Sala v Ferrandino & Son, Inc.
2019 NY Slip Op 33993(U)
July 25, 2019
Supreme Court, Nassau County
Docket Number: 600674-17
Judge: Jerome C. Murphy
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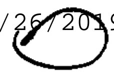

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

TRIAL/IAS PART 13

Index No.: 600674-17
Motion Date: 5/28/19
Sequence No.: 002, 003
MG, MD
DECISION AND ORDER

DOMINIC SALA,

Plaintiff,

- against -

FERRANDINO & SON, INC., CREATIVE LANDSCAPING BY COW BAY, INC., and COW BAY CONTRACTING, INC.,

Defendants.

The following papers were read on these motions:

Motion Seq. 002
Notice of Motion of Ferrandino & Son, Inc., Affirmation in Support, Exhibits 1
Affirmation for Plaintiff in Opposition 2
Reply Affirmation 3

Motion Seq. 003
Notice of Cross-Motion of Creative Landscaping, Affidavit in Support, Exhibits 1
Affirmation in Opposition 2
Reply Affirmation 3

PRELIMINARY STATEMENT

In motion sequence 002, defendant, Ferrandino & Sons, Inc., brings this application for an Order pursuant to CPLR §3212, granting summary judgment to the defendant, Ferrandino & Sons, Inc. pursuant to CPLR §3212 on the grounds that not triable issues of fact exist and/or dismissing plaintiff's complaint pursuant, and any and all cross-claims against defendant, Ferrandino, & Son,

Inc., such other and further relief as this Court may deem just and proper. Opposition and reply papers have been received with respect to this application.

In motion sequence 003, plaintiff, Dominic Sala, brings this application for an order pursuant to CPLR §3212 granting summary judgment to defendant Creative Landscaping by Cow Bay Contracting, Inc. on the grounds that no triable issue of fact exist and/or dismissing Plaintiff's complaint pursuant to CPLR §3212 and any and all cross-claims against defendant, Creative Landscaping by Cow Bay Inc. and granting such other and further relief as this court deems just and proper. Reply papers have been submitted with respect to this application.

BACKGROUND

On March 9, 2015, at approximately 7:00 A.M., plaintiff, an employee of TD Bank, at 500 Old Country Road, Plainview, New York, slipped on a patch of ice in the parking lot of the bank. He did not observe the ice patch, approximately 2 ½ ft. x 2 ft. prior to falling. He had taken approximately 7 steps after exiting his car when he fell.

Defendant Ferrandino & Son, Inc. ("Ferrandino") submitted a Snow Removal Proposal dated February 16, 2015, which was accepted by TD Bank, effective March 9, 2015, and covering a number of TD Bank locations, including 500 Old Country Road. Plaintiff commenced this action to recover for personal injuries by filing a Summons and Complaint on January 25, 2017 (Exh. "A". Ferrandino served an Answer on May 18, 2017, and an Amended Answer on June 1, 2017 (Exh. "B"). Defendants Creative Landscaping by Cow Bay, Inc., and Cow Bay Contracting, Inc. ("Creative Landscaping") filed their Answer on June 28, 2017 (Exh. "C"). Creative Landscaping was the previous snow removal company, and their contract expired on March 8, 2015, the day before the incident. Creative Landscaping is an independent company, and asserts that it is not a subsidiary of Cow Bay Contracting, Inc.

DISCUSSION

<u>Motion Sequence 002</u>

Ferrandino argues that it has no duty to plaintiff, and plaintiff cannot show that they owned, operated, or made some special use of the property. They are not directly involved in snow removal, but, rather, engage local subcontractors to perform the work for which they contract with individual customers. In any event, they did not perform any snow removal prior to plaintiff's fall at 7:00 A.M.

on the day on which their contract with TD Bank commenced. Plaintiff testified that the weather on the date of the incident was clear and sunny, and there were no piles of snow in the parking lot.

Because a finding of negligence must be based upon a breach of a duty, a threshold question is whether the alleged tortfeasor owed a duty of care to the injured party. In *Espinal v. Melville Snow Contrs.* 98 N.Y.2d 138 (2002), the Court of Appeals held that a snow removal contractor with a contract with the property owner, generally does not give rise to tort liability in favor of a third party. The court referenced *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 168 (1928), in which Chief Judge Cardozo stated that imposing liability under such circumstances could render the contracting parties liable in tort to "an indefinite number of potential beneficiaries."

Recognizing, however, that the existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations. Citing *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 585—586 (1994); *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226—227 (1990); an *Moch, supra,* the Court in *Espinal,* 98 N.Y.2d at 140, held that "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 under one of the following three circumstances:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties "launche[s] a force or instrument of harm (*Mocha* 247 N.Y. at 168); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*see Eaves Brooks,* 76 N.Y.2d at 226); and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Palka,* 83 N.Y.2d at 589). These principles are firmly rooted in our case law, and have been generally recognized by other authorities (*see, eg.* Restatement [Second] of Torts §324A).

Santos v. Deanco Services, Inc, 104 A.D.3d 933 (2d Dept. 2013), involved an employee of Lowe's Home Improvement ("Lowe's") who slipped and fell on ice outside the store. The Court held that the employee did not justifiably rely on continued performance of snow removal by store's snow removal contractor, and thus contractor was not liable on that basis. But the court denied summary judgment, ruling that material issues of fact existed as to what snow removal services were performed by the snow removal contractor on the day that the employee slipped in an outdoor area

of the store's premises.

In a second visit to the Second Department at 142 A.D.3d 137 (2d Dept. 2016) the court was confronted with the issue of whether the first of the three "*Espinal* exceptions" applied to a snow removal contractor's passive omissions, and whether this 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. The court ruled that liability cannot be imposed under such circumstances (*Santos v. Deanco Srvices, Inc.,* 142 A.D.3d at 138). The court determined that the second and third exceptions, reliance upon the contractor's continuing performance of the contractor's duty, and the contractor's entirely displacing the other contracting party's obligation to maintain the premises safely, were inapplicable.

Additionally, as to Ferrandino, there is no evidence that they ever provided snow plowing services to TD Bank, as their commencement date was March 9, 2015, the date of the incident, plaintiff fell at 7:00 A.M., the weather was clear, and he did not observe any piles of plowed snow in the parking lot. For all of the foregoing reasons, Ferrandino's motion for summary judgment dismissing the Complaint is granted.

Motion Sequence 003

Creative Landscaping's duty allegedly arose from a written contract. Creative did not attach the contract to the motion and they have the burden of proof on their motion for summary judgment. Accordingly, the Court can not determine the extent of their duties. Creative's motion is denied, without prejudice to renew.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
July 25, 2019

ENTER:

JEROME C. MURPHY
J.S.C.

ENTERED
JUL 26 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE