

Robinson v Brooks Shipping Ctrs., LLC

2015 NY Slip Op 32069(U)

September 21, 2015

Supreme Court, New York County

Docket Number: 106847/2011

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ROXANA ROBINSON,
Plaintiff,
-against-

INDEX NO. 106847/2011
MOTION DATE 09-09-2015
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

BROOKS SHOPPING CENTERS, LLC and
MACERICH MANAGEMENT CO.,

Defendants.

MACERICH MANAGEMENT CO. and
BROOKS SHOPPING CENTERS, LLC,

Third-Party Plaintiffs,

-against-

MONTESANO BROS., INC.

Third-Party Defendants

MACERICH MANAGEMENT CO. and
BROOKS SHOPPING CENTERS, LLC,

Second Third-Party Plaintiffs,

-against-

UGL SERVICES UNICCO OPERATIONS CO.,
FORMERLY KNOWN AS UNICCO SERVICE
COMPANY D/B/A UGL UNICO,

Second Third-Party Defendant.

The following papers, numbered 1 to 10 were read on this motion and cross-motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

PAPERS NUMBERED

1 - 4

5-6, 7, 8,

9, 10

RECEIVED
SEP 22 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED

SEP 23 2015

COUNTY CLERK'S OFFICE
NEW YORK

Upon a reading of the foregoing cited papers, it is Ordered, that moving defendants' motion under Motion Sequence 005 for summary judgment dismissing the Second Amended Complaint as against them is granted, the portions of the motion seeking common law and contractual indemnification as against the Second Third-Party and the Third-Party defendant are denied, the Third-Party Defendant's cross-motion for summary judgment is granted, Second Third-Party defendant's motion under Motion Sequence 006 for summary judgment dismissing the Second Third-Party Complaint and all cross-claims asserted against the Second Third-Party defendant is granted.

This is an action to recover for personal injuries sustained by plaintiff, Roxana Robinson, on April 5, 2010 when she fell in a parking lot within the Cross County Mall (herein "Mall") located in Yonkers, New York. The Mall is owned by Brooks Shopping

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

EA
9/24/15
JS

Centers, LLC (herein "Brooks") and the property is managed by Macerich Management Co. (herein "Macerich"). Macerich sub-contracted with UGL Services Unicco Operations Co. (herein "Unicco") to perform "building maintenance, repairs, engineering and housekeeping" (see Moving Papers, Exhibit D - A, Pg. 1).

The scope of the work to be performed by Unicco included providing the "labor and materials to perform minor parking lot and parking structure repair," such as "pothole filling, curb repair, [and] minor surface painting" (see Moving Papers, Exhibit N, Pg. 34 of 63). Services not included in Unicco's scope of work were "major parking lot and parking structure repairs and replacements" (Id., Pg. 38 of 63).

Brooks commenced major renovations on the Mall. As part of the renovation project, Brooks contracted with The Whiting-Turner Contracting Company (herein "General Contractor"). The General Contractor sub-contracted with Montesano Bros., Inc. (herein "Montesano") for road work and utilities site work (see Moving Papers, Exhibit M).

The scope of the work to be performed by Montesano included "protection of pedestrians throughout the length of the contract; furnish, maintain, and relocate fencing as required to facilitate the install of work; [p]rovide maintenance and protection of traffic and other measures as required to safely redirect vehicle and pedestrian traffic around trenching areas; being responsible for all placement, maintenance and removal of erosion and sedimentation control measures around all areas affected by [Montesano's] work; dispose of all trash and construction material generated by [Montesano] and [its] work; and perform all trade related daily cleanup" (see Moving Papers, Exhibit N - B: Scope of Work, PP. 34-37, 40-41).

Robinson alleges that on April 5, 2010 she visited the Mall and parked in an outdoor parking lot adjacent to the Sports Authority (see Moving Papers, Exhibit I, Pg. 101). In order to get to the Sports Authority, Robinson had to exit her vehicle, walk across a road, up a set of stairs, and into the building within the Mall where the Sports Authority is located (Id., Pg. 101-103). Upon exiting her vehicle, Robinson saw on-going construction, concrete barriers, dug-up dirt, and gravel (Id. Pg. 104). Robinson testified that "the whole place was a mess" (Id.).

Robinson proceeded to "walk to wherever [the] concrete barriers were set to mark an area for [her] to walk through (Id., Pg. 105) because there was no other way to walk" (Id., Pg. 113). She walked from her car to the Sports Authority with no issue. Upon returning to her car, Robinson testified that she had to walk through a pathway which had two barricades on either side of her forming a path (Id., Pg. 114). Jones stated that "there was a little ridge ... a ridge like they use to mark a [parking space], it was [a] little broken, like a jaggedy edge thing, so you kind of have to step over it to get [to where you're going]" (Id. Pg. 122). The "ridge" was a curb stop that Robinson stated was "in the ground," and not loose (Id. Pg. 127). However, Robinson's foot never came into contact with the curb stop either prior, during or after her fall (Id. Pg. 127; 155-156).

After lifting her foot approximately one or two inches in order to step over the broken concrete curb stop (Id., Pg. 125), Robinson's "foot went down into this hole that was there, and that's when [she] lost [her] balance and just pitched forward flat on [her] face" (Id., Pg. 124). An incident report taken by the Mall's security stated that Robinson "lost her footing" while walking from the indoor portion of the Mall to the outdoor parking lot (see Moving Papers, Exhibit R). At the time of her fall, Robinson was within a pathway "between two construction (traffic) barricades" between the outdoor and indoor portion of the Mall (Id., Pg 141-145).

Robinson explained that the "hole" was "not a deep hole, it's just like the place wasn't level anymore. It's uneven, an uneven spot there. I'm calling it a hole but it wasn't like they dug a hole there, it was just that the spot was – it wasn't as level as the other side" (Id., Pg. 126). Robinson was further questioned about the "uneven spot" that caused her fall (see Id. Pg. 155-157; 160; 182). Robinson was specifically asked:

Q. Did the unlevel part of the roadway, is that what caused you to fall?

A. Yes.

Q. Was there anything else that caused you to fall?

....

A. No, there wasn't anything else that caused me to fall.
(Id., 185).

Robinson was taken to the hospital, treated for her injuries, and released. After leaving the hospital, Robinson went back to the Mall with her son in order to take pictures of the area where she fell (see Moving Papers, Exhibit I, Pg. 117-118, 132-133). The barricades had been moved to cover the uneven location where Robinson fell, and the barricades had been reconfigured (Id., Pg. 159).

Robinson commenced this action by summons and complaint, which she then amended. The Second Amended Complaint asserts causes of action for negligence against Brooks and Macerich. The Second Amended Complaint alleges that the defendants created the defective condition causing Robinson's fall, or had actual or constructive notice of the defective condition (see Moving Papers, Exhibit C).

After joinder of issue, Brooks and Macerich commenced a Third-Party action against Montesano alleging that any injuries sustained by Robinson were caused by Montesano's negligence. Brooks and Macerich seek contribution from Montesano, and common law and contractual indemnification. Brooks and Macerich also commenced a Second Third-Party action against Unicco making the same allegations and seeking the same relief as the Third-Party action.

Depositions were taken of Jeff Shey and Thomas Moran on behalf of Brooks; Dennis Tinney on behalf of Unicco; and Stephen Moore on behalf of Montesano.

They testified that Macerich did not deal with the Mall's renovation project, or the General Contractor or Montesano (see Moving Papers, Mot. Seq. 006, Exhibit H, Pg. 15). Macerich contracted with Unicco for the "supervision of the maintenance staff and housekeeping staff" (Id., Pg. 27). In regard to parking lots, the maintenance staff would pick up debris such as glass bottles, plastic cups, and other trash (Id., 31). The maintenance staff would also be responsible for repairing "small potholes, even larger potholes, curb repairs, restriping of the parking lots, [and] minor sidewalk repairs" (Id, EBT# 2, Pg. 30). They also stated that Unicco was responsible for overseeing repairs in the construction areas within the Mall, even when the areas were blocked off by barriers (Id., EBT#2, Pg. 47). However, Unicco was not responsible for overseeing the grading being done on the parking lot during the renovations (Id, EBT#2, Pg. 48), nor was Unicco responsible for moving the construction barriers or determining the pedestrian or vehicle traffic route (Id., EBT#2, Pg. 68-69).

