Phillips v Strathmore Terrace Clubhouse
2016 NY Slip Op 31837(U)
August 2, 2016
Supreme Court, Suffolk County
Docket Number: 11-24345
Judge: Arthur G. Pitts
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[* 1]

SHORT FORM ORDER

INDEX No. 11-24345
CAL. No. 15-01011OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 6-17-15 (003)
MOTION DATE 6-30-15 (004)
MOTION DATE 7-30-15 (005)
MOTION DATE 8-27-15 (006)
ADJ. DATE 10-8-15
Mot. Seq. #003 - MD #005 - XMG
#004 - MG #006 - XMG;CASEDISP

JOAN PHILLIPS and EARL PHILLIPS,

Plaintiffs,

- against -

STRATHMORE TERRACE CLUBHOUSE a/k/a STRATHMORE TERRACE HOMEOWNERS ASSOCIATION, INC. and ELIZABETH McBRIDE,

Defendants.

VESSA & WILENSKY, P.C.
Attorney for Plaintiffs
626 RexCorp Plaza - 6th Floor
Uniondale, New York 11556

VINCENT D. McNAMARA, ESQ.
Attorney for Strathmore Terrace Clubhouse
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East Norwich, New York 11732

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Attorney for Elizabeth McBride
50 Route 111, Suite 314
Smithtown, New York 11787

STRATHMORE TERRACE CLUBHOUSE a/k/a STRATHMORE TERRACE HOMEOWNERS ASSOCIATION, INC. and ELIZABETH McBRIDE,

Third-Party Plaintiffs,

- against -

ISLAND LANDSCAPING, INC.,

Third-Party Defendant.

BAXTER, SMITH & SHAPIRO, P.C.
Attorney for Island Landscaping Corp.
99 North Broadway
Hicksville, New York 11801

ELIZABETH McBRIDE,

Second Third-Party Plaintiff,

- against -

ISLAND LANDSCAPING, INC.,

Second Third-Party Defendant.

Upon the following papers numbered 1 to 61 read on these motions and cross motions for trial preference and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 11 - 28; Notice of Cross Motion and supporting papers 29 - 34; 36 - 42; Answering Affidavits and supporting papers 43 - 55; Replying Affidavits and supporting papers 56 - 61; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions and cross motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 003) by plaintiffs for a trial preference pursuant to CPLR 3403 (a)(4) by reason of the advanced age of plaintiff Joan Phillips is denied as moot; and it is further

ORDERED that the motion (# 004) by third-party defendant Island Landscaping, Inc. for summary judgment dismissing the third-party complaint and the second third-party complaint against it is granted; and it is further

ORDERED that the cross motion (# 005) by defendant/third-party plaintiff Strathmore Terrace Homeowners Association, Inc., for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the cross motion (# 006) by defendant/third-party plaintiff Robert McBride, temporary administrator of the estate of Elizabeth McBride, for summary judgment dismissing the complaint and all cross claims against him is granted.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Joan Phillips on January 17, 2011, at approximately 2:30 p.m., when she slipped and fell on ice on the step in front of the premises owned by Elizabeth McBride, located within a condominium development called Strathmore Terrace Community operated by defendant/third-party plaintiff Strathmore Terrace Homeowners Association, Inc. ("Strathmore Terrace"). Prior to the accident, Strathmore Terrace entered into a snow removal contract with third-party defendant Island Landscaping, Inc. ("Island"). Elizabeth McBride died on June 29, 2013, and upon the order of the Court, dated October 8, 2014, her son, Robert McBride, who was appointed as temporary administrator of Elizabeth McBride, substituted as defendant/third-party plaintiff in her stead. The gravamen of the complaint is that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition.

Island moves for summary judgment dismissing the third-party complaint and the second third-party complaint against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. In support, Island submits, inter alia, the pleadings, the bill of particulars, and the transcripts of the deposition testimony of plaintiff Joan Phillips, Anthony Defabritis, a representative of Island, and Joyce Seman, the president of Strathmore Terrace.

At her deposition, Joan Phillips testified that she lives in the subject condominium development, that Elizabeth McBride was her neighbor, and that they shared a driveway. On the afternoon of the accident, Phillips crossed the driveway and visited McBride without incident. When Phillips left her house, she did not observe any snow on the driveway or the walkway leading to McBride's house. Before entering McBride's residence, Phillips saw the step in front of the residence was wet, but did not see any ice or water accumulation on it. Phillips testified that when she went to McBride's residence, the outdoor temperature was warm, not freezing. When Phillips exited McBride's house approximately one or one and a half hours later, she slipped on the step and fell. She described the appearance of the step when she fell as "shiny" and "clear." When she got up, she observed ice on the step. Phillips testified that the step was not shiny when she walked into McBride's house, and that the wet step must have frozen while she was inside McBride's house. She did not

make any complaints about the condition of the step to McBride or Strathmore Terrace prior to the accident. In addition, she had no recollection as to when it had snowed last time prior to the subject accident.

At his deposition, Anthony Defabritis testified to the effect that he is the vice president of Island, a snow removal contractor, and that Island was hired by Strathmore Terrace to provide snow plowing services. If there was a minor snowfall of less than two inches, he would have to call the president of the condominium board before performing snow removal services. If there was a big snowfall, Island automatically would go to the subject property. The scope of work provided by Island included all of the roadways and driveways at the Strathmore Terrace community. Defabritis testified that approximately 16 inches of snow accumulated during a snowstorm that occurred between January 11, 2011 and January 12, 2011, and Island's two crew chiefs and several other people performed snow removal work at the property, including shoveling the walkways up to the doorway of each unit. One of the crew chiefs inspected the area upon completion of the work. Island did not receive any complaints regarding the snow shoveling performed on January 11 and January 12. According to his business note, he contacted the president of the condominium board, and she refused to approve the application of ice melt on the walkways of the community. Thereafter, Island performed no other snow removal work at the Strathmore Terrace community until the day of the subject accident.

At her deposition, Joyce Seman testified to the effect that she is the president and a board member of Strathmore Terrace, and that Fairfield Properties is the managing company for the condominium community. She testified that homeowners in the community do not customarily perform ice and snow removal. She further testified that prior to the subject accident, Strathmore Terrace entered into a contract with Island to remove snow from the roads, walkways and driveways in the community. She testified that in January 2011, she did not make any complaints to Island regarding its snow removal services, and that she did not learn of the accident until 2013. Seman also testified that Island is not responsible for applying ice melt to the walkways.

As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties (*see* ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]; ***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 1103, 915 NYS2d 103 [2d Dept 2010]). However, in ***Espinal v Melville Snow Contrs.***, (98 NY2d 136, 746 NYS2d 120 [2002]), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*id.*).

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Figueroa v Lazarus Burman Assoc.***, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, Island is required to establish that it did not perform any snow removal operations related to the condition which caused the plaintiff's accident or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (*see* ***Diaz v City of New York***, 93 AD3d 755, 940 NYS2d 654 [2d Dept 2012]; ***Schwint v Bank St. Commons, LLC***, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; ***Keese v Imperial Gardens Assoc., LLC***, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]).

Here, Island established its entitlement to judgment as a matter of law by demonstrating that its limited contractual undertaking to provide snow removal services is not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see* ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; ***Katz v Pathmark Stores***, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]). Island also made a prima facie showing that it did not launch a force or instrument of harm by showing that it did not perform snow removal work in the Strathmore Terrace community during the 5-day period between the last snow storm in the area and the subject accident (*see* ***Roach v AVR Realty Co.***, LLC, 41 AD3d 821, 839 NYS2d 173 [2d Dept 2007]; ***Linarello v Colin Serv. Sys.***, *supra*).

In opposition, plaintiffs contend that there is an issue of fact as to whether Island's snow removal operation created or exacerbated a dangerous condition in the area of the subject accident. Plaintiffs have not submitted any contrary expert proof or affidavit. Plaintiffs submit only an affirmation of their attorney, which lacked probative value and is insufficient to raise a triable issue of fact (*see* ***1375 Equities Corp. v Buildgreen Solutions, LLC***, 120 AD3d 783, 992 NYS2d 288 [2d Dept 2014]; ***Shickler v Cary***, 59 AD3d 700, 874 NYS2d 233 [2d Dept 2009]; ***Blumenfeld v DeLuca***, 24 AD3d 405, 807 NYS2d 99 [2d Dept 2005]). Accordingly, Island's motion is granted, and the third-party complaint and the second third-party complaint are dismissed.

Strathmore Terrace cross-moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it did not create the alleged dangerous condition, and that it had no actual or constructive notice of the condition. Defendant/third-party plaintiff Robert McBride also cross-moves for summary judgment dismissing the complaint and all cross claims against him on the grounds that Elizabeth McBride did not create the alleged dangerous condition, and that she lacked notice of such condition.

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 if it created the dangerous condition or had actual or constructive notice of the condition (*see* ***Devlin v Selimaj***, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; ***Morreale v Esposito***, 109 AD3d 800, 801, 971 NYS2d 209 [2d Dept 2013]; ***Gushin v Whispering Hills Condominium I***, 96 AD3d 721, 721, 946 NYS2d 202 [2d Dept 2012]). Thus, 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 hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Dhu v New York City Hous. Auth.***, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; ***Cruz v Rampersad***, 110 AD3d 669, 972 NYS2d 302 [2d Dept 2013]; ***Santoliquido v Roman Catholic Church of Holy Name of Jesus***, 37 AD3d 815, 830 NYS2d 778 [2d Dept 2007]). To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see* ***Dhu v New York City Hous. Auth.***, *supra*; ***Oliveri v Vassar Bros. Hosp.***, 95 AD3d 973, 943 NYS2d 604 [2d Dept 2012]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]).

Here, Seman testified that Island was hired to provide snow removal services at the premises, including the walkway of each unit. Defabritis testified that Island did not perform snow removal work in the premises since January 12, 2011 until the day of the accident. Joan Phillips testified that when she entered McBride's house about an hour or hour and a half prior to her accident, she did not see any ice or water accumulation on the step. Through the submission of such deposition testimony, Strathmore Terrace and McBride established

a prima facie case that they did not create the allegedly dangerous condition which caused Joan Phillips' fall. Moreover, Strathmore Terrace and McBride established that they lacked actual or constructive notice of the alleged dangerous condition based on Joan Phillips' deposition testimony that the alleged icy condition on the step was not visible and apparent (*see* ***Mullaney v Royalty Properties, LLC***, 81 AD3d 1312, 916 NYS2d 545 [4th Dept 2011]; ***Lewis v Bama Hotel Corp.***, 297 AD2d 422, 745 NYS2d 627 [3d Dept 2002]).

In opposition, plaintiffs submit, inter alia, the affidavit of Joan Phillips, stating that her testimony at the deposition that "she did not see any ice on the step" does not mean that ice was not present. Joan Phillips contends that she meant that she "did not remember seeing" ice when she entered McBride's house. Joan Phillips' affidavit, which contradicted her deposition testimony, created only a feigned issue of fact, and was insufficient to defeat Strathmore Terrace's motion (*see* ***Mermelstein v East Winds Co.***, 136 AD3d 505, 24 NYS3d 643 [1st Dept 2016]; ***Telfeyan v City of New York***, 40 AD3d 372, 373, 836 NYS2d 71 [1st Dept 2007]). Plaintiffs have failed to raise a triable issue of fact as to whether a defect, in fact, existed which would constitute a dangerous or defective condition and further as to whether Strathmore Terrace or McBride created the allegedly dangerous condition or had actual or constructive notice of the condition. Thus, the cross motions by Strathmore Terrace and McBride are granted, and plaintiffs' complaint against them is dismissed. Accordingly, plaintiffs' motion for a trial preference pursuant to CPLR 3403 (a)(4) by reason of the advanced age of plaintiff Joan Phillips is denied, as moot.

Dated: Riverhead, New York
August 2, 2016

ARTHUR G. PITTS, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION