

Blanco v Port Auth. of N.Y. & N.J.

2014 NY Slip Op 33149(U)

February 28, 2014

Supreme Court, Queens County

Docket Number: 22785/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

HIMERA BLANCO,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, BRITISH AIRWAYS PLC and
ABM INDUSTRIES, INC.,
Defendants.

BRITISH AIRWAYS PLC,
Third-Party Plaintiff,

-against-

AVIATION SAFEGUARDS, a DIVISION OF
THE COMMAND SECURITY CORPORATION,
Third-Party Defendant.

Index No. 22785/11
Motion
Date November 26, 2013
and December 19, 2013

Motion
Cal. No. 38, 16, 17

Motion
Sequence No. 6, 4, 5

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Upon the foregoing papers it is ordered that these motions by defendants, Port Authority of New York and New Jersey ("Port Authority"), British Airways PLC ("British Airways") and ABM Industries, Inc. ("ABM") granting summary judgment in favor

of said defendants and dismissing plaintiff's Complaint and ABM's motion for dismissal of all cross-claims and third-party claims asserted against it are hereby joined solely for the purposes of disposition of the instant motions and are hereby decided as follows:

Plaintiff, Himera Blanco, alleges that she sustained personal injuries as a result of slipping and falling on snow and ice in front of the Aviation Safeguards Office known as Terminal 7 at John F. Kennedy International Airport on December 27, 2010 at approximately 2:00 p.m. Plaintiff alleges she was caused to be seriously injured due to the negligence of defendants.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

For defendants to be liable, plaintiff must prove that defendants either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of

time prior to the accident to permit defendants to discover and remedy it (see *id.*).

Defendant, Port Authority established a prima facie case that there are no triable issues of fact. Defendant established a prima facie case that plaintiff's claims against them should be dismissed because they were an out-of-possession landlord who did not retain control of the premises and were not contractually obligated to perform maintenance and repairs. It is well-established law that an out-of-possession landowner is generally not liable for injuries occurring on its premises unless the landlord retains control of the premises or is contractually obligated to perform maintenance and repairs (see, *Brewster v. Five Towns Health Care Realty Corp.*, 59 AD3d 483 [2d Dept 2009]; *Chapman v. Silber*, 97 NY2d 9 [2001]; *Putnam v. Stout*, 38 NY2d 607 [1976]). The determinative factor in premises liability cases is control (see, *Siegel v. Hofstra University*, 154 AD2d 449 [2d Dept 1989]). Defendant additionally established a prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). In support of the motion, defendant Port Authority submitted, inter alia, the affidavit of Diane Taglich-Oh, the Senior Property Representative for the Port Authority who averred, inter alia that: the Port Authority subleases the Premises known as Terminal 7 to British Airways pursuant to a lease agreement entered into on January 4, 1988 and which lease agreement was in effect on December 27, 2010, the Port Authority transferred exclusive control and possession of Terminal 7 to defendant British Airways, "[t]he Port Authority is not responsible for operating, maintaining, repairing, or inspecting the Terminal 7 leasehold premises, including the premises where the incident involving Ms. Blanco occurred", and to the best of her knowledge, the Port Authority did not receive any reports from anyone regarding a leak on the subject premises; and a copy of the lease agreement between the Port Authority and British Airways.

In opposition, plaintiff raised a triable issue of fact against defendant, Port Authority. In opposition, plaintiff submitted, inter alia, an expert affidavit of Stuart Sokoloff, P.E., who averred inter alia, that: he is a licensed professional engineer with over 40 years experience as a structural/bridge engineer, "the roadway which contained the subject expansion joint contains an inherent structural defect - the positioning of the expansion joint 2-3 inches below the roadway's surface - that probably dates to the roadway's initial construction . . .The

construction existing at the joint is not compatible with good construction practice, and represents a structural defect in the premises owned by the Port Authority and leased to British Airways. . .the defective joint was the mechanism that resulted in the leak that caused ice outside the Aviation Safeguards Office . . .The existence of a leak directly resulted in the icy condition that Ms. Blanco described”.

Accordingly, there are triable issues of fact in connection with, inter alia, whether a structural defect existed on the premises, which structural defect existed prior to British Airways assumption of control of the premises, and whether the Port Authority created or had actual or constructive notice of a dangerous condition. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant, Port Authority's motion for summary judgment is denied.

Defendant, British Airways established a prima facie case that there are no triable issues of fact. Defendant established a prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). In support of the motion, defendant British Airways submitted, inter alia, the examination before trial transcript testimony of plaintiff herself, wherein she testified, inter alia, that: she did not know where the ice came from but that it looks like there was a leak coming from pipes located on top of the ceiling of the Aviation Safeguards Office and she did not see pipes leaking at the time of her accident; the examination before trial transcript testimony of Claude Rodriguez, British Airways' Terminal 7 Facilities Manager who testified that he was not made aware of any complaints about water leaking from the ceiling or from the pipes; the examination before trial transcript testimony of Robert Evanchik, the current Director of Facilities for British Airways at Terminal 7, who testified inter alia that: the leaky pipes described by plaintiff did not contain any water, rather they contained electrical wiring for the building; and the examination before trial transcript testimony of Jessy Figueroa, a project manager for ABM, who testified inter alia that: ABM is a janitorial/cleaning service company hired by British Airways to manage snow and ice removal at Terminal 7, she was responsible for snow and ice removal at JFK on the date in question, ABM had the task of ice and snow removal of said area on the subject accident date, and on the date in question, she inspected the subject area "at least a dozen times" and did not recall seeing any ice and she did not

slip as she walked in the subject area.

In opposition, plaintiff raised a triable issue of fact against defendant, British Airways. In opposition, plaintiff submitted, inter alia, the examination before trial transcript testimony of Claude Rodriguez, British Airways' Terminal 7 Facilities Manager who testified that: the leak occurred on British Airways' premises, which were routinely inspected by a British Airways employee; plaintiff's own examination before trial transcript testimony wherein she testified that she had repeatedly noticed the leak and knew of at least three complaints that had been made to her supervisor at Aviation Safeguards; the affidavit of Robert Evanchik, who testified inter alia, that a week prior to the accident, he had been notified of a leaking expansion joint.

Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether defendant, British Airways had either actual or constructive notice of a defective condition, and whether defendant, British Airways acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant, British Airways' motion for summary judgment is denied.

Defendant, ABM established a prima facie case that there are no triable issues of fact. Defendant ABM established its *prima facie* entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2nd Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2nd Dept 1997]). Defendant established a prima facie case that it owed no duty to plaintiff and there is no duty to remove ice or snow while a storm is in progress. In support of the motion, defendant ABM submitted, inter alia, a certified copy of the weather records for JFK Airport for the month of December 2010 from the US Department of Commerce, which records indicate that there was a heavy, ongoing blizzard that struck New York City the day before the plaintiff's incident and continued into the next morning; examination before trial transcript testimony of Jessy Figueroa and Claude Rodriguez; and plaintiff's own examination before trial transcript testimony. Under the "storm in progress" rule, "a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*Dowden v. Long*

Island Rail Road, 305 AD2d 631 [2d Dept 2003]).

In opposition, plaintiff raised a triable issue of fact. In opposition, plaintiff submitted, inter alia, the examination before trial transcript testimony of plaintiff herself, who testified that she specifically informed ABM of the need for snow removal in the subject area; and the examination before trial transcript testimony of Jessy Figueroa, a project manager for ABM, who testified inter alia, that: at the time of plaintiff's fall, the snow had stopped about four hours earlier.

Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether defendant ABM had either actual or constructive notice of a defective condition, and whether defendant ABM acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant, ABM's motion for summary judgment is denied.

As the issue of whether or not ABM's negligence has not yet been decided, the issue of contractual indemnification is not yet ripe. Dismissal of the third-party complaint is premature. As it has not yet been adjudged as to whether ABM is liable to plaintiff, the issues of whether third-party defendant is liable to third-party plaintiff is not yet ripe (*Marano v. Commander Electric, Inc.*, 12 AD3d 571 [2d Dept 2004]; *Tulovic v. Chase Manhattan Bank, N.A.*, 309 AD2d 923 [2d Dept 2003]; *Prenderville v International Service Systems*, 10 AD3d 334 [1st Dept 2004]; *Gomez v. National Center for Disability Services, Inc.* 306 AD2d 103 [1st Dept 2003]; *Northland Associates v. Joseph Baldwin Construction Co., Inc.*, 6 AD3d 1214 [4th Dept 2004]).

This constitutes the decision and order of the Court.

Dated: February 28, 2014

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Howard G. Lane, J.S.C.