

Wood v Gumberg

2020 NY Slip Op 34980(U)

May 14, 2020

Supreme Court, Erie County

Docket Number: Index No. 810662/2016

Judge: Daniel J. Furlong

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This opinion is uncorrected and not selected for official publication.

PRESENT: HONORABLE DANIEL J. FURLONG, J.S.C.

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

ROSALIND WOOD and THEODORE WOOD
Plaintiffs

DECISION

v

Index No. 810662/2016

MARSHA M. GUMBERG,
ICT GROUP, INC.,
LG REALTY ADVISORS, INC. And
DREAMSCAPES LANDSCAPING,
Defendants

DREAMSCAPES LANDSCAPING
Third-Party Plaintiff

v

SYKES ENTERPRISES, INCORPORATED
Third-Party Defendant

FURLONG, J.

Rosalind Wood commenced this action seeking damages for injuries allegedly sustained when she slipped and fell on ice in a paved area on property owned by Defendant Marsha M. Gumberg. Plaintiff, Theodore Wood, is the spouse of Rosalind Wood. His claim is derivative and not based on any physical injuries to himself.

Defendant Marsha M. Gumberg resides out-of-state and is an out-of-possession landlord. Defendant, LG Realty Advisors, Inc. (Hereinafter referred to as “LG”), was employed by Marsha M. Gumberg to manage the property. LG is also located out-of-state.

The property, at the time of the alleged incident, was leased to ICT Group, Inc. (hereinafter referred to as “ICT”). ICT, prior to the incident, became Sykes Enterprises, Incorporated (hereinafter

referred to as “Sykes”). Sykes, prior to the incident, contracted with Dreamscapes Landscaping (hereinafter referred to as “Dreamscapes”) to perform snow and ice removal and maintenance services at the property. All discovery has been completed.

Pending before the Court are the following motions:

- A. Marsha M. Gumberg and LG’s Summary Judgment Motion seeking to dismiss all claims and Causes of Action filed against them; and
- B. Dreamscapes Summary Judgment Motion seeking dismissal of all claims and Causes of Action filed against it by Plaintiffs and dismissal of all cross-claims brought against Dreamscapes by Sykes.
- C. Dreamscapes further seeks alternative relief should its Summary Judgment Motion be denied. Dreamscapes seeks a ruling that Sykes should contractually indemnify and hold harmless Dreamscapes for any injuries to Plaintiff, Rosalind Wood, arising from any negligence of Sykes.

A. **Marsha M. Gumberg and LG’s Summary Judgment Motion**

In response to Defendants Summary Judgment Motion, Plaintiffs advance two (2) theories of liability with regard to Marsha M. Gumberg and LG. (Note: Plaintiffs have conceded that Marsha M. Gumberg is an out-of-possession landlord).

First, that (a) Marsha M. Gumberg retained the right under the lease to re-enter the premises for inspection and to make repairs and improvements; and (b) that Marsha M. Gumberg violated a specific statute, to wit: New York State Property Maintenance Code Section 302.3; and (c) that the alleged icy condition resulted from a significant structural or design defect.

The Court finds that Plaintiffs have made a prima facie showing as to issue (a) by directing attention to Marsha M. Gumberg’s Lease with ICT/Sykes. Said Lease, at Article XV states: “At any

time during the term of this lease the lessor or his agent may enter the demised premises to inspect the same and to make repairs and improvements.”

The Plaintiffs submit the Affidavit of William Van Cott in support of issues (b) and (c). Robert Scott, Esq., attorney for Marsha M. Gumberg and LG, submitted a Reply Affirmation dated November 15, 2019.

In said Affirmation, attorney Scott argues that Mr. Van Cott is not a valid expert, that his methodology is flawed and that his “expert” opinion is of no value. The Court agrees with Mr. Scott and the assertions set-forth in his Reply Affirmation. The Court finds Mr. Van Cott is not a valid expert and rejects his findings and conclusions. Plaintiffs, therefore fail to present a prima facie showing as to issues (b) and (c). This first theory of liability advanced by Plaintiff is not sustained as a matter of law.

Plaintiffs’ second theory of liability regarding Marsha M. Gumberg and LG is that the alleged icy condition causing Plaintiff’s, Rosalind Wood’s, injury was created by Marsha M. Gumberg and LG in that the construction or design of the premises is defective. Under this theory, Plaintiffs need not establish that Marsha M. Gumberg or LG had actual or constructive notice of the condition.

Plaintiffs’ second theory of liability is supported solely by the Affidavit of Mr. Van Cott. As previously stated, the Court finds that Mr. Van Cott is not a valid expert and rejects his findings and conclusions. Plaintiffs, therefore, fail to present a prima facie showing as to the issues of defective design or construction. The second theory of liability advanced by Plaintiffs is not sustained as a matter of law.

It is therefore ordered that Defendants Marsha M. Gumberg and LG’s Summary Judgment Motion dismissing all claims and Causes of Action against them is granted.

B. Dreamscapes Summary Judgment Motion

The following facts are undisputed:

1. Plaintiff's, Rosalind Wood's, fall occurred on February 3, 2014 on the sidewalk leading into Plaintiff's, Rosalind Wood's employer's place of business.
2. Plaintiff, Rosalind Wood, claims that she fell because of ice on the sidewalk.
3. That Dreamscapes and Sykes entered into a contract on October 20, 2013 entitled "Annual Winter Maintenance Service Agreement" (hereinafter referred to as the "Agreement"). (The entire Agreement is attached to Dreamscapes Motion as Exhibit C).
4. The Agreement's relevant terms are as follows:
 - a. Sykes engaged Dreamscapes to do plowing and shoveling services of the parking lot and sidewalk. Dreamscapes was obligated to provide said services when there was a minimum of 2" of snowfall.
 - b. When there was less than 2" of accumulation Sykes was responsible for the parking lot and sidewalk care and maintenance.
 - c. Dreamscapes would provide salting and ice-melt services but only upon request of Sykes and only when Sykes deemed those services appropriate. Sykes controlled when, where and how frequently salt and ice-melt would be applied.
5. Dreamscapes sent out a shoveling crew at Sykes request to address the sidewalks at the property on February 2, 2014, the day before the accident. Dreamscapes did apply ice-melt to the sidewalks. (Note: the amount of ice-melt applied and if it was sufficient **is** disputed).

The general rule is that a party to a contract **is** not liable in tort to third persons. There are

three exceptions to this rule. See, *Espinal v. Melville Snow Contrs.*, 98 NY2d 136 (2002). Plaintiffs rely solely on the first exception in opposing Dreamscapes Summary Judgment Motion. The first exception provides that a party to 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 where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, i.e., creates or exacerbates a dangerous condition.

Plaintiffs allege that Dreamscapes created the dangerous condition or exacerbated same by applying an inadequate amount of ice-melt or salt which caused the existing ice to melt and **refreeze**. Plaintiffs support this position by submitting the October 17, 2019 Affidavit of William Van Cott. Mr. Van Cott states, “It appears snow was removed, but ice-melt/salt was not adequately applied. A reasonable amount of ice-melt and/or salt would have prevented the water from refreezing and creating the slippery hazardous situation on the sidewalk.” This conclusion is based upon Mr. Van Cott’s review of two (2) photographs taken of the scene. The Court will not repeat here its determination that Mr. Van Cott is not qualified to render an expert opinion in this case. Even assuming that Mr. Van Cott is a qualified expert, his conclusion is pure speculation. No meteorological data is provided by Plaintiffs or Mr. Van Cott evidencing the weather conditions between the time the ice-melt/salt was applied on February 2, 2014 and Plaintiff’s, Rosalind Wood’s, fall on February 3, 2014.

If the temperature rose above freezing causing the ice to melt and then dropped back down below freezing causing the ice to reform, the amount of ice-melt/salt applied would be irrelevant. Did it snow again after the application of the ice-melt/salt? Did the temperatures drop below freezing after the new snow fell, causing ice to form? Without meteorological data, Mr. Van Cott’s conclusion is pure speculation.

Even if the Court were to accept Mr. Van Cott as an expert and even if the Court were to accept his conclusion that an inadequate amount of ice-melt/salt was applied, thus causing the water to refreeze, the Plaintiffs cannot prevail as a matter of law. Dreamscapes did not create the icy condition. It existed prior to their application of ice-melt/salt. Even if the icy condition existed after the application of the ice-melt/salt, it was the same icy condition that existed prior to the ice-melt/salt application. A condition which Dreamscapes did not create. The failure to remedy the condition does not equate to creation of the condition.

Lastly, there is no evidence presented by Plaintiffs evidencing that Dreamscapes exacerbated the icy condition.

For the reasons aforesated, Dreamscapes motion for Summary Judgment is **GRANTED**.

Submit Order.



i/a/o

HON. DANIEL J. FURLONG
Supreme Court Justice

Hon. Paula Feroletto i/a/o
Hon. Daniel J. Furlong

DATED: May 14, 2020
Buffalo, New York