

Jones-Facey v A-1 Realty Mgt., Inc.
2020 NY Slip Op 35156(U)
July 17, 2020
Supreme Court, Nassau County
Docket Number: Index No. 611612/18
Judge: Diccia T. Pineda-Kirwan
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Short Form Order

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN
Justice

IA PART 27

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NIKKIA JONES-FACEY,

Plaintiff(s),

-against-

A-1 REALTY MANAGEMENT, INC. and
SITE SERVICES GROUP, INC.,

Defendant(s).

-----X
A-1 REALTY MANAGEMENT, INC.

Third-Party Plaintiff(s)

-against-

LANE VALENTE INDUSTRIES, INC.,

Third-Party Defendant(s).

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The following numbered papers read on these motions by defendant/third-party plaintiff A-1 Realty Management and third-party defendant Lane-Valente Industries Inc. i/s/h/a Lane Valente Industries, Inc., for summary judgment on the issue of liability.

PAPERS	NUMBERED
Notices of Motion-Affidavits-Exhibits.....	EF 61 - 75, 77 - 91
Answering Affidavits-Exhibits.....	EF 92 - 98
Replying.....	EF 100

Upon the foregoing cited papers, and after Skype for Business conference, it is ordered that the motions by defendant/third-party plaintiff A-1 Realty Management (A-1) and third-party defendant Lane-Valente Industries Inc. i/s/h/a Lane Valente Industries, Inc. (Lane-Valente), for summary judgment on the issue of liability, are consolidated for disposition, and are determined as follows:

Plaintiff commenced this action to recover for injuries she allegedly sustained on February 10, 2017, at approximately 9:45P.M., when she slipped and fell on icy conditions in the parking lot of the premises located at 140 Adams Court, Hempstead, New York (the Premises). A-1 is the property manager of the Premises, and contracted with Lane-Valente to perform snow removal services. A-1 now moves to dismiss the complaint and Lane-Valente moves to dismiss the complaint and third-party complaint.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form, demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Only when the movant satisfies its initial burden will the burden shift to the opponent, “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Chance v Felder*, 33 AD3d 645, 645-646 [2006]).

In support, A-1 submits, among other things, the deposition testimony of plaintiff, photographs of the accident location, the affidavit of Jeff Postman, the Property Manager for A-1, a copy of an invoice from Lane-Valente, and a certified copy of weather records from the National Centers for Environmental Information (NCEI).

Plaintiff states that on the date of the accident, it was icy and there was a lot of snow. She believes it last snowed the day before the accident. She entered the Premises, an apartment complex, and initially walked on the sidewalk, but then had to move to the parking lot because the sidewalk had snow on it, and it appeared that the parking lot had been plowed. She avers that she took about three steps onto the parking lot when she fell on “black” ice that was more than 6 inches in diameter. There was no salt or sand in the area where she fell. She did not see the ice prior to the accident, and there was no snow in the area. She did not know who performed snow removal at the Premises.

Mr. Postman states that he would visit and walk through the Premises on a daily basis to make sure that there were no conditions that needed maintenance or repair. He retained Lane-Valente to perform snow removal at the Premises, although they do not have a written contract. He identified an invoice from Lane-Valente, showing that it had removed snow and ice, and applied 12 bags of ice melt to the Premises the day before the accident. He does not recall observing any ice or any snow melting in the parking lot between the time that snow removal operations were complete and the time of the accident. He avers that if he had observed any such conditions, he would have called Lane-Valente to return to remediate the condition. He testified that he did not receive any complaints of ice in the parking lot prior to the accident, and that the accident location had “never been subject to pooling water or ice accumulation.”

The weather records from NCEI have readings from JFK Airport. On February 9, 2017, there was precipitation between 3:33A.M. and 3:51P.M., with a snow accumulation of 8.3 inches. For the remainder of the day, the temperature did not rise above freezing. The records disclose that there was no precipitation on the date of the accident, and the temperature did not rise above freezing.

In a slip and fall case, the owner or party in possession or control has the burden to establish *prima facie* that they neither created the dangerous condition nor had actual or constructive notice of it (*see Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137 [2017]). Here, A-1 failed to establish, *prima facie*, that it did not create the condition or lacked actual or constructive notice of it, as it failed to establish when the accident location was last cleaned or inspected prior to the accident, and any references to general inspection practices is insufficient (*see Rong Wen Wu v Arniotes*, 149 AD3d 786, 787 [2017]). Here, the evidence shows that Lane-Valente plowed the parking lot the day before the accident, and Mr. Postman only spoke as to his normal practice, but did not state whether he inspected the parking lot after it was cleaned, and prior to the accident. Since the weather records show that the temperatures remained below freezing after Lane-Valente completed its work, issues of fact exist as to how long the icy condition was present, and whether A-1 had constructive notice of its presence. Thus, A-1's motion is denied.

As to Lane-Valente, in support of its motion, it submits, among other things, the affidavit of Gary Robbins, its Vice President of Compliance and Risk Management. He states that Lane-Valente did not have an exclusive or comprehensive property maintenance contract or agreement with the Premises. Since there is little space to pile snow at the Premises, and the sidewalk is next to the parking lot, it is Lane-Valente's normal routine to create a walkway into the parking lot to allow pedestrians to traverse the parking lot, which is clear of snow and ice. After a job is completed, it is normal practice for Lane-Valente's workers to inspect the area to ensure that there is no snow or ice in the parking lot. If there was any additional work needed at the Premises, Lane-Valente would have received a call to return, which it did not. He does not have any knowledge, nor did he receive any complaints of black ice in the parking lot.

Lane-Valente seeks dismissal on the grounds it did not owe plaintiff a duty of care. Generally, a contractual obligation on its own will not give rise to tort liability in favor of a third party except under one of three exceptions: "(1) 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, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely" (*Rudloff v Woodland Pond Condo. Ass'n*, 109 AD3d 810 [2013]).

Lane-Valente first argues that it does not have to affirmatively demonstrate that these exceptions do not apply as the facts alleged in the complaint and bill of particulars do not establish the applicability of any of the exceptions (*see Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955 [2014]). Here however, affording plaintiff the benefit of all reasonable inferences, plaintiff sufficiently alleges the applicability of these exceptions

by alleging that defendants created the hazardous condition by improperly piling snow on the sidewalk and forcing plaintiff to walk on the dangerous condition of the parking lot. Lane-Valente must therefore disprove the applicability of these exceptions.

Lane-Valente established the inapplicability of the second and third exceptions as plaintiff failed to allege that she knew who performed snow removal at the Premises or detrimentally relied on Lane-Valente's performance (*see Espinal* at 141-42; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214-15 [2010]), and there is no evidence that Lane-Valente entirely displaced A-1's duty to maintain the Premises safely. However, Lane-Valente did not meet its burden under the first exception as it failed to establish that it neither created nor exacerbated the allegedly hazardous condition (*see Espinal* at 142; *Keese v Imperial Gardens Associates, LLC*, 36 AD3d 666, 667-68 [2007]).

Lastly, Lane-Valente moves to dismiss A-1's causes of action in the third-party complaint for contractual indemnity, common law indemnity, contribution, and breach of contract for failure to procure insurance.

A-1's causes of action for contractual indemnity and breach of contract for failure to procure insurance are dismissed. Here it is undisputed that A-1 and Lane-Valente had an oral contract, and without evidence of an agreement to provide indemnification or to procure insurance, third-party claims of contractual indemnification and failure to procure insurance should be dismissed (*see Cunningham v N. Shore Univ. Hosp. at Glen Cove Hous., Inc.*, 123 AD3d 650, 651 [2014]).

However, as issues of fact remain as to whether Lane-Valente owed a duty to plaintiff, or if the accident was solely due to Lane-Valente's negligence, the causes of action for common-law indemnification and contribution survive (*see Morris v Home Depot USA*, 152 AD3d 669, 673 [2017]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 216 [2010]).

Accordingly, A-1's motion is denied and Lane-Valente's motion is granted solely to the extent that the causes of action for contractual contribution and breach of contract for failure to procure insurance in the third-party complaint, are dismissed.

Any request for relief not expressly granted herein is denied.

This constitutes the decision and order of the Court.

ENTERED

Jul 23 2020

Dated: July 17, 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE


DICCIA T. PINEDA-KIRWAN, J.S.C.