Ringer v PC1-Bay Plaza, LLC
2015 NY Slip Op 31042(U)
June 17, 2015
Supreme Court, New York County
Docket Number: 150482/2012
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

CRYSTAL RINGER,

Plaintiff,

-against-

PC1-BAY PLAZA, LLC, PRESTIGE PROPERTIES & DEVELOPMENT CO., INC., APPLE-METRO, INC., ROBERT LANDSCAPING & CONSTRUCTION, INC., and BAY PLAZA COMMUNITY CENTER, LLC,

Defendants.

INDEX NO.	150482/2012
MOTION DATE	05-27-2015
MOTION SEQ. NO	002
MOTION CAL. NO	

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 5
Replying Affidavits	7 - 8

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered, that defendants' motions for summary judgment under Mot. Seq. 002 and 003 dismissing the complaint are granted, the complaint is dismissed.

This action arises from personal injuries sustained by plaintiff on February 22, 2011 when she drove into an Applebee's restaurant owned by Apple-Metro, Inc. (herein "Applebees") and located at Bay Plaza in the Bronx (herein "Bay Plaza"). Plaintiff alleges that when she parked her car and exited her vehicle she stood up, took one step toward the rear of her car, then slipped on a patch of clear ice.

Bay Plaza Community Center (herein "Owner") owns the parking lot, and Prestige Properties & Development Co., Inc. (herein "Prestige") manages Bay Plaza. Prestige, on behalf of Owner, contracted with Robert Landscaping & Construction, Inc. (herein "Landscaping") to remove snow from Bay Plaza whenever there was more than two and one-half inches accumulated. The contract between the Owner and Landscaping requires Landscaping to perform snow removal and salt-spreading services for predetermined fees. The contract states:

> "[Owner] agrees to notify [Landscaping] that their services are required. [Landscaping] will not be responsible to provide services unless the services have been requested and confirmed by [Prestige]" (see Moving Papers, Mot. Seq. 002, Exhibit 36).

After joinder of issue, the parties proceeded with discovery. Depositions were taken of the plaintiff; Matthew Lucchese, property manager for Prestige; Reny Samuel, general manager for Applebees; and Carlos R. Membreno, owner and president of Landscaping.

Samuel testified that Applebees does not maintain the area outside of the building where the restaurant is located. Applebees does not create or maintain any accident reports for the area outside of the restaurant, nor do they inspect the outside area, including the parking lot where plaintiff's accident occurred. (see Moving Papers, Exhibit I, Pg. 18-25). Lucchese testified that Prestige supplies the salt used at the parking lot, but that Landscaping, not Prestige, does the salt spreading (see Moving Papers, Exhibit H, Pg. 29 - 39). Prestige owns shovels and has employees that shovel the sidewalks, but Prestige does not salt the parking lot (Id.).

Membreno testified that the day prior to plaintiff's accident, Landscaping plowed the area where plaintiff fell and salted the parking lot "three times because the storm was composed of snow and ice. And to undo the ice, to melt the ice, you have to spread salt three times to make sure the parking lot remains clean" (see Pg. 46). Before it begins snowing, Prestige begins to spread salt in Bay Plaza, and Prestige calls Landscaping in order to come remove the snow and spread more salt (Id., Pg. 56). Membreno also stated that before leaving Bay Plaza, someone from Prestige has to approve that "everything is okay" (Id., Pg. 47).

Prestige, Applebees, Owner, and defendant PC1-BAY PLAZA, LLC now move for summary judgment dismissing the complaint. Plaintiff does not oppose dismissal of the complaint as against Applebees and PC1-BAY PLAZA, LLC.

Prestige and Owner argue that they neither created nor had actual or constructive notice of the dangerous condition causing plaintiff's fall. Prestige and Owner contend that all snow removal was completed by 10:00pm the day prior to plaintiff's fall, and that no other snow removal took place (see Exhibit J., Pg. 40). Plaintiff testified that she did not notice any snow or ice in the area where she fell, and that at the time of her fall, she did not notice any snow removal in progress (see Pg 29, 66-67). Prestige and Owner assert that they did not plow the snow, remove the snow, or spread salt in the area where plaintiff fell.

Landscaping also moves for summary judgment dismissing the complaint arguing that it owes no duty of care to plaintiff for allegedly failing to properly clear snow and ice from the Bay Plaza parking lot. Landscaping claims that it neither created or exacerbated the dangerous condition.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

"To subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury. A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence. "In the case of actual or constructive notice, plaintiff must also show that the owner had a sufficient opportunity, with the exercise of reasonable care, to remedy the situation" (Smith v. Costco Wholesale Corp., 50 A.D.3d 499, 856 N.Y.S.2d 573, 575 [1st Dept., 2008]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (Ceron v. Yeshiva University, 126 A.D.3d 630, 7 N.Y.S.3d 66, 68 [1st Dept., 2015]).

Prestige and Owner make a prima facie showing that they neither created the dangerous condition causing plaintiff's fall, nor had actual or constructive notice. They did not plow the parking lot or spread salt in the parking lot the day prior to plaintiff's fall. They conducted a search for complaints for the day of and the day prior to plaintiff's accident. No complaints of icy or snowy conditions were filed with them on those dates (see Moving Papers, Exhibits N, O, P). There is no evidence in admissible form showing when the icy condition was created or how long it existed prior to plaintiff's fall. Plaintiff testified that she did not see the ice until after she had fallen; she did not see the ice when she pulled into the parking spot at Bay Plaza; and that the area where she fell was "well lit" (see Moving Papers, Exhibit G, Pg. 27-29, and 35).

Plaintiff fails to raise a triable issue of fact that Owner created the defect or had actual or constructive notice. Plaintiff testified that she saw snow piles, but does not remember where they were located or how high they were. In opposition to summary judgement, plaintiff submits a self-serving affidavit stating that on the day of the accident she "slipped on clear ice which was difficult to see," Plaintiff also states that there was "a large pile of snow about two car spaces" away from her car, and that the pile "was considerably taller than me as I stood up and out of the car" (see Aff in Opp., Exhibit A; see Cyril v Mueller, 104 A.D.3d 465, 961 N.Y.S.2d 108 [1st Dept., 2013]). Plaintiff also submits an unverified weather report for the proposition that "there was some melting of snow with subsequent freezing as the temperature dropped to freezing and below" prior to plaintiff's fall (see Aff. In Opp., PP 6; also Exhibit B). Plaintiff then submits a certified copy of said weather report contending that the defendants were on constructive notice of the icy condition (see Doc. No. 53).

This self-serving affidavit and weather report are insufficient to raise a triable issue of fact. The deposition testimony establishes that there was adequate drainage near the area where plaintiff fell; that the snow piles were not placed on top of the drains; and that there were no complaints on the day prior and the day of plaintiff's accident. Summary judgment dismissing the complaint as against the Prestige and Owner is granted.

As to Landscaping's motion for summary judgment, "[b]ecause a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 138, 773 N.E.2d 485, 487, 746 N.Y.S.2d 120 [2002]). The Court of Appeals has held that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (Id.). "[T]here are three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a hazardous condition; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Sperling v. Wyckoff Hgts. Hosp., 2015 NY Slip Op 04840, Pg. 2 [2nd Dept., June 10, 2015]).

Landscaping neither caused a force or instrument to be launched and cause harm, exacerbated a hazardous condition, or caused plaintiff to detrimentally rely on Landscaping's continued performance. Further, the contract does not entirely displace the Prestige and Owner's duty to maintain Bay Plaza safely. Summary judgment dismissing the complaint as against Landscaping is proper.

Accordingly, it is ORDERED, that defendants PC1-BAY PLAZA, LLC, PRESTIGE PROPERTIES &DEVELOPMENT CO., INC., APPLE-METRO, INC., and BAY PLAZA COMMUNITY CENTER, LLC's motion made under Mot. Seq. 002 for summary judgment dismissing the complaint as against them is granted, and it is further,

ORDERED, that the defendant ROBERT LANDSCAPING & CONSTRUCTION, INC.'s motion for summary judgment made under Mot. Seq. 003 dismissing the complaint as against it is granted, and it is further,

ORDERED, that the complaint is dismissed in its entirety, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

MANUEL J. MENDEZ
Enter: J.S.C.

Dated: June 17, 2015

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE