

Meehan v Weissman Selden Props. LLC
2018 NY Slip Op 32469(U)
October 3, 2018
Supreme Court, Suffolk County
Docket Number: 15-19095
Judge: David T. Reilly
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INDEX No. 15-19095
CAL. No. 18-00047OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice Supreme Court

MOTION DATE 5-25-18 (001)
MOTION DATE 5-31-18 (002)
ADJ. DATE 8-3-18
Mot. Seq. # 001 - MG
002 - MD

-----X
MARY ANN MEEHAN and DENNIS
MEEHAN,

Plaintiffs,

- against -

WEISSMAN SELDEN PROPERTIES LLC,

Defendants.
-----X

THE LAW OFFICES OF EDWARD J. TROY
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-----X
WEISSMAN SELDEN PROPERTIES LLC,

Third-Party Plaintiff,

- against -

COMMUNITY LANDSCAPERS OF
SUFFOLK, LTD.,

Third-Party Defendants.
-----X

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Upon the following papers numbered 1 to 54 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-24; 35-46 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 25-26 ; Answering Affidavits and supporting papers 27-32 ; Replying Affidavits and supporting papers 33-34; 47-52 ; Replying Affidavits and supporting papers 53-54 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 001) by third-party defendant Community Landscapers of Suffolk, Ltd., and the motion (seq. 002) by defendant Weissman Selden Properties, LLC, are consolidated for purposes of this determination; and it is

ORDERED that the motion by third-party defendant Community Landscapers of Suffolk, Ltd. for an order granting summary judgment dismissing the third-party complaint is granted; and it is

ORDERED that the motion by defendant Weissman Selden Properties, LLC, for an order dismissing the complaint against it is denied

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Mary Ann Meehan (hereinafter "plaintiff") on February 24, 2015, when she slipped and fell on ice in the parking lot of the premises known as 280 Middle Country Road in Selden, New York. The property is owned by defendant Weissman Selden Properties LLC ("Weissman"). Weissman hired Soundview Property Management to maintain the subject property. Weissman also hired third-party defendant Community Landscapers of Suffolk, Ltd. ("Community") to conduct winter maintenance on the premises. On the date of the accident, plaintiff was walking to her car from a hair salon located at the premises. Plaintiff's husband, Dennis Meehan, sues derivatively for loss of services. By their bill of particulars, plaintiffs allege that defendants were negligent, among other things, in failing to maintain, manage and control the premises in a reasonably safe condition which caused her to fall. A third-party action brought by Weissman against Community alleges that plaintiff's injuries were a result of Community's failure to properly shovel, salt, sand, and snow plow the premises in violation of their agreement.

Community now moves for summary judgment dismissing the third-party complaint against it. In support of the motion, it submits, among other things, copies of the pleadings, the contract with Weissman, photographs of the premises, invoices, certified climatological data, and the transcripts of the deposition testimony of plaintiff, Dennis Meehan, Peter Elliot, and Eugene Radenburg. Community argues that it acted in accordance with the agreement, that there was a storm in progress at the time of the accident, that it owed no duty to plaintiff, and that it did not create or exacerbate any dangerous condition. Weissman opposes the motion by Community, arguing that there remains a question of fact regarding whether Community negligently performed snow removal at the premises. In opposition, Weissman submits an affirmation by counsel.

Weissman also moves for summary judgment dismissing the complaint against it. Weissman argues that it would be purely speculative to attribute plaintiff's fall on the pre-existing ice when there was snow falling at the time of her accident. In support of its motion, Weissman submits, among other thing, copies of the pleadings, the transcripts of the deposition of plaintiff, photos of the premises, and certified climatological data.

Plaintiffs oppose both of the motions for summary judgment by Community and Weissman. Plaintiffs submit a sworn statement by Cerk Coker, a nonparty witness, an expert affidavit by Howard Altchule, certified consulting meteorologist, and photographs of the premises. They argue that Weissman

has not satisfied its prima facie burden by demonstrating that the pre-existing ice condition was not the cause of plaintiff's fall.

