Macchia v Christ the King Church
2020 NY Slip Op 35014(U)
April 13, 2020
Supreme Court, Westchester County
Docket Number: Index No. 52908/2018
Judge: Linda S. Jamieson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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MARIA V. MACCHIA,

Plaintiff, Index No. 52908/2018

-against-

DECISION AND ORDER

CHRIST THE KING CHURCH, BEAR MAINTENANCE INC. and PAUL COSTA,

Defendants.
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The following papers numbered 1 to 6 were read on this motion:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Affirmation and Exhibits in Opposition[1]	2
Memorandum of Law	3
Affirmation in Opposition	4
Reply Affirmation	5
Reply Affirmation	6

Defendants Bear Maintenance Inc. ("Bear") and Paul Costa, Bear's principal, bring this motion for summary judgment in this case arising from a slip and fall on ice in the parking lot at the Church. The motion seeks (1) summary judgment dismissing all claims and cross-claims against Bear; (2) summary judgment

[1]The Court did not receive Working Copies of the opposition papers from either plaintiff or Christ the King Church (the "Church"). Counsel is directed to review the Part Rules.

against Mr. Costa; and (3) an order requiring contractual defense and indemnification from the Church.

The relevant facts are as follows. Plaintiff habitually parked in the Church's parking lot when she went to work at a nearby bank. The Church and plaintiff dispute whether plaintiff had permission to park there. Although plaintiff testified at her deposition that in 2013, Father Robert J. Staar, the priest, gave her and her colleagues permission to park at the Church, at his deposition, Father Staar testified absolutely that he had **never** given plaintiff permission to park in the Church's lot.

On the date of the accident, a cold morning in March, plaintiff exited from her car after parking in the Church's lot and slipped and fell on what she testified was thick dark ice that completely covered the parking lot. Bear's principal testified, without any contradiction, that the contract between it and the Church provided that it was to provide snow removal services after a snowstorm. It further provided that the only time it was to salt or apply calcium chloride to the premises was "upon request only" by the Church.[2] Indeed, at his deposition, Robert S. Fenton, the "handyman" for the Church, testified unequivocally that it was his sole responsibility to salt and sand the premises, including the parking lot. Mr. Fenton was

[2]Plaintiff contends that this contract is inadmissible. However, given the sworn testimony about it, the Court disagrees.

quite clear in his testimony that once the Church had hired him, Bear was **never** asked to do any salting or sanding. Father Staar corroborated Mr. Fenton's testimony on this account.

It had snowed, apparently heavily, approximately one week prior to plaintiff's accident. Bear plowed, as it was required to, thereafter. Since there were several cars parked in the Church's parking lot at the time of the snowfall and plowing, these cars were "snowed in." Nonetheless, plaintiff was still able to park in the Church's lot in the several days post-snowstorm, prior to her accident. In fact, plaintiff testified at her deposition that she parked in the Church's parking lot on the day before the accident. There is no dispute that plaintiff navigated the parking lot to and from her car that previous day without incident.

"Here, the defendants established, prima facie, that [the snow removal contractor] did not owe the plaintiff a duty of care by offering proof that the plaintiff was not a party to the snow/ice removal contract." *Bronstein v. Benderson Dev. Co.*, 167 A.D.3d 837, 838-39, 91 N.Y.S.3d 142, 144 (2d Dept. 2018). In opposition, all that plaintiff asserts is that she was an intended beneficiary because she had permission to park there. As discussed above, this is an issue in significant dispute. More important is the fact that there is no evidence that Bear had **any** responsibility to salt or sand the Church's parking lot -

and quite a lot of evidence that it did not. The Second Department has explained that "a contractor may be liable in tort where it fails to exercise reasonable care in the performance of its duties, and thereby launches a force or instrument of harm. 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. A failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a preexisting ice condition from *improving*." *Trombetta v. G.P. Landscape Design, Inc.*, 160 A.D.3d 677, 678, 73 N.Y.S.3d 230, 231-32 (2d Dept. 2018). As stated, there is no evidence that Bear had any obligation whatsoever to salt or sand the parking lot. It thus could not have created or exacerbated any dangerous condition.

The Court grants the motion in its entirety, and dismisses Bear and Mr. Costa from the action. Since the Court has found that they bear no liability, the issues of defense and indemnification are moot.

The remaining parties are directed to appear for a Settlement Conference in the Settlement Conference Part,

Courtroom 1600, at a date to be determined.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 13, 2020

HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Joseph A. Maria, PC
Attorneys for Plaintiff
301 Old Tarrytown Rd.
White Plains, NY 10603

Gallo Vitucci et al.
Attorneys for Bear and Costa
90 Broad St., 12th Fl.
New York, NY 10004

Bleakley Platt et al.
Attorneys for the Church
1 N. Lexington Ave.
White Plains, NY 10601