Sion v Grant Mgt. Servs., Co.
2019 NY Slip Op 34802(U)
March 19, 2019
Supreme Court, Nassau County
Docket Number: Index No. 602439/17
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

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ANN SION,

Plaintiff(s),

-against-

GRANT MANAGEMENT SERVICES, CO., JONATHAN AUTO REPAIR, INC. and BARSTOW OWNERS CORP.,

Defendant(s).

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TRIAL/IAS, PART 21
NASSAU COUNTY

Index No. 602439/17

Motion Seq. No.: 003, 004 & 005
Motions Submitted: 1/18/19

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XX
Notice of Cross Motion/Supporting Exhibits.....X
Affirmations in Opposition/Supporting Exhibits.....XXXX
Affirmation in Support/Opposition.....X
Reply Affirmations.....XXXX

Defendant, Jonathan Auto Repair, Inc. (Jonathan), moves this court (Motion Seq. 003), pursuant to CPLR §3212, for an order granting summary judgment and dismissing the complaint and all cross claims against it. Co-Defendants, Grant Management Services (Grant) and Barstow Owners Corp. (Barstow), and Plaintiff, Ann Sion (Sion) oppose the motion. Grant and Barstow move separately (Motion Seq. 004) for an order

granting them summary judgment and dismissing the complaint and all cross claims against them. Jonathan opposes the motion. Sion opposes the motion and cross moves (Motion Seq. 005) for an order, pursuant to CPLR §3025, for leave to amend her bill of particulars. Grant and Barstow oppose the cross motion.

Sion commenced this slip and fall action by service of a summons and complaint dated March 20, 2017. Issue was joined by service of an answer with cross claims by Grant and Barstow dated April 28, 2017. Jonathan interposed an answer with cross claims dated June 16, 2017. The case certified ready for trial on May 10, 2018 and a note of issue was filed on August 7, 2018.

The following facts are taken from the pleadings, the deposition transcripts and other exhibits annexed to the moving papers. Sion owns a co-op apartment in Great Neck, County of Nassau. Barstow owns the premises and Grant was hired by Barstow to manage the premises. Jonathan was hired as the snow removing contractor by Grant on behalf of Barstow. On February 9, 2017, it snowed approximately 12 inches. Once the snow stopped, Jonathan came to the property to plow, shovel and disseminate salt and sand. On February 10, 2017, at approximately 9:15 a.m., Sion, then 80 or 81years old, left her apartment with the intention of getting into her car and driving to the doctor.

Her car was in her garage which was to the back of her apartment. There was a driveway that she and seven other co-tenants would use to access their garages. The driveway could be described as an alleyway, with access to the street from only one side.

Standing with one's back to the street, all the garages were on the right, and Sion's was the second one in. It is undisputed that from the entrance of the driveway until just before the first garage, the driveway declines steeply.

Normally, Sion could walk out of her apartment, walk down some steps and be at her garage. On February 10, 2017, however, she claims snow was blocking access to the steps, so she had to walk out of her apartment, and then walk down the length of the driveway. As she began walking down the driveway, she kept to the right-hand wall because it had a handrail. She used the handrail to navigate the steep decline, and she claimed there was still snow and ice in places. She recalled seeing some sand, but did not recall seeing any salt. Toward the end of the decline, just before where the steps are, the handrail ends. Based upon pictures, it appears to be between 20 to 30 feet from the end of the handrail to her garage door. The first 10 feet, at least, are still part of the decline. After letting go of the handrail, Sion took a few steps and then slipped and fell, causing her a serious head injury. Her next door neighbor happened to look out the back window of his apartment and saw her on the ground

Jonathan moves for summary judgment claiming it owed no duty to Sion and that none of the exceptions elucidated *Espinal v. Melville Snow Contractors, Inc.,* 98 N.Y.2d 136 (2002) apply herein . Barstow and Grant move for summary judgment, arguing they were not negligent and had no notice of a dangerous or defective condition.

It is well settled that in a motion for summary judgment the moving party bears the

burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.,* 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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 Zuckerman v. City of New York,* 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy,* 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). "To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

A defendant who moves for summary judgment in a slip-and-fall-action has the initial burden of making a prime facie demonstration that it neither created the dangerous condition, nor had actual or constructive notice of its existence (*see Manning v. Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006].

JONATHAN'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 003)

Relying on the rule enunciated in *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 [2002], Jonathan claims that it has no liability for Sion's injuries because it complied with and met the terms of the contract with Barstow, and had no contractual

relationship with Sion. The contract, which states it is between Jonathan and "Barstow Owners Corp. c/o Grant management Services" and was signed by Marsha Grant, principal of Grant as agent for Barstow, is mostly a price list. It indicates, depending upon the accumulation of snow, how much their services will cost. At the end of the contract, it states:

> Salt or Sand will be applied together or separate due to the temperatures.
> It will be determined whether one or both are needed.
> Amounts will be adjusted to snow fall per storm if accumulations become more [sic].
> Contractor to monitor weather.

The only exceptions to the *Espinal* rule are: 1) where the contracting party launches a force or instrument of harm, 2) where the plaintiff relies, to her detriment, on the continuing performance of the contractor's duty and 3) where the contracting party has completely absorbed the landowner's duty to maintain the premises. (*Id.; Santos v. Deanco Services, Inc.*, 142 A.D.3d 137 [2nd Dept. 2016]).

Herein, the contract makes clear that the Jonathan did not absorb Grant's or Barstow's duties to maintain the property. Thomasine Sandul, a representative of Grant, testified that different companies are hired to for different purposes for Barstow. While Jonathan was hired for snow removal, other entities are used for landscaping and other maintenance issues. In fact, the contract between Barstow and Grant indicates Grant would cause the building to be maintained, and this included cleaning the premises inside

and out, repairs and alterations to "...electrical, plumbing, steam fitting, carpentry masonry, elevator, decorating and such other incidental alterations" as would arise. Therefore, as its duties were limited to snow removal, it cannot reasonably be argued that Jonathan absorbed Barstow's duty to maintain the premises. Further, there is no evidence that Sion relied upon the continuing performance of Jonathan's duties, despite Sion attempting to couch her testimony in those terms. Therefore, the remaining question is whether Jonathan has established it did not launch a force or instrument of harm.

Jonathan agrees it performed snow removal and de-icing services the day before the accident, and did not know at what time it performed the services, but did know Barstow was the first client it serviced that day. Jonathan claims to have never been told of any complaints about the manner in which it cleared snow from Barstow, and Ms. Grant testified both that the only complaints she heard were about cost, and that Jonathan did its job well. Further the mere existence of ice in the parking is not an indication that Jonathan either inadequately performed its duties or exacerbated a dangerous condition. (*Espinal v. Melville Snow Contractors, Inc.*; *Santos v. Deanco Services, Inc*, *supra*). Though Jonathan denies that it failed to properly apply salt and sand to prevent icing, assuming they did fail to do so, that failure resulted in a pre-existing condition from not improving, not the launching of an instrument of harm. *Id.* The court therefore finds that Jonathan has established entitlement to summary judgment as against Sion on the complaint and Barstow and Grant on the cross claims. The burden

shifts to Sion to raise a material issue of fact requiring a trial of the action and to Barstow and Grant on the cross claims.

In opposition, Sion first argues that Jonathan assumed a comprehensive responsibility for snow removal at the property. In so stating, Sion argues that this falls within an exception to *Espinal*. Sion spends a great deal of time discussing *Pulka v. Edelman*, 40 NY2d 781 (1976), a case the Court of Appeals distinguishes in *Espinal* from circumstances involving snow removal contractors. In *Pulka*, the court found that the defendant had a comprehensive and exclusive duty to maintain the entire premises of a hospital, which made them liable to the injured plaintiff. In *Espinal*, the court found that a contractor whose duties were limited to snow removal and did not have a "property maintenance obligation." Herein, Jonathan only had snow removal duties, and the evidence supplied by Sion herself indicates that there were many other areas of property maintenance for which other contractors were required. Therefore, Jonathan's contractual duties did not completely absorb Barstow's and Grant's duties to maintain its premises.

Sion next argues that Jonathan launched an instrument of harm. First, because Sion claims to have been unable to access the steps down to her garage based upon plowed snow blocking the area, Jonathan launched an instrument of harm in forcing her to walk down the driveway. Second, the accumulation of ice was another instrument of harm launched by Jonathan's failure to disseminate salt and sand in the area where Sion

fell. The court rejects these arguments.

Even assuming it was true that snow blocked the steps to the extent that Sion had to walk down the driveway, it was not the blocked stairs that caused the alleged dangerous condition, but the alleged ice at the bottom of the driveway. The court notes that the pictures provided by Sion indicate that had she used the steps, she likely would have encountered the same icy condition as she seemed to fall right at the bottom of the steps. Further, as discussed, *supra*, the existence of ice where a contractor fails to use sand and salt does not equate to the launching of an instrument of harm, but was the failure to ameliorate a preexisting icy condition. Further, Jonathan states they did use salt and sand, and Sion never stated there was no salt and sand used. She stated she did not see any at the time of her fall, but did testify to seeing some sand. This undermines her arguments.

Finally, the court finds the third *Espinal* exception does not apply either. While Sion's deposition testimony is carefully worded at times to try to create the impression of her detrimental reliance on Jonathan doing its job, she does not establish that fact. It is clear there was no contractual privity between Sion and Jonathan, and that Sion was, prior to this action, aware there was a snow removal contractor, but did not know who it was. When she began walking down the driveway, she did so based upon her desire to get to her car, and based upon what she saw. She did not testify that she assumed the snow removal had been completed satisfactorily based upon prior performance, and therefore

she relied upon that as she started walking down the driveway. The court therefore finds Sion is unable to raise a material issue of fact.

Grant and Barstow make three cross claims against Jonathan[1]. The cross claims for contractual indemnity and failure to procure insurance are dismissed outright. The contract is silent on these issues and the court cannot write new terms into a contract that do not exist. The third cross claim is for common law indemnification. For a party to be responsible for common law indemnification, that party must be "actively at fault in bringing about the injury". (*McCarthy v. Turner Constr, Inc.* 17 NY3d 369, 375 [2011]). The party seeking indemnification must be vicariously liable without proof of its own negligence. *Id.* Herein, as the court finds both that Jonathan was not negligent, and that Grant and Barstow have failed to establish their lack of negligence, common law indemnification is not available to them. Therefore, they are unable to raise an issue of fact.

GRANT AND BARSTOW'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 004)

Grant and Barstow make four arguments in favor of summary judgment. Three are without merit. Citing to Housing Maintenance Standards, Chapter 124-44(C) of Article VI of the Great Neck Village Code, Grant and Barstow argue both that they, separately, did not have sufficient time to remove the snow. That section of the Village Code

[1]They are numbered the "Second", "Third" and "Fourth" cross claims. There is no "First".

indicates that snow and ice shall be cleared "within 24 hours" after it has stopped snowing or after ice has formed. However, Section 174-2 of the Village Code holds that landowners must remove snow and ice from "sidewalks, steps, walks, driveways, parking areas and similar paved areas..." within two hours if the snowing ends between 10:00 a.m. and 6:00 p.m. Monday through Saturday, except for holidays. Section 174-6 indicates that should this section contradict another section of the Code, this section prevails.

Herein, the snow stopped at 4:00 p.m. on Thursday, according to Grant and Barstow. Applying Section 174-2, they had until 6:00 p.m. on February 9, 2017, not 4:00 p.m. on February 10, 2017, to clear the snow. As a result, their argument about not having enough time must fail.

Barstow next argues it did not owe a duty to Sion. This argument must fail because a landowner is always under the obligation to maintain its premises in a reasonably safe condition. (*Giulini v. Union Free School Dist. # 1, supra*). Owing a duty does not automatically mean one is liable. To establish liability, it still must be proven that Barstow knew of the dangerous condition, but the duty exists to maintain the property in a safe manner.

The third argument is that there is no proximate cause. However, in the moving papers, Grant and Barstow merely cite case law on proximate cause, but offer no argument how it relates to this case. Therefore, based upon the foregoing, Barstow has failed to establish entitlement to summary judgment as a matter of law, regardless of the

sufficiency of the opposition papers.

The one argument Grant makes that has merit is that Sion failed to plead any of the *Espinal* exceptions in her complaint or bills of particulars. If properly pled, a defendant's obligation is to then negate those exceptions. (*Sperling v. Wycoff Heights Hosp.*, 129 AD3d 826 [2d Dept 2015]). As Grant is is a contractor, for liability to attach an *Espinal* exception must be pled. Since they were not, Grant has established entitlement to summary judgment as a matter of law. The burden shifts to Sion to raise a material issue of fact requiring a trial of the action.

In opposition, Sion acknowledges the failure to plead any of the *Espinal* exceptions, but points out that the exceptions can still be raised to oppose the motion. (*Foster v. Herbert Slepoy Corp.*, 76 AD3d 210 [2d Dept 2010]). It does not require a great deal of effort to realize that Grant's contract with Barstow was comprehensive. Ms. Grant testified that she does "everything" for her clients including Barstow, and as listed, *supra*, the contract between Barstow and Grant requires Grant to maintain the premises, inside and out, including electricity, plumbing and all other systems. Therefore, at least one of the exceptions apply. Further, Sion has raised an issue of fact as to whether Grant had actual or constructive notice of the icy condition of the driveway. All parties have pointed out the weather conditions, and how it snowed until 4 p.m on February 9, and how Sion fell around 9:15 a.m. on February 10. The certified weather report submitted by Sion also indicates that the temperature never raised above freezing from the time the

snow started until Sion fell. There is a question of fact, therefore, as to whether an icy condition existed for a long enough period of time that Grant should have been aware of it. As such, Barstow's and Grant's motion for summary judgment will be denied. However, as the court has previously found Jonathan not liable, Jonathan's cross claims against Grant and Barstow will be dismissed as moot.

SION'S MOTION TO AMEND HER BILL OF PARTICULARS (MOTION SEQ. 005)

Herein, Sion seeks to amend her bill of particulars to add a violation of Village Code §174-2, referenced *supra*. " 'Leave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit' " (*Bloom v. Lugli*, 102 AD3d 715 [2d Dept 2013]; quoting *Greco v. Christoffersen*, 70 AD3d 769, 770 [2d Dept 2010], quoting *Gitlin v. Chirinkin*, 60 AD3d 901, 901–902 [2d Dept 2009]; see CPLR 3025[b];). "A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed" (*Gitlin*, 60 AD3d at 902; see *Greco*, 70 A.D.3d at 770). "The granting of such leave is committed to the sound discretion of the trial court and must be determined on a case-by-case basis" (*Biaggi & Biaggi v. 175 Medical Vision Properties, LLC*, 105 AD3d 790, 791 [2d Dept. 2013]; quoting *Skinner v. Scobbo*, 221 A.D.2d 334, 335 [2d Dept 1995]).

In opposition, Grant and Barstow argue that Sion failed to offer an excuse for the

delay, and address the merit of the amendment. They further argue that Sion failed to include the proposed amended bill of particular as an exhibit, and that, regardless, §174-2 does not "appear" to apply to Sion's residence.

While it is true that Sion fails to offer an excuse for the delay in seeking the amendment, delay absent prejudice is not grounds to deny the motion. (*Skinner v. Scobbo*, *supra*). Further, the court finds the error of not including a proposed amended bill of particulars was cured by including it in the reply papers. Sion is seeking to add a section of the Village Code, not add a new cause of action or new theory of liability, rendering the necessity of submitting a proposed amendment less relevant. More importantly, Grant and Barstow fail to explain how they will be prejudiced by allowing the amendment. Mere lateness, or exposure to greater liability does not constitute prejudice. (*Dolan v. Garden City Union Free School Dist.*, 113 AD3d 781 [2d Dept 1985]). As the court finds there is no prejudice, and as none is argued, the motion to amend will be granted. Finally, the argument that Section 174-2 does not apply to the Barstow property is speculative. This is acknowledged by Barstow and Grant in stating that it "appears" not to apply. This lack of certainty alone raises an issue of fact.

Accordingly, it is hereby

ORDERED, that Jonathan's motion (Motion Seq. 003) for summary judgment is GRANTED in its entirety. The complaint is dismissed against Jonathan and all cross claims against Jonathan are dismissed. As the court finds Jonathan not liable, Jonathan's cross claims

are dismissed as moot; and it is further

ORDERED, that Grant's and Barstow's motion (Motion Seq. 004) for summary judgment is DENIED in its entirety; and it is further

ORDERED, that Sion's motion (Motion Seq. 005) to amend the bill of particulars is GRANTED. The proposed bill of particulars annexed to the reply papers is deemed served upon Grant and Barstow.

The court has considered the other arguments raised by the parties and finds them to be without merit.

This constitutes the Decision and Order of the Court.

Dated: March 19, 2019
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED
MAR 20 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE