Haus v Fedex Off. & Print Servs., Inc.
2015 NY Slip Op 31082(U)
June 18, 2015
Supreme Court, Suffolk County
Docket Number: 37008/2009
Judge: James C. Hudson
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[* 1]

Short Form Order

COPY

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x---x
DAWN HAUS,

Plaintiff,

- against -

FEDEX OFFICE AND PRINT SERVICES, INC. d/b/a FED EX KINKO'S, FEDERAL EXPRESS CORPORATION, RDL HOLDINGS, LLC and ISLANDWIDE INDUSTRIAL SERVICES, INC.,

Defendants.
x---x

x---x
RDL HOLDINGS, LLC,

Third-Party Plaintiff,

- against -

ISLANDWIDE INDUSTRIAL SERVICES, INC.,

Third-Party Defendant.
x---x

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MOT. SEQ. NO. 003-MG
004-XMG

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Upon the following papers numbered 1-47 read on this motion for Summary Judgment; Notice of Motion and supporting papers 1-18; Notice of Cross Motion and supporting papers 24-44; Answering Affidavits and supporting papers 19-23; Replying Affidavits and supporting papers __; Other; memorandum of law 47; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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ORDERED that the motion by Defendant Islandwide Industrial Services, Inc., for Summary Judgment dismissing the complaint and the third-party complaint against it is granted; and it is

ORDERED that the cross motion of Defendant RDL Holdings, LLC for summary judgment dismissing the complaint against it is granted.

This action was commenced by Plaintiff in September of 2009 to recover damages for personal injuries she allegedly sustained as the result of a slip and fall accident that occurred as she was entering the premises of Defendant Fedex Office and Print Services, Inc. (hereinafter Fedex). In April of 2011, coDefendant RDL Holdings, LLC (hereinafter RDL) commenced a third-party action against Islandwide. By order of this court (Spinner, J.) dated July 17, 2012, the complaint and all cross-claims were dismissed as against FedEx. The court determined that Fedex, as tenant, and pursuant to the terms of the lease it maintained with RDL, had no responsibility for snow and ice removal at the subject premises.

The complaint alleges, inter alia, that Defendant Islandwide Industrial Services, Inc. (hereinafter Islandwide) entered into an exclusive agreement with RDL to provide snow and ice removal services for the premises located at 3460 Veterans Highway, Bohemia, and that Islandwide assumed the duty of the owner for the safe maintenance of the premises with respect to snow and ice removal of the parking lot, sidewalks and roadways. It alleges Plaintiff slipped and fell on ice that had formed on the sidewalk.

Islandwide now moves for summary judgment dismissing the complaint and the third-party complaint against it on the ground that it did not create the condition that caused Plaintiff's accident and, thus, owed no duty to Plaintiff. In support of its motion, Islandwide has annexed copies of the pleadings, the bill of particulars, and transcripts of the deposition testimony of Plaintiff, David Dennis, a Fedex employee, and Anthony Plumitallo, a witness for RDL. It also submits its own deposition testimony.

Plaintiff testified that on the evening of January 6, 2009, while walking towards the entrance of a Fedex store to ship a package, she slipped and fell on "black ice." Plaintiff stated that she did not see any ice or snow on the walkway while approaching the entrance, but did observe ice after she fell to the ground. According to Plaintiff and the deposition testimony of David Dennis, the only Fedex employee present that evening, it was a cold evening but it was not snowing or raining. Plaintiff testified that it had snowed lightly three days prior to the accident and heavily a week earlier, but she did not see any snow or ice on the walkway before her fall. She also testified that she saw a mound of snow in front of bushes, which were several feet away from the area where she fell and from the entrance of the Fedex store.

The prior legal determinations of Judge Spinner, which are the law of the case (*see* ***Ramanathan v Aharon,*** 109 AD3d 529, 531, 970 NYS 2d 574 [2d Dept 2013]), establish that RDL owned the property where Plaintiff allegedly slipped, and that it had a duty to "keep all sidewalks and parking areas free of debris, snow and ice." Further, according to the deposition testimony of Anthony Plumitallo, the supervisor of maintenance of the office complex where the fall occurred, Islandwide had no written contract with RDL. Rather, Plumitallo would contact Islandwide through Joseph Tuscano when it needed snow removal services, which was when the snow was at least two inches. Plumitallo testified Islandwide had no authority to commence any work until it received a phone call from him and that he would inspect the premises after Islandwide performed their services. As part of the snow removal process, Plumitallo also used day laborers every morning to salt and shovel if necessary. According to his testimony and the testimony of Joseph Tuscano, Islandwide was at the premises on December 31, 2008 and January 10, 2009, to perform snow removal services, but was not hired or present on the date of Plaintiff's accident.

Liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property (*see* ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept. 2007]). Owners of real property onto which members of the public are invited have a nondelegable duty to provide the public with reasonably safe premises and a safe means of ingress and egress (*see* ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc***., 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]).

A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third-parties (*see* ***Espinal v Melville Snow Contrs***., 98 NY2d 136, 141-142, 746 NYS2d 120 [2002]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Liability may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.,*** *id, quoting* ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk; (2) where a Plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp***., 76 NY2d 220, 226, 557 NYS2d 286 [1990]); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp***., 83 NY2d 579, 611 NYS2d 817 [1994]).

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a 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 (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

Islandwide demonstrated its prima facie entitlement to judgment as a matter of law by coming forward with proof that Plaintiff was not a party to the snow removal contract and, therefore, it owed no duty of care to Plaintiff (***Foster v Herbert Slepoy Corp***., 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]). Thus, the burden shifted to Plaintiff to proffer evidence in admissible form to raise a triable issue of fact as to whether any of the exceptions apply so as to hold Islandwide liable. The terms of the verbal agreement between RDL and Islandwide limited its snow removal obligations, including ice control measures, to accumulations of two inches or more and only upon a request from RDL. With accumulations of snow less than two inches, no services were required from Islandwide; rather, the day laborers inspected the grounds and sanded and shoveled if necessary. This arrangement between the RDL and Islandwide is not the type of comprehensive and exclusive property maintenance obligation that would remove the property owner's duty to maintain the premises in a safe condition (***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]).

Further, Plaintiff failed to submit any admissible evidence further addressing the detrimental reliance exception and has not presented any evidence that Islandwide by removing snow one week prior to the incident, launched a force or instrument of harm which created or exacerbated the allegedly hazardous condition. Accordingly, Islandwide's motion for summary judgment dismissing the complaint and the third-party complaint against it is granted.

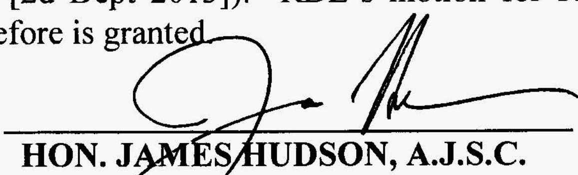
With respect to the motion by RDL for summary judgment dismissing Plaintiff's complaint, movant has submitted the same pleadings, documents and depositions as those submitted by Islandwide with some additions. Plaintiff contends that RDL, as owner and landlord of the premises where the incident occurred, breached the duty of care owed to her by failing to maintain its premises in a reasonably safe condition and was thus negligent.

"In slip-and-fall cases involving snow and ice, a property owner is not liable unless he or she created the defect, or had actual or constructive notice of its existence" (***Gil v Manufacturers Hanover Trust Co.***, 39 AD3d 703, 704, 833 NYS2d 634 [2d Dept 2007];

see, ***Powell v Cedar Manor Mut. Hous. Corp.***, 45 AD3d 749, 844 NYS2d 890 [2d Dept 2007]). A Defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Mercedes v City of New York***, 107 AD3d 767, 968 NYS2d 519 [2d Dept 2013]). To constitute constructive notice, a hazardous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to afford the Defendant a reasonable opportunity to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; ***Perez v New York City Hous. Auth.***, 75 AD3d 629, 906 NYS2d 299 [2d Dept 2010]).

The evidence establishes that RDL did not create the icy condition nor did it have actual or constructive notice of its existence. Plaintiff acknowledges that she did not see the ice until she fell to the ground, which establishes that the ice was not visible and apparent giving Defendants little chance to discover and remedy the condition (***Ronconi v Denzel Assocs.***, 20 AD3d 559, 799 NYS2d 271 [2d Dept 2005]). Also, there is no evidence that RDL or its employees were aware or should have been aware of the alleged hazardous condition. David Dennis, who was working at Fedex from 1:00 p.m. to 9:00 p.m. on the day of the incident, testified that he did not receive any complaints that day from any patrons about snow or ice conditions on the walkway, and both he and Plaintiff stated that they did not recall any form of precipitation occurring on the day of the incident. Consequently, RDL established its entitlement to judgment as a matter of law by submitting evidence sufficient to demonstrate that it did not create or have actual or constructive notice of the "black ice" that allegedly caused Plaintiff to fall (*see* ***Sweeney v Doria***, 95 AD3d 1298, 944 NYS2d 893 [2d Dept 2012]; ***Cantwell v Fox Hill Community Assn. Inc.***, 87 AD3d 1106, 930 NYS2d 459 [2d Dept 2011]; ***Aurilia v Empire Realty Assocs.***, 58 AD3d 773, 873 NYS2d 103 [2d Dept 2009]), shifting the burden to Plaintiff to proffer evidence in admissible form raising a triable issue of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

Plaintiff's opposition papers fail to raise an issue of fact. The contentions of her attorney that RDL had notice of the icy condition or that such condition was the result of improper snow removal are conclusory and speculative, and, thus, insufficient to defeat this motion (*see*, ***Makaron v Luna Park Hous. Corp.***, 25 AD3d 770, 809 NYS2d 520 [2d Dept 2006]). Furthermore, the "weather report" that Plaintiff annexed in opposition to the motion in an attempt to show that temperatures were fluctuating and some precipitation occurred is unsupported by expert testimony and, hence, inadmissable (***Pilgrim v Wilson Flat, Inc.***, 110 AD3d 973, 974, 973 NYS2d 738 [2d Dept 2013]). RDL's motion for summary judgment dismissing the complaint, therefore is granted.



DATED: 6/18/15

HON. JAMES HUDSON, A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION