McGuinness v Shane

2017 NY Slip Op 30506(U)

March 21, 2017

Supreme Court, Suffolk County

Docket Number: 13-11725

Judge: Arthur G. Pitts

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SHORT FORM ORDER

INDEX No. 13-11725
CAL. No. 16-00645OT

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

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-8-16
ADJ. DATE 11-10-16
Mot. Seq. # 002 - MotD

ERIN MCGUINNESS, an Infant by her Mother and Natural Guardian, JENNIFER MCGUINNESS and JENNIFER MCGUINNESS, Individually,

Plaintiffs,

- against -

JAMES SHANE, MARGARET SHANE, WILLIAM SHANE, all Individually and doing business as GREAT OAK MARINA, INC., and GREAT OAK MARINA, INC.,

Defendants.

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Upon the following papers numbered 1 to 41 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-37 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 38-39 ; Replying Affidavits and supporting papers 40-41 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants motion for summary judgment dismissing the complaint against them is granted to the extent set forth herein, and is otherwise denied.

Plaintiff Jennifer McGuinness, individually and on behalf of her daughter, infant plaintiff Erin McGuinness, commenced this action seeking damages for injuries resulting from a slip and fall accident that allegedly occurred at the Great Oak Marina located at 840 Middle Country Road in the Town of Smithtown, New York on February 24, 2013. The complaint, as amplified by the verified bill of particulars, alleges, inter alia, that defendants were negligent, among other things, in failing to maintain the parking lot, passageway and walkways in a safe condition; in failing to remove snow and ice from said area; in failing to inspect the area of the accident for snow and ice; and in failing to place barriers or restrict use of the area.

Defendants now move for summary judgment dismissing the complaint against them on various grounds. Defendant Great Oak Marina, Inc. argues that it did not breach its duty of care owed to plaintiffs, that the snow and ice patch was open and obvious, and plaintiff was the sole proximate cause of her own injuries. Defendant Margaret Shane argues that she is an out-of-possession landlord who transferred the obligation to remove snow and ice to the tenant of the property, Great Oak Marina, Inc., and, thus, cannot be held liable for plaintiffs' injuries. Defendants James Shane and William Shane argue they cannot be personally liable to plaintiff as they were acting in their capacity as corporate principals for Great Oak Marina, Inc. In support of the motion, defendants have annexed copies of the verified pleadings, a verified bill of particulars, the transcripts of the parties' deposition testimony, a copy of the lease agreement between defendants Margaret Shane and William Shane and Great Oak Marina, Inc., an affidavit by William Shane and photographs of the subject premises.

Infant plaintiff testified that on the date of the incident she accompanied her parents and her brother to Great Oak Marina so her father could purchase a boat. She testified that it was a cold, clear day and that there was some snow on the ground. Infant plaintiff testified that they parked their vehicle in the parking lot, which was completely clear of snow and ice and walked into the building. She testified that James Shane greeted them and told her and her family to go outside with him through the side door to view the boat. Infant plaintiff testified that there was a clear pathway from the side door to the boat, but that there was ice along the side of the pathway. She testified that James had told her and her family to "watch out for snow." Infant plaintiff testified that her father and her brother climbed a ladder to view the inside of the boat and that she, her mother and James stayed on the lot which had a combination of asphalt, snow and ice. Infant plaintiff testified that she did not observe any salt or sand on the ground. She testified that when her father and brother came down from the boat, they all stood in a circle talking, and that they were all standing on ice. She testified that when she attempted to walk over to her mother, she slipped on the ice and fell to the ground, injuring her leg.

Plaintiff Jennifer McGuinness testified that she, her husband and their two children arrived at the subject premises and parked their vehicle in the parking lot which was "perfectly clear" of snow and ice. She testified that they all walked into the showroom and were greeted by James Shane, who told them to come outside through the side door to view the boat. She testified that he warned them to "watch out for the snow." Mrs. McGuinness testified that there were a few boats on the lot and a truck and trailers. She testified that there was a lot of snow and ice on the ground, that it did not look like the area where the boat was located had been plowed, and that she did not observe any salt or sand on the ground. She testified that the boat was approximately 20 feet from the side door, with the rear of the boat facing the side door. Plaintiff testified that when her husband and son climbed down from the boat, they all started walking towards the building, but that they stopped to talk and stood in a semi circle. She testified that the ground that they were standing on had a combination of snow, ice and blacktop, that the ice was thick and grayish-white, and that it was beginning to melt. Plaintiff testified that infant plaintiff was standing across from her, approximately five feet away, and that she asked her to come over to her, as the area was making her nervous. She testified that infant plaintiff slipped and fell while attempting to walk over to her.

James Shane testified that he is the president of Great Oak Marina, Inc., and that his brother, William Shane, is the vice president. He testified that the corporation leases the property from the owners, Margaret Shane and William Shane, and that it sells boats and trailers. He testified that he works at the marina every

day and has five employees, including his brother. He testified that he and his brother are responsible for snow removal, and that they use a truck with a plow, shovels, salt and sand. Shane testified that there is a parking lot in front of the building that has eight marked spaces and that there is an area outside on the side of the building where he displays boats. He testified that a week prior to the subject incident there was a blizzard, and that three days prior it snowed approximately two inches. He testified that he and his brother plowed and shoveled the parking lot and the walking areas, but did not remove snow from the surrounding areas. Shane testified that plaintiffs had an appointment with him on the date of the incident to look at a boat that they placed a deposit on at a boat show, so he brought the boat to the side of the building with a fork lift twenty minutes before plaintiffs arrived. Shane testified that he took pictures of the subject area within a half hour after plaintiffs left the premises, and the pictures are annexed to the motion. He testified that he did not observe the white mound of snow shown in the photograph prior to the subject incident because he was in front of the boat with the fork lift and did not look at the area behind the boat, as it is not meant to be walked on. He testified that he parked the boat on the side of the building, approximately 12 feet from the door, and when the plaintiffs arrived, he led them out the side door to view it. Shane testified that he heard Mrs. McGuinness tell the children to stop playing in the snow at least three times before infant plaintiff fell.

Mr. McGuiness testified that the ground in the area of the side of the boat, where the ladder was, was sufficiently cleared of snow and ice, but that there was only a five foot area that was cleared at the rear of the boat.

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, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980].

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). While a property owner is not a guarantor of safety, a property owner has a duty to use reasonable care under the circumstances in maintaining its property in a safe condition (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS 2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). The extent of the duty owed is determined by the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*id*).

Here, defendant Great Oak Marina argues that it did not have a duty to remove the snow and ice from the area where infant plaintiff fell, and that it met its duty by clearing the area immediately surrounding the

boat. However, the pictures do not establish that the area surrounding the boat was cleared of icy patches. The pictures reveal a mound of white snow and several gray areas which appear to be ice patches in between the snow mound and the boat. Furthermore, the conflicting testimony does not indicate that infant plaintiff slipped and fell in the area where the white snow mound was. Defendants' submissions, therefore, do not establish a prima facie case that the premises were maintained in a reasonably safe condition (***Pampillonia v Burducea***, 68 AD3d 1081, 892 NYS2d 451 [2d Dept 2009]). Rather, their submissions demonstrate the existence of several triable issues of fact (***Cassell v County of Westchester***, 122 AD3d 788, 996 NYS2d 689 [2d Dept 2014]).

With respect to the branch of the motion seeking summary judgment dismissing the complaint against defendants Margaret Shane and William Shane, the motion is granted. Generally, a landlord has a duty to maintain the premises in a reasonably safe condition (***Kellman v 25 Tiemann Assoc***, 87 NY2d 871, 638 NYS2d 937 [1995]; ***Alnashmi v Certified Analytical Group, Inc.***, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]). However, an out-of-possession landlord who relinquishes control over the leased premises generally will not be responsible for injuries occurring on its premises unless the landlord has a duty imposed by statute, or assumed by contract or a course of conduct (***Mendoza v Manila Bar & Restaurant Corp*** 140 AD3d 934, 33 NYS3d 448 [2d Dept 2016]; (***Madry v Heritage Holding Corp.***, 96 AD3d 1022, 1023, 947 NYS2d 588 [2d Dept 2012]). Here, Margaret Shane and William Shane established that they are out-of-possession landlords and that paragraph 9 of the lease agreement placed responsibility upon Great Oak Marina "to keep the premises clear of snow and debris" and, at its own expense and cost, to maintain the premises free of snow and ice, among other things. Having established, prima facie, their entitlement to judgment as a matter of law on the issue of liability by tendering sufficient evidence to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923), defendants Margaret Shane and William Shane shifted the burden to plaintiff to proffer evidence in admissible form raising a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). Plaintiffs do not address this branch of the motion in their opposition.

Defendants' submissions further establish that James Shane and William Shane were the president and the vice president of Great Oak Marina, that James Shane signed the lease agreement to the subject premises as the president of Great Oak Marina, and that they were acting on behalf of Great Oak Marina in managing and operating the premises. It is well settled that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009] *affd* 16 NY3d 775, 919 NYS2d 496 [2011]). However, a limitation on this principle, known as the doctrine of piercing the corporate veil, permits the imposition of personal liability on the corporation's owners for the obligations of their corporation (***Morris v State Dept. of Taxation & Fin.***, 82 NY2d 135, 603 NYS2d 807 [1993]). The burden is on the party seeking to pierce the corporate veil to show that he owners exercised complete domination of the corporation in respect to the transaction attacked and that such domination was used to commit a fraud or wrong which resulted in infant plaintiff's injuries (***James v Loran Realty V Corp.***, 20 NY3d 918, 956 NYS2d 482 [2012]). James Shane and William Shane have established, prima facie, their entitlement to summary judgment dismissing the complaint against them. No opposition has been proffered by plaintiffs to raise a triable issue of fact as to whether the corporate veil should be pierced and liability personally imposed on such defendants. Moreover, the alleged

negligent conduct does not constitute a fraud or wrong sufficient to pierce the corporate veil (*see* ***Bonacasa Realty Co., LLC v Salvatore***, 109 AD3d 946, 972 NYS2d 84 [2d Dept 2013]).

Accordingly, defendants' motion for summary judgment in their favor is granted as to defendants James Shane, William Shane and Margaret Shane, but denied as to defendant Great Oak Marina, Inc.

Dated: Riverhead, New York
March 21, 2017

ARTHUR G. PITTS, J.S.C.

_____ FINAL DISPOSITION __XX__ NON-FINAL DISPOSITION