Cassino-Sharp v Whispering Hills Homeowners Assn., Inc.
2020 NY Slip Op 35517(U)
December 2, 2020
Supreme Court, Orange County
Docket Number: Index No. EF012450-2018
Judge: Sandra B. Sciortino

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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LAUREN CASSINO-SHARP,

Plaintiff,

-against-

WHISPERING HILLS HOMEOWNERS ASSOCIATION, INC. and LAND WORX OF NEW YORK, INC.,

Defendants.

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DECISION AND ORDER

INDEX NO.: EF012450-2018
Motion Date: 10/27/2020
Sequence No.: 1 & 2

SCIORTINO, J.

The following documents numbered 1 to 41 were read on the motions by Defendant Whispering Hills Homeowners Association, Inc. (Seq. #1) and Defendant Land Worx of New York, Inc. (Seq. #2), pursuant to CPLR §3212, for summary judgment dismissing the Complaint and all cross-claims asserted against them:

PAPERS	NUMBERED
Notice of Motion (Seq. #1)/Affirmation in Support (Berwick)/Memorandum of Law/ Exhibits A-J	1-13
Affirmation in Opposition (Brandel)/Exhibits A-K	14-25
Affirmation in Reply (Berwick)	26
Notice of Motion (Seq. #2)/Affirmation in Support (Sherwin)/Exhibits A-K	27-38
Affirmation in Opposition (Brandel)/Exhibits A-L	28-40
Affirmation in Reply (Sherwin)	41

Background and Procedural History

This is an action for personal injuries allegedly sustained by plaintiff on March 2, 2018 at approximately 10:00am. Plaintiff claims she sustained injuries as the result of a slip and fall on icy on a stairwell leading to the parking lot of 1908 Whispering Hills, Chester, New York.

This action was commenced by the filing of a Summons and Verified Complaint on December 28, 2018. Issue was joined by defendant Land Worx of New York, Inc. ("Land Worx") by service of its Answer on January 25, 2019. Defendant Whispering Hills Homeowners Association, Inc. ("Whispering Hills") joined issue by the service of its Answer on January 28, 2019. Plaintiff served a Verified Bill of Particulars on April 22, 2019. The examinations before trial of plaintiff; Joan Linder, officer manager for Whispering Hills; and Peter Nilsestuen, president and owner of Land Worx, were held on October 21, 2019.

Plaintiff's Testimony

Plaintiff testified that, on March 1, 2018, the day before her fall, it was rainy. She was out running errands with her children between 3:30pm and 5:30pm. She observed a sheet of ice on the stairs leading to the parking lot around 3:30pm when she left her home and again around 5:30pm when she returned home. Plaintiff did not notify anyone at Whispering Hills of the alleged icy condition on the stairs. On March 1, 2018, plaintiff parked her car in the parking circle near her condo unit. This parking area is a designated "snow zone." Vehicles parked in the "snow zone" are subject to towing during a snow event.

On March 2, 2018, plaintiff woke up around 6:30am. It was raining. At some point around 10:00am, plaintiff heard snowplows in the complex and went to move her car from the parking circle so that her car would not be towed. Plaintiff testified that it was raining, but not snowing, when she went to move her car. Plaintiff descended the same set of stairs that she had used the night before, when she slipped and fell on ice. Plaintiff testified that it did not begin to snow until after she arrived at the hospital around 11:00am.

Joan Linder's Testimony

Joan Linder is the office manager for Whispering Hills. In 2018, Whispering Hills had one maintenance employee. However, that employee was not responsible for snow or ice removal. Whispering Hills has a contract with Land Worx. Under the terms of the contract, Land Worx was responsible for, among other things, snow and ice removal at Whispering Hills. At approximately, 10:42am, Ms. Linder received notice not to tow plaintiff's vehicle from the parking circle. Ms. Linder relayed the information to Peter Nilsestuen, of Land Worx. Ms. Linder testified that it snowed approximately 5-8 inches on March 2, 2018 and when she received notice not to tow plaintiff's vehicle, it was snowing heavily.

Peter Nilsestuen's Testimony

Peter Nilsestuen is the president and owner of Land Worx, a landscaping and property maintenance company. Land Worx performs snow and ice removal of driveways and walkways, including stairwells, for Whispering Hills, pursuant to a contract. On March 2, 2018, Mr. Nilsestuen arrived at Whispering Hills at approximately 2:30am. It was snowing when he arrived. It snowed heavily in the morning until about mid-day.

His crew of approximately eight employees began snow removal efforts at approximately 3:30am. Whispering Hills is a 690-unit complex that takes several hours to clear. The crew does a "sweep" of the complex which takes approximately three hours. Depending on the snow event, two or three "sweeps" are typically completed. Calcium chloride is used on the sidewalks and stairs but is not applied until the snow event has ended. However, if ice is already present, then calcium chloride is applied.

Mr. Nilsestuen remained at Whispering Hills throughout the entirety of the snow event. He received a call around 11:00am from Ms. Linder advising him that someone had fallen and

not to tow the vehicle in the parking circle, parked in the "snow zone." At the time he received the call, it was snowing heavy wet snow; approximately 4 to 5 inches had fallen. He testified that approximately 5 inches of total snowfall had accumulated from the storm.

Motions for Summary Judgment

On their motions for summary judgment, defendants both contend the storm in progress doctrine applies. In support of their motions, defendants append the affidavit and report of their expert meteorologist, Steven Roberts together with certified climatological data. Mr. Roberts states there was no snow or ice cover present throughout the preceding two days. On March 1, 2018, it rained shortly after midnight, and again between approximately 5:20pm and 8:00pm. However, there was no snow or ice cover throughout the day and the temperatures remained above freezing all day. On March 2, 2018, he states that no snow or ice cover was present at the start of the day (midnight). Precipitation in the form of snow and rain fell from approximately 2:50 a.m. to 6:45-7:30am, at which point precipitation changed to all snow and fell frequently through approximately 9:10-9:25pm, and then intermittently through approximately 10:05pm. Approximately 8.5 inches of snow cover remained at the end of day (11:59pm). Mr. Roberts opined that, at the time of plaintiff's alleged fall, there was approximately 5.4 inches of snow cover; the sky was cloudy; snowing was falling, and the temperature was near 35 degrees. The high temperature for March 2, 2018 was near 41 degrees and the low temperature was near 34 degrees. He opined that "any weather-related slippery condition that was present in untreated, undisturbed, exposed outdoor areas at the time and location of plaintiff's alleged slip and fall incident was the result of the ongoing winter storm that persisted through the time of the incident on [March 2, 2018]" (Roberts Aff. At ¶15).

Defendants also contend that they lacked actual or constructive notice of the alleged icy condition.

In addition, Defendant Land Worx argues that it does not owe a duty to plaintiff and that none of the exceptions under *Espinal* are applicable to this case because it did not launch a force or instrument of harm; plaintiff did not detrimentally rely upon its continued service under its' contract with Whispering Hills; and the contract between Whispering Hills and Land Worx was not a comprehensive and exclusive agreement that displaced Whispering Hills' duty to maintain the premises in a safe condition.

In opposition, plaintiff contends that Land Worx failed to establish that it did not owe a duty to the plaintiff because Land Worx failed to demonstrate that its snow removal efforts did not create or exacerbate a dangerous condition. Plaintiff further contends that defendants failed to demonstrate that the storm in progress doctrine is applicable. Plaintiff does not submit an expert meteorologist affidavit in opposition, but, instead, replies upon the assertion set forth in her attorney's affirmation to discredit Mr. Roberts' opinions and to interpret the certified climatological records.

In reply, defendants contend that plaintiff has failed to raise a triable issue of fact and that the affirmation of her attorney is insufficient to rebut their expert meteorologist.

Discussion

It is well established that "the proponent pf a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475-476 [2013]; CPLR 3212 [b]). Once the movant makes the proper showing,

"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*, 68 NY2d at 324). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]). Bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]), as are merely conclusory claims (*Putrino v Buffalo Athletic Club*, 82 NY2d 779, 781 [1993]).

Duty to Third Party

Generally, a contractual obligation standing alone will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, the Court of Appeals has identified three situations wherein the party who enters into a contract to render services may be held liable in tort to a third party: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his 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 the other party's duty to maintain the premises safely" (*id.* at 140 [internal quotation marks and citations omitted]).

Here, Land Worx made a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidence that the plaintiff was not a party to its contract with Whispering Hills, and therefore, it owed her no duty of care (*see Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 956 [2d Dept 2016]). Since the pleadings did not allege facts that would establish the applicability of any of the *Espinal* exceptions above, Land Worx was not required to

affirmatively demonstrate that these exceptions did not apply (although it did so) in order to establish its *prima facie* entitlement to judgment as a matter of law (*see Cayetano v Port Auth. of New York & New Jersey*, 165 AD3d 1223, 1224 [2d Dept 2018]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]). The burden then shifted to plaintiff and the property owner to raise a triable issue of fact, including as to whether the *Espinal* exceptions are applicable (*id.*). They have failed to do so, and as such, Land Worx's motion for summary judgment is granted (*see Foster v Herbert Slepoy Corp.*, 76 AD3d at 215; *Pavlovich v Wade Assoc., Inc.*, 274 AD3d 382, 383 [2d Dept 2000]; *Linarello v Colin Serv. Sys.*, 31 AD3d 396 [2d Dept 2006]).

Storm in Progress

"Under the storm in progress rule, '[a] property owner will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter'" *(Kearse v 40 Wall St. Holdings Corp.*, 185 AD3d 1015, 1016 [2d Dept 2020], quoting *Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]). Here, in support of its motion, Whispering Hills submitted the deposition testimony of Ms. Linder and Mr. Nilsestuen, as well as the affidavit and report of their expert meteorologist with attached certified climatological data. These submissions demonstrated, *prima facie*, that a storm was in progress at the time of the accident (*see Meyers v Big Six Towers, Inc.*, 85 AD3d 877, 877 [2d Dept 2011])).

Where the defendant makes a *prima facie* showing that the storm in progress rule applies, the burden shifts to the plaintiff to show that something other than the precipitation from the storm in progress caused the accident (*see Blair v Loduca*, 164 AD3d 639, 639-40). "To do so, the plaintiff [is] required to raise a triable issue of fact as to whether the accident was caused by a slippery condition that existed at the location of the fall prior to the storm, as opposed to

precipitation from the storm in progress; and that the defendant had actual or constructive notice of the preexisting condition" (*Meyers v Big Six Towers, Inc.*, 85 AD3d at 878).

Plaintiff's unsubstantiated testimony that she slipped on the same ice that existed the day before is mere speculation and insufficient to raise a triable issue of fact. Plaintiff does not submit a meteorological expert to rebut defendants' *prima facie* showing that there was no ice or snow cover on March 1, 2018, the day before plaintiff's accident, and that the temperature on March 1, 2020 remained above freezing. Instead, she relies upon the affirmation of her attorney, which does not supply the evidentiary showing necessary to successfully resist a motion for summary judgment (*see Powell v Cedar Manor Mut. Housing Corp.*, 45 AD3d 749, 749-750 [2d Dept 2007]; *Small v Coney Is. Site 4A-1 Houses, Inc.*, 28 AD3d 741, 742 [2d Dept 2006]; *Dowden v Long Is. Railroad*, 305 AD2d 631, 632 [2d Dept 2003]; *Bingham v Godfrey*, 114 AD2d 987, 988 [2d Dept 1985]). Nor did plaintiff submit evidence that defendant had actual or constructive notice of the alleged preexisting icy condition *(Elizee v Village of Amityville*, 172 AD3d 1004, 1005 [2d Dept 2019]). Notably, plaintiff did not notify defendant of the alleged icy condition on March 1, 2018. As such, Whispering Hills is entitled to summary judgment dismissing the complaint and any cross claims asserted against it.

Conclusion

Based upon the foregoing, it is

ORDERED that Defendant Land Worx of New York, Inc.'s motion for summary judgment dismissing the complaint and all cross-claims asserted against it is granted in its entirety; and it is further

ORDERED that Defendant Whispering Hills Homeowners Association, Inc.'s motion for summary judgment dismissing the complaint and all cross-claims asserted against it is granted in its entirety; and it is further

The foregoing constitutes the Decision and Order of the Court.

Dated: December 2, 2020
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*