

Vargas v East End Eye Associates, LLP

2019 NY Slip Op 32492(U)

August 23, 2019

Supreme Court, Suffolk County

Docket Number: 15-8099

Judge: David T. Reilly

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This opinion is uncorrected and not selected for official publication.

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Affidavits and supporting papers 129 - 132; 133 - 139; 140 - 145; Replying Affidavits and supporting papers 146 - 151; 152 - 157;
Other ____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (seq. 001) by defendant/third-party defendant Collaborative Realty, LLC, the motion (seq. 002) by defendants/third-party plaintiffs East End Eye Associates, LLP, and Scott B. Sheren, and the motion (seq. 003) by third-party defendant Green Nature Landscaping are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants/third-party plaintiffs East End Eye Associates, LLP, and Scott B. Sheren for summary judgment dismissing the complaint and all cross claims against them is granted; and it is further

ORDERED that the motion by defendant/third-party defendant Collaborative Realty, LLC, for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the motion by defendant/third-party defendant Collaborative Realty, LLC, for summary judgment dismissing all cross claims against it is denied, as moot; and it is further

ORDERED that the motion by third-party defendant Green Nature Landscaping for an order dismissing the third-party complaint against it is denied, as moot.

At approximately 10:30 a.m., on January 13, 2015, plaintiff Crystal Vargas allegedly slipped and fell on a patch of ice adjacent to her vehicle while she was exiting said vehicle in a parking lot of a medical office, known as East End Eye, located at 669 Whiskey Road, Ridge, New York. At the time of the accident, the subject premises was owned by defendants East End Eye Associates, LLP, and Scott B. Sheren (hereinafter collectively referred to as East End defendants), and was leased by defendant Collaborative Realty, LLC. By her amended verified complaint, plaintiff alleges, *inter alia*, that defendants were negligent, among other things, in failing to maintain the premises in a reasonably safe condition. In September of 2016, East End defendants brought a third-party action against third-party defendants Green Nature Landscaping and Collaborative Realty, LLC, f/k/a Prohealth Realty, LLC (known as Collaborative Realty) for contractual and common-law indemnification and contribution.

East End defendants move for summary judgment dismissing the complaint and any claims asserted against them, and for summary judgment on their third-party causes of action against Green Nature and Collaborative Realty for contractual and common-law indemnification and contribution. In support of their motion, East End defendants submit, *inter alia*, the deposition testimony of plaintiff, Sheren, Kevin Lalone, and Kelley Reyes, the lease agreement for the subject premises, and the snow removal contract. East End defendants contend that the lease for the premises solely placed the obligation to keep the subject parking lot free from snow and ice on Collaborative Realty. In addition, East End defendants contend that they neither created the alleged dangerous condition, nor had constructive notice of its existence. In the alternative, they argue that should this Court find them liable, they are entitled to indemnification and contribution from Green Nature Landscaping and Collaborative Realty.

In opposition, Collaborative Realty contends that triable issues of fact remain as to East End defendants' negligence, as they hired Green Nature Landscaping to perform snow removal services on the premises. Collaborative Realty also moves for summary judgment dismissing the complaint and all claims against it, arguing that it neither created the icy condition, nor had notice of its existence. In support of its motion, Collaborative Realty submits the deposition testimony of plaintiff and Kelly Reyes. In opposition to defendants' motions for summary judgment dismissing the complaint, plaintiff contends that triable issues of fact remain as to whether the alleged icy condition existed for a sufficient period of time prior to the accident such that it could have been discovered and corrected. Plaintiff submits the affidavit of John A. Allin.

Green Nature Landscaping moves for summary judgment dismissing the third-party complaint against it, arguing that it did not have an exclusive maintenance agreement for the removal of snow and ice on the premises. In support of its motion, Green Nature Landscaping submits, *inter alia*, the deposition testimony of plaintiff, Sheren, Reyes, Lalone, and the snow removal contract. Collaborative Realty opposes the motion to the extent that it argues its cross claims against Green Nature Landscaping for indemnification should not be dismissed.

Plaintiff testified that on the date of the accident, she was operating an ambulette to transport a patient to a medical appointment on the premises. According to plaintiff's testimony, she parked the vehicle in the only available spot in the subject parking lot, and did not observe its surface before exiting the vehicle. She stated that there were snow mounds on the sides of the parking lot, and that there was snow in front of the walkway abutting the medical office. She testified that she was exiting her vehicle when she slipped and fell on the ice patch. She further testified that ice patch was transparent, and that it had dimensions of approximately 5 feet by 5 feet.

A partner of East End Eye Associates, LLP, Sheren testified that he entered into a written agreement to lease the subject premises to Collaborative Realty from July 1, 2014, until June 30, 2015. He testified that Collaborative Realty began to manage the property in June of 2014. Nonparty East End Eye allegedly was the sole tenant at the time of the incident. He testified that East End Eye was a division of Prohealth Care Associates, LLP, and that East End Eye Associates, LLP, was a partner in Prohealth Care Associates, LLP. According to his testimony, he would visit the premises weekly for the purposes of conducting his business as an ophthalmologist. When asked to describe how Collaborative Realty selected Green Nature Landscaping to perform snow removal services, he stated that an employee of nonparty Prohealth Medical Management, Gareth Swift, had recommended Green Nature Landscaping for snow removal services. Prior to June of 2014, Swift allegedly contacted Green Nature Landscaping regarding snow removal on the premises for the winter of 2015. Sheren testified that he did not manage the property, and that he did not employ any company to perform regular maintenance work on the property. Although Sheren admitted that Swift recommended Green Nature Landscaping to Collaborative Realty, he stated that he was unaware of how Collaborative Realty selected Green Nature Landscaping to perform snow removal services on the premises. He admitted that no one inspected the property after snow removal services were performed. He stated that prior to the incident, he was not aware of anyone slipping and falling in the subject parking lot.

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A front desk supervisor of Pro Health Medical Management, Kelly Reyes, testified that she was working on the premises on the date of the incident. According to her testimony, Pro Health Medical Management was the entity which managed the medical office. She testified that it snowed the night before the incident, and that Green Nature Landscaping performed snow removal services in the subject parking lot earlier that morning based on how the snow was positioned. However, she did not observe anyone from Green Nature Landscaping on the premises on that particular date.

The president of Green Nature Landscaping, Lalone, testified that Green Nature Landscaping had provided snow removal services on the premises since approximately 2000. He allegedly only interacted with Swift concerning snow removal through the 2015 winter season. According to his testimony, Pro Health and Green Nature Landscaping entered into an agreement for Green Nature Landscaping to perform snow removal services on the premises for the period of November 15, 2014, until April 15, 2015. He stated that Green Nature Landscaping performed snow removal services based on weather reports, visible snow accumulation, or upon request by Swift. He further stated that if there was snow accumulation between two and six inches of snow, Green Nature Landscaping would automatically perform snow removal services. However, he stated that he and Pro Health also had a verbal agreement, in which snow removal services for snow accumulations of less than two inches would be performed upon request. According to his testimony, prior to the accident, snow removal services were last performed on the premises, when the parking lot was empty, on January 9, 2015. He testified that on this date, he performed the snow plowing of the parking lot, and another employee shoveled and applied ice melt to walkways. He testified that after snow removal services were performed on January 9, 2015, Green Nature Landscaping did not perform any snow removal services on the premises before the accident. He further testified that he did not receive any complaints regarding the services provided on January 9, 2015.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form 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, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient 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, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see New York City Asbestos Litig. v Chevron Corp.*, 33 NY3d 20, 99 NYS3d 734 [2019]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 45 NYS3d 864 [2016]).

A landowner, or a party in possession or control of real property, has a duty to maintain its property in a reasonably safe condition (*see Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 638 NYS2d

937 [1995]; *Pilgrim v Avenue D Realty Co.*, 173 AD3d 788, 99 NYS3d 688 [2d Dept 2019]; *Chang v Marmon Enters., Inc.*, 172 AD3d 678, 99 NYS3d 397 [2d Dept 2019]). A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the alleged dangerous condition, and that it did not have actual or constructive notice of its existence (see *Pilgrim v Avenue D Realty Co.*, *supra*; *Barron v Eastern Athletic, Inc.*, 150 AD3d 654, 53 NYS3d 689 [2d Dept 2017]; *Torre v Aspen Knolls Estates Home Owners Assn., Inc.*, 150 AD3d 789, 54 NYS3d 84 [2d Dept 2017]). A defendant has constructive notice of a dangerous condition on its premises when the condition is visible and apparent, and has existed for a sufficient length of time to afford him or her a reasonable opportunity to discovery and correct it (see *Gani v Avenue R Sephardic Congregation*, 159 AD3d 873, 72 NYS3d 561 [2d Dept 2018]; *Torre v Aspen Knolls Estates Home Owners Assn., Inc.*, *supra*). To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's accident (see *Falco-Averett v Wal-Mart Stores, Inc.*, 101 NYS3d 642, 2019 NY Slip Op 05388 [2d Dept 2019]; *Reed v 64 JWB, LLC*, 171 A D 3d 1228, 98 NYS3d 636 [2d Dept 2019]; *Branciforte v 2248 Thirty First St., LLC*, 171 AD3d 1003, 98 NYS3d 626 [2d Dept 2019]). Nonetheless, an out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises, and has a duty imposed by statute or assumed by a contract or course of conduct (see *Behluli v 228 Hotel Corp.*, 172 AD3d 1151, 98 NYS3d 873 [2d Dept 2019]; *Crosby v Southport, LLC*, 169 AD3d 637, 94 NYS3d 109 [2d Dept 2019]; *Bartels v Eack*, 164 AD3d 1202, 83 NYS3d 657 [2d Dept 2018]). Thus, the court must look not only to the terms of the lease agreement, but also to the parties' course of conduct, including the landowner's ability to access the premises to determine whether the landlord surrendered control over the premises as to extinguish his or her liability as a matter of law (see *Gronski v County of Monroe*, 18 NY3d 374, 940 NYS2d 518 [2011]).

East End defendants established, prima facie, that they were out-of-possession landlords who neither retained control over the subject parking lot, nor were contractually obligated by the lease to maintain it (see *McComish v Luciano's Italian Rest.*, 56 AD3d 534, 868 NYS2d 79 [2d Dept 2008]; *Stein v Harriet Mgt., LLC*, 51 AD3d 1007, 859 NYS2d 243 [2d Dept 2008]; *Sparozic v Bovis Lend Lease LMB, Inc.*, 50 AD3d 1121, 858 NYS2d 207 [2d Dept 2008]; *Lindquist v C & C Landscape Contrs., Inc.*, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; *Penny v Pembroke Mgt.*, 280 AD2d 590, 720 NYS2d 549 [2d Dept 2001]). Here, the rider to the lease between Sheren and Collaborative Realty unequivocally placed the ongoing obligation to maintain the subject parking lot solely on Collaborative Realty (see *Hawkins v Stewart & Clinton, Co., LLC*, 133 AD3d 567, 18 NYS3d 450 [2d Dept 2015]; *Travers v RCPI Landmark Props., LLC*, 74 AD3d 956, 906 NYS2d 563 [2d Dept 2010]; *McComish v Luciano's Italian Rest.*, *supra*; *Lindquist v C & C Landscape Contrs., Inc.*, *supra*). By the terms of the lease rider, "[the] Tenant shall maintain and clean the sidewalks, driveways, parking lot areas and entrance and shall keep same free of ice, snow, debris and refuse." The opposing parties failed to raise a triable issue of fact (see *Hawkins v Stewart & Clinton, Co., LLC*, *supra*; *Seawright v Port Auth. of N.Y. & N.J.*, 90 AD3d 1017, 937 NYS2d 234 [2d Dept 2011]; *Couluris v Harbor Boat Realty, Inc.*, 31 AD3d 686, 820 NYS2d 282 [2d Dept 2006]; *Knipfing v V&J, Inc.*, 8 AD3d 628, 779 NYS2d 244 [2d Dept 2004]). As the complaint is dismissed against East End defendants, the branch of Collaborative

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Realty's summary judgment motion seeking to dismiss any cross claims against it, and the motion by Green Nature Landscaping seeking to dismiss the third-party-complaint against it are denied, as moot.

The branch of Collaborative Realty's motion seeking dismissal of the complaint against it is denied, as it failed to establish, prima facie, that it lacked constructive notice of the alleged icy condition that caused plaintiff to slip and fall (*see Moore v Great Atl. & Pac. Tea Co., Inc.*, 117 AD3d 695, 985 NYS2d 605 [2d Dept 2014]; *Stewart v Sherwil Holding Corp.*, 94 AD3d 977, 942 NYS2d 174 [2d Dept 2012]; *Sabatino v 425 Oser Ave., LLC*, 87 AD3d 1127, 930 NYS2d 598 [2d Dept 2011]). Reyes testified that Green Nature Landscaping performed snow removal services earlier in the morning on the date of the accident. Conversely, Lalone testified that prior to the accident, Green Nature Landscaping last performed snow removal services a few days earlier. In light of this conflicting testimony, Collaborative Realty failed to meet its initial burden on the claim sounding in premises liability (*see Moore v Great Atl. & Pac. Tea Co., Inc.*, *supra*; *Stewart v Sherwil Holding Corp.*, *supra*; *Sabatino v 425 Oser Ave., LLC*, *supra*).

Accordingly, the motion by East End defendants for summary judgment dismissing the complaint and all claims against them is granted, and the branch of the motion by Collaborative Realty for summary judgment dismissing the complaint against it is denied. As the complaint is dismissed against East End defendants, the branch of the motion by Collaborative Realty for summary judgment dismissing any cross claims against it, and the motion by Green Nature Landscaping for summary judgment dismissing the third-party complaint against it are denied, as moot.

Dated: August 23, 2019


HON. DAVID E. REILLY

FINAL DISPOSITION NON-FINAL DISPOSITION