

Solazzo v Calverton Hills Homeowners Assn., Inc.

2014 NY Slip Op 32577(U)

October 1, 2014

Supreme Court, Suffolk County

Docket Number: 11-3023

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

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PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MG
002 - XMD

-----X

ALFONSO SOLAZZO,

Plaintiff,

- against -

CALVERTON HILLS HOMEOWNERS
ASSOCIATION, INC. and MODERN
LANDSCAPE & DESIGN, INC.,

Defendants.

-----X

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Upon the following papers numbered 1 to 30 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 20; Answering Affidavits and supporting papers 21 - 26; Replying Affidavits and supporting papers 27 - 28; 29 - 30; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Modern Landscape & Design, Inc. for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the cross motion by defendant Calverton Hills Homeowners Association, Inc. for summary judgment dismissing the complaint and all cross claims against it is denied.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on January 17, 2010 at approximately 10:30 a.m. when he slipped and fell on ice in the roadway across from 163 Hill Ride Road in Calverton, New York, owned by defendant Calverton Hills Homeowners Association,

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Inc. ("Calverton Hills"). Prior to the accident, Calverton Hills entered into a snow removal contract with defendant Modern Landscape & Design, Inc. ("Modern Landscape").

Modern Landscape moves 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, Modern Landscape submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony of the plaintiff, Mitchell Pickman, a representative of Calverton Hills, and Christopher Pancari, a representative of Modern Landscape as well as the snow removal contract between Calverton Hills and Modern Landscape.

At his examination before trial, the plaintiff testified to the effect that on the day before the accident, when he arrived at the condominium parking lot, he parked his vehicle in front of his girlfriend's unit at 163 Hill Ride Road. When he exited his vehicle, he observed that there was no snow on the parking lot and the walkway leading to the unit. On the morning of the accident, when he left the condominium to walk a dog, he observed that the roadway was cleared. As he was returning, his right foot slipped on a patch of black ice, about three to five feet in diameter and half an inch to one inch thick, near the fire hydrant across from the unit. At the time of the accident, he was looking at the dog and walking on the roadway, about three feet away from the fire hydrant. Prior to the accident, he did not see the ice. He testified that he did not know how long the patch of ice was there and "who or what caused that area of ice to develop."

At his deposition, Mitchell Pickman testified to the effect that he is an owner of MVP Management, LLC ("MVP Management"), which is a managing agent for Calverton Hills. At the time of the subject accident, MVP Management was not a managing agent for Calverton Hills. He testified that Calverton Hills entered into a snow removal contract with Modern Landscape during the 2009 and 2010 period. He testified that he was not sure whether Calverton Hills's managing agent performed snow or ice removal on the subject premises during the period between December 2009 and January 2010. He also testified that upon searching records maintained by Calverton Hills, he did not find any records indicating that Modern Landscape had performed snow removal services after January 4, 2010, or that any calls were made to Modern Landscape within one week prior to the accident.

At his deposition, Christopher Pancari testified to the effect that he is the owner and president of Modern Landscape, and that Modern Landscape was hired by Calverton Hills 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 automatic deploy, Modern Landscape would initiate service without being directed by Calverton Hills and would perform snow removal on the premises including the roadways and walkways. He also testified that he discussed with the property manager and Tone Maintenance, Inc. ("Tone Maintenance"), a managing agent for Calverton Hills at the time of the accident, if something needed to be done, and if Tone Maintenance let him know it, he would take care of it. Modern Landscape performed snow plowing operations at the subject premises on January 2, 2010 and January 4, 2010, which was the last snow event for which Modern Landscape provided services prior to the accident. At that time, sand/salt was applied. He testified that Modern Landscape was never called back to the subject premises because of any complaint after its January 4, 2010 service was performed.

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As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties (*see Diaz v Port Auth. of NY & NJ*, 990 NYS2d 882, 2014 NY Slip Op 05830 [2d Dept 2014]; *Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]; *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 1103, 915 N.Y.S.2d 103 [2d Dept 2010]). However, in *Espinal v Melville Snow Contrs.*, (98 NY2d 136, 746 NYS2d 120 [2002]), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*id.*).

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*; *Figueroa 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, Modern 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 (*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, Modern Landscape established its entitlement to judgment as a matter of law by demonstrating that Modern Landscape'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]). Modern Landscape also made a prima facie showing that it did not launch a force or instrument of harm by showing that it did not perform snow removal work at Calverton Hills during the 13-day period between the last snow storm and the plaintiff's accident (*see Roach v AVR Realty Co., LLC*, 41 AD3d 821, 839 NYS2d 173 [2d Dept 2007]; *Linarello v Colin Serv. Sys.*, *supra*).

In opposition, the plaintiff contends that Modern Landscape created a hazardous condition at the accident site by not applying additional salt or sand thereon. The plaintiff also contends that Modern Landscape failed to proffer evidence demonstrating when the premises was last inspected prior to the accident. The plaintiff testified that he did not know how long the patch of ice where he fell had been there and what caused the alleged ice condition. By merely plowing the snow, almost two weeks before the subject accident, in accordance with the contract, Modern Landscape cannot be said to have created or exacerbated a dangerous condition (*see Rudloff v Woodland Pond Condominium Assn.*, *supra*; *Quintanilla v John Mauro's Lawn Serv., Inc.*, 79 AD3d 838, 912 NYS2d 415 [2d Dept 2010]). The plaintiff failed to present any evidence sufficient to raise a triable issue of fact on those issues.

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Accordingly, the motion by Modern Landscape for summary judgment is granted, and the complaint and all cross claims as asserted against it is dismissed.

Calverton Hills cross-moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it did not create the alleged dangerous condition, and that it had no actual or constructive notice of the condition.¹ In support, Calverton Hills submits the bill of particulars and an affirmation of one of its attorneys which attempts to adopt exhibits and arguments submitted in the motion by Modern Landscape.

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 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]).

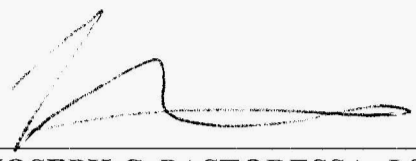
Here, Calverton Hills has failed to establish its entitlement to judgment as a matter of law by demonstrating that it lacked constructive notice of ice which allegedly caused the plaintiff to slip and fall in its roadway across a condominium unit at 163 Hill Ride Road (*see Feola v City of New York*, 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 roadway so as to create liability on the part of Calverton Hills; whether it had actual or constructive notice of the dangerous condition (*see Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 843 NYS2d

¹ Although Calverton Hills cross-moves for an order pursuant to CPLR 3211 (a)(7) dismissing the complaint for failure to state a cause of action and for summary judgment pursuant to CPLR 3212, a review of the moving papers and the opposing papers submitted on this cross motion reveals that the parties have clearly charted a summary judgment course. Thus, a summary judgment standard is applied to the cross motion.

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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 cross motion by Calverton Hills for summary judgment dismissing the complaint and all cross claims against it is denied.

Dated: October 1, 2014



HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION