

Bates v Greenview VII. II, Inc.
2019 NY Slip Op 31620(U)
May 28, 2019
Supreme Court, Suffolk County
Docket Number: 14-5792
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 14-5792
CAL. No. 18-00882OT

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

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 10-10-18 (001 & 002)
ADJ. DATE 1-16-19
Mot. Seq. # 001 - MG
002 - MD

-----X

GINETTE BATES,

Plaintiff,

- against -

GREENVIEW VILLAGE, II, INC., and
ANDREW MARTONE LANDSCAPE DESIGN,
INC.,

Defendants.

SIBEN & SIBEN, LLP
Attorney for Plaintiff
90 East Main street
Bay Shore, New York 11706

BRODY, O'CONNOR & O'CONNOR, ESQS.
Attorney for Defendant/Third-Party Plaintiff
Greenview Village II, Inc.
7 Bayview Avenue
Northport, New York 11768

MAZZARA & SMALL, P.C.
Attorney for Defendant/Third-Party Defendant
Andrew Martone Landscape Design, Inc.
1698 Roosevelt Avenue
Bohemia, New York 11716

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GREENVIEW VILLAGE, LL, INC.,

Third-Party Plaintiff,

- against -

ANDREW MARTONE LANDSCAPE DESIGN,
INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 42 read on these motions for summary judgment: Notice of Motion and supporting papers 1 - 18; 19 - 24; Answering Affidavits and supporting papers 25 - 37; Replying Affidavits and supporting papers 38 - 39; 40 - 42; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 001) by defendant/third-party defendant Andrew Martone Landscaping Design, Inc., and the motion (seq. 002) by defendant/third-party plaintiff Greenview Village II, Inc., are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant/third-party defendant Andrew Martone Landscaping Design, Inc., for summary judgment in its favor is granted; and it is further

ORDERED that the motion by defendant/third-party plaintiff Greenview Village II, Inc., for summary judgment in its favor is denied.

This action was commenced by plaintiff Ginette Bates to recover damages for injuries she allegedly sustained on February 6, 2014, when she slipped and fell on ice while delivering mail at an apartment complex known as 465 Chelsea Drive, Islip, New York. Defendant/third-party plaintiff Greenview Village II, Inc. (Greenview), is alleged to own the subject premises, while defendant/third-party defendant Andrew Martone Landscaping Design, Inc. (Martone), is alleged to have provided snow removal services for Greenview.

Martone now moves for summary judgment in its favor, arguing that as a third-party contractor, it owed plaintiff no duty, that it did not launch an instrument of harm, that it did not displace Greenview's duty to maintain the premises, and that plaintiff did not detrimentally rely upon any of its actions. In support of its motion, Martone submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, a copy of a snow removal contract between it and Greenview, copies of snow removal invoices, and certified meteorological records. Greenview also now moves for summary judgment in its favor, arguing that it did not create the alleged icy condition, nor did it have actual or constructive notice thereof. In support of its motion, Greenview adopts the exhibits submitted by Martone.

Plaintiff testified that at approximately noon on the date in question, a Thursday, she was a United States Postal Service employee delivering mail on Nikia Drive within the Greenview Village community. She stated that the temperature was approximately 25 degrees Fahrenheit, the weather was cloudy, and that it had rained the previous day. She indicated that snow remained on the ground from a storm occurring on the prior Sunday. Plaintiff testified that she parked her vehicle six feet from a "cluster box," meaning a structure containing multiple mailboxes, each corresponding to an individual residential unit within Greenview Village. Asked whether she had difficulty delivering mail to the subject location on the previous Monday, she stated that she did, as piled snow forced her to park her vehicle "a little further from the curb than normal." Upon further questioning, plaintiff acknowledged that she had made complaints to Greenview's staff, at some unspecified time in the past, of snow being piled in such a way that made her mail delivery more difficult. She indicated that Greenview responded appropriately to her complaints and remedied the condition.

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As to the circumstances immediately preceding her accident, plaintiff testified that she exited her postal vehicle, walked to its rear, retrieved mail from the rear of the vehicle, then began walking across the parking lot toward the apartment occupied by Ms. Reedy. She explained that she hand-delivered Ms. Reedy's mail as a courtesy, because Ms. Reedy is handicapped. Plaintiff indicated that after she walked approximately three to four steps from the postal vehicle, "looking straight ahead . . . [to make] sure there were no cars coming," she slipped and fell to the ground. Though she denied observing any snow or ice on the pavement prior to her fall, plaintiff testified she noticed she was laying on "clear," "smooth" ice when she was on the ground.

Robert Ghanbari testified that he has been employed as superintendent of property for Greenview for 16 years. He indicated that he is responsible for the maintenance of the interior of Greenview Village's apartments, as well as its exterior landscaping and snow removal. Mr. Ghanbari stated that Greenview hired outside contractors to provide landscaping and snow removal services, the latter supplied by Martone. Asked if Greenview took any actions of its own to remediate ice at the subject premises, Mr. Ghanbari testified that Greenview employees "put down calcium [chloride]" on sidewalks, but not on roadways or parking lots. Regarding inspections, he stated that it was his custom and practice to check the premises for icy conditions at "around 2:30 in the afternoon, and around 8:30 in the morning" each day, but did not keep logs of such inspections. He indicated that Greenview also kept shovels and "ice pickers" at the premises for "[b]reaking ice" and other cold-weather maintenance. Upon questioning as to where at the subject premises ice breaking would occur, Mr. Ghanbari stated "the handicap ramp, from the garbage containers, and in front of the mailboxes," but not the roadways. Mr. Ghanbari further testified that if he was present when Martone was undertaking snow removal at the premises, he would inspect Martone's work upon its completion.

Patricia Ruggeri testified that she was employed by Greenview as a residential property manager at the time of the incident in question. She stated that her office was at Greenview Village, a 24-building, 204-unit apartment complex, but that she was responsible for at least two other properties owned by Greenview. Ms. Ruggeri indicated that in winter months, Mr. Ghanbari and his assistant would alert her of any snow or ice conditions they encountered on the premises. She testified that depending on the condition's severity and "the time of the day," she may call Greenview's snow removal contractor to remedy it. Asked why the time of day was a factor, Ms. Ruggeri stated that "[i]f it was mid-morning and the sun was going to melt anything that was there, [she] certainly would not call them to come back and do that." On the other hand, she indicated that "if the temperature was going to drop during the evening, [she] would ask the contractor to come back and sand the roadway." Shown a snow removal contract between Greenview and Martone, Ms. Ruggeri confirmed that it was the contract in effect at the time of plaintiff's incident, and that it required Martone to automatically begin snow removal services when snow accumulations reached two inches. She indicated that it was Martone's decision whether to salt or sand after snow had been removed.

Ms. Ruggeri further testified that on the date in question, she received a telephone call from a resident informing her that the mail person had fallen. She stated that she walked across the complex and arrived at the scene of plaintiff's incident prior to the police or emergency personnel. She indicated that she saw plaintiff had fallen near a "slushy" area on Nikia Drive. Upon questioning, Ms. Ruggeri

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denied seeing any salt or sand in the area of plaintiff's fall. Ms. Ruggeri also denied inspecting the location on the date in question, stating that she last visited the area "within the [previous] two days."

Andrew Martone, Jr., testified that he is the owner of Martone and that it provided snow removal services to Greenview during the 2013-2014 winter season, pursuant to a written contract. He stated that on February 3, 2014, Martone cleared 7 ½ inches of snow from the roadways, walkways, and empty parking stalls at Greenview Village, then applied salt to the roadways and calcium chloride to the walkways. Mr. Martone stated that his employees returned to Greenview Village on February 5, 2014, and cleared two inches of snow from the premises. However, Martone did not salt the roadways or apply calcium chloride to the walkways on that date because the weather warmed up and "turned to rain" before it left the premises "between 3:00 and 3:30 [p.m.]." Mr. Martone stated he informed Ms. Ruggeri that applying ice melting compounds at such time would be "a waste of money because the salt and calcium would be washed away with the rain."

Mr. Martone further indicated that he inspected the subject premises on both of the aforementioned dates following the completion of all snow removal efforts and found all relevant areas well-cleared. He testified that he also communicated with Ms. Ruggeri, who expressed her satisfaction with Martone's work. Finally, Mr. Martone stated that on February 6, 2014, he received a telephone call from Ms. Ruggeri, who stated that someone had fallen, and requested that Martone perform salt and calcium chloride application at Greenview Village.

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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). 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 (*see Vega v Restani Constr. Corp.*, 18 NY3d 499; *Zuckerman v City of New York*, 49 NY2d 557). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see 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 real property owner "will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" (*Yeung v Selfhelp (KIV) Assoc., L.P.*, 170 AD3d 653, 653, quoting *Cuillo v Fairfield Prop. Servs., L.P.*, 112 AD3d 777, 778). A defendant has constructive notice of a hazardous condition on property "when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (*Torre v Aspen Knolls Estates Home Owners Assn., Inc.*, 150 AD3d 789, 790). To meet its prima facie burden on the issue of lack of constructive notice, "the defendant must offer some evidence as to when the area in question was last

cleaned or inspected relative to the time when the plaintiff fell” (*Rong Wen Wu v Arniotes*, 149 AD3d 786, 787).

“A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties” (*Yvars v Marble Hgts. of Westchester, Inc.*, 158 AD3d 850, 850-851, quoting *Baratta v Home Depot USA*, 303 AD2d 434, 434). However, 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]).

Turning first to Greenview’s motion, it failed to submit sufficient evidence to establish when it last inspected the area where the plaintiff fell, relative to the time of the accident (*see Sartori v JP Morgan Chase Bank*, 127 AD3d 1157; *Rong Wen Wu v Arniotes*, *supra*). The deposition testimony of Greenview’s witnesses established nothing more than their general practices regarding inspecting the property, which is insufficient to demonstrate that Greenview lacked constructive notice of the alleged icy condition (*see Sartori v JP Morgan Chase Bank*, *supra*). Accordingly, Greenview’s motion for summary judgment dismissing the complaint against it is denied.

Martone, however, established a prima facie case of entitlement to summary judgment in its favor by demonstrating that its contract with Greenview was not a comprehensive property maintenance agreement, that such contract contained no indemnification clause, that it performed snow removal services at the subject premises on the day before plaintiff’s accident, that such work was found satisfactory upon inspection by Greenview, and that it had no duty to monitor the subject premises for melt/re-freeze conditions (*see Turner v Birchwood on the Green Owners Corp.*, 171 AD3d 1119; *Yvars v Marble Hgts. of Westchester, Inc.*, *supra*; *see generally Alvarez v Prospect Hosp.*, *supra*). Further, Martone demonstrated that plaintiff was not a party to its snow removal contract with Greenview and, thus, as a third-party contractor, it owed plaintiff no duty of care (*see Reisert v Mayne Constr. of Long Is., Inc.*, 165 AD3d 854; *Espinal v Melville Snow Contrs.*, *supra*). The burden, thus, shifted to plaintiff to raise a triable issue (*see generally Vega v Restani Constr. Corp.*, *supra*).

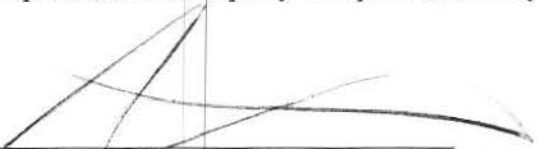
In opposition, plaintiff argues that Martone “launched a force or instrument of harm,” pursuant to *Espinal*, *supra*, “by virtue of the manner in which [it] performed snow and ice removal services at the subject location.” Plaintiff further argues that Martone’s decision to refrain from applying salt to the subject location following its snow removal on February 5, 2014, created or exacerbated the dangerous condition. Plaintiff submits her own affidavit, copies of the pleadings, transcripts of the parties’ deposition testimony, certified meteorological records, and an affidavit of meteorologist Alicia C. Wasula. Such evidence is insufficient to raise a triable issue as to Martone. “A snow removal contractor cannot be held liable for personal injuries on the ground that the snow removal contractor’s passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition” (*Somekh v Valley Natl. Bank*, 151 AD3d

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783, 786 [internal quotations omitted]). The mere failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a preexisting ice condition from improving (*see Somekh v Valley Natl. Bank, supra; Santos v Deanco Servs. Inc.*, 142 AD3d 137). Plaintiff's contention that Martone created the alleged icy condition by plowing snow into piles near the location of plaintiff's fall, which then melted and re-froze, is speculative (*see Cayetano v Port Auth. of New York & New Jersey*, 165 AD3d 1223).

Accordingly, the motion by defendant/third-party defendant Andrew Martone Landscaping Design, Inc., for summary judgment dismissing the complaint, the third-party complaint, and any cross claims against it is granted.

Dated: May 28, 2019



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

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION