

Payne v New Rochelle Prop. Group, LLC
2017 NY Slip Op 33466(U)
March 15, 2017
Supreme Court, Westchester County
Docket Number: Index No. 51773/2015
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
RONALD WALTER PAYNE,

Plaintiff,

-against-

DECISION AND ORDER

Sequence No. 2

Index No. 51773/2015

NEW ROCHELLE PROPERTY GROUP, LLC, UNITED
GOURMET DELI, and MECHANICAL SERVICE CORP.
OF NEW YORK,

Defendants.

-----X
RUDERMAN, J.

The following papers were considered in connection with the motion by Defendants New Rochelle Property Group, LLC and United Gourmet Deli for summary judgment:

Papers	Numbered
Notice of motion, affirmation, exhibits A - O	1
Plaintiff's affirmation in opposition	2
Defendant Mechanical Service Corp. of New York's affirmation in opposition	3
Reply	4

Defendants New Rochelle Property Group, LLC ("NRPG") and United Gourmet Deli ("United;" collectively, "the moving defendants") move for an order pursuant to CPLR 3212 granting the defendants summary judgment dismissing the complaint and all claims against them, and for summary judgment against defendant Mechanical Service Corp. of New York ("Mechanical") on their claim for common law indemnity. The plaintiff and defendant Mechanical submit written opposition.

The plaintiff commenced this action to recover damages for a slip and fall injury which occurred on December 30, 2014, at approximately 11:30 PM. The accident allegedly occurred as

the plaintiff exited a delicatessen owned and operated by United, in a building owned by NRPB. At the time of the accident, employees of Mechanical were using a power washer to clean the grill located within the delicatessen.

The plaintiff was deposed twice. At each deposition, he testified that he entered the delicatessen through a side door, and observed hoses leading out of the store to the sidewalk. He also testified each time that he fell due to streams of water exiting the store, as he walked down steps leading from the side entrance to the sidewalk. At his first deposition, he stated that it was raining heavily at the time of the accident. (Notice of motion, Ex. H, at 51, 52.) According to the plaintiff, the water which caused him to fall was "coming out in streams" when he exited, and "that's why I slipped." (Notice of motion, Ex. H, at 62 – 63.) The power washing equipment was not running when he entered, allowing him to enter without difficulty. (Notice of motion, Ex. H, at 62 – 63.) After he fell, he noticed that his hand was "stuck" in ice, which he had not seen as he entered the delicatessen. (Notice of motion, Ex. H, at 70 – 71.)

In his second deposition, the plaintiff never mentioned the presence of ice. He also stated that there was no precipitation, and that the weather was merely "cold and damp." (Notice of motion, Ex. I, at 9, 18.) On the way into the delicatessen, he observed rushing water. (Notice of motion, Ex. I, at 14 – 15.) He also observed the rushing water as he exited, at which point he slipped and fell. (Notice of motion, Ex. I, at 18.)

The moving defendants denied any knowledge of an accident as described by the plaintiff. Mechanical's employee denied at his deposition that any water was present on the floor or the steps as a result of their power-washing activities. (Notice of motion, Ex. L, at 126.)

The moving defendants contend that they did not cause or create the condition which caused the plaintiff to fall, and that they had no notice of any condition on the steps prior to the accident.

Mechanical argues that there is an issue of fact as to whether the accident occurred due to the failure of the defendants to remove ice from the steps. Plaintiff argues that issues of fact exist as to whether United's employees failed to supervise Mechanical's employees and to observe and remedy a dangerous condition existing on the premises.

Analysis

Standard of Review

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]!) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

Proximate Cause

Although the plaintiff mentioned the presence of ice at his first deposition, there is no indication that ice cause the plaintiff to slip. Plaintiff's own testimony, though riddled with inconsistencies, at both depositions clearly attributed his fall to the presence of the rushing water, not ice. The mere mention of the presence of ice, in the absence of any testimony that ice contributed to the fall, or the submission of climatological data, makes any theory of negligence based on the presence of ice speculative. (*Johnson v. Braun*, 120 A.D.3d 765 [2d Dept. 2014] [plaintiff's opposition to the motion was premised on his theory that the driver lost control of the vehicle upon traveling over an improperly applied asphalt patch, which created a dangerous condition, rather than

as a result of a black ice condition coupled with the driver's own negligence; plaintiff's theory was speculative and insufficient to raise a triable issue of fact].)

Accordingly, the Court will consider only the theory of liability articulated in the plaintiff's deposition testimony – i.e., that the accident was caused by water flowing out of the interior of the delicatessen and flowing down the steps.

Liability of United

Generally, a person who hires an independent contractor is not liable for the independent contractor's negligent acts because the employer has no right to control the manner in which the work is to be done. (*See Kleeman v Rheingold*, 81 N.Y.2d 270, 273 [1993].)

One of the exceptions to the general rule that a party who retains an independent contractor is not liable for the independent contractor's negligent acts is the "nondelegable duty exception, which is applicable where the party 'is under a duty to keep premises safe.'" (*Backiel v Citibank*, 299 A.D.2d 504, 505, [2d Dept. 2002], quoting *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 N.Y.2d 663, 668 [1992].) When this exception applies, the party "is vicariously liable for the fault of the independent contractor because a legal duty is imposed on it which cannot be delegated." (*Backiel v. Citibank, N.A.*, supra, 299 A.D.2d 504 [2d Dept. 2002].)

In *Backiel (supra)*, the owner of an office building was denied summary judgment when the plaintiff, employed by an independent contractor hired by the building's owner to clean the premises, slipped and fell on the wet sidewalk as she exited the premises, which had been "hosed down" by a fellow employee. In finding that the building owner had a nondelegable duty to keep its premises safe, the Court observed, "An owner may be held vicariously liable for the negligence of its

independent contractor because the owner in possession has retained control over the premises.” (Id at 506.) As the *Backiel* court explained:

Later cases expanded the scope of this duty, commencing with *Gallagher v St. Raymond's R. C. Church* (21 N.Y.2d 554, 289 N.Y.S.2d 401, 236 N.E.2d 632), in which the Court of Appeals formulated an even broader standard of care to conform with the mores of a modern society and held that "whenever the general public is invited into stores, office buildings and other places of public assembly" it is entitled to a safe and reasonable means of entry and exit from the premises. Thus, owners are charged with a nondelegable duty to provide members of the general public with a reasonably safe premises, including a safe means of ingress and egress (see *Thomassen v J & K Diner*; *supra*; *Richardson v Schwager Assocs.*, 249 A.D.2d 531, 672 N.Y.S.2d 114). The use of the term "members of the general public" is significant, as it is difficult to conceive of a larger class of protected persons. Clearly the plaintiff must be considered a member of the "general public." Indeed, it is commonly defined as relating to or affecting all of the people and not limited or restricted to a particular class of persons (see *People v Powell*, 280 Mich. 699, 274 N.W. 372; *People v Ruthven*, 160 Misc 112, 288 N.Y.S. 631)." (Emphasis added.) (Id at 507.)

Subsequently, in *Blatt v. L'Pogee, Inc.* (112 A.D.3d 869 [2d Dept. 2013]), a salesperson who was employed by the defendants as an independent contractor, allegedly tripped and fell on a hazardous condition created by another salesperson, also an independent contractor retained by the defendants, near the entrance of the defendants' showroom. In denying the defendants' motion for summary judgment, the Court held:

“As a general rule, a party who engages an independent contractor is not liable for the independent contractor's negligent acts (see *Kleeman v Rheingold*, 81 NY2d 270, 273, 614 NE2d 712, 598 NYS2d 149 [1993]). One of the exceptions to this general rule is the "nondelegable duty exception, which is applicable where the party 'is under a duty to keep premises safe' " (*Backiel v Citibank*, 299 AD2d 504, 505, 751 NYS2d 492 [2002], quoting *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668, 595 NE2d 840, 584 NYS2d 765 [1992]). Whenever the general public is invited into stores, office buildings, and other places of public assembly, "the owner of such premises is charged with the duty to provide members of the general public with a reasonably safe premises, including a safe means of ingress and egress" (*Thomassen v J & K Diner*, 152 AD2d 421, 424, 549 NYS2d 416 [1989]; see *Podlaski v Long Is.*

Paneling Ctr. of Centereach, Inc., 58 AD3d 825, 826, 873 NYS2d 109 [2009];
LoGiudice v Silverstein Props, Inc., 48 AD3d 286, 287, 851 NYS2d 187 [2008];
Backiel v Citibank, 299 AD2d at 505; *Richardson v Schwager Assoc.*, 249 AD2d 531,
672 NYS2d 114 [1998]).” (Id. at 869.)

In view of the foregoing, United may be found liable based on the actions of Mechanical. Issues of fact thus exist as to United’s liability.

Liability of NRPG

As an out-of-possession owner, NRPG did not control the operations of the store employees, and did not hire Mechanical or control Mechanical’s employees. An out-of-possession landlord is not liable for injuries sustained on the premises unless a duty to maintain the premises in reasonably safe condition is "imposed by statute or assumed by contract or a course of conduct" (*Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2d Dept 2011]; *Santos v. 786 Flatbush Food Corp.*, 89 A.D.3d 828 [2d Dept. 2011] [out-of-possession owner not liable for slip and fall on water in supermarket aisle]). Here, where the complaint sounds in common-law negligence and does not allege the violation of a statute, the defendant NRPG established, prima facie, that it was an out-of-possession landlord which was not bound by contract or course of conduct to make nonstructural repairs. (See *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18-19 [2d Dept. 2011]).

In opposition, no party has raised an issues of fact as to the liability of NRPG.

As the NRPG is entitled to summary judgment, its claim for common law indemnity against Mechanical is academic. (*Stagno v. 143-50 Hoover Owners Corp.*, 48 A.D.3d 548 [2d Dept. 2008] [“In light of our determination that the Supreme Court should have granted that branch of the

appellants' motion which was for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, the appellants' contentions concerning their claim for common-law indemnification against the defendant third-party defendant SBC, Inc., have been rendered academic."])

Conclusion

Based upon the foregoing, it is hereby,

ORDERED that defendant NEW ROCHELLE PROPERTY GROUP, LLC's motion for summary judgment is granted, and all claims and cross-claims against it are dismissed; and it is further

ORDERED that defendant UNITED GOURMET DELI's motion for summary judgment is denied; and it is further

ORDERED that all (remaining) parties appear in the Settlement Conference Part on Tuesday, March 28, 2017 at 9:15 a.m., in room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

March 15, 20167


HON. TERRY JANE RUDERMAN, J.S.C.