Faust v ABM Mgt. Co., LLC.
2017 NY Slip Op 32386(U)
November 6, 2017
Supreme Court, Suffolk County
Docket Number: 14-17990
Judge: Joseph C. Pastoressa
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[* 1]

SHORT FORM ORDER

INDEX No. 14-17990
CAL. No. 17-00442OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 4-24-17 (002)
MOTION DATE 5-31-17 (003)
ADJ. DATE 8-2-17
Mot. Seq. # 002 - MG
003 - MG; CASEDISP

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SUSAN FAUST,

Plaintiff,

- against -

ABM MANAGEMENT COMPANY, LLC., and ALL ISLAND LANDSCAPE and MASONRY DESIGN, INC.,

Defendants.

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Upon the following papers numbered 1 to 43 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 12, 13 - 30 ; Answering Affidavits and supporting papers 31 - 32, 33 - 37, 38 - 39 ; Replying Affidavits and supporting papers 40 - 41, 42 - 43 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 002) by defendant ABM Management Company, LLC, and the motion (seq. 003) by defendant All Island Landscape & Masonry Design, Inc., are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant ABM Management Company, LLC, for summary judgment dismissing the complaint and any cross claims against it is granted; and it is further

ORDERED that the motion by defendant All Island Landscape & Masonry Design, Inc., for summary judgment dismissing the complaint and any cross claims against it is granted.

This action was commenced by plaintiff Susan Faust to recover damages for injuries she allegedly sustained on January 3, 2014, when she slipped and fell on ice in the parking lot near her residence, known as 154 Eagle Hill Court, Middle Island, New York. The parking lot is owned by Coventry Homeowners Association, Inc. (Coventry), which is not a named defendant in this action. Defendant ABM Management Company, LLC, was the premises' property manager and defendant All Island Landscape & Masonry Design, Inc., was the snow removal contractor. Defendants assert cross claims against one another for indemnification or contribution.

Defendant ABM Management Company, LLC (ABM), now moves for summary judgment in its favor, arguing that since the owner of the subject premises retained All Island Landscape & Masonry Design, Inc., to perform snow removal services there, it owed no duty of care to plaintiff. In support of its motion, it submits copies of the pleadings, transcripts of the parties' deposition testimony, and copies of two contracts.

Defendant All Island Landscape & Masonry Design, Inc. (All Island), also moves for summary judgment, arguing that a storm was in progress at the time of plaintiff's alleged fall, that it owed no duty to plaintiff, a third-party to its snow removal contract, and that it had no notice of any dangerous condition. In support of its motion, All Island submits, among other things, an affidavit of Michael Merin, copies of documents regarding the declaration of a snow emergency, and seven photographs.

Plaintiff testified that she and her husband are the owners of the "semi-attached" single-family home known as 154 Eagle Hill Court, Middle Island, New York. She indicated that said premises is part of the Coventry Manor "planned unit development" and that the homeowner's association maintains the roadways and common areas within the development. Plaintiff explained the maintenance includes "[t]he lawn, snow removal . . . [the] pool and a tennis court, a playground . . . garbage pickup and water." Upon questioning as to whom she would contact to complain of unacceptable conditions in the development, plaintiff testified that ABM was the management company. She stated that All Island performed snow removal and landscaping for her development. Plaintiff testified that her home does not have a driveway but, instead, is allotted two parking spots for her vehicles.

Plaintiff further testified that at approximately 11:00 a.m on the date in question she was at home, her place of employment having closed due to the approximately one foot of snow that had fallen the previous night. She stated that she went outside to shovel the snow off of her front walkway, which she was able to do, then walked toward her husband's parked motor vehicle to remove the snow that had accumulated upon it. Plaintiff testified that snowfall had ceased "[a]bout three, four hours or so" prior to her exiting her home, and that snow removal operations were ongoing in "another section of [her approximately 25 home] court." Questioned regarding what snow removal had been completed at that point, plaintiff stated "[her] husband had taken [her] car out of [her] parking spot and then they came with the machinery and they . . . cleaned out [her] parking area and pushed all of the snow up onto the lawn." She explained that normally, when homeowners see the snow removal contractors arrive in their area of the development, they clear the snow off of their vehicles, move them, allow the contractors to

clear their parking spaces, then return their vehicles to their spaces. Plaintiff indicated that while the snow removal contractors cleared her parking spot, it was not completed to her satisfaction. She stated that the contractors "left all of the ice behind and some snow," but she did not complain.

Plaintiff testified that "[a]bout 20 minutes to a half hour" after the snow removal contractors departed her immediate area, she was walking in the street, approximately one foot behind her parking spot, when she slipped on ice and fell. She indicated that the contractors had not put down any ice melt, salt, or sand after they had completed their snow removal in the vicinity of her home.

Barry Manson testified he is the president of ABM, which managed co-ops, condominiums, and homeowner associations, including Coventry Manor, at the time of plaintiff's fall. Explaining ABM's responsibilities at Coventry Manor, Mr. Manson stated that he would visit the premises twice a month: one time for a cursory inspection of the grounds, and a second time to attend Coventry's monthly board meeting. He testified that if he discovered any issues at Coventry Manor, he would report them to Coventry's board. Mr. Manson further testified Coventry did not hire ABM to be an on-site property manager; rather, its primary task was to "collect the common charges" from homeowners, then use those funds to "pay the standard expenses," such as the invoices for water, electric, landscaping, and snow removal.

David Donofrio testified he is the president of All Island, and that he was present at the subject premises on the day of plaintiff's alleged fall. He explained that All Island was hired by Coventry in 2013, pursuant to a two-year contract, to provide landscaping services at the Coventry Manor development during warmer months, and snow removal services in winter months. Mr. Donofrio indicated that while ABM handled the bidding process through which All Island was hired, All Island mainly dealt with Coventry directly. Further, Mr. Donofrio stated that All Island's hiring was solely contingent upon Coventry's approval. He testified that ABM did not exert any control over All Island's snow removal procedures, which were formally specified in All Island's contract with Coventry.

Regarding the date in question, Mr. Donofrio testified All Island was present at Coventry Manor from between 5:00 p.m. and 7:00 p.m. the previous day, when snowfall had accumulated to a depth of two inches, and cleared snow continuously until the following afternoon. He indicated that large truck-mounted plows were used to constantly remove snow from the roads of Coventry Manor as the storm progressed, and then smaller machines were used to clear snow from all other areas after snowfall ended. Upon being shown photographs taken by plaintiff after her fall, Mr. Donofrio stated that he believes they were taken during All Island's snow removal operations, not after their completion. He testified that a sand/salt mixture would be spread throughout Coventry Manor only after plowing was finished. He further testified All Island had not received any complaints of inadequate snow clearing prior to plaintiff's alleged fall.

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 demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40; ***Alvarez v Prospect Hosp.***, 68 NY2d 320). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which

require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853). A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955). It is well-established that there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140 [internal quotation marks and citations omitted]). As part of its prima facie showing, "a contracting defendant is only required to negate the applicability of those ***Espinal*** exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars" (***Glover v John Tyler Enters., Inc.***, 123 AD3d 882, 882).

A duty of care on the part of a managing agent "may arise where there is a comprehensive and exclusive management agreement between the agent and the owner that displaces the owner's duty to safely maintain the premises" (***Calabro v Harbour at Blue Point Home Owners Assn., Inc.***, 120 AD3d 462, 463). The contract entitled "Management Agreement" between The Board of Directors of Coventry Manor Townhouses Home Owners Association and ABM, dated March 15, 2005, imputes no liability to ABM for personal injuries incurred on Coventry's property and, indeed, imposes no duty upon ABM to maintain the premises in any manner whatsoever. Rather, the contract merely designates ABM as an intermediary between the residents of the development and Coventry, whereby ABM, among other things, accepts complaints, orders equipment, and collects payments. Therefore, ABM has established a prima facie case of entitlement to summary judgment (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). The burden then shifts to opposing parties to raise a triable issue (*see* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition to ABM's motion, plaintiff submits her attorney's affirmation wherein she argues that ABM, as property manager for Coventry, "assumed snow removal responsibilities from the property owner." Such argument is unavailing, given the plain language of the contract between Coventry and ABM. Said contract provides for no such assumption of responsibility. Twice-monthly visits, solicitation of contractors' bids, collection of fees, and the receipt of resident complaints is insufficient to place ABM within any of the ***Espinal*** exceptions. Accordingly, the motion by ABM for summary judgment dismissing the complaint and any cross claims against it is granted.

All Island has also made a prima facie showing of its entitlement to summary judgment by submitting evidence that plaintiff was not a party to its snow removal contract with Coventry and, thus,

it owed her no duty of care (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Bryan v CLK-HP 225 Rabro, LLC***, *supra*). Further, Mr. Denofrio's deposition testimony established, prima facie, that All Island "did not leave the subject [premises] in a condition more dangerous than [it] had found them" (***Barone v Nickerson***, 140 AD3d 1100, 1102).

Plaintiff's counsel argues that All Island falls within the first exception delineated in ***Espinal***, as it "launched" an instrument of harm through its allegedly insufficient clearing of snow. In opposition to All Island's motion, plaintiff submits, among other things, certified climatological data and ten photographs. All Island and Coventry agree that All Island was not obligated under the contract to perform snow and ice removal services at the subject premises unless there was at least a two-inch accumulation of snow. Thus, All Island's responsibilities were not so comprehensive as to displace Coventry's own duty to maintain the subject premises in a reasonably safe condition (*see* ***Espinal v Melville Snow Contrs.***, *supra*). In reference to All Island's performance of its duties, plaintiff has not raised any issue of fact that suggests All Island's actions "launched a force or instrument of harm" or created a dangerous condition. By merely plowing the snow in front of plaintiff's residence, All Island cannot be said to have created or exacerbated a dangerous condition (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Somekh v Val. Natl. Bank***, 151 AD3d 783; ***Santos v Deanco Servs.***, 142 AD3d 137). Accordingly, the motion by defendant All Island for summary judgment dismissing the complaint and any cross claims against it is granted.

Dated: November 6, 2017

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION