscapes. However, the plaintiff failed to proffer any evidence sufficient to raise a triable issue of fact as to whether Catering Boss owned or controlled the parking lot where the plaintiff fell or whether Catering Boss created the defective condition.

Accordingly, Catering Boss's motion for summary judgment is granted, and the complaint and all cross claims as asserted against it are severed as well as dismissed.

Muller Landscapes moves (# 004) for summary judgment dismissing the complaint and all cross claims against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. In support, Muller Landscapes submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony of the plaintiff, Jeffrey Grossfeld, Steven Maietta, and David Muller as well as the snow removal contract between Muller Landscapes and Kitridge Realty and BLDG Management.

At his deposition, David Muller testified to the effect that he is the owner of Muller Landscapes, and that Muller Landscapes was hired by Kitridge Realty and BLDG Management to provide snow plowing services during the 2009 and 2010 period. According to the snow removal contract, if the weather event met the requirements of the contract for auto deploy, Muller Landscapes would initiate service without being directed by Kitridge Realty or BLDG Management. Muller Landscapes performed snow plowing operations at the subject parking lot three times during the day and night of February 26, 2010, extending into the early morning of February 27, 2010. The first plowing was performed by a truck between 3:00 a.m. and 4:00 a.m. on February 26, 2010 and by a second truck between 3:15 a.m. and 4:50 a.m. At that time, five yards of a melting agent was applied over the parking lot. The second operation was performed by a single truck between 8:55 a.m. and 9:40 a.m. on the same day. The final plowing was performed by a truck between 11:30 p.m. on February 26, 2010 and 12:25 a.m. on February 27, 2010 and by a second truck between 11:30 p.m. and 12:45 a.m. After the snow removal was finished, his employee told him that the job was completed. He testified that Muller Landscapes never called it back to the subject parking lot because of any complaint. He also testified that he and Steven Maietta, a contact person associated with Kitridge Realty, talked in general terms as to where snow was to be moved when Muller Landscapes would plow.

Pursuant to the contract between Muller Landscapes and Kitridge Realty and BLDG Management, Muller Landscapes was obligated to "supply all supervision, labor, materials and proper equipment to perform the snow plowing services." It was understood and agreed that Muller Landscapes would automatically begin snow plowing operations when there was a 1" average accumulation. Muller Landscapes was not to be responsible for any injury or damages to any person due to hazardous or slippery conditions. Furthermore, Muller Landscapes would not be liable for damages or injuries sustained before work commences, or after cessation of its work. Kitridge Realty and BLDG Management agreed to hold Muller Landscapes harmless and indemnify it for any injuries and/or damages. All services would be performed in a good workmanlike manner with automatic dispatching in accordance with the scope of work.

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. In general, contractual obligations will not create a duty to a third-party unless (1) the third-party has reasonably relied, to his or her detriment, on the continued performance of the contracting party's duties under the contract; (2) the contract is so comprehensive and exclusive that it completely displaces the other contracting party's duty to the third-party; or (3) the contracting party has launched a force or instrument of harm, thereby creating or exacerbating a dangerous condition (*see Stiver v Good & Fair Carting & Moving*, 9 NY3d 253, 848 NYS2d 585 [2007]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Rubistello v Bartolini Landscaping, Inc.*, 87 AD3d 1003, 929 NYS2d 298 [2d Dept 2011]).

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (*see Espinal v Melville Snow Contrs.*, *supra*; *Figuroa v Lazarus Burman Assoc.*, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, Muller Landscapes is required to establish that it did not perform any snow removal operations related to the condition which caused the plaintiff's accident or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition thereby launching an instrument of harm (*see Diaz v City of New York*, 93 AD3d 755, 940 NYS2d 654 [2d Dept 2012]; *Schwint v Bank St. Commons, LLC*, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; *Keese v Imperial Gardens Assoc., LLC*, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]).

Here, Muller Landscapes's limited contractual undertaking to provide snow removal services is not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see Linarello v Colin Serv. Sys.*, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; *Katz v Pathmark Stores*, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]). Nevertheless, Muller Landscapes's submissions failed to establish its entitlement to judgment as a matter of law (*see Keese v Imperial Gardens Assoc. LLC, supra*). There are questions of fact as to whether the snow-removal efforts of Muller Landscapes created or exacerbated the allegedly dangerous condition in the parking lot (*see Keese v. Imperial Gardens Assoc., LLC, supra* at 668; *Prenderville v. International Serv. Sys., Inc.*, 10 A.D.3d 334, 336–337, 781 N.Y.S.2d 110; *cf. Foster v. Herbert Slepoy Corp.*, 74 A.D.3d 1139, 902 N.Y.S.2d 426). Accordingly, the branch of Muller Landscapes' motion for summary judgment dismissing the complaint against it is denied.

Muller Landscapes also seeks summary judgment for contractual indemnification against Kitridge Realty and BLDG Management. Muller Landscapes contends that the indemnification clause in the snow removal contract evinces the parties' intent to hold Kitridge Realty or BLDG Management responsible for any accident which occurred at the premises, even if attributable to slippery icy conditions created by the presence of snow and ice which was the subject of Muller Landscapes's snow plowing activities. In opposition, Kitridge Realty and BLDG Management contend that the indemnification clause violates General Obligations Law § 5-322.1 since it seeks to absolve Muller Landscapes for its own negligence that caused the subject accident.

General Obligations Law § 5-322.1 (1) voids indemnification clauses in contracts that "purport to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons ... contributed to, caused by or resulting from the negligence of the promisee ... whether such negligence be in whole or in part." An indemnification agreement will be deemed void and unenforceable if the party seeking indemnification was itself negligent (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 658 NYS2d 903 [1997]; *Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 966 NYS2d 292 [4th Dept 2013]; *Giglio v St. Joseph Intercommunity Hosp.*, 309 AD2d 1266, 765 NYS2d 775 [4th Dept 2003]).

Here, since there is a triable issue of fact whether Muller Landscapes created or exacerbated an allegedly dangerous condition that caused the plaintiff to fall, the court is unable to determine at this stage of the litigation whether under the within circumstances, the indemnification clause in the snow removal contract violates General Obligations Law § 5-322.1 (*see Smith v Nestle Purina Petcare Co., supra*; *Miller*

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v *Pike Co. Inc.*, 52 AD3d 1240, 860 NYS2d 774 [4th Dept 2008]). Accordingly, the branch of Muller Landscapes's motion for contractual indemnification against Kitridge Realty and BLDG Management is denied.

Kitridge Realty and BLDG Management move (# 005) for summary judgment dismissing the complaint and all cross claims against them on the grounds that they did not create the alleged dangerous condition, and that they had no actual or constructive notice of the condition. The moving defendants contend that Muller Landscapes alone performed snow removal at the subject premises without any supervision, direction, control or assistance by Kitridge Realty or BLDG Management. In support, Kitridge Realty and BLDG Management submit, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony of the plaintiff, Jeffrey Grossfeld, Steven Maietta, and David Muller.

A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only if it created the dangerous condition or had actual or constructive notice of the condition (*see Devlin v Selimaj*, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; *Morreale v Esposito*, 109 AD3d 800, 801, 971 NYS2d 209 [2d Dept 2013]; *Gushin v Whispering Hills Condominium I*, 96 AD3d 721, 721, 946 NYS2d 202 [2d Dept 2012]). Thus, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Dhu v New York City Hous. Auth.*, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; *Cruz v Rampersad*, 110 AD3d at 670, 972 NYS2d 302 [2d Dept 2013]; *Santoliquido v Roman Catholic Church of Holy Name of Jesus*, 37 AD3d 815, 830 NYS2d 778 [2d Dept 2007]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see Dhu v New York City Hous. Auth.*, *supra*; *Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 943 NYS2d 604 [2d Dept 2012]; *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see Clark v AMF Bowling Ctrs., Inc.*, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; *Moons v Wade Lupe Constr. Co.*, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; *Fasano v Green-Wood Cemetery*, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]).

Here, Kitridge Realty and BLDG Management have failed to establish their entitlement to judgment as a matter of law by demonstrating that they lacked constructive notice of snow which allegedly caused the plaintiff to slip and fall in their parking lot (*see Feola v City of New York*, 102 AD3d 827, 958 NYS2d 208 [2d Dept 2013]; *Taylor v Rochdale Vil. Inc.*, 60 AD3d 930, 875 NYS2d 561 [2d Dept 2009]). There are questions of fact as to whether a dangerous condition existed on the parking lot so as to create liability on the part of Kitridge Realty and BLDG Management; whether they had actual or constructive notice of the dangerous condition (*see Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]); whether reasonable inspections were made on the premises prior to the accident (*see McCummings v New York City Tr. Auth.*, 81 NY2d 923, 597 NYS2d 653 [1993]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]); and whether the plaintiff was comparatively negligent (*see Bruker v Fischbein*, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]). Thus, the branch of the motion by Kitridge Realty and BLDG Management for summary judgment dismissing the complaint and all cross claims against them is denied.

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Kitridge Realty and BLDG Management also seek summary judgment on their claim for common-law indemnification against Muller Landscapes. Muller Landscapes may be liable to Kitridge Realty and BLDG Management for common-law indemnification even in the absence of a duty running to the plaintiff, if the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of Muller Landscapes (*see Peycke v Newport Media Acquisition II*, 17 AD3d 338, 793 NYS2d 92 [2d Dept 2005]; *Baratta v Home Depot USA*, 303 AD2d 434, 756 NYS2d 605 [2d Dept 2003]). Since there is a question of fact as to whether Kitridge Realty and BLDG Management retained control over the subject parking lot, there is also a question of fact as to whether the plaintiff's injuries are attributable to the negligent performance or nonperformance of an act that was solely within the province of Muller Landscapes (*see Franklin v Omni Sagamore Hotel*, 5 AD3d 348, 772 NYS2d 534 [2d Dept 2004]; *Mitchell v Fiorini Landscape*, 284 AD2d 313, 726 NYS2d 673 [2d Dept 2001]). These questions of fact preclude the granting of the branch of the motion by Kitridge Realty and BLDG Management for common-law indemnification against Muller Landscapes.

Dated: SEP 03 2014



A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION