Fitzgerald v Walden Woods Homeowners Assn.
2019 NY Slip Op 34443(U)
September 24, 2019
Supreme Court, Westchester County
Docket Number: Index No. 63645/2017
Judge: William J. Giacomo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

- x

MARY FITZGERALD,

Plaintiff,

– against –

WALDEN WOODS HOMEOWNERS ASSOCIATION and SP&S LANDSCAPING & MASONRY, LTD.,

Defendants.

- x

Index No. 63645/2017

Sequence No. 1 & 2

DECISION & ORDER

In an action to recover damages for personal injuries the defendants separately move for summary judgment dismissing the complaint:

Papers Considered

1. Notice of Motion/Affirmation of Lucinda H. Alfieri, Esq./Exhibits A-M;
2. Affirmation of Robert J. Menna, Esq. in Opposition;
3. Reply Affirmation of Angelo M. Bianco, Esq.
4. Notice of Motion/Affirmation of John P. Meenagh, Jr., Esq./Exhibits A-Q;
5. Affirmation of Robert J. Menna, Esq. in Opposition;
6. Reply Affirmation of John P. Meenagh, Jr., Esq.

Factual and Procedural Background

On January 7, 2017, plaintiff allegedly slipped and fell on an eighth of an inch of snow on exterior steps outside her townhome located at 74 Round Hill Road in Dobbs Ferry. Plaintiff lived in a townhouse community known as Walden Woods. Plaintiff commenced this action against Walden Woods Homeowners Association ("Walden Woods") and SP&S Landscaping & Masonry, Ltd. ("SP&S"), the snow removal contractor.

Plaintiff testified that on the date of the accident it was cold and there was a light dusting of snow. She stated that it had not been snowing all day and that it stopped snowing three to four hours prior to the accident. Plaintiff testified that at the time of the accident she walked out of her home and was walking toward her car to get soda out of the trunk. She was wearing snow boots. Plaintiff walked on the pathway leading from her home to her parking spot and was looking forward. She observed that the pathway had not been cleared of snow. She continued to walk and as she stepped on the exterior wooden stairway she immediately slipped off and fell. After she fell, she observed a patch

of dark old ice under the layer of snow. Plaintiff did not see the ice prior to her fall. The wooden stairway had three stairs made of railway ties.

Although there was a handrail on the right side of the wooden stairway plaintiff did not use it because that side of the step was rotted. At 2:00 p.m. that afternoon when she left the house, she did not notice any ice or snow on the path or the staircase and did not have any trouble walking in that area. It was not snowing at that time. When she returned home at 3:30 she did not observe any snow or ice on the staircase and had no trouble walking on the staircase or the pathway. Plaintiff testified that there was no other accumulation of snow from previous storms in the area. She testified that between 3:30 and 8:30 p.m. it had snowed. At the time of the accident there was a dusting, approximately an eighth of an inch, in the area where the accident occurred.

Plaintiff identified a letter to Walden Woods residents dated December 2, 2016, stating that SP&S, as a courtesy, would be providing calcium chloride shakers to residents to use if their walkway or steps suddenly iced over. Plaintiff testified that she had the calcium chloride shaker at the time of the accident. She testified that although she saw the snow on the steps as she walked toward her vehicle, she did not get the calcium chloride.

Margaret Federici testified that she is employed by the property manager for Walden Woods. Federici identified the service agreement between Walden Woods and SP&S in effect in January 2017. The contract provided that during a snow storm, if there is more than an inch of snow, SP&S was required to plow the roadways and apply calcium chloride. When the storm ceased, SP&S would provide hand shoveling to the walkways in the development.

Each individual homeowner has a walkway that may be shared with another homeowner. Federici testified that the maintenance of the walkways was the responsibility of the individual homeowners. The landing area and the steps where plaintiff's accident occurred was the responsibility of the plaintiff as the owner of unit 74 and the owner of unit 72. Federici identified a photograph of the area where plaintiff's accident occurred, specifically the stairway, and testified that pursuant to the Walden Woods covenants and restrictions, the plaintiff and the owner of unit 72 was responsible for the maintenance of the stairway. Federici further testified that if there was an eighth of an inch of snow on the walkway it would be plaintiff's responsibility to put salt down if she felt it was necessary. Federici testified that between storms or after an initial cleanup is performed, it is the responsibility of the homeowners to maintain the walkways and the steps free of ice and snow up to one-inch.

Jean Patino testified on behalf of SP&S. Patino was familiar with the Walden Woods townhouse community. Patino testified that SP&S contracted with Walden Woods but also performed some side jobs for the particular homeowners. The homeowners themselves would contact SP&S directly for certain services. Patino confirmed that the snow removal obligations were triggered in Walden Woods when there was more than

one inch of snow. Once a storm stopped, SP&S would start cleaning the walkways. When the walkways were cleaned calcium chloride would be put down.

Patino identified the SP&S calendar for January 2017. Contrary to plaintiff's testimony, the SP&S calendar indicates that there were four to six inches of total snowfall that day. The calendar indicates that SP&S was at Walden Woods between 6:00 p.m. and 11:00 p.m. on the date of the accident.

Discussion

SP&S moves for summary judgment dismissing the complaint. SP&S argues that it did not owe a duty to the plaintiff who was a third party to its contract with Walden Woods. Moreover, SP&S argues that its contractual obligation was not triggered because it only provided snow removal services upon an accumulation of one inch of snow. SP&S further argues that the complaint must be dismissed due to the storm in progress doctrine.

Walden Woods moves for summary judgment dismissing the complaint on the grounds that there was a storm in progress at the time of plaintiff's accident. Walden Woods submits certified weather records for January 7, 2017, from Westchester County airport. The report indicates that traces of precipitation began at 9:00 a.m. and ended after midnight. For the day .02 inches of precipitation was reported.

In opposition, plaintiff argues that issues of fact exist as to whether there was a storm in progress at the time of the accident. As to SP&S, plaintiff argues that an issue of fact exists as to whether its snow removal efforts launched a force or instrument of harm. Plaintiff argues that an ice condition from pre-existing weather caused her to fall and not the trace amount of precipitation from that day's weather. Plaintiff also argues that SP&S failed to demonstrate that any snow removal efforts did not create a dangerous condition or exacerbate a natural hazard.

Generally, "a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties" (*Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 810 [2d Dept 2013]; *Bronstein v Benderson Dev. Co., LLC*, 167 AD3d 837, 838 [2d Dept 2018]). The Court of Appeals has recognized three exceptions to the general rule: "(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; (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 [2002] [internal quotation marks and citations omitted]; *Bronstein v Benderson Dev. Co., LLC*, 167 AD3d at 838).

Here, SP&S established, prima facie, that it did not owe the plaintiff a duty of care by demonstrating that the plaintiff was not a party to its snow removal contract with Walden Woods (*see Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955 [2d Dept 2016]). SP&S further established, prima facie, that the *Espinal* exceptions are not applicable.

In opposition, the plaintiff failed to raise a triable issue of fact. There is no evidence that SP&S launched a force or instrument of harm even if it was on site at the time of the accident. "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 783, 786 [2d Dept 2017] *quoting Santos v Deanco Servs., Inc.*, 142 AD3d 137, 138 [2d Dept 2016]). Plaintiff testified that there was no snow in the area from any previous storms. She further testified that there was only an eighth of an inch of snow on the walkway and stairway. Moreover, the evidence demonstrates that it was the homeowners responsibility to apply salt to their walkways where accumulations had not reached one inch. Moreover, the exception for launching a force or instrument of harm cannot be triggered where, as here, "there is only speculation and conjecture regarding whether the contractor created or exacerbated an icy condition" (*Santos v Deanco Servs., Inc.*, 142 AD3d at 143).

Plaintiff also failed to raise an issue of fact as to whether she detrimentally relied on the continued performance of SP&S's duties, or whether SP&S entirely displaced the owner's duty to maintain the premises in a safe condition (*see Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955 [2d Dept 2016]). Although the snow removal contract obligated S&P to plow snow at any time snowfall reaches a depth of one inch, it was not a comprehensive or exclusive agreement obligating SP&S to maintain the entire premises. SP&S did not displace the owners' general duty to keep the premises in a safe condition, and thus SP&S owed no such duty of care to the plaintiff (*see Linarello v Colin Serv. Sys., Inc.*, 31 AD3d 396, 397 [2d Dept 2006]). Therefore, SP&S is entitled to summary judgment.

Walden Woods moves for summary judgment arguing that the storm in progress doctrine is applicable. Under the storm in progress rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm (*Marchese v Skenderi*, 51 AD3d 642, 642 [2d Dept 2008]; *see Solazzo v New York City Tr. Auth.*, 6 NY3d 734 [2005]; *McCurdy v KYMA Holdings, LLC.*, 109 AD3d 799 [2d Dept 2013]). Walden Woods failed to establish, prima facie, entitlement to judgment as a matter of law on the grounds that the storm in progress rule applies.

Plaintiff's testimony reveals that it was not snowing at 2:00 p.m. when she left her home in Dobbs Ferry that day and it was not snowing at 3:30 p.m. when she returned home that day. At the time of the accident, plaintiff testified that it was snowing and that an eighth of an inch of snow had accumulated. This testimony is supported by the certified weather reports from Westchester County airport demonstrating that there was trace amounts of snow between 9:00 a.m. and midnight resulting in .02 of an inch of accumulation.

While it was snowing at the time of the accident, there was no measurable accumulation to support a finding, as a matter of law, that there was a storm in progress (*see Dancy v New York City Hous. Auth.*, 23 AD3d 512 [2d Dept 2005]). Thus, Walden Woods failed to demonstrate that there was a storm in progress at the time of the accident.

The Court notes that the SP&S calendar log for the day of plaintiff's accident indicates that SP&S was at Walden Woods between 6:00 p.m. and 11:00 p.m. and that four to six inches of snow had fallen that day. While this creates an issue of fact as to whether there was a storm in progress at the time of the accident Walden Woods is entitled to summary judgment on other grounds.

"A 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" (*Cuillo v Fairfield Prop. Servs., L.P.*, 112 AD3d 777, 778 [2d Dept 2013]; *see Mignogna v 7-Eleven, Inc.*, 76 AD3d 1054 [2d Dept 2010). The evidence demonstrates that the Walden Woods did not create the dangerous condition or have actual or constructive notice of such condition.

Plaintiff's argument that she slipped on an old patch of ice is belied by her own testimony that she did not observe any ice on the stairway at 2:00 p.m. or 3:30 p.m. that day and that there was no other snow present in the area from any prior storms. Plaintiff testified that there was no snow on the steps at 3:30 p.m. on the date of the accident. At some point between 3:30 and 8:30 p.m. when she walked outside it had snowed. This snowfall, according to plaintiff herself, was only an eighth of an inch accumulation. Federici testified that the individual unit owners were responsible for the maintenance of the walkways leading from their units to the curb which included salting the area if there was less than one-inch of snow. Thus, Walden Woods demonstrated that it did not create the condition or have actual or constructive notice of the condition (*see Cuillo v Fairfield Prop. Servs., L.P.*, 112 AD3d 777; *Gushin v Whispering Hills Condominium I*, 96 AD3d 721 [2d Dept 2012]).

Accordingly, it is

ORDERED that the motion of the defendant Walden Woods Homeowners Association for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is GRANTED (motion sequence 1); and it is further

ORDERED that the motion of the defendants SP&S Landscaping & Masonry, Ltd, for summary judgment dismissing the complaint and all cross claims is GRANTED (motion sequence 2); and it is further

ORDERED that the complaint is dismissed.

Dated: White Plains, New York
September 24, 2019

HON. WILLIAM J. GIACOMO, J.S.C.