Moran testified that he was and still is a Brooks employee with a job title of Rehab Foreman (Id, Exhibit I, Pg. 8). His duties include "checking landscaping, the parking surfaces [and] running a small street sweeper for litter" (Id., Pg. 12). The Brooks employees were supervised by Unicco (Id). Moran's rehab team would make smaller repairs such as repairing potholes. Any grading being performed at the Mall would have to be done as part of the Mall's renovation project, and not the rehab team's responsibility (Id., Pg. 36-38). On the date of the accident, Montesano was performing an on-going renovation wherein they replaced all walking surfaces, raised the parking lots, filled in the parking lots, and had huge piles of dirt around the parking lot (Id.).

Tinney testified that Unicco had two employees on-site at the Mall (see Moving Papers, Mot. Seq. 006, Exhibit J, Pg. 23). Those employees would inspect the Mall's parking lots and look for "cleanliness, debris and potholes" (Id.). If a minor pothole was found in the parking lot, Unicco would inform Macerich and/or Brooks, and Brooks employees would perform the necessary repairs (Id., 23-24). Unicco was not responsible for cleaning or inspecting areas that were under construction at the time of the renovation project (Id. 33-48). There was on-going construction being done in the Mall on the date of the accident, and in the area where Robinson fell (Id).

Moore testified that Montesano's role in the Mall's renovation project entailed creating temporary roadways within the Mall in order to "accommodate construction that, at times would pass through what was the parking lot" (see Moving Papers, Mot. Seq. 006, Exhibit K, Pg. 16). Around the date of Robinson's fall, Montesano was in the Ring Road phase, which involved demolishing and removing the existing blacktop, and grading, compaction, and resurfacing the area where Robinson fell (Id., Pg. 32-34). Cones, barricades, stripping and sign painting were placed around the construction site by Montesano at the direction and design of the General Contractor (Id., 32-34, 36, 56-61). Montesano also removed all of the debris during roadway excavation (Id., 39).

Brooks and Macerich (collectively known herein as "Moving Defendants") now move under Motion Sequence 005 for summary judgment dismissing the Second Amended Complaint as asserted against them. The Moving Defendants also seek summary judgment as to its claims for common law and contractual indemnification as asserted against Montesano and Unicco. Montesano cross-moves under Motion Sequence 005 for summary

judgment dismissing the Second Third-Party Complaint. Unicco moves under Motion Sequence 006 for summary judgment dismissing the Second Third-Party Complaint as asserted by the Moving Defendants.

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 (*Ceron v. Yeshiva University*, 126 A.D.3d 630, 7 N.Y.S.3d 66, 68 [1st Dept., 2015]). 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*, *Supra*).

Here, there is no testimony that either the Moving Defendants or Unicco created the defective condition causing Robinson’s fall. The deposition testimony establishes that the Mall was undergoing construction on the date of the accident. The construction area where Robinson fell was controlled by the General Contractor and Montesano. Macerich and Unicco were not responsible for inspection, cleaning or repairing areas that were under construction.

Robinson’s fall was not due to a “pothole” as she stated. Rather, her fall was caused by an “uneven/unlevel” portion of the parking lot that was within construction barricades. Of the named parties, only Montesano was responsible for all grading of the Mall’s parking lots. During the construction, the Moving Defendants and Unicco did not design the layout of the barricades, or place or remove the barricades.

The agreement between the Moving Defendants and Unicco required patchwork for minor potholes. However, the deposition testimony establishes that Unicco was not responsible for grading the Mall’s parking lot or issues involving grading. The agreement between the General Contractor and Montesano require Montesano to protect pedestrians and redirect vehicle and pedestrian traffic wherever they performed road or sidewalk work.

The Moving Defendants make a prima facie showing that they neither created the defective condition, nor had actual or constructive notice of the defective condition.

Robinson fails to rebut the Moving Defendants' prima facie showing of entitlement to judgment as a matter of law. Robinson fails to put forward contrary evidence in admissible form. Summary judgment dismissing the Second Amended Complaint as against the Moving Defendants is granted.

The Moving Defendants also argue that the alleged defect causing Robinson's fall was de minimus and trivial. Montesano adopts the Moving Defendants arguments within its cross-motion to dismiss the Second Third-Party Complaint.

At the time of her fall, Robinson was approached by a security guard working within the Mall. After speaking to Johnson, the security guard requested emergency services. The Yonkers Police Department and Emergency Medical Services arrived at the Mall. As part of the regular course of business, the security guard filed an internal incident report, which included pictures taken of the scene of Robinson's fall within a short duration after her fall (see Moving Papers, Exhibit R).

The photographs annexed as Exhibit R to the Moving Papers show a trivial defect, which is not a trap or snare. The photographs do not depict any broken or uneven surfaces. At most, the photographs may depict a slight incline or a slope. Therefore, the alleged defect causing Robinson's fall was trivial in nature and not actionable (see Lipsky v. Manhattan Plaza, Inc., 103 A.D.3d 418, 959 N.Y.S.2d 181[1st Dept., 2013]; Leon v. Alcor Assoc., L.P., 96 A.D.3d 635, 946 N.Y.S.2d 574[1st Dept., 2012]). Summary judgment dismissing all claims and cross-claims asserted against Montesano is granted.

Robinson does not submit sufficient proof to rebut Montesano's prima facie showing that the alleged defect causing her fall was de minimus and therefore not actionable.

Unicco moves under Motion Sequence 006 for summary judgment dismissing the Third-Party claims and cross-claims asserted against it.

The Moving Defendants' witnesses testified that Brooks and Unicco had no duty to enter construction areas to oversee work or perform repairs within construction zones. The agreement between the Moving Defendants and Unicco did not require Unicco to perform grading or major pothole repairs. Further, Montesano was contractually responsible for the repavement of the Mall's parking lot area where Robinson fell, including all grading related to resurfacing that area of the Mall.

Unicco makes a prima facie showing of entitlement to judgment as a matter of law. None of the parties rebut Unicco's prima facie showing through the submission of admissible evidence. Summary judgment dismissing the Third-Party complaint and cross-claims against Unicco is granted.

The Moving Defendants under Motion Sequence 005 also seek summary judgment of the Third-Party and Second Third-Party claims for common law and contractual indemnification as against Montesano and Unicco.

Unicco was not negligent in causing Robinson's fall. Further, the alleged defect causing Robinson's fall is de minimus and not actionable. Therefore, the Moving Defendants have not stated a basis for summary judgment as to its claims for common law and contractual indemnification as against Unicco and Montesano.

Accordingly, it is ORDERED, that defendants' BROOKS SHOPPING CENTERS, LLC and MACERICH MANAGEMENT CO.'s motion made under Mot. Seq. 005 for summary judgment dismissing the complaint as against them is granted, the portions of the motion seeking common law and contractual indemnification as against Third-Party defendant MONTESANO BROS., INC. and the Second Third-Party defendant UGL SERVICES UNICCO OPERATIONS CO. FORMERLY KNOWN AS UNICCO SERVICE COMPANY D/B/A UGL UNICO are denied, and it is further,

ORDERED, that the Second Amended Complaint is dismissed as against defendants BROOKS SHOPPING CENTERS, LLC and MACERICH MANAGEMENT CO., and it is further,


ORDERED, that the Third-Party Complaint, the Second Third-Party Complaint, and all cross-claims asserted against the Third-Party defendant MONTESANO BROS., INC. and the Second Third-Party defendant UGL SERVICES UNICCO OPERATIONS CO. FORMERLY KNOWN AS UNICCO SERVICE COMPANY D/B/A UGL UNICO are hereby dismissed, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

MANUEL J. MENDEZ
J.S.C.

Enter:

Dated: September 21, 2015



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED
SEP 23 2015
COUNTY CLERK'S OFFICE
NEW YORK