Brillante v Mid Is. Physical Therapy, PLLC
2020 NY Slip Op 34974(U)
November 23, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 611655/16
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

MICHAEL BRILLANTE and JOYCE BRILLANTE,

Plaintiffs,

-against-

MID ISLAND PHYSICAL THERAPY, PLLC and 1245 MIDDLE COUNTRY ROAD, LLC,

Defendants.

MICHAEL BRILLANTE and JOYCE BRILLANTE,

Plaintiffs,

-against-

EMPIRE LANDSCAPE & DESIGN, INC.,

Defendant.

Index No.
611655/16

Motion Seq:
006 MG

Decision/Order

The following electronically filed papers were read upon this motion:

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Defendant Mid Island Physical Therapy, PLLC (Mid Island) seeks summary judgment dismissal of the complaint and any and all cross-claims asserted against it on the ground that Mid Island did not owe a duty of care to the injured plaintiff (Michael Brillante) since his accident occurred in the common parking lot of the strip mall for which Mid Island had no duty to

perform any maintenance/work. Plaintiffs oppose the requested relief, but neither of the co-defendants has submitted any opposition to the instant motion.

It is undisputed that Mid Island rents a unit in the strip mall known as Strathmore Commons. Mid Island's unit consists of approximately 3,000 square feet of gross rentable space. The entire Commons is sixteen (16) acres in size, with 150,000 square feet of building space and four hundred (400) parking spots located in its parking lot. There are approximately twenty (20) tenants, and the parking spots are shared by all tenants of the Commons, meaning that no tenants have been assigned any particular spots for their respective customers. There is a sidewalk that runs in front of the tenants' units that is bordered by a curb from which one steps down into the parking lot. The parking lot is located in the middle of the strip mall. It is further undisputed that co-defendant 1245 Middle Country Rd., LLC (1245) owns the entire strip mall, and that its property manager is Island Associates Real Estate, Inc. Defendant Empire Landscape & Design, Inc. (Empire) is the snow removal contractor hired by 1245 who had last performed services on March 5, 2015, two days before plaintiff's accident on March 7, 2015.

In support of its motion for summary judgment, Mid Island submits, *inter alia*, the pleadings, its prior motion for summary judgment that was withdrawn for prematurity, the deposition transcripts of the parties, two photographs, and the lease with amendments existing between itself and the property owner/manager.

Robert A. Bartoli, Jr. testified that he owns the Mid Island physical therapy business and that he is a physical therapist. According to his testimony, he rents the unit out of which he operates his business, but he does not own the unit or any part of the 1245 property. He also testified that he is familiar with the lease under which he rents his unit, and he described it as a "vanilla lease," meaning that he is responsible for taking care of what is inside his walls. In Mid Island's prior summary judgment motion submitted as part of the instant motion (Exhibit F), Mr. Bartoli's affidavit sworn to on October 25, 2017 attests to the authenticity of the lease and amendments attached thereto. The Court has compared that lease and the amendments annexed to Mr. Bartoli's prior affidavit to Exhibit U that is made part of the instant motion, determining that Exhibit U and the lease and amendments annexed to Mr. Bartoli's prior affidavit are identical. Accordingly, the lease and amendments have been authenticated and may be considered by this Court in the determination of this motion.

Moreover, Robert Monahan, the property manager for 1245, testified that he is also familiar with the terms of the lease that was in effect on March 7, 2015. Based upon the testimony of Mr. Bartoli and Mr. Monahan, there is no question that the tenants are responsible to remove snow and ice from the sidewalks adjoining their respective units, but that the landlord (1245) is responsible to maintain the parking lot, including snow and ice removal from that parking lot.

"Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property" (***Russo v Frankels Garden City Realty Co.***, 93 A.D.3d 708, 710 [2d Dept 2012]). Before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to plaintiff. Whether a defendant

owes a duty to a plaintiff is a question of law to be determined by the court (***Purdy v Public Administrator of the County of Westchester***, 127 AD2d 285, 288 [2d Dept 1987]). "Under these circumstances, [HBS] owed the injured plaintiff no duty of care to maintain or repair the parking lot, and may not be held liable for permitting the existence of a dangerous condition" (***Millman v. Citibank, N.A.***, 216 AD2d 278, 278 [2d Dept 1995]; *see also* ***Kubicsko v. Westchester County Electric, Inc.***, 116 AD3d 737, 739 [2d Dept 2014]). "In the absence of duty, there is no breach and without a breach there is no liability" (***Pulka v. Edelman***, 40 NY2d 781, 782 [1976]).

The two submitted photographs (Exhibit T) were initialed by the injured plaintiff, who testified that the "X" marks the spot where he fell. It is clear that the spot where Michael Brillante fell is in the parking lot, in a handicapped parking space. In addition, Mr. Brillante unequivocally testified that he fell at the driver's side door of his vehicle, as he was attempting to get back into his car that was parked in a handicapped parking spot. Mr. Brillante testified that the parking lot was covered in ice and snow, and as he opened his driver's side door, one of his feet slipped and he fell to the ground. The only apparent connection to Mid Island is the plaintiffs' testimony that they went to the strip mall on March 7, 2015, a Saturday, to drop off a prescription for physical therapy to be administered to Joyce Brillante. It is undisputed that the plaintiffs did not have an appointment with Mid Island for the day of the accident, nor did they call ahead to ensure that Mid Island was even open. When they arrived at the strip mall, they both got out of their car and walked over the parking lot, to the Mid Island's door, only to discover that it was closed. Neither plaintiff could recall when they were last at Mid Island, but they acknowledged that both of them had treated at Mid Island for years prior to the subject accident, and that Michael Brillante even treated with Mid Island after the subject accident. Mid Island's Bartoli testified that he had treated one or both plaintiffs in 2010 and in 2012, based upon his billing records, but he was not open on Saturdays in 2015 and had not been open on Saturdays even as far back as 2010 and 2012. Furthermore, neither of the plaintiffs had an appointment to see him on March 7, 2015.[1]

As of the last day that Mid Island was open for business as usual prior to plaintiff's accident, which was March 6, 2015, Mr. Bartoli testified that none of his patients complained to him regarding the condition of the parking lot, and he was not aware of anyone else who slipped and fell in the parking lot during the winter of 2015, prior to March 7, 2015. Mr. Bartoli did not speak to the landlord on March 6, 2015, and Mid Island has no shovels or snow removal equipment on its premises aside from ice melt that Bartoli testified he may put down as needed on the sidewalk immediately adjacent to his unit; however, Mr. Bartoli did not testify that he placed any ice melt on the sidewalk on any of the days immediately preceding plaintiff's fall. Further according to Mr. Bartoli, there was no time during the week preceding plaintiff's fall that he was unable to open Mid Island for business because the parking lot had not been cleared.

It is undisputed that the lease terms establish that Mid Island is not responsible for maintenance and/or repair of the parking lot where plaintiff fell. Defendants' respective

[1] The Court notes that Michael Brillante treated with Mid Island even after the subject accident for injuries that he alleges he suffered as a result thereof.

deposition transcripts serve to independently confirm that Mid Island had no responsibility for maintaining the parking lot, and that Mid Island did not have exclusive possession of the subject parking lot or any of the parking spaces. Mid Island used the parking lot in common with the other tenants of the subject premises, and based upon Mid Island's submissions, there is no evidence that Mid Island made special use of the parking lot, or that Mid Island created the alleged dangerous condition. Furthermore, plaintiffs' Bill of Particulars alleges only common law negligence as the premise upon which plaintiff asserts that Mid Island is liable for Michael Brillante's resultant injuries. Since Mid Island has established that the parking lot where the injured plaintiff's accident occurred was part of the strip mall shopping center's common parking area, the maintenance of which was the sole responsibility of 1245, Mid Island has tendered sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 MY2d 851, 853 [1985]), thereby demonstrating its *prima facie* entitlement to summary judgment as a matter of law (***Koutsiaftis v. Alliance Parking Services, LLC***, 175 AD3d 1519, 1520 [2d Dept 2019]; ***Henriquez v. Inserra Supermarkets, Inc.***, 89 AD3d 899, 900 [2d Dept 2011]).

The burden now shifts to the plaintiffs to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

In opposition, plaintiffs rely upon the same deposition transcripts of the parties while also contending that the submitted lease is not admissible for lack of authentication. Plaintiffs' argument with respect to the lease is unpersuasive in view of the fact that the parties to the lease testified that they were familiar with its terms, including the fact that the tenants are not responsible for maintaining the parking lot, and the lease and its addendums were authenticated by Mid Island's principal, Robert Bartoli, in his affidavit that was also submitted with the instant motion.

Plaintiffs' arguments concerning Mid Island's alleged failure to make a *prima facie* showing that it did not create or have actual or constructive notice of the ice and snow in the parking lot in time to remedy it is inapposite to the established fact that Mid Island is not responsible to maintain the common parking lot and the utter lack of any evidence that Mid Island has a duty to monitor and report conditions in the parking lot to the landlord (1245) (*see* ***Koutsiaftis***, ***supra***; ***Henriquez***, ***supra***).

Plaintiffs' claim that Mid Island owed a common law duty to remove dangerous conditions from the parking lot is not supported by the submitted record, and plaintiffs have not raised a material question of fact necessary to defeat Mid Island's motion. Specifically, plaintiffs have not raised a material question of fact as to Mid Island's actual or constructive knowledge of the defective condition. Plaintiffs' hearsay testimony about what Mr. Bartoli said to Michael Brillante when Mid Island rendered treatment to Brillante after the subject accident is admissible upon a summary judgment motion, but it is insufficient to bar summary judgment since it is vague and speculative (*see* ***Stock v Otis Elevator Company***, 52 AD3d 816 [2d Dept 2008]).

Plaintiffs specifically rely upon Mr. Brillante's testimony that he spoke to "Bob," the owner of Mid Island after Brillante's accident, and that Bob "told me on many occasions the number of times he told the landlord to clean that property because it was dangerous to his clients," that "Bob" "complained to me [Brillante] a number of times about the dangerous conditions out there," and that "Bob" has "complained to the landlord, he told me, about the dangerous conditions in the parking lot." When plaintiff was asked what Bob told him about the landlord's response, plaintiff testified that Bob "would just shake his head." Plaintiff did not indicate what he understood the head shake to mean. More importantly, when plaintiff was asked if he knew when Bob allegedly made those complaints to the landlord about the parking lot, the plaintiff answered, "No, I don't." Later in the plaintiff's deposition, plaintiff indicated that he had one conversation with Bob, "once when [he] was there for physical therapy," "after the accident." Plaintiff was asked how long after his accident did this one conversation with Bob take place, but plaintiff answered, "I don't recall. Bob complained about the landlord quite a bit, about his air-conditioning." Finally, when the plaintiff was asked, "Did Bob tell you whether he made the complaints to the landlord before or after your accident?," the plaintiff replied, "I don't recall." Mr. Brillante's testimony as outlined is vague and lacking a specific timeframe, in addition to being the only evidence that plaintiffs point to in their affirmation in opposition in order to attempt to raise a triable issue of fact as to an alleged common law duty; accordingly, this testimony is insufficient to defeat Mid Island's motion (***Stock***, ***supra***). The Court further notes that none of Mr. Brillante's testimony contradicts the established fact that, according to the lease, Mid Island has no responsibility to maintain the common parking lot of the strip mall owned by 1245.

It is this Court's determination that the plaintiffs have failed to raise a material triable issue of fact sufficient to defeat Mid Island's summary judgment motion. Mid Island's motion is granted and the complaint and any and all cross-claims are dismissed as asserted against Mid Island.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 23, 2020
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

AS TO MID ISLAND PHYSICAL THERAPY, PLLC: FINAL DISPOSITION [X]

NON-FINAL DISPOSITION [ ]