

**Konoski v AMC Realty Props. Co., LLC**

2020 NY Slip Op 35299(U)

May 21, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 607006/2015

Judge: Linda Kevins

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

KONOSKI v. R & L Lawn, et. al  
Index no. 607006/2015  
Mot. Seq. 003  
Page 1 of 5

SHORT FORM ORDER

INDEX No. 607006/2015  
CAL. No. \_\_\_\_\_

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 29 - SUFFOLK COUNTY**

**PRESENT:**

**HON. LINDA KEVINS**  
*Justice of the Supreme Court*

MOTION DATE: July 9, 2019  
ADJ. DATE 10-15-19  
Mot. Seq. # 003 - MG

JENNIE SUE KONOSKI

Plaintiff,

- against -

AMC REALTY PROPERTIES CO., LLC and  
R & L LAWN CARE, Inc.

Defendants.

Upon the following papers e-filed and read on this motion for summary judgment: Notice of Motion and supporting papers by defendant R & L Lawn Care, Inc., dated June 4, 2019; Answering Affidavits and supporting papers by plaintiff dated October 8, 2019; Replying Affidavits and supporting papers by R & L, dated October 10, 2019; Other \_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendant R & L Lawn Care, Inc. for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

**ORDERED** that counsel for the parties, and if a party has no counsel, then the party, are directed to appear before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901, on \_\_\_\_\_, 2020 at 9:30 a.m., for a Conference, or if the court is still operating remotely due to the COVID-19 health crisis, such appearance shall be held remotely on the same date. Counsel and any parties who are not represented by counsel shall contact the court by email at Sufkevins@nycourts.gov at least five days prior to the date of the scheduled conference to obtain the time and manner of such conference; and it is further

KONOSKI v. R & L Lawn, et. al  
Index no. 607006/2015  
Mot. Seq. 003  
Page 2 of 5

**ORDERED** that if this Order has not already been entered, R & L is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

**ORDERED** that upon Entry of this Order, R & L is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court; and it is further

**ORDERED** that due to the current health crisis caused by COVID-19 and the resulting filing restrictions imposed upon the Suffolk County Clerk and the Court, the term "promptly" shall mean within ten days of the rescission of such filing restrictions.

Plaintiff commenced this action to recover damages for injuries she allegedly sustained from a slip and fall accident that occurred on January 31, 2015, in the parking lot of a building where she is employed, located at 285 Commack Road, Commack, New York. The complaint alleges that defendants were negligent in failing to maintain the parking lot in a safe condition by failing to remove snow and ice from the parking lot, failing to apply salt or sand in the parking lot, failing to inspect the parking lot and in placing snow piles in areas where they would melt and refreeze.

Defendant R & L Lawn Care, Inc. now moves for summary judgment dismissing the complaint and cross claims against it on the ground that it did not owe plaintiff a duty of care, as it was a third-party contractor retained by defendant AMC Realty Properties Co., LLC (hereinafter AMC), to perform limited snow removal services. In support of the motion, R & L Lawn Care, Inc. (hereinafter R & L) submits copies of the pleadings and bill of particulars and transcripts of the parties' deposition testimony.

At her deposition, plaintiff testified that she works for Long Island Spine and Health Center as a "practice manager" at their office located at the subject premises. She testified that the office was closed for one week prior to the incident, as one of the doctors was ill and had to close the office. She testified that it had snowed during the week that the office was closed, and it was "intense" and lasted two days. She testified that it was not snowing on the day of the incident, and that it had not snowed for several days prior. Plaintiff testified that when she arrived at the subject premises on January 31, 2015, she observed snow and ice patches in the parking lot and that it was "horrendous." Plaintiff testified that she exited her vehicle and walked inside the office without issue, and that she left shortly thereafter to purchase coffee for her boss at a 7 eleven store. She testified that she walked to her vehicle without issue, that she drove to 7 eleven and purchased two cups of coffee and drove back to the subject premises.

Plaintiff testified that she carried the coffee in a tray and held it with both hands as she exited her vehicle and took a few steps in the parking lot alongside her vehicle. She testified that the snow was unsmooth and bumpy, that she slipped, but she does not recall anything afterwards. She testified that her next memory was when a patient came to her while she was lying on the ground and assisted her to standing and they walked into the office. Plaintiff was asked whether she observed any plow markings or shovel marks in the parking lot, and she responded in the negative. She testified further that she did not recall observing any piles of snow in the parking lot.

KONOSKI v. R & L Lawn, et. al  
Index no. 607006/2015  
Mot. Seq. 003  
Page 3 of 5

Richard Zagorski testified that he is the President of defendant R & L, and that the company was created over 26 years ago. He testified that R & L is in the business of landscaping and snow removal services, and that AMC is one of its clients. He testified that he and Carmine Vano, a managing partner with AMC, entered into a snow removal agreement which requires R & L to perform snow removal services at the subject premises when accumulations reach two inches. He testified further that the contract does not require R & L to apply salt or sand to the ground of the subject parking lot unless Carmine requests him to do so. Notwithstanding, Zagorski testified that AMC has been its client for over 20 years, and it became a custom for R & L to apply sand even if not requested. Zagorski testified that he plows the parking lot and applies a salt and sand combination after the ground is plowed. He testified that he was instructed to place snow piles in areas where there are no walkways, and that he places the piles of snow on the north and south side of the parking lot close to the edges where there are no walkways.

Zagorski testified that he plowed the parking lot at the subject premises three times on January 27, 2015, and that he applied salt and sand to the ground after he plowed. He testified that he plowed close to the pavement, and that when he completed plowing a quarter of an inch or residue remained to which he applied salt and sand. He testified that it had snowed on January 30, 2015, and that there was half an inch of snow accumulation, so he did not go to the subject premises, as it was below two inches and no one from AMC requested his services. He testified that Carmine has a bobcat, and that he periodically removes snow and moves it into piles in the parking lot.

Zagorski testified that he received a telephone call from Carmine on January 31, 2015 at 12:00 p.m., requesting him to apply sand and salt to the subject parking lot as someone slipped that morning. He testified that he arrived at the premises at 1:00 p.m., and that he used a machine to apply the salt and sand.

A copy of the snow removal contract for the period of 2014 through 2015 between AMC and R & L is submitted. Pursuant to the agreement, services from R & L are required when accumulations of snow exceed two inches, and salt, sand and other ice melting agents are only applied upon request.

Carmine Vano testified at his deposition that he is a managing partner with AMC which owns the subject property. He testified that R & L provides landscaping and snow removal services for AMC, and he was shown a copy of the snow removal agreement and confirmed its terms. He testified further that he never had any issues with R & L's services, that Zagorski was very conscientious, and he never received any complaints about a dangerous condition in the parking lot nor is he aware of any prior incidents. He testified that he became aware of the subject incident through his secretary who was informed of it by Dr. Olsen, plaintiff's employer.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment 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 Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

KONOSKI v. R & L Lawn, et. al  
Index no. 607006/2015  
Mot. Seq. 003  
Page 4 of 5

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*Knight v 177 W. 26 Realty, LLC*, 173 AD3d 846, 103 NYS3d 503 [2d Dept 2019]; *Rodriguez v 5432-50 Myrtle Ave., LLC*, 148 AD3d 947, 50 NYS3d 99 [2d Dept 2017]; *Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]).

Generally, a third-party contractor is not liable in tort to an injured plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142, 746 NYS2d 120 [2002]; *Pinto v Walt Whitman Mall, LLC*, 175 AD3d 541, 107 NYS3d 373 [2d Dept 2019]; *Nachamie v County of Nassau*, 147 AD3d 770, 47 NYS3d 58 [2d Dept 2017]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Liability may be imposed on a contractor under the following circumstances: (1) “where the contracting party, in failing to exercise reasonable care in the performance of its duties, ‘launched a force or instrument of harm’” (*Espinal v Melville Snow Contrs.*, *id.*, quoting *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk; (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party’s obligations (*see Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226, 557 NYS2d 286 [1990]); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner’s duty to safely maintain the property (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 611 NYS2d 817 [1994]).

As plaintiff did not expressly allege facts in the complaint or bill of particulars that would establish the possible applicability of any of the *Espinal* exceptions, R & L is not required to demonstrate that none of the exceptions apply in order to establish its prima facie case (*Ramsey v Temco Serv. Indus., Inc.*, 179 AD3d 726, 101 NYS3d 77 [2d Dept 2020]; *Bronstein v Benderson Dev. Co., LLC*, 167 AD3d 83, 91 NYS3d 142 [2d Dept 2018]; *Koslosky v Malmut*, 149 AD3d 925, 52 AD3d 400 [2d Dept 2017]; *Hsu v City of New York*, 145 AD3d 759, 43 NYS3d 139 [2d Dept 2016]; *Barone v Nickerson*, 140 AD3d 1100, 32 NYS3d 663 [2d Dept 2016]). Here, R & L established its prima facie entitlement to summary judgment by demonstrating that plaintiff was not a party to the snow removal contract and, therefore, it did not owe her a duty of care (*Sampaiolopes v Lopes*, 172 AD3d 1128, 101 NYS3d 77 [2d Dept 2019]; *Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]; *Diaz v Port Auth. of NY & NJ*, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]). Having established a prima facie case, the burden shifts to plaintiff to submit sufficient proof to raise a triable issue of fact regarding the applicability of one or more of the *Espinal* exceptions (*Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 26 NYS3d 207; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]).

In opposition, plaintiff submits an affirmation of counsel and photographs of the subject parking lot. Counsel’s arguments regarding R & L’s failure to properly remove snow and ice, permitting a dangerous condition to exist, and its failure to apply salt and sand, inter alia, are inapplicable to a third-party contractor.

KONOSKI v. R & L Lawn, et. al  
Index no. 607006/2015  
Mot. Seq. 003  
Page 5 of 5

Plaintiff is not a party to the snow removal contract and any contractual duties do not extend to the plaintiff (*Reeves v Welcome Parking LLC*, 175 AD3d 633, 107 AD3d, 371[2d Dept 2019]; *Castillo v Port Auth. of N.Y. & N.J.*, 159 AD3d 792, 72 AD3d 782 [2d Dept 2018]). Counsel's argument that R & L was negligent in failing to place salt and sand around the snow piles is not sufficient to defeat summary judgment. "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" (*Santos v Deanco Servs., Inc.*, 142 AD3d 137, 143, 35 NYS3d 686 [2d Dept 2016]; see also *Trombetta v G.P. Landscape Design, Inc.*, 160 AD3d 677, 73 AD3d 230 [2d Dept 2018]; *Somekh v Val. Natl. Bank*, 151 AD3d 783, 57 NYS3d 487 [2d Dept 2017]). There must be some showing that a contractor left the premises in a more dangerous condition than he or she found them to constitute a "launching of an instrument of harm." The photographs do not establish that R & L created a dangerous condition. If anything, the photographs show that R & L did not perform snow removal services at the premises.

Here, plaintiff's submissions are insufficient to raise a triable issue of fact as to whether R & L launched a force or instrument of harm (*Turner v Birchwood on the Green Owners Corp.*, 171 AD3d 1119, 98 NYS3d 323 [2d Dept 2019]). With respect to the remaining *Espinal* exceptions, it is undisputed that they are inapplicable, nor has plaintiff attempted to argue that the remaining *Espinal* exceptions apply. As plaintiff has failed to raise a triable issue of fact regarding the applicability of any the *Espinal* exceptions, the motion of R & L for summary judgment in its favor is granted.

Anything not specifically granted herein is hereby denied.

This constitutes the decision and Order of the Court.

Dated: 5/21/2020



LINDA KEVINS, JSC

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION