Reisert v Mayne Constr. of Long Is., Inc.
2017 NY Slip Op 33470(U)
October 5, 2017
Supreme Court, Suffolk County
Docket Number: Index No. 14-70288
Judge: Joseph Farneti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

ORIGINAL

INDEX No. 14-70288
CAL. No. 16-02261OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-21-17
ADJ. DATE 6-8-17
Mot. Seq. # 002 - MD

CYNTHIA M. REISERT and ERIC REISERT,

Plaintiffs,

- against -

MAYNE CONSTRUCTION OF LONG ISLAND, INC., and O&M MAINTENANCE OF LONG ISLAND, INC.,

Defendants.

GRUENBERG KELLY DELLA
Attorney for Plaintiffs
700 Koehler Avenue
Ronkonkoma, New York 11779

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER
Attorney for Defendants
333 Earle Ovington Blvd., Suite 502
Uniondale, New York 11553-3625

Upon the following papers filed and read on this motion for summary judgment by defendant O & M Maintenance of Long Island, Inc. dated March 24, 2017 ; Answering Affidavits and supporting papers by plaintiff dated June 1, 2017 ; Replying Affidavits and supporting papers by O & M dated June 14, 2017 ; Other ____; it is,

ORDERED that the motion of defendant O & M Maintenance of Long Island, Inc. for summary judgment dismissing the complaint against it is denied.

Plaintiff commenced this action to recover damages for injuries she allegedly sustained from a slip and fall accident that occurred on February 8, 2014, in the employee parking lot of Brookhaven Memorial Hospital. The complaint, as amplified by the verified bill of particulars, alleges, *inter alia*, that defendants were negligent in failing to maintain the parking lot in a safe condition; in failing to remove snow and ice from said area; in failing to apply salt and sand; in creating a hazardous condition within the parking lot; in failing to inspect the area of the accident for snow and ice; and in failing to restrict access to the parking lot. Plaintiff further alleges that defendant O & M Maintenance of Long Island, Inc. negligently performed snow removal services which launched an instrument of harm causing plaintiff's injuries, and that plaintiff detrimentally relied on its snow removal services. Additionally, plaintiff alleges that defendant O & M Maintenance of Long Island, Inc. was negligent in failing to train and supervise its agents in proper snow removal procedures.

By Stipulation dated June 27, 2016, the action was discontinued with prejudice as against defendant Mayne Construction of Long Island, Inc. Defendant O & M Maintenance of Long Island, Inc. (hereinafter "O & M") now moves for summary judgment dismissing the complaint against it on the grounds that it did not owe plaintiff a duty of care, as it was a third-party contractor retained by Brookhaven Memorial Hospital to perform limited snow removal services, and that it did not create the alleged dangerous condition or cause plaintiff's injuries. In support of the motion, O & M submits copies of the pleadings, the bill of particulars, transcripts of the parties' deposition testimony, copies of occurrence logs, invoices to Brookhaven Hospital, and photographs of the subject parking lot.

Plaintiff testified that on the morning of the incident, she arrived at Brookhaven Memorial Hospital at 7:50 a.m. and parked her vehicle in the employee parking lot. She testified that the weather was dry, and that it was cloudy and very cold outside. Plaintiff, who is employed at the hospital, testified that it had snowed two to three days prior to the date of the incident, and that there were piles of snow, one to two feet high, in between the parking stalls. She testified that she left the facility at lunch time and returned and parked her vehicle in the third row of the employee parking lot. She testified that her vehicle was adjacent to a mound of hard snow and ice, which was the length of her vehicle and three feet wide. Plaintiff testified that when she exited her vehicle she did not have a clear path to the building, as the surface of the parking lot was uneven with patches of snow and ice. She testified that she left the facility at 4:00 p.m. to go home, and that she slipped and fell when she got to her vehicle. Plaintiff testified that the roadway from the building to her vehicle was "somewhat clear," but she chose a direct route to her vehicle which entailed walking between parked vehicles. She testified that she was walking on top of a mound, approaching the driver's side from the front of the vehicle, when she slipped and fell. She testified that there was a clear area next to the driver's side of her vehicle, which was the width of a tire track, and that she does not recall if there was sand or salt on the ground. She testified further that she never heard of O & M until the instant lawsuit. Plaintiff testified that she drove herself home, and that she and her husband returned to the hospital and went to the emergency department with complaints of pain to her hip and rib area.

Jose Ferrara testified that he was working for O & M as a foreman at the time of the incident. He testified that O & M has a contract with Brookhaven Hospital to remove snow and ice from the parking lot, and that such services commence upon a request from Brookhaven Hospital, which is usually made after snow accumulations exceed a half of an inch. A copy of the purported contract is submitted. The document appears to be a proposal created by O & M that was submitted to Brookhaven Hospital. It does not provide any details of the terms of an agreement other than the cost of the services. Ferrara testified that O & M does not perform snow removal services at the walkway areas and it does not perform any shoveling in any area. He testified that O & M uses snow plows, bobcats, pay loaders and a truck to spread salt and sand, and that it remains on site during a snow storm or until an engineer from the hospital inspects the area and reports his satisfaction with its services. He testified that O & M leaves its equipment at the hospital in case the hospital requests additional services or remediation. Ferrara further testified that he maintains "snow logs," and was shown a log dated February 5, 2014. The snow log indicates that O & M performed snow removal services at the hospital on that day, beginning at 3:00 a.m. and ending at 2:30 p.m; that five employees and Ferrara were on site; and that they utilized a pay loader, a bobcat and a pick up truck. The log also indicates that no snow plow was

utilized, that 2.1 inches of snow had accumulated, and that the conditions were "snow to hail then rain." He testified that O & M returned to the hospital on February 6, 2014 and spread 500 tons of salt and sand in the parking lot area. Invoices included with the moving papers indicate that on February 5, 2014 a snow plow was used in the entire lot to remove one to three inches of snow, and that salt and sand were spread on February 5 and February 6, 2014.

Ferrara testified to the snow removal procedures that O & M employs, and testified that O & M uses the pay loader when accumulations are greater than three inches to push the snow away from the building, that the bobcats are used to remove snow between parked vehicles, and that the parking stalls are cleared if there are no cars parked in them. If the stalls were not accessible, they would not be cleared unless the hospital contacted them to return. Ferrara testified that the bobcats and plows do not fit between parked vehicles, but if cars were moved during the day, they would remove whatever snow and ice they could. He testified that if the vehicles did not move while they were on the premises, either the employees of the hospital would shovel between the occupied stalls, or the hospital would contact O &M and request their return. He testified that O & M does not maintain any written policies or guidelines for its employees for snow removal procedures, and does not maintain any checklists after services are performed.

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, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

Generally, a third-party contractor is not liable in tort to an injured plaintiff (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 141-142, 746 NYS2d 120 [2002]; ***Nachamie v County of Nassau***, 147 AD3d 770, 47 NYS3d 58 [2d Dept 2017]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Liability may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm' " (***Espinal v Melville Snow Contrs.***, *id*, quoting ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk; (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

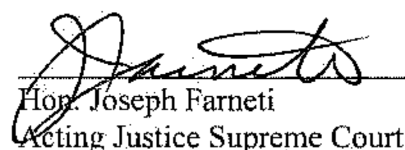
FILED: SUFFOLK COUNTY CLERK 10/10/2017 10:41 AM INDEX NO. 070288/2014
NYSCEF DOC. NO. 47 RECEIVED NYSCEF: 10/10/2017

"Launch of a force or instrument of harm has been interpreted as requiring that the contractor create or exacerbate the dangerous condition" (***Santos v Deanco Servs., Inc.***, 142 AD3d 137, 141, 35 NYS3d 686 [2d Dept 2016]). It must be demonstrated that the contractor left the premises in a more dangerous condition than he or she found it (***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]). Here, no evidence has been submitted by O & M to establish, *prima facie*, that it exercised reasonable care in the performance of its duties and did not launch a force or instrument of harm by creating or exacerbating the snow and ice condition. Plaintiff's testimony indicates that the parking stalls were encased by piles of snow and ice leaving the width of a tire tread to traverse upon. It is undisputed that O & M was on the premises two days prior to the incident and conducted snow removal services. The testimony of Joe Ferrara did not indicate the manner in which the snow removal services were performed on February 5, 2014, and the documentary evidence submitted by O & M is contradictory. Additionally, no meteorological or expert evidence is submitted. "On its motion for summary judgment, the defendant bore the burden of affirmatively demonstrating the merit of its claim or defense" (***Rubistello v Bartolini Landscaping, Inc.***, 87 AD3d 1003, 1005, 929 NYS2d 298 [2d Dept 2011]). Here, defendant's submissions do not eliminate triable issues of fact regarding its performance of its snow removal services.

However, O & M has established, through plaintiff's testimony, that liability cannot be imposed under the "detrimental reliance" exception, as plaintiff testified that she does not know who is responsible for snow removal and was unaware of O & M until the instant lawsuit. In opposition, plaintiff does not address this contention.

Regarding the third exception, where the contracting party undertook a comprehensive and exclusive property maintenance obligation, plaintiff did not plead such exception in the complaint or in the bill of particulars. Therefore, O & M is not required to affirmatively demonstrate its inapplicability in order to establish its *prima facie* case (*see* ***Hsu v City of New York***, 145 AD3d 759, 43 NYS3d 139 [2d Dept 2016]; ***Barone v Nickerson***, 140 AD3d 1100, 32 NYS3d 663 [2d Dept 2016]; ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]). In opposition, plaintiff submits the purported contract between O & M and Brookhaven Hospital, which was also submitted by O & M. However, the document is a proposal submitted by O & M to Brookhaven Hospital and only indicates the cost of the services and types of equipment to be used. No terms of the purported agreement are included to enable this Court to determine if it is of the type of comprehensive agreement that falls within the exception. Accordingly, O & M's motion for summary judgment dismissing the complaint against it is denied.

Dated: October 5, 2017



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

[* 4]