Rubin v KDG Pound Ridge
2014 NY Slip Op 32872(U)
May 5, 2014
Sup Ct, Westchester County
Docket Number: 50957/2011
Judge: James W. Hubert

To commence the statutory time period 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.

FILED and ENTERED
May [redacted] 5 , 2014
WESTCHESTER COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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SUSAN RUBIN,

Plaintiff,

DECISION & ORDER

-against-

Index No. 50957/11

Seq. No. 3, 4 & 5

KDG POUND RIDGE, LLC KEYSTONE DEVELOPMENT GROUP LLC, THE STOP & SHOP SUPERMARKET COMPANY LLC and SCOTTS CORNER MARKET,

Defendant.

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KDG POUND RIDGE, LLC and KEYSTONE DEVELOPMENT GROUP, LLC,

Third-Party Plaintiff(s)

-against-

FRANK CASTELLI, INC.,

Third-Party Defendant(s).

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KDG POUND RIDGE, LLC and KEYSTONE DEVELOPMENT GROUP, LLC,

Second Third-Party Plaintiff(s),

-against-

POUND RIDGE ENTERPRISES, LLC d/b/a WESTCHESTER HOME MANAGEMENT

Second Third-Party Defendant(s).

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Hubert, A.J.S.C.

The following papers numbered 1 to 32 were read on these motions brought pursuant to

CPLR 3212 by defendants KDG Pound Ridge LLC, Keystone Development Group LLC and by defendant Scott's Corner Market, each seeking an Order granting summary judgment dismissing plaintiff's complaint as asserted against them:

Papers	**Numbers**
Notices of Motion/Affirmation;	1 - 2
Notice of Cross Motion/Affirmation;	24
Affirmations in Support/Opposition;	29 - 30
Affirmations in Reply	31 -32
Exhibits;	3 -9, 10 -23, 25 - 28

Upon the foregoing papers, it is hereby ORDERED that the motion to dismiss brought by defendant Scott's Corner Market, Inc., so much of the complaint as asserted against it, is GRANTED; and it is further

ORDERED, that the motion brought by defendants KDG Pound Ridge LLC and Keystone Development Group LLC, seeking summary judgment dismissing so much of the complaint as asserted against them, t is DENIED; and it is further

ORDERED, that all parties are to appear in the Settlement Conference Part, Courtroom 1600 on June 23, 2014 at 9:30 a.m; and it is further

ORDERED, that the motion brought by Pound Ridge, LLC d/b/a Westchester Home Management to sever the second third-party action is GRANTED; and it is further

ORDERED, that defendants are directed to file an RJI and pay the RJI fee in the third-party action within 10 days of this order, and the County Clerk is directed to issue a new index number in the severed third-party action at no additional charge; and it is further

ORDERED, that the parties in the severed third-party action are directed to appear for conference in the Compliance Part, Courtroom 800 on May 22, 2014 at 9:30 a.m.

Plaintiff commenced this negligence action to recover damages for personal injuries she allegedly sustained in slipping on an accumulation of ice in the parking lot of the Trinity Corners Shopping Center located at 55 Westchester Avenue, Pound Ridge, New York, on December 14, 2009 at 11:30 a.m. Defendant KDG Pound Ridge, LLC ("KDG") is the owner/landlord of the premises. Keystone Development Group LLC ("Keystone") is the management company for the property. The tenant, defendant Scott's Corner Market, operates a grocery store on the premises. Plaintiff claims that defendants KDG Pound Ridge LLC/Keystone Development Group LLC and Scott's Corner Market were negligent in permitting the condition of the parking area to become and remain icy. The defendants now bring their motions for summary judgment seeking dispositive relief. Pound Ridge Enterprises, LLC ("Pound Ridge"), the second third-party defendant, seeks to sever the second third-party action.

The application by defendants, KDG/Keystone, asserts that it is entitled to dispositive relief on the ground that the defendant did not create the dangerous condition nor had actual or constructive notice of the condition. In addition, the defendants assert that a Snow Removal Agreement between KDG/Keystone and third-party defendant Frank Castelli Inc. ("Castelli") obligates Castelli to assume the defense and indemnify KDG/Keystone. In addition, defendants KDG/Keystone assert that a Property Oversight Agreement between itself and second third-party defendant Pound Ridge demonstrates, prima facie, that it is an out of possession landlord and thus was not responsible for maintenance of the subject premises, and as such third-party defendant Castelli and second third-party defendant Pound Ridge should both defend and indemnify KDG/Keystone from exposure. In support of their motion, defendants annex a copy of the Snow Removal Agreement and the Property Oversight Agreement.

Plaintiff maintains that KDG/Keystone cannot be absolved from liability on the basis that

KDG/Keystone has failed to provide sufficient and admissible evidentiary proof showing an absence of a triable issue of fact.

According to plaintiff's affidavit, she parked in the parking lot of Trinity Corners Shopping Center, stepped out of her vehicle on the driver's side and proceeded towards the rear of her vehicle when she slipped on "black" ice which she described as 5 feet wide and 10 feet long. Four inches of snow had fallen on December 9, 2009. The parking lot was plowed by Castelli. Castelli applied a sand/salt mix to the lot due to "overnight freeze" on December 13 and 14, 2009. According to the contract between Castelli and KDG/Keystone, the salt/sand mix "shall be applied to the parking lot. . . after each snow removal and as needed for ice and icy conditions." The contract further states that "additional work-including but not limited to de-icing applications beyond the initial application - may only be authorized by Management Company representative, Michael Blazoski."

The lease agreement between KDG/Keystone and Scott's Corner Market states that "[a]ll automobile parking areas, driveways, entrances and exits thereto, and other facilities furnished by Landlord in or near the Shopping Center, including employee parking, the truck-way or ways, loading docks, package pick-up stations, pedestrian sidewalks and ramp, landscaped areas. . . and other areas and improvements provided by Landlord for the general use, in common, of tenants, their offices, agents, employees and customers, shall at all times be subject to the exclusive control and management of Landlord." See Section 9(b) of the lease.

The Property Oversight Agreement between KDG/Keystone and Pound Ridge states that Pound Ridge was charged with grounds keeping activities including, "(vii) inspect the property on a daily basis to make sure that the property is being maintained properly by tenants and/or landlord's contractors, that snow and ice are removed by landlords contractor as required...and

that any and all other portions of the property are being maintained in a safe and sanitary manner..."

To establish prima facie entitlement to judgment as a matter of law, a movant for summary judgment must come forward with evidentiary proof, in admissible form, demonstrating the absence of any triable issues of fact (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med Ctr*, 64 NY2d 851 [1985]; *McDonald v Mauss*, 38 AD3d 727 [2d Dept, 2007]).

Initially, the Court concludes that, as to defendant Scott's Corner Market, the movant has demonstrated prima facie entitlement to judgment as a matter of law by proffering the subject lease which establishes that it is a tenant that did not retain control over the premises and was not obligated under the terms of the lease to perform repairs or maintenance (*see generally Panico v Jiffy Lube Int., Inc*, 86 AD3d 553 [2d Dept, 2011]; *McElroy v Bernstein*, 72 AD3d 757 [2d Dept, 2010]; *Kane v Port Aut. of NY & NJ*, 49 AD3d 503, 504 [2d Dept, 2008]; *see also Euvino v Loconti*, 67 AD3d 629, 631 [2d Dept, 2009]; *Felder v Wank*, 227 AD2d 442, 442 [2d Dept, 1996]).

In opposition, plaintiff has not raised a triable issue of fact as to whether Scott's Corner Market retained control over the premises and thus that it could be held liable for injuries caused by the icy condition of the parking lot at the subject premises (*see Nelson v Cunningham Assoc*, 77 AD3d 638, 639 [2d Dept, 2010]). Accordingly, the defendant's motion seeking dismissal of the complaint as against defendant Scott's Corner Market is granted.

As to the matter of KDG/Keystone being an out of possession landlord, it appears from

the lease and the Snow Removal Agreement that there is an issue of fact as to whether KDG/Keystone was the party in control of the subject property. The lease clearly states that all control is held by the landlord and although KDG/Keystone contracted directly with Castelli for snow removal services in the Snow Removal Agreement, the agreement raises a question of fact as to how much control remained with KDG/Keystone to authorize additional sand/salt mix after the initial applications. The record here shows additional applications after the initial application on December 13 and 14. According to the contract, additional applications would need specific authorization from KDG/Keystone representative Michael Blazoski. Thus, there is an issue of fact as to actual notice of the icy conditions in the parking lot from December 9 until the day of the accident.

Another issue of fact exists regarding the quantity of the ice on which the plaintiff slipped and fell upon. The defendant argues that the plaintiff's fall was due to a "scanty patch" of ice. The plaintiff's testimony regarding the size of the ice condition was that it was 5 feet wide and about 10 feet long. The facts and circumstances of this case raise genuine issues of fact for the jury to decide regarding the dangerous condition of the ice, who was in control, and whether there was notice of the condition.

An out of possession landlord is not liable for injuries sustained on the premises unless a duty to maintain the premises in reasonably safe condition is "imposed by statute or assumed by contract or a course of conduct" (*Alnashmi v Certified Analytical Group, Inc*, 89 AD3d 10, 929 NYS2d 620, 627 [2d Dept, 2011]; *see Rivera v Nelson Realty*, LLC 7 NY3d 530, 534 [2006]; *Chapman v Siber*, 97 NY2d 9, 21 [2001]). Here, defendants KDG/Keystone have not demonstrated that they were an out of possession landlord in view of the terms of the subject lease and the Snow Removal Agreement. The amount of control over the premises which

remained with KDG/Keystone to remove ice from the premises remains an issue of fact to be determined by a jury.

As the proponent of the motion for summary judgment, KDG/Keystone must demonstrate, prima facie, that it neither created the ice condition nor had actual or constructive notice of the condition (*see Persaud v S & K Green Groceries, Inc*, 72 AD3d 778, 779 [2d Dept, 2010]; *Vasta v Home Depot*, 25 AD3d 690 [2d Dept, 2006]). On this record, KDG/Keystone has not sustained this burden as it offered no evidence that they did not create the dangerous condition nor that they did not have notice of the condition. The defendants did not provide any affidavits or testimony of employees with knowledge of the last inspection of the parking lot nor the condition of the parking lot on the day of the slip and fall. (*see Mignogna v 7-Eleven, Inc*, 76 AD3d 1054(2nd Dept, 2010); *Baines v G&D Ventures, Inc*, 64 AD3d 528 (2nd Dept, 2009); *Totten v Cumberland Farms, Inc*, 57 AD3d 653 (2nd Dept, 2008).

KDG/Keystone also seeks an order directing Castelli and Pound Ridge to defend and indemnify KDG/Keystone in this matter. Inasmuch as there are issues of fact as to amount of control retained by KDG/Keystone in relation to the removal of ice and a lack of evidence in admissible form as to any negligence on behalf of Castelli or Pound Ridge, summary judgment is inappropriate as to the issue of whether there is a duty to defend or indemnify KDG/Keystone.

A cross motion to sever was made by second third party defendant Pound Ridge. The original action was commenced by the filing of a summons and complaint on or about April 13, 2011. Issue was joined by service of an answer by the defendants KDG/Keystone on or about August 5, 2011. The first third-party action against Frank Castelli, Inc. was commenced on or about January 18, 2012. The second third-party action against Pound Ridge was commenced by the filing of a second third party summons and complaint on or about April 11, 2013. Issue was

joined as to the second third party action by service of an Answer on behalf of Pound Ridge on or about June 13, 2012. KDG/Keystone filed its motion on May 30, 2012, for summary judgment against plaintiff and its motion for defense and indemnification against Pound Ridge. Counsel for KDG filed a motion for summary judgment prior to joiner of issue and acknowledges same in paragraph "7" of its affirmation. Pound Ridge's Answer was files within the 30 days allowed and thus was not in default.

Discovery in this case has proceeded for over two years, and KDG was aware of the claims against it and the contract it entered into with Pound Ridge. However, Pound Ridge was impleaded into this matter at the late date of April 11, 2013. Pound Ridge has not had an adequate opportunity for discovery.

Whether or not to grant a motion to sever depends usually on whether the third-party defendant has had an adequate opportunity for discovery. *Singh v City of New York*, 294 AD2d 422, 741 NYS 2d 915 (2nd Dept 2002); *Cusano v Sankyo Sieki Mfg Co Ltd*, 184 AD2d 489, 584 NYS 2d 324 (2nd Dept 1992). To avoid extreme prejudice upon Pound Ridge and to avoid undue delay in the determination of the main action, the motion to sever is granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
May 5, 2014

James W. Hubert
Acting Supreme Court Justice

TO:

Jonathan O. Gill, Esq.
Creedon & Gill, P.C.
24 Woodbine Avenue, Suite 14
Northpointe, New York 11768