Basile v Simon Props.
2019 NY Slip Op 33555(U)
December 5, 2019
Supreme Court, Suffolk County
Docket Number: 15-19800
Judge: William G. Ford

COPY

SHORT FORM ORDER

INDEX No. 15-19800
CAL. No. 18-02171OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 4-11-19 (006 & 007)
ADJ. DATE 5-9-19
Mot. Seq. # 006 - MD
 # 007 - MotD

----------X

NICOLE BASILE,

Plaintiff,

-against-

SIMON PROPERTIES and WALT WHITMAN MALL, LLC,

Defendants.

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WALT WHITMAN MALL, LLC,

Third-Party Plaintiff,

-against-

COLLINS BUILDING SERVICES, INC., and THE CHEESECAKE FACTORY RESTAURANTS, INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 57 read on these motions for summary judgment: Notice of Motion and supporting papers 1 - 21; 22 - 42; Answering Affidavits and supporting papers 43 - 47; 48 - 49; 50 - 51; Replying Affidavits and supporting papers 52 - 53; 54 - 55; 56 - 57; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (seq. 006 and seq. 007) by defendant/third-party plaintiff Walt Whitman Mall, LLC, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant/third-party plaintiff Walt Whitman Mall, LLC, for summary judgment on its third-party claims against third-party defendant The Cheesecake Factory Restaurants, Inc., is denied; and it is further

ORDERED that the motion by defendant/third-party plaintiff Walt Whitman Mall, LLC, for summary judgment dismissing the complaint against it is granted to the extent provided herein, and is otherwise denied.

This action was commenced by plaintiff Nicole Basile to recover damages for injuries she allegedly sustained on January 27, 2013, when she slipped and fell on ice in a parking lot located at 160 Walt Whitman Road, Huntington, New York. At the time of her fall, plaintiff was performing work while in the employ of third-party defendant The Cheesecake Factory Restaurants, Inc., which leased the subject premises from its owner, defendant/third-party plaintiff Walt Whitman Mall, LLC. The Court notes that the third-party complaint against Collins Building Services, Inc. was discontinued pursuant to a stipulation dated June 14, 2017, and that defendant Simon Properties has not appeared in this action.

Defendant/third-party plaintiff Walt Whitman Mall, LLC (WWM) now moves for summary judgment in its favor as to its claims against third-party defendant The Cheesecake Factory Restaurants, Inc. (Cheesecake Factory) for contractual indemnification and breach of contract for failing to name WWM as an additional insured under its policy. In support of its motion, WWM submits, among other things, transcripts of the parties' deposition testimony, a copy of a lease agreement between The Retail Property Trust and Cheesecake Factory, various photographs, and an expert affidavit of Steven Roberts, CCM. In a separate motion, submitting identical evidence, WWM moves for summary judgment in its favor as to plaintiff's complaint, arguing that it had no notice of the alleged dangerous condition.

Plaintiff testified that on the date in question, she arrived at her place of employment, the Cheesecake Factory restaurant at the Walt Whitman Mall, between 12:00 p.m. and 12:30 p.m. She stated that it had snowed the previous night, and that the weather remained cold. Plaintiff indicated that in her role as a cashier, it was her responsibility to carry take-out orders from the restaurant and deliver them to customers waiting in designate "curbside" pickup stalls in the parking lot. She testified that while the sidewalk outside of the Cheesecake Factory was clear of snow and ice, the parking lot was covered in "slush." Plaintiff stated that at approximately 7:00 p.m., after having delivered at least 10 orders to vehicles in a similar fashion, she carried half of a large take-out order to a waiting red SUV. After returning to her indoor station and retrieving the second half of the large order, she exited the Cheesecake Factory from a different exit and walked, again, toward the red SUV parked in a designated pickup stall approximately 10 steps away. Plaintiff indicated that as she neared the vehicle, she slipped on a patch of "black ice" and fell forward onto her right knee. Questioned as to whether she had made

complaints regarding the parking lot's condition in the past, plaintiff stated that she had, to her managers, whom she believes contacted WWM. She indicated that while she had seen Cheesecake Factory employees cleaning the sidewalks immediately adjacent to the restaurant, she had never seen a Cheesecake Factory employee clean the subject parking lot.

Thomas Baldi testified that he was the manager present at Cheesecake Factory on the date in question. He stated that in the event of snow or ice covering the parking stalls designated for curbside pickup, he would call mall maintenance. His attention directed to the evening in question, Mr. Baldi indicated that he inspected the general area of plaintiff's fall and found "some slush, some snow" on the ground, which he had no difficulty seeing.

Deborah Weber testified that she is employed by the Simon Property Group, and that she was the general manager of the Walt Whitman Mall at the time of plaintiff's incident. She indicated that the ownership of the Walt Whitman Mall was transferred to WWM at some point in time, but she cannot recall when. She stated, however, that whatever entity owned Walt Whitman Mall, owned the mall's parking lots and leased a portion of the premises to the Cheesecake Factory. Ms. Weber testified that, pursuant to its lease agreement, Cheesecake Factory was afforded use of some parking stalls for its curbside takeout service. She stated that those parking spaces were marked with signs, but that WWM had the sole responsibility for maintaining them.

In his affidavit, Steven Roberts states that he is a certified consulting meteorologist, has been employed by CompuWeather since 2000, and has been providing expert witness testimony since 2007. He indicates he was retained by WWM "to perform a site-specific analysis of the weather conditions that occurred on January 27, 2013, at approximately 7:00 p.m., in the vicinity of 160 Walt Whitman Road, Huntington, New York." In preparation for drafting his report, he states that he reviewed climatological data from five weather stations, ranging in distance from 5 miles to 16 miles from the incident location. He also reviewed "special weather statements" issued by the Upton, New York National Weather Service and NEXRAD Doppler radar images.

Based upon his review of the climatological records, Mr. Roberts states that no precipitation occurred on January 26, 2013, and that the last precipitation prior to plaintiff's accident was when approximately 1 inch of snow fell on January 25, 2013. He opines that due to compaction, less than 0.5 inches of snow would have been present at the end of the day on January 26, 2013. He further opined that on the incident date, January 27, 2013, the temperature was above freezing from approximately 2:00 p.m. until sometime between 4:00 and 5:00 p.m., when it dropped below freezing, and remained below freezing until the time of plaintiff's fall. In conclusion, Mr. Roberts opines that within a reasonable degree of meteorological certainty, "meltwater would have frozen into ice in untreated, exposed outdoor areas after 4:00-5:00 p.m. [on the incident date]" and "that ice could have formed at any time during the 2-3 hours prior to plaintiff's incident."

It is undisputed that a lease agreement between The Retail Property Trust, as "Landlord," and the Cheesecake Factory, as "Tenant," dated July 17, 2007, sets forth the obligations of the relevant parties to the subject premises. Section 2.6, paragraph 10 of such lease agreement provides that "Tenant shall have the non-exclusive right to utilize five (5) parking spaces designated "Take Out Spaces" on the Site Plan for Tenant's take out and curbside to-go service." In the first paragraph of Section 5.1, "all parking

areas" are designated as "Common Areas" which "shall at all times be subject to the exclusive control and management of Landlord." Section 11.1 of the lease agreement outlines the Landlord's insurance obligations, providing that "Landlord shall carry or caused (sic) to be carried commercial general liability insurance . . . on those portions of the Common Areas included in Landlord's Tract, including all Common Areas of the Premises." Section 11.2 (a) provides that "Tenant agrees to carry insurance on the Premises during the Lease Term, covering Tenant and naming Landlord and Simon Property Group, Inc. as additional insureds." The "Premises" is defined in Section 1.1 (b) as "[a] building to be constructed by Tenant." The first paragraph of Section 11.6 provides that

> Except for the negligent or intentional acts or omissions of Landlord . . . Tenant shall save harmless, indemnify, and at Landlord's option, defend Landlord . . . from and against any and all liability, liens, claims, demands, damages, expenses, fees . . . actions and causes of action of any and every kind and nature arising or growing out of or in any way connected with Tenant's, its employees and agents use, occupancy, management or control of the Premises or Tenant's employees or agents operations, conduct or activities.

Conversely, the second paragraph contains a reciprocal provision, stating that

> Landlord shall save harmless, indemnify, and at such indemnitee's option, defend Tenant . . . from and against any and all liability, liens, claims, demands, damages, expenses, fees . . . actions and causes of action of any and every kind and nature arising or growing out of or in any way connected with Landlord's use, occupancy, management or control of the Common Areas.

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, 508 NYS2d 923, 925 [1986]). 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, 487 NYS2d 316, 318 [1985]). 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, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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, 937 NYS2d 157, 159 [2011]).

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, 429 NYS2d 606 [1980]). 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" (***Lauture v Board of Mgrs. at***

Vista at Kingsgate, Section II, 172 AD3d 1351, 1352, 99 NYS3d 662 [2d Dept 2019], quoting ***Cuillo v Fairfield Prop. Servs., L.P.***, 112 AD3d 777, 778, 977 NYS2d 353 [2d Dept 2013]). A defendant has constructive notice of a hazardous condition on property "when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected (***Kyte v Mid-Hudson Wendico***, 131 AD3d 452, 453, 15 NYS3d 147 [2d Dept 2015]). 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, 50 NYS3d 563 [2d Dept 2017]).

Here, MMW failed, in both of its instant motions, to establish a prima facie case of entitlement to summary judgment in its favor (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). As to its motion for an order dismissing plaintiff's complaint, MMW submitted no evidence of when the parking lot in question was last inspected and, therefore, it cannot establish, prima facie, a lack of constructive notice (*see* ***Branciforte v 2248 Thirty First St., LLC***, 171 AD3d 1003, 98 NYS3d 626 [2d Dept 2019]; ***Butts v SJF, LLC***, 171 AD3d 688, 97 NYS3d 219 [2d Dept 2019]; ***D'Esposito v Manetto Hill Auto Serv., Inc.***, 150 AD3d 817, 54 NYS3d 429 [2d Dept 2017]; ***Rong Wen Wu v Arniotes***, *supra*). The expert affidavit submitted by MMW also fails to demonstrate, as a matter of law, that the alleged dangerous condition developed in so short a time that it could not reasonably have been expected to discover and remedy it (*see* ***Waters v Ciminelli Dev. Co., Inc.***, 147 AD3d 1396, 46 NYS3d 756 [4th Dept 2017]). Further, MMW's argument that it could not have had constructive notice of the alleged icy condition, due to plaintiff's own inability to notice it prior to slipping thereupon, is unavailing. Plaintiff did not state that the alleged "black ice" was invisible or undetectable, only that she did not see it before slipping on it (*see* ***York v Thompson Sta. Inc.***, 172 AD3d 1593, 100 NYS3d 707 [3d Dept 2019]; *cf.* ***Vozzo v Fairfield Westlake Sq., LLC***, 152 AD3d 815, 59 NYS3d 125 [2d Dept 2017]). Further, there was no testimony adduced from plaintiff that she had walked in the specific area of the alleged "black ice" prior to her incident. Plaintiff testified that the parking area was covered with "slush" from the time she commenced her work day, approximately seven hours prior to her fall. Thus, MMW has failed to eliminate all triable issues regarding its notice of the alleged dangerous icy condition on its premises (*see* ***Muzio v Levittown Union Free Sch. Dist.***, 172 AD3d 1212, 101 NYS3d 379 [2d Dept 2019]).

However, as to plaintiff's claim alleging inadequate lighting at the subject location, MMW, through plaintiff's own testimony that the lighting was adequate, established a prima facie case of entitlement to summary judgment in its favor. In opposing that portion of MMW's motion, plaintiff failed to raise a triable issue. Mr. Baldi's testimony regarding a failure by MMW to provide adequate lighting at the subject location is insufficient to raise a triable issue, given his inability to recall when such failure occurred. Accordingly, the motion by MMW for summary judgment is granted to the limited extent provided herein, and is otherwise denied.

Turning to its motion for summary judgment in its favor as to its third-party claims against the Cheesecake Factory, and viewing the evidence in the light most favorable to the non-moving party, MMW has not demonstrated, prima facie, any basis upon which Cheesecake Factory would be solely liable (*see* ***County of Nassau v Technology Ins. Co., Inc.***, 174 AD3d 847, 107 NYS3d 348 [2d Dept 2019]; ***Wilson v Nassau Univ. Med. Ctr.***, 165 AD3d 1205, 87 NYS3d 44 [2d Dept 2018]). First, regarding its third-party claims against Cheesecake Factory for common law indemnification and contribution, MMW failed to demonstrate that Cheesecake Factory breached any duty owed to plaintiff

(*see* ***Sodhi v Dollar Tree Stores, Inc.***, 175 AD3d 914, 107 NYS3d 549 [4th Dept 2019]). "The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (***Poalacin v Mall Props., Inc.***, 155 AD3d 900, 909, 64 NYS3d 310 [2d Dept 2017], quoting ***Curreri v Heritage Prop. Inv. Trust, Inc.***, 48 AD3d 505, 507, 852 NYS2d 278 [2d Dept 2008]). Here, MMW's witness, Ms. Weber, testified that Cheesecake Factory had no obligation to maintain the parking lot in question. Second, as to MMW's third-party claims for contractual indemnification, the lease agreement provides that the landlord (now, MMW) will indemnify the tenant (Cheesecake Factory) against all claims "growing out of or in any way connected with Landlord's use, occupancy, management or control of the Common Areas." The right to contractual indemnification "depends upon the specific language of the contract [and the] intent to indemnify must be clearly implied from the language and purposes of the entire agreement and the surrounding circumstances" (***Canela v TLH 140 Perry St., LLC***, 47 AD3d 743, 744, 849 NYS2d 658 [2d Dept 2008]). While it is true that a provision of the lease agreement mandates that Cheesecake Factory indemnify the landlord for "causes of action of any and every kind and nature arising or growing out of or in any way connected with Tenant's, its employees and agents use, occupancy, management or control of the Premises or Tenant's employees or agents operations, conduct or activities," such provision explicitly excludes the negligent acts of the landlord. As it is undisputed that plaintiff's accident occurred in a parking lot owned and maintained by MMW, designated a "Common Area" by the controlling lease agreement, MMW failed to eliminate all triable issues of whether the aforementioned lease provision binding Cheesecake Factory applies given the circumstances of this matter (*see* ***McCoy v Medford Landing, L.P.***, 164 AD3d 1436, 84 NYS3d 224 [2d Dept 2018]). Finally, as to MMW's third-party claim for breach of contract, it adduced no evidence, testimonial or documentary, that Cheesecake Factory failed to list The Retail Property Trust, or any of its successors in interest, as an additional insured on a liability insurance policy. In any event, that provision of the lease agreement mandating that the landlord be listed as an additional insured only applies to insurance covering the "Premises," which is the Cheesecake Factory building/patio, and not the subject parking lot. WWM's claim that the five "curbside" pickup parking spaces were part of Cheesecake Factory's leased premises is without merit. MMW having failed to establish a prima facie case regarding its third-party claims the Court need not review the opposing parties' submissions in opposition (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the motion by MMW for summary judgment on its third-party claims against Cheesecake Factory is denied.

Dated: December 5, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION