Tabacoff v Burbank
2014 NY Slip Op 32871(U)
April 4, 2014
Sup Ct, Westchester County
Docket Number: 50950/2011
Judge: William J. Giacomo

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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RISA TABACOFF and MARK HESS,
Plaintiff,

Index No. 50950/2011

-against-

DECISION & ORDER

ROBERT BURBANK, ROSS BURBANK, TODD BURBANK and BURBANK MANAGEMENT COMPANY,
Defendants.

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The following papers numbered 1 to 8 were read on defendants' motion for summary judgment dismissing the complaint:

PAPERS NUMBERED

Notice of Motion/Affirmation/Exhibits 1-3
Affirmation in Opposition/Exhibits 4-6
Reply Affirmation/Exhibit 7-8

Factual and Procedural Background

On January 28, 2010 at about 8:15 a.m. plaintiff Risa Tabacoff slipped and fell in a parking lot owned, operated, maintained and controlled by defendants. Plaintiff Mark Hess brings a derivative action. The office building the lot serves is owned by defendant Robert Burbank and is managed and maintained by his sons Ross and Todd Burbank. Ross and Todd also own Burbank Motors Corp. commonly known as Burquip located at

235 Adams Street, Mount Kisco, New York. Burquip sells and repairs truck equipment including snow removal equipment, such as plows and sanding and salting attachments.

On the day of the accident plaintiff arrived at the parking lot adjacent to her office located at 83 Adams Street. When she arrived she noticed about 1-2 inches of snow in the parking lot. She called defendant Ross Burbank and asked that the parking lot be plowed. At 9:00 a.m., when the lot remained unplowed, plaintiff called Ross again asking for the area to be plowed. Since Ross's plowing contractor was not available at the time, he directed a Burquip employee to put a snow plow on a pickup truck. Ross then drove to the parking lot and plowed it himself. He did not put down any salt or sand and did not exit his vehicle after plowing the parking lot.

At about 9:14am plaintiff observed out her window that a co-worker Maureen Grissom was trying to get up an incline into the parking lot which was stuck and sliding in the parking lot. She called Ross again and told him that the person who plowed did not sand or salt. Plaintiff, who was expecting a client soon, was concerned that they too would get stuck getting into the parking lot.

After receiving plaintiff's call, Ross asked a customer to go to the lot and apply salt and sand. The customer left to sand and salt the property about 15 minutes later.

In the meantime, plaintiff becoming more concerned about her client's arrival so she walked out towards Grissom's car with a cannister of salt and slipped and fell in the parking lot.

Plaintiff commenced this personal injury action on May 25, 2011 and issue was joined on June 21, 2011.

Defendants now move for summary judgment dismissing the complaint on the ground that because there was a storm in progress it had a reasonable time after the storm stopped to ameliorate the hazards created by the storm.

In opposition, plaintiff argues that whether or not there was a storm in progress, defendants undertook snow removal and performed it negligently by failing to sand and salt after plowing. Plaintiff notes that conditions present that day made it very likely that condensation or liquid remains from the plowing would freeze. Plaintiff notes that Ross plowed the parking lot "very quickly" and did not get out of the car to see the result of his plowing. Further, plaintiff notes that when defendants plow the parking lot at Burquip they sand and salt as well. Plaintiff also notes that defendants' regular plowing contractor for the subject parking lot uses sand and salt.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. *(See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Here, defendants have not established entitlement to summary judgment dismissing the complaint since there is a question of fact regarding whether they created the condition which caused plaintiff's fall (*see McBryant v. Pisa Holding Corp.*, 110 A.D.3d 1034 [2nd Dept 2013]).

The Second Department in held *Kantor v Leisure Glen Homeowners Assn., Inc.*, (95 A.D.3d 1177, 944 N.Y.S.2d 640 [2nd Dept 2012]).

> "Under the 'storm in progress rule,' a landowner 'generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter' " (*Weller v Paul*, 91 AD3d 945, 947 [2012], *quoting Mazzella v City of New York*, 72 AD3d 755, 756 [2010]; *see Marchese v Skenderi*, 51 AD3d 642 [2008]). However, once a landowner elects to engage in snow removal activities, it is required to act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm (*see Chaudhry v East Buffet & Rest.*, 24 AD3d 493, 494 [2005]; *Friedman v Stauber*, 18 AD3d 606, 606-607 [2005]; *Grau v Taxter Park Assoc.*, 283 AD2d 551, 551-552 [2001]).

Based on the foregoing, defendant's motion for summary judgment is DENIED.

The parties are directed to appear in the Settlement Conference Part on June 2, 2014 at 9:30 a.m. room 1600 for further proceedings.

Dated: White Plains, New York
April 4, 2014

HON. WILLIAM J. GIACOMO, J.S.C.

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