It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the Court is not responsible for resolving issues of fact or determining matters of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

Whether an alleged tortfeasor owed a duty of care to the injured party is a threshold issue for a finding of negligence (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120 [2002]). "Although a jury determines whether and to what extent a particular duty was breached, it is for the court to first determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally" (*Cupo v Karfunkel*, 1 AD3d 48, 51, 767 NYS2d 40 [2d Dept 2003], quoting *Tagle v Jakob*, 97 NY2d 165, 168, 737 NYS2d 331 [2001]). Liability for a dangerous condition on real property is generally based on ownership, possession, control or special use of such property (*Casson v McConnell*, 148 AD3d 863, 49 NYS3d 711 [2d Dept 2017]). An owner or possessor of real property has a continuous duty to maintain such property in a reasonably safe condition considering all of the circumstances, such as the likelihood and seriousness of injury to others and the burden of avoiding the risk (*Cupo v Karfunkel*, *supra*; *see Basso v Miller*, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). Generally, whether a dangerous condition exists on real property is an issue to be determined by the jury based on the unique facts of each case (*DeLaRosa v City of New York*, 61 AD3d 813, 813, 877 NYS2d 439 [2d Dept 2009]; *see Trincere v County of Suffolk*, 90 NY2d 976, 977, 655 NYS2d 615 [1997]). An owner or possessor's duty of care may also arise under statute or regulation, or it may be assumed by agreement or course of conduct (*see Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541 [2001]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]).

"[A]n owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition" (*Bolloli v Waldbaum, Inc.*, 71 AD3d 618, 619, 896 NYS2d 400 [2d Dept 2010], quoting *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 474-475, 781 NYS2d 47 [2d Dept 2004]; *see Crosthwaite v Acadia Realty Trust*, 62 AD3d 823, 879 NYS2d 554 [2009]; *Voss v D&C Parking*, 299 AD2d 346, 749 NYS2d 76 [2002]; *Whitt v St. John's Episcopal Hosp.*, 258 AD2d 648, 685 NYS2d 789 [1999]). Constructive notice requires "[the] condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it" (*Bolloli v Waldbaum, Inc.*, *supra*,

quoting *Deveau v CF Galleria at White Plains, LP*, 18 AD3d 695, 769 NYS2d 119 [2d Dept 2005]). A defendant seeking summary judgment in a slip-and-fall case bears the burden of establishing, prima facie, that it neither created nor had actual or constructive notice of the alleged hazardous or defective condition (see *Mandarano v PND, LLC*, 157 AD3d 664, 66 NYS3d 631 [2d Dept 2018]; *Jackson v Jamaica First Parking, LLC*, 91 AD3d 602, 936 NYS2d 278 [2d Dept 2012]).

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third-party (see *Espinal v Melville Snow Contrs.*, *supra*; *Perkins v Crothall Healthcare, Inc.*, 148 AD3d 1189, 51 NYS3d 118 [2d Dept 2017]). The Court of Appeals has recognized several exceptions to this general principal whereby a party who enters into a contract may have assumed a duty of care to non-contracting third persons when (1) the contracting party fails to exercise reasonable care while performing his or her duties and launches a force or instrument of harm, (2) a plaintiff detrimentally relied on the continued performance of the contracting party's duties, or (3) the contracting party entirely displaced another's duty to maintain the premises safely (*Espinal v Melville Snow Contrs.*, *supra*; *Koslosky v Ross-Malmut*, 149 AD3d 925, 52 NYS3d 400 [2d Dept 2017]; see also; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 611 NYS2d 817 [1994]; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 557 NYS2d 286 [1990]; *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160 [1928]).

"The essential elements of a breach of contract cause of action are 'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages'" (*Liberty Equity Restoration Corp. v Park*, 160 AD3d 628, 630, 75 NYS3d 47 [2d Dept 2018], quoting *JP Morgan Chase v J.H. Elec. of New York Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]; see *Starker v Trump Vil. Section 4, Inc.*, 162 AD3d 946, 80 NYS3d 79 [2d Dept 2018]). A defendant may not be held liable for breach of contract without proof of a contractual relationship or privity between the parties (*CDJ Builders Corp. v Hudson Group Const. Corp.*, 67 AD3d 720, 889 NYS2d 64 [2d Dept 2009]; see *Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 878 NYS2d 97 [2d Dept 2009]; *Outrigger Const. Co., Inc. v Bank Leumi Trust Co. of New York*, 240 AD2d 382, 658 NYS2d 394 [2d Dept 1997]). This privity between a plaintiff and defendant is necessary to maintain an action on the contract, and "[t]he consideration must be furnished by the party to whom the promise was made" (*Seaver v Ransom*, 224 NY 233, 237 [1918]). A contract cannot be enforced by or against a third party (*Seaver v Ransom*, *supra*).

The motion for summary judgment by Community dismissing the third-party complaint is granted. Inasmuch as Weissman did not allege any facts in its pleadings that would establish any of the exceptions applicable (see *Espinal v Melville Snow Contrs.*, *supra*), Community is only required to affirmatively demonstrate that it did not create or exacerbate the alleged icy condition by failing to exercise reasonable care (see *Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]). There is no evidence as to when the parking lot was plowed in relation to the time of the plaintiff's accident. There is also no expert testimony regarding any standard of care that may have been violated if no salt or sand were applied under the circumstances. Further, it was not demonstrated that the icy condition in the parking lot worsened between when it purportedly should have been salted and the time of plaintiff's accident. "[A] failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a pre-existing ice condition from improving" (*Santos Deanco Services Inc.*, 142 AD3d 137, 143, 35 NYS3d 686 [2d Dept 2016]). The agreement between Weissman and Community demonstrates that Community was required to plow snow when accumulations were in excess of one inch, and to apply salt or sand as needed. It is undisputed that only "trace amounts," less than one inch, of snow fell on the date of the accident. The deposition testimony of Peter Elliot, property manager for Soundview

Property Management, establishes that he was satisfied with Community's work in the winter of 2015, he made no complaints about the work performed, and the invoices for any such work were paid in full. Community performed its duties in accordance with the agreement (*see Mathey v Metro. Transp. Auth.*, 95 AD3d 842, 943 NYS2d 578 [2d Dept 2012]). The agreement does not provide for indemnification of defendants/third-party plaintiffs by Community. As there are no triable issues of fact regarding negligence on the part of Community, Weissman's indemnification claim fails as well (*see Lubell v Stonegate at Ardsley Home Owners Ass'n, Inc.*, 79 AD3d 1102, 915 NYS2d 103 [2d Dept 2010]).

Plaintiffs and Weissman failed to raise a triable issue of fact regarding Community's negligent performance of its duties by focusing on whether Community did or did not apply salt or sand before the accident, rather than whether doing so or failing to do so created or exacerbated any icy condition. Plaintiffs and Weissman rely only on speculation and conjecture, which is insufficient (*see Santos v Deanco Services Inc., supra*). Even if Community failed to apply salt or sand, more than mere speculation that such a failure rendered the premises less safe than it was before Community began working is required (*see Trombetta v G.P. Landscape Design, Inc.*, 160 AD3d 677, 73 NYS3d 230 [2d Dept 2018]). Plaintiffs and Weissman failed to raise a triable issue of fact regarding whether plaintiff detrimentally relied on the continued performance of Community's duties, or whether Community entirely displaced Weissman's duty to maintain the premises in a safe condition (*see Bryan v CLK-HP 225 Rabro, LLC, supra*).

Weissman, however, failed to establish its prima facie entitlement to summary judgment dismissing the complaint. Weissman argues that due to the precipitation at the time of plaintiff's accident, it is purely speculative to deem the pre-existing icy condition to be the cause of her fall. However, Weissman cannot satisfy its initial burden based on anticipated gaps in plaintiffs' proof (*see Williams v JP Morgan Chase & Co.*, 39 AD3d 852, 834 NYS2d 310 [2d Dept 2007]). Reference to general inspection practices does not establish when, prior to the accident, Weissman last inspected the subject location (*see Schwartz v Gold Coast Restaurant Corp.*, 139 AD3d 696, 31 NYS3d 535 [2d Dept 2016]; *Schiano v Mijul, Inc.*, 79 AD3d 726, 912 NYS2d 134 [2d Dept 2010]). Therefore, a material issue of fact remains regarding defendant's constructive notice of the alleged dangerous condition (*see Lombardo v Kimco Cent. Islip Venture, LLC*, 153 AD3d 1340, 60 NYS3d 497 [2d Dept 2017]; *Schwartz v Gold Coast Restaurant Corp., supra*; *Schiano v Mijul, Inc., supra*). The undisputed trace amounts of precipitation that were falling at the time of plaintiff's accident also raises a question as to Weissman's duty to maintain the premises in a safe condition (*see Clement v New York City Tr. Auth.*, 122 AD3d 448, 997 NYS2d 18 [1st Dept 2014]; *Powell v MLG Hillside Assoc., L.P.*, 290 AD2d 345, 737 NBYS2d 27 [1st Dept 2002]). Accordingly, the motion by Weissman for summary judgment dismissing the complaint is denied.

Dated: October 3, 2018



J.S.C.

HON. DAVID T. REILLY

FINAL DISPOSITION NON-FINAL DISPOSITION