

Vaughan v Lake Park 135 Crossways Park Dr. LLC

2020 NY Slip Op 35114(U)

April 21, 2020

Supreme Court, Nassau County

Docket Number: Index No. 601388/18

Judge: John M. Galasso

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

JENNIFER VAUGHAN,

Plaintiffs,

- against -

Index No. 601388/18
Sequence # 001
Motion Date: 1/23/2020

Part 13

LAKE PARK 135 CROSSWAYS PARK
DRIVE LLC, CLK-HP 135 CROSSWAYS
PARK DRIVE LLC HOULIHAN PARNES
REALTORS, LLC d/b/a LAKE PARK,
d/b/a CLK-HP and HUNTINGTON
PAVING, INC.,

Defendants.

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Upon the foregoing papers, the motion brought by defendants, Lake Park 135 Crossways Park Drive LLC, CLK-HP 135 Crossways Park Drive LLC, Houlihan Parnes Realtors, LLC d/b/a Lake Park, d/b/a CLK-HP (hereinafter collectively "CLK defendants") and Huntington Paving, Inc., seeking an Order granting all defendants summary judgment on the issue of liability, thereby dismissing plaintiff's complaint and all cross-claims against them, is determined as follows.

This is an action for personal injuries allegedly sustained by the plaintiff, on February 2, 2015, when she slipped and fell in the parking lot at the premises located at 135 Crossways Park Drive, Woodbury, New York (hereinafter "subject parking lot") due to alleged accumulation of snow and ice on the parking lot.

Defendants move for summary judgment on the issue of liability contending that the 'black ice' condition plaintiff alleges to have fallen from at the subject premises was neither visible nor apparent; that defendants had neither actual or constructive notice of the alleged 'black ice' condition; that the defendant snow removal contractor neither rendered the condition at the subject premises worse or created the alleged condition; and that plaintiff did not detrimentally rely upon the defendant snow removal contractor's removal of ice from the subject parking lot.

In support of their motion for summary judgment defendants submit, *inter alia*, copies of the pleadings, verified bill of particulars and the transcripts of deposition testimony of plaintiff, John Burke, Vice President of Property Management for CLK Commercial Management, and James Brown, President and owner of Huntington Paving, Inc.

Plaintiff, Jennifer Vaughn, testified that on the date of the accident she arrived at the premises to go to work at approximately 9:30 a.m. and noticed that the parking lot was very shiny due to what might have been black ice or just moisture. The deposition testimony of plaintiff states that she did not have any difficulty walking into the building on the morning of the accident and that there was no snow on the ground when she left the building to go home at approximately 1:00 p.m. Plaintiff's deposition testimony states that the patch of ice that allegedly caused her accident was situated close to where her car was parked, and that she did not see anyone doing any kind of snow removal services in the parking lot that morning, nor did she see any salt or sand on the ground anywhere prior to her fall. Plaintiff's deposition states that she mounds of snow from previous snow falls was pushed off to the edges of the premises on the outsides of the parking lot far away from the cars.

John Burke (hereinafter "Burke"), Vice President of Property Management for CLK Commercial Management (hereinafter "CLK") testified at his deposition that he oversees general maintenance operations of eleven buildings, including the subject premises located at 135 Crossways park Drive, and that CLK has exclusive decision making authority pertaining to the maintenance of the subject parking lot. Burke's deposition testimony states that he is not aware of any complaints concerning snow or ice on the subject premises on or before the date of the alleged accident on February 2, 2015. Burke testified at his deposition that after a snow event it would be the job of CLK's field supervisor to inspect the premises following the completion of any snow plowing and to call the plowing company back to the premises if necessary.

The deposition testimony of James Brown (hereinafter "Brown"), president and owner of defendant, Huntington Paving, Inc. (hereinafter "Huntington Paving") states that he was personally involved in the snow and ice removal at the subject parking lot and that prior to the subject accident he was last at the subject premises the day before the subject accident. Brown's deposition testimony states that he has an independent recollection of being at the subject premises on the day prior to the subject accident and recalls that the parking lot surface was clear of snow and ice. Brown states in his deposition testimony that Huntington Paving performed snow removal at the subject premises the night before the date of the accident, arriving at midnight February 2, 2015 and leaving approximately 8:00 a.m. Brown's deposition testimony states that Huntington Paving would not go back to perform any other work unless they were called back and that it is their practice to plow the lot within a quarter inch before covering the lot with a final coat of salt before leaving the job.

In opposition, plaintiff contends that the defendants fail to establish that the subject premises was maintained in a reasonably safe condition where the testimony of James Brown owner of Huntington Paving Co., Inc. does not address the conditions of the specific lot on the day in question and where the testimony of John Burke, field manager in charge of inspecting the subject parking lot, states that he has no independent recollection of the parking lot on the date of plaintiff's accident, wherein he cannot speak to the observations of the field inspector for the maintenance company.

In opposition, plaintiff submits *inter alia*, copies of the defendant, Huntington Paving's invoices for plowing and salting services at the subject, and an email plaintiff received from her employer on the

date of the accident advising to use caution due to snow and ice conditions, along with the meteorologist report of James Nobile, Certified Consulting Meteorologist.

“In a slip-and-fall case, a defendant moving for summary judgment has the initial burden of making a prima facie showing that it did not create the condition on which the plaintiff slipped, and did not have actual or constructive notice of the condition” (*Arabica v. We're Associates, Inc.*, 125 A.D.3d 904, 905, 4 N.Y.S.3d 124 [2nd Dept. 2015]).

“To impose liability upon a defendant in a trip and fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it.” (*Dennehy-Murphy v. Nor-Topia Serv. Ctr., Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512 (2d Dept. 2009); *Gordon v. American Museum of Natural history*, 67 N.Y.2d 836, 501 N.Y.S.2d 836 (1986). “A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected.” (*Id.*, *Penn v. Fleet Bank*, 12 A.D.3d 584, 785 N.Y.S.2d 107 (2d Dept. 2004); *Spagnola v. Staten Island Hosp.*, 84 A.D.3d 1057, 922 N.Y.S.2d 801 (2d Dept. 2011); *Gloria v. MGM Emerald Enters.*, 298 A.D.2d 355, 751 N.Y.S.2d 213 (2d Dept. 2002); *Gordon v. American Museum of Natural History*, 67 N.Y.S.2d 836, 501 N.Y.S.2d 646 (1986)). “To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell.” (*Birnbaum v. New York Racing Ass'n, Inc.*, 57 A.D.3d 598, 869 NYS2d 222 (2d Dept. 2008); *Braudy v. Best Buy Co. Inc.*, 63 A.D.3d 1092, 883 N.Y.S.2d 90 (2d Dept. 2009); *Oliveri v. Vassar Bros., Hosp.*, 95 A.D.3d 973, 943 N.Y.S.2d 604 (2d Dept. 2012)).

In the instant matter, while the deposition testimony of the parties demonstrates that the CLK defendants may not have had actual notice of snow/ice on the subject premises, there is no testimony regarding the last time the parking lot in question was inspected prior to plaintiff's fall. Although there is evidence that the subject parking lot was cleared of snow prior to plaintiff's alleged accident as of approximately 8:00 a.m., questions of fact exist as to the condition of the parking lot at the time of the accident at 1:00 p.m., based upon plaintiff's deposition testimony that the whole parking lot was ice at the time of her fall, and consequently, whether there was adequate time to discover and remedy the alleged situation. (*See, Spinoccia v. Fairfield Bellmore Ave., LLC*, 95 A.D.3d 993, 943 N.Y.S.2d 601 (2d Dept. 2012)). While there is insufficient evidence as to when the accident site was last inspected by CLK's field supervisor prior to plaintiff's fall, and the CLK defendants offer only evidence as to its general cleaning practices, it has failed to establish, prima facie, that it did not have constructive notice of the snow/ice which allegedly caused plaintiff's fall. (*See, Santos v. 786 Flatbush Food Corp.*, 89 A.D.3d 828, 932 N.Y.S.2d 525 (2d Dept. 2011); *Schiano v. Mijul, Inc.*, 79 A.D.3d 726, 912 N.Y.S.2d 134 (2d Dept. 2010); *Farrell v. Waldbaum's Inc.*, 73 A.D.3d 846, 900 N.Y.S.2d 453 (2d Dept. 2010)).

Accordingly, and given the issues of fact raised, the defendants' motion for summary judgment as to the CLK defendants is denied.

“A contractor or subcontractor's limited contractual undertaking to provide snow removal series generally does not give rise to a duty of care to persons not a party to the contract, absent evidence that the

contractor or subcontractor assumed a comprehensive maintenance obligation, created or exacerbated a dangerous condition or launched a force or instrument of harm, or that the plaintiff detrimentally relied on the contractor's continued performance of its obligation." (*Lastimore v. First Mineola, Co.* 60 A.D.3d 639, 874 N.Y.S.2d 253 (2d Dept. 2009).

Defendant, Huntington Paving, established, *prima facie*, that it did not assume a comprehensive and exclusive maintenance obligation at the subject premises and that it owned no duty of care to plaintiff. The deposition testimony of both Hurke and Brown provide evidence that the snow and ice removal at the subject premises was under the exclusive control of the CLK defendants, pursuant to their maintenance agreement with Huntington Paving.

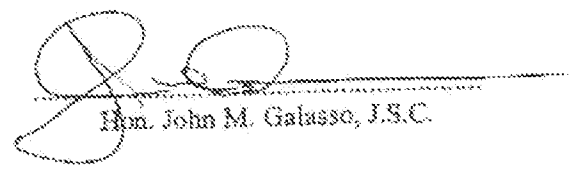
In opposition, plaintiff does not raise an issue of fact as to whether Huntington Paving assumed a comprehensive maintenance obligation giving rise to a duty of care to third parties and fails to provide evidence in admissible form that this defendant exacerbated or created the alleged dangerous condition.

Accordingly, defendants' motion for summary judgement as to defendant, Huntington Paving Inc., is granted.

Motion Seq. #001 seeking summary judgment on the issue of liability, thereby dismissing plaintiff's complaint and all cross-claims against them is granted as to defendant, Huntington Paving Inc. only.

This constitutes the decision and Order of this Court. Any relief not expressly granted herein is denied.

Dated: April 21, 2020


Hon. John M. Galasso, J.S.C.

18-601388 Vaughan Seq. 1

ENTERED
May 01 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE