Ardeljan v Port Auth. of N.Y. & N.J.
2015 NY Slip Op 30468(U)
March 23, 2015
Sup Ct, Queens County
Docket Number: 1539/2012
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

TIBERIUS ARDELJAN,

Plaintiff,

- against -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, DEJANA INDUSTRIES, INC., and SNOWLIFT, LLC,

Defendants.

Index No.: 1539/2012

Motion Date: 12/18/14

Motion No.: 8

Motion Seq.: 2

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The following papers numbered 1 to 17 were read on this motion by defendants, SNOWLIFT, LLC, and the cross-motion of PORT AUTHORITY OF NEW YORK and NEW JERSEY for an order (1) lifting the stay in this matter imposed when the plaintiff's counsel was relieved; and (2) for an order pursuant to CPLR 3212(b) granting summary judgment in favor of defendants and dismissing the plaintiff's complaint on the ground that the plaintiff cannot establish a prima facie case of negligence:

	Papers Numbered
Notice of Motion-Affidavits-Memo of Law	1 - 8
Affirmation in Opposition-Affidavits-Exhibits	9 - 12
Reply Affirmation	13 - 17

This is an action for damages for personal injuries sustained by plaintiff, Tiberius Ardeljan, on January 26, 2011, when a forklift operated by a co-employee allegedly slid on snow, slush and ice, causing a pallet to fall off the forklift and strike the plaintiff. The alleged incident occurred at John F. Kennedy International Airport near Cargo Building Number 21. At the time of the accident plaintiff was employed as a half track cargo driver by Swissport USA at JFK Airport. Plaintiff alleges

that as a result of the accident he sustained, inter alia, a tear of the medial meniscus of the left knee, and disc herniations and disc bulges of the cervical and thoracic spines.

The plaintiff commenced this action by filing a summons and complaint on January 24, 2012 naming Port Authority of New York and New Jersey, Dejana Industries, Inc., and Aero Snow Removal Corp. as defendants and by filing a supplemental summons with notice and amended verified complaint on March 8, 2012, adding Snowlift, Inc, as an additional party-defendant in lieu of Aero Snow Removal Corp. Pursuant to a stipulation of discontinuance dated April 13, 2012, the plaintiff voluntarily discontinued the action against Dejana, Inc. Snowlift interposed its answer to the amended complaint on May 20, 2013. On March 23, 2012 co-defendant, the Port Authority interposed its answer.

On August 30, 2013, the parties entered into a preliminary conference order and on January 28, 2014, the parties entered into a compliance order in which plaintiff was directed to file a Note of Issue on or before June 20, 2014. On February 27, 2014 plaintiff's counsel moved to be relieved on the grounds that his client was not cooperating in the prosecution of the action. By order dated April 22, 2014, the motion of plaintiff's counsel, Arnold E. DiJoseph III, Esq. was granted without opposition. All proceedings were ordered to be stayed for 30 days from service of a copy of the order to enable plaintiff to obtain new counsel. The order was served on the plaintiff by his outgoing counsel on April 29, 2014. Since that date the plaintiff has not appeared in the action pro se or retained new counsel.

In his bill of particulars, plaintiff alleges that the defect or condition which caused the accident consisted of snow and ice that had been allowed to accumulate and remain upon the premises. Plaintiff claims the accident occurred as a result of the negligence of defendants in allowing the premises to become covered with snow and ice; in failing to inspect the premises, in failing to properly remove snow and ice existing on the premises, in failing to spread salt and sand, and in failing to take any and all preventative measures to melt and/or remove snow and ice existing on the premises. Plaintiff claims that the defendants had both actual and constructive notice of the condition.

The defendants now move for an order, pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint.

In their memorandum of law Snowlift, LLC (Snowlift) states that it is a snow removal company that has a contract with Delta Airlines to perform certain snow removal services at certain exterior areas of Cargo Building 21 at JFK Airport. Counsel asserts that if Snowlift was responsible for removing snow from the area where the plaintiff's accident occurred that the action should be dismissed pursuant to the storm in progress rule. Defendant asserts that plaintiff was allegedly injured during the middle of a severe storm lasting two days during which more than ten inches of snow and freezing precipitation fell at JFK. In addition, counsel argues that Snowlift is entitled to summary judgment under the Court of Appeals decision in Espinal v Melville Snow Contractors, 98 NY 2d 136 [2002]). Further, defendant argues that the court should dismiss the action pursuant to CPLR 3126 for plaintiff's failure to comply with a compliance conference order requiring him to respond to outstanding discovery demands, appear at a site inspection and appear for IMEs. The plaintiff has also failed to file a timely Note of Issue.

In support of the motion, Snowlift submits an affidavit from Joseph Ferrucci, Vice President of Snowlift, LLC stating that on August 1, 2006, Snowlift entered into a contract to perform certain limited snow removal services at designated locations at facilities operated by Delta Air Lines at JFK. Pursuant to the terms of the amendment dated August 1, 2009, Snowlift was hired to perform certain limited snow removal services at Cargo Building 21. According to the scope of services Snowlift is required to push and pile snow in designated locations upon the accumulation of one inch of snow when requested to do so by Delta Airlines. Mr. Ferrucci states that on January 26, 2011, in accordance with its contractual obligations, Snowlift performed snow removal services at Cargo Building 21 and used a front end loader to push snow from the aeronautical ramp at Cargo Building 21 for 31 hours from January 26, 2011 at 1:45 pm to January 27, 2011 at 9:45 p.m. The plaintiff's accident took place on January 26 at 6:00 p.m.

The plaintiff also submits records from the National Climactic Data Center for JFK Airport showing that it started snowing on January 26, 2011 at approximately 8:00 a.m and continued snowing through the remainder of the day with periods of freezing precipitation between 4:00 p.m. and 7:00 p.m. It did not stop snowing until January 27, 2011 at approximately 5:00 a.m. At the completion of the storm, a total of 10.3 inches of snow fell at the airport. As stated above, Snowlift was deployed to push snow from the ramp to a designated location beginning January 26, 2011 at 1:45 p.m.

Counsel argues that pursuant to the storm in progress rule, the duty to take reasonable measures to remedy a dangerous condition caused by the storm is suspended while a storm is in progress and does not commence until a reasonable time after the storm has ended. Further, it is alleged that the fact that Snowlift was removing snow during the storm and prior to the plaintiff's accident does not create an issue of fact as to whether their actions exacerbated the condition of the ramp during the storm. Secondly it is argued that Snowlift, a contracting party is entitled to summary judgment as it owed no legal duty to the plaintiff, an injured third-party as there is no proof in the record that in failing to exercise reasonable care in the performance of its duties it launched a force or an instrument of harm or made the conditions of the ramp more hazardous (see Espinal, supra). Counsel argues that the condition of the ramp where the accident occurred was slippery from the ongoing weather conditions as opposed to an act or omission on the part of Snowlift.

Port Authority contends that it is entitled to summary judgment on the ground that Port Authority owed plaintiff no duty under the out-of-possession landlord defense and under New York's storm in progress rule. Port Authority also moves to dismiss the plaintiff's claims pursuant to CPLR 3126(3) because the plaintiff has failed to comply with the Court's discovery order and failed to file a Note of Issue and Certificate of Readiness although directed by the Court to do so. In support of the motion, Port Authority submits the affidavit of Patrice James, Principal Property Representative for JFK. Ms. James submits that he premises where the accident occurred is whin the premises leased by JFK from the Port Authority. In addition, it is claimed that the lease provides that Port Authority is not responsible for any maintenance or repair of the subject premises including any maintenance or repair of fixtures, equipment or personal property. The lease also states that the leasee shall remove all snow and ice and perform all other activities and functions necessary or proper to make the premises available for use. Ms James states that through a series of assignments, copies of which have been submitted with the motion, Delta Air Lines ultimately leased the subject premises and was the leasee on the date of the accident.

The plaintiff, although duly served with the motions, has not retained new counsel since being served with a copy of the order relieving his prior counsel, has failed to file a Note of Issue within the required time, and has failed to provide the defendants with court ordered discovery. In addition, the plaintiff has not filed opposition to the instant motion and cross-motion.

Therefore, upon review and consideration of the respective motions of the defendants, this Court finds that the stay which was imposed by this Court in order to permit the plaintiff to obtain new counsel is hereby lifted and the matter shall be restored to active status. Plaintiff was served with an order relieving prior counsel in April 2014 and with an order staying the matter for 30 days from that time to enable plaintiff to obtain new counsel or proceed pro se. Since that date, however, the plaintiff has not retained new counsel nor made any efforts to prosecute the matter pro se.

"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 when it created the alleged dangerous condition or had actual or constructive notice of it" (McBryant v Pisa Holding Corp., 110 AD3d 1034 [2d Dept. 2013] citing Feola v City of New York, 102 AD3d 827 [2d Dept. 2013] quoting Cantwell v Fox Hill Community Assn., Inc., 87 AD3d 1106 [2d Dept. 2011]. A defendant moving for summary judgment must establish, prima facie, that it neither created the snow and ice condition nor had actual or constructive notice of it, and may sustain this burden by presenting evidence that there was a storm in progress at the time of the plaintiff's accident (see Smith v Christ's First Presbyt. Church of Hempstead, 93 AD3d 839 [2d Dept. 2012]; Meyers v Big Six Towers, Inc., 85 AD3d 877 [2d Dept. 2011]).

"Under the "storm in progress" rule, a property owner will not be held responsible for accidents caused by snow or ice that accumulates on its premises during a storm "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" (Popovits v New York City Hous. Auth,115 AD3d 657 [2d Dept. 2014] quoting Cotter v Brookhaven Mem. Hosp. Ctr., Inc., 97 AD3d 524 [2d Dept. 2012]).

However, once a landowner or a tenant in possession elects to engage in snow removal, 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" (Fernandez v City of New York, 2015 NY Slip Op 01410 [2d Dept. 2015]; Yassa v Awad, 117 AD3d 1037[2d Dept. 2014]; Gwinn v Christina's Polish Rest., Inc., 117 AD3d 789 [2d Dept. 2014]; Wei Wen Xie v Ye Jiang Yong, 111 AD3d 617[2d Dept. 2013]).

Here, the evidence submitted by the defendants in support of their motion for summary judgment, including certified climatological data, demonstrated, prima facie, that a storm was in progress at the time of the accident (see Meyers v Big Six Towers, Inc., 85 AD3d 877 [2d Dept. 2011]; Skouras v New York

City Tr. Auth., 48 AD3d 547 [2d Dept. 2008]; DeStefano v City of New York, 41 AD3d 528 [2d Dept. 2007]. Furthermore, the defendants established, prima facie, that their efforts to remove snow and ice from the platform did not create a hazardous condition or exacerbate the natural hazard created by the storm (see Talamas v Metropolitan Transp. Auth., 120 AD3d 1333 [2d Dept. 2014]; Batista v City of New York, 119 AD3d 498 [2d Dept. 2014]; Wei Wen Xie v Ye Jiang Yong, 111 AD3d 617 [2d Dept. 2013]; McCurdy v KYMA Holdings, LLC, 109 AD3d 799 [2d Dept. 2013]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the stay imposed to permit the plaintiff to obtain new counsel is hereby vacated and the matter shall be restored to the active calendar, and it is further,

ORDERED, that the branch of the motion for an order granting summary judgment and dismissing the complaint against defendant Port Authority of New York and New Jersey, an out-of-possession landlord who did not have a duty to clear the snow under the terms of the lease, is granted without opposition, and it is further,

ORDERED, that the motion by defendant, Snowlift, LLC, for summary judgment dismissing the plaintiff's complaint against it based upon the storm in progress rule is granted without opposition and the complaint shall be dismissed against the defendant Snowlift, Inc., and it is further,

ORDERED, that the Clerk of Court shall enter judgment accordingly.

Dated: March 23, 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.