

Kintzel v Laser Indus., Inc.

2017 NY Slip Op 30436(U)

March 3, 2017

Supreme Court, Suffolk County

Docket Number: 14-1267

Judge: Daniel Martin

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.

COPY

INDEX No. 14-1267
CAL. No. 15-02345OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 4-12-16
ADJ. DATE 9-13-16
Mot. Seq. # 002 - MG; CASEDISP

-----X

GARY KINTZEL,

Plaintiff,

- against -

LASER INDUSTRIES, INC., AND
RESIDENTIAL FENCE CORP.,

Defendants.

-----X

SAVITT & KRANTZ, ESQ.
Attorney for Plaintiff
353 Veterans Memorial Hwy
Commack, New York 11725

WHITE & McSPEDON, P.C.
Attorney for Defendants
875 Avenue of the Americas, Suite 800
New York, New York 10001

Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-18; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 19-20; Replying Affidavits and supporting papers 21-22; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendants Laser Industries, Inc. and Residential Fence Corp., for summary judgment dismissing the complaint is granted.

This action for personal injuries arises from an accident which occurred on January 27, 2011, at approximately 6:50 a.m. Plaintiff alleges that, while reporting to work as an employee of National Grid, he slipped and fell on ice in one of the parking lots at the National Grid facility in Hicksville, New York, and suffered personal injuries. Plaintiff alleges that his injuries were caused by the negligence of defendants Laser Industries, Inc. and Residential Fence Corp. (collectively referred to as "Laser")

Laser now moves for summary judgment dismissing the complaint. In support of the motion Laser submits, *inter alia*, a copy of the pleadings, the verified bill of particulars, the deposition transcripts of plaintiff, Michael Halupa, Wayne Grebe, Richard Zavada and John Araujo, a copy of an agreement between Keyspan Corporate Services, LLC ("Keyspan") and Laser Industries, Inc., dated

Kinzel v Laser Industries

Index No. 14-1267

Page 2

November 18, 2003, the affidavit of James V. Bria, dated February 17, 2016, and the affidavit of John Araujo, dated February 22, 2016. In opposition plaintiff submits his attorneys affirmation, certified weather data, and a copy of a page from the agreement between Laser and Keyspan.

Plaintiff testified that he was involved in an accident on January 27, 2011, at about 7:00 a.m., as he was reporting for work at the Hicksville facility of National Grid. He testified that when he arrived at the plant the entrance road into the facility had been cleared of snow. He testified that the parking lot where he had his accident was to the right of the entrance. Plaintiff testified that as he entered the parking lot there were two bulldozers, farther down from where his accident occurred, piling up mountains of snow. He testified that he did not observe any snow removal operations in the area of the lot where he parked. He testified that there were two other bulldozers in the lot, but they were not being operated. Plaintiff testified that the parking lot where he had his accident was right at the entrance of his building. He testified that he did not see any snow removal activity in this parking lot. He testified that when he entered into the parking lot it was almost empty, and he saw that it had been plowed because there were piles of snow. Plaintiff testified that as he pulled into the parking lot he observed a light covering of snow, less than an inch, covering the parking lot with no blacktop visible. He testified that National Grid did its own snow removal on roads and paths in the complex, and that the snow contractor cleared the parking areas. Plaintiff testified that as he entered the parking lot he observed National Grid workers removing snow from around the buildings, walkways and steps, and putting down salt. He testified that he could not recall whether the light covering of snow had been ridden over or walked on, and that the parking lot was slippery as he got out of his car. He testified that he saw no evidence of sand or salt in the parking lot where he fell, and that there was ice under the snow. Plaintiff testified that his accident occurred after he had taken four steps away from his car. Plaintiff testified that he "fell right at the entrance, right at the opening of this gate. If I had taken maybe another two steps I would have been through the gate."

Michael Halupa testified that he is employed by National Grid as a safety advocate at its Hicksville facility. He testified that his duties involve overseeing the practices of the workers in the field to ensure that work is done safely. After being informed of plaintiff's accident, he drove to the parking lot. Without leaving his vehicle, he was able to see the location where the plaintiff fell, by a gate used to exit the parking lot. He testified that there was no snow present in the parking lot, but that it was extremely icy. He testified that when he arrived he saw payloaders in the parking lot area removing piles of snow from the parking lot. He testified that he knew that an outside contractor, Laser, performed snow removal activities, and that National Grid's facility management did have some employees performing snow removal, but he did not know what their responsibilities were. He testified that there were complaints about the payloaders, because the tires compress leftover snow and water so hard that they freeze right away.

Wayne Grebe is employed as a substation operator by National Grid. He testified that he reported to work at the Hicksville facility at about 6:00 a.m. He testified that when he entered the parking lot it had already been plowed and that he saw no snow clearing activity being performed in the lot. He testified that he waited in the parking lot intending to meet a Laser employee who was operating a payload and escort him to another substation. Mr. Grebe testified that, after he been parked for about 15 or 20 minutes, he saw plaintiff lying on the ground in the parking lot. He testified that he had

previously attempted to get out of his truck but almost fell because the parking lot was slippery. Mr. Grebe testified that there was no snow on the ground, and that the parking lot surface was covered with ice. He testified that he drove over to where plaintiff was lying, and helped him get up and move into the substation building.

Richard Zavada testified that he is employed as a senior supervisor at the National Grid facility in Hicksville, which consists of over 70 acres and 15 buildings. He testified that his duties involve managing the facilities of the complex as well as other National Grid facilities. He testified that he oversees janitorial work, building maintenance and ground keeping, including snow removal. He testified that National Grid had a snow removal contract with Laser, but he was not certain whether the contract contained a specific trigger for Laser to appear at the site. When Laser would need to report for snow removal would depend on National Grid's planning and scheduling for each storm. Mr. Zavada testified that he would contact Laser in order to have them come and remove snow. He testified that if there were more than flurries forecast, National Grid would plan a schedule for snow removal, and the plan would be relayed to Laser, which would then report to the facility. Mr. Zavada testified that depending on the amount of snowfall predicted, National Grid would have Laser report to the site early on, at the start of the storm, before the storm, or if little snow was predicted, not at all. He testified that Laser would sometimes also be called on to perform "follow-up work" after a storm to deal with the refreezing of melted snow; other times National Grid would do such work itself. Mr. Zavada testified that, even in situations where Laser was removing snow on the property, National Grid at times would use its own salt spreaders. He testified that National Grid would determine whether it wanted Laser to spread salt or sand before a storm ended or at the conclusion of snow removal operations. Mr. Zavada testified that he would drive around during snow removal operations looking for problem areas which needed attention, and he would relay the information to Laser's foreman on the site. He testified that National Grid performed snow removal in foot traffic areas of the complex, including doorways and gates, clearing a 10-foot area on each side of the gates. Mr. Zavada testified that he would inspect and sign off on Laser's work when completed and that he did so on the date of plaintiff's accident. He testified that, based on the amount of snowfall, it could take up to three days to complete snow removal. Mr. Zavada testified that he could not recall any situation where National Grid had any problem with Laser creating icy conditions during the snow removal process.

John Araujo testified that he is employed as a foreman by Laser Industries. He testified that he was the foreman for the work performed by Laser at the National Grid facility in Hicksville beginning on January 26, 2011 and ending on January 27, 2011. He testified that Laser arrived at National Grid at 3:00 p.m. the day prior to plaintiff's accident, with 10 employees and 10 pieces of equipment to be used in its snow removal efforts. He testified that snow removal was not completed until 24 hours later. He testified that typically Laser would be called by National Grid whenever two inches of snow had fallen or had been predicted. Mr. Araujo testified that, once called by National Grid, Laser would perform snow removal on the roadways and parking lots in the complex. Mr. Araujo testified that the openings around the fences, which allowed employees to enter and exit the parking lots, would be shoveled by National Grid employees to 10 feet or so into the parking lot. He testified that Laser snow plows would begin by clearing and plowing the interior roads within the complex to gain entry. He testified that after clearing the roadways, the focus would be on clearing the parking lots. He testified that the plowing would create piles of snow in the lots, and that pay loaders were used to remove the piles. Mr. Araujo

testified that snow removal procedures would have continued until all snow was removed from the roadways and parking lots, as far down to the pavement as possible. He testified that salting procedures would not have begun until the storm had ended, and all of the snow had been removed from the roadways and parking lots. After the work was completed, it would have been inspected by Rich Zavada of National Grid, who then would sign off on the work if it was acceptable. In his affidavit, Mr. Araujo states that National Grid did not require salting to take place until all roadways and parking lots were cleared.

Certified weather records submitted by both defendant and plaintiff show approximately 17.5 inches of snow fell on Long Island on January 26 into January 27, 2011. Laser's records were obtained from Kennedy Airport in Queens and plaintiff's records were obtained from Republic Airport in Farmingdale. However, the weather data from Kennedy Airport indicated that the subject storm ended at approximately 5:30 a.m., less than two hours prior to plaintiff's accident, while the weather data from Farmingdale indicates that all precipitation ended by 3:00 a.m., more than four hours prior to plaintiff's accident. The affidavit of defendant's expert witness, James Bria III, indicates that, based on the weather data, the snow began on January 26, 2011 at 8:00 a.m., changed to sleet and freezing rain at 1:00 p.m., and then later turned back to snow, with a total accumulation of approximately 17.5 inches. He also states that the temperature was below freezing throughout the storm, and had last been above freezing on January 25, 2011.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Laser has introduced evidence sufficient to establish its prima facie entitlement to summary judgment dismissing the complaint. Fundamental to recovery in a negligence action, a plaintiff must establish that defendant owed plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49 [1986]). To establish a prima facie case of liability in a slip and fall accident involving snow and ice, a plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*see Zabbia v Westwood, LLC*, 795 NYS2d 319 [2d Dept 2005]; *Tsivitis v Sivan Associates, LLC*, 292 AD2d 594, 741 NYS2d 545 [2d Dept 2002]). Standing alone, a contractual obligation to remove snow from a property will generally not give rise to tort liability in favor of a third party (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361, 850

Kinzel v Laser Industries

Index No. 14-1267

Page 5

NYS2d 359, 366 [2007]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138, 746 NYS2d 120, 122 [2002]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578, 853 NYS2d 383 [2d Dept 2008]).

However, a snow removal contractor may be found to have assumed a duty of care to third persons, and thus assume tort liability when that duty is breached, in three circumstances: (1) where the snow removal contractor, 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 snow removal contractor's duties; and (3) where the snow removal contract has entirely displaced the property owner's duty to safely maintain the premises (*see Espinal v Melville Snow Contrs.*, *supra*, at 139-140; *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 915 NYS2d 103 [2d Dept 2010]; *Lehman v North Greenwich Landscaping, LLC*, 65 AD3d 1291, 887 NYS2d 136 [2d Dept 2009]; *Bickelman v Herrill Bowling Corp.*, *supra*).

Laser made a prima facie showing did not displace the landowner's duty to maintain the premises in a safe condition or assume any duty to plaintiff. National Grid closely controlled the Laser's snow removal operation, giving them specific instructions as to how their snow removal operations were to be carried out. In addition to this, the record establishes that National Grid was also carrying out snow removal activities on the premises during and after the subject snow storm, and, that, at times, its snow removal operations overlapped with Laser's (*see Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]; *Espinal v Melville Snow Contrs.*, *supra*). There is also no evidence that created or exacerbated the icy condition which allegedly caused plaintiff's accident. The certified weather data submitted by the parties indicate that any icy conditions were caused by sleet and freezing rain which fell in the course of the storm, not by any action of defendants (*see Espinal v Melville Snow Contrs.*, *supra*; *Pavlovich v Wade Associates, Inc.*, 274 AD2d 383, 710 NYS2d 615 [2d Dept 2000]). By setting forth such proof, Laser has also established plaintiff did not detrimentally rely on Laser's performance of its duties under the snow removal contract (*see Palka v Servicemaster Management Services*, 83 NY2d 579, 611 NYS2d 817 [1994]; *Pavlovich v Wade Associates, Inc.*, *supra*).

Further, Laser has established their entitlement to summary judgment under the storm in progress rule. Under the storm in progress rule, neither a property owner nor a snow removal contractor will be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises 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 (*see Dumela-Felix v FGP W. St., LLC*, 135 AD3d 809, 22 NYS3d 896 [2d Dept 2016]; *McCurdy v Kyma Holdings, LLC*, 109 AD3d 799, 971 NYS2d 137 [2d Dept 2013]; *Smilowitz v GCA Serv. Group, Inc.*, 101 AD3d 1101 957 NYS2d 391 [2d Dept 2012]; *Smith v Christ's First Presbyt. Church of Hempstead*, 93 AD3d 839, 941 NYS2d 211 [2d Dept 2012]; *Coyne v Talleyrand Partners, L.P.*, 22 AD3d 627, 802 NYS2d 513 [2d Dept 2005]). On a motion for summary judgment, the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case (*see Valentine v City of New York*, 57 NY2d 932, 457 NYS2d 240 [1982]; *Rabinowitz v Marcovecchio*, 119 AD3d 762, 989 NYS2d 305 [2d Dept 2014] *Sie v Maimonides Medical Center*, 106 AD3d 900, 965 NYS2d 562 [2d Dept 2013]). Evidence submitted establishes that snow removal operations began at the National Grid Hicksville site at approximately 3:00 p.m. on January 26, 2011, and were not completed until 24 hours later, at 3:00 p.m. on January 27, 2011. It has also been established that the National Grid complex

Kinzel v Laser Industries
Index No. 14-1267
Page 6

covered approximately 70 acres and contains multiple roads and parking lots from which snow and ice had to be removed. Whether one accepts as more accurate plaintiff's certified weather data which shows the storm ended at 3:00 a.m., or Laser's certified weather data, which shows the storm ending at 5:30 a.m., an adequate amount of time had not passed since the cessation of the storm to allow Laser to ameliorate all hazards caused by the storm. The records and testimony from of both Laser and National Grid establish that snow removal operations for the entire site were not completed until almost seven hours after plaintiff's accident occurred. Under these circumstances, no liability may be imposed on Laser herein. The speculative claim Laser caused or created an alleged icy condition as a result of their snow removal operations is insufficient to defeat the defendants' motion for summary judgement (*see Smith v Hariri Realty Associates, Inc.*, 109 AD3d 897, 971 NYS2d 451 [2d Dept 2013]; *Crosthwaite v Acadia Realty Trust*, 62 AD3d 823, 879NYS2d 554 [2d Dept 2009]; *Spinnoccia v Fairfield Bellmore Ave., LLC*, 95 AD3d 993, 943 NYS2d 601 [2d Dept 2012]; *Zabbia v Westwood, LLC*, *supra*).

Accordingly, the motion for summary judgment dismissing the complaint is granted.

Dated: MARCH 3, 2017


A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION