

Colon v Site A-Wash. Hgts.

2021 NY Slip Op 31156(U)

April 8, 2021

Supreme Court, New York County

Docket Number: 159922/2015

Judge: Richard G. Latin

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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD G. LATIN PART IAS MOTION 46

Justice

-----X

JOSE COLON,
Plaintiff,

- v -

SITE A- WASHINGTON HEIGHTS,
Defendants.

INDEX NO. 159922/2015
MOTION DATE 02/11/2021
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

-----X

SITE A- WASHINGTON HEIGHTS TP4 HOUSING
DEVELOPMENT FUND COMPANY, INC., MANHATTAN
NORTH MANAGEMENT CO., INC.

Third-Party
Index No. 595036/2017

Third-Party Plaintiffs,

-against-

AIDS SERVICE CENTER OF LOWER MANHATTAN, INC
D/B/A AIDS SERVICE CENTER,

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 141, 142, 143, 144,
145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 179, 180, 181, 182,
183, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendants/third-party plaintiffs Site A-Washington
Heights TP4 Housing Development Fund Company, Inc. and Manhattan North Management Co.,
Inc.'s (collectively "Site A") motion for, inter alia, summary judgment pursuant to CPLR 3212,
and plaintiff's cross-motion to amend the pleadings to conform to the proof pursuant to CPLR
3025(b), are determined as follows:

Plaintiff Jose Colon commenced the instant action to recover for injuries he
allegedly sustained, on or about March 19, 2015 at approximately 1:45 p.m., when he
slipped and fell on snow and/or ice in the parking lot located outside of the CASA
Washington Heights branch of the AIDS Service Center NYC ("ASCNYC") located at
2036 Amsterdam Avenue, New York, New York 10032.

Defendants/third-party plaintiffs now seek summary judgment dismissing plaintiff's complaint and for an order granting summary judgment for their third-party claims for contractual and common law indemnification. Defendants/third-party plaintiffs assert they did not assume or owe a duty to plaintiff pursuant to the "storm in progress" defense. Plaintiff also cross moves pursuant to CPLR 3025(b) seeking to amend their pleadings to reflect the correct date of accident.

Pursuant to CPLR 3025(b), "[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." The decision to allow or disallow the amendment is committed to the court's discretion (*see Detrinca v De Fillippo*, 165 AD2d 505 [1st Dept 1991]). "Mere lateness is not a barrier to the amendment, it must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (Siegel, Practice Commentaries, McKinney's Cons.Laws of NY, Book 7B, CPLR 3025:5, p 477.) Additionally, "[i]t is well established law that, leave to amend the pleadings 'shall be freely given' absent prejudice to or surprise resulting directly from the delay" (*see Detrinca v De Fillippo*, 165 AD2d 505 [1st Dept 1991]).

Here, plaintiff's bill of particulars clearly states that, "[t]he accident occurred on or about March 19, 2015 at approximately 1:45 p.m." The defendants/third-party plaintiffs herein were on notice from the commencement of this action as to the approximate date of plaintiff's alleged accident. Plaintiff herein is seeking leave to amend his pleadings to reflect the correct date of the accident to March 20, 2015, a day after the initial purported accident date in the complaint. Although the action was commenced in 2015, plaintiff's lateness must be coupled with significant prejudice to the other side to bar the amendment. Based on the depositions and discovery already conducted to date, significant prejudice to the other side is not present here. As such, plaintiff is granted leave to amend his pleadings to correct the date of accident to March 20, 2015.

As to defendants/third-party plaintiff's motion, 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 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its *prima facie* burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see al Zuckerman v City of New York*, 49 NY2d 557 [1980]).

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it neither created nor has actual or constructive notice of the unsafe condition (*see Rosario v Prana Nine Properties, LLC*, 143 AD3d 409 [1st Dept 2016]). Once that showing is made, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice of it (*id.*).

However, a landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and does not commence until a reasonable time after the storm has ended (*see Sherman v New York City Thruway Authority*, 27 NY3d 1019 [2016]). "The rule is designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds simply re-covers the walkways as fast as they are cleaned, thus rendering the effort fruitless" (*see Powell v MLG Hillside Associates, L.P.*, 290 AD2d 345 [1st Dept 2002]). Where the evidence in the record is clear that the accident occurred while the storm was still in progress, defendants may avail themselves of the rule as a matter of law (*id.*). Indeed, evidence of a storm in progress presents a prima facie case for dismissal (*id.*).

In support of defendants/third-party plaintiff's motion, defendants/third-party plaintiffs submit, inter alia, plaintiff's deposition transcript, non-party witness Derrick Horton's deposition transcript, the affidavits of certified consulting meteorologist Howard Altschule, and the lease agreement between Site A and ASCNYC.

Plaintiff testified that at the time of the accident he was a coordinator and substance abuse counselor for CASA, also known as ASCNYC. On the date of the accident, plaintiff stated that at approximately 8:30 a.m. it was "snowing real heavy that day." When he first arrived at work, plaintiff stated that he observed the building maintenance crew shoveling snow out of the parking lot. Plaintiff further testified that he knew that the maintenance crew work for the building since he had seen them for many years performing repair work at the center. At around 12:30 p.m., while escorting a client to the train station, the plaintiff averred that "the snow was tapering." Upon his return to the office, he observed that it was still snowing and accumulating on the sidewalk. He further stated that the snow "was a little thick" and "there was a thin layer of that snow on top of what was already on the ground."

At approximately 1:45 p.m., plaintiff testified that he helped the staff shovel the snow so they would be able to move their vehicles. He further stated that normally, as a staffer, he would not perform snow and ice removal, but maintenance men employed by ASCNYC as well as individuals hired by building management would engage in snow removal. Plaintiff opined that it had not snowed the day prior to the accident or during that week. At the deposition, plaintiff identified with a circle on a photograph the location where he fell on the tarred pavement inside the driveway on black ice. Plaintiff further averred that at the time he fell it was "gradually snowing," and did not notice anyone performing snow or ice removal. Additionally, plaintiff further testified that he did not see any salt or sand put down on the ground in the area of the parking lot where he fell. After he fell, plaintiff stated that he went inside the office and reported the incident to the receptionist and his supervisor Derrick Horton. He also stated that he saw the incident report but did not sign it.

Derrick Horton was also deposed and stated that at the time of plaintiff's accident, he was an associate director for ASCNYC. He averred that prior to 2015 up until approximately two years thereafter, he worked for ASCNYC. Horton averred that while he was in charge of daily operations at the clinic, he also would ensure that all safety precautions would be adhered to, such as maintenance on the ground floor of the building.

He also testified that the ASCNYC employees who were in charge of maintenance were responsible for putting mats down during inclement weather and “if it was snow and ice, that it would be removed, and salt would be put down.”

According to Horton, even though he was not responsible for removing the snow and ice, he nonetheless took part in the removal process. Horton testified that even though there was no policy for ASCNYC employees with respect to snow removal, workers such as himself, the plaintiff, and a worker named Terry took part in the snow removal process when it snowed. With respect to the date of plaintiff’s accident, Horton stated that it was snowing on that day, heavy at times, and the snow was sticking. He further averred that the accumulation was approximately eight or nine inches and had stopped snowing after plaintiff’s accident. Horton testified that on the day he arrived at work at 8:30 and performed snow removal. Moreover, Horton stated that plaintiff was in the process of conducting snow removal when he slipped on ice.

As to the incident report, Horton stated that he drafted and signed the report however, he was unsure as to the date he created it.

The report states that:

On Thursday March 19, 2015 at approximately 1:45 pm Jose Colon reported to me that he had just slipped on the snow and ice in the drive way at 2036 Amsterdam parking lot. It had been snowing all morning and the staff at CASA Washington Heights had been shoveling and salting the drive way every hour. The drive way is on an incline and very slippery creating a safety hazard. Jose Colon reported that he had slipped and fell on his knee. I inquired as to his condition and if he was alright. He stated that the drive way was very slippery and that it presented a dangerous situation. He reported that his leg was hurting, and I asked if he needed medical care. He declined and continued at his work assignment.

Horton clarified that the sentence in the report which reads, “the staff at CASA Washington Heights had been shoveling and salting the driveway every hour” refers to himself, the plaintiff and another worker named Tyrell. Horton testified that it had stopped snowing after plaintiff’s accident but could not recall the exact date or the time of the accident. Additionally, he stated that even though he was unsure as to the precise date of plaintiff’s accident, he was certain that it was snowing on the date that the plaintiff fell. To Mr. Horton’s knowledge, “the building is responsible for removing snow from that circle area.” He further stated that on the date of the incident, the building workers cleared the path only one time. However, it continued to snow and create a hazard, so he would continue to clear a path throughout the day.

John Noboas, the current director of IT and operations for ASCNYC was also deposed. He stated that the ASCNYC employed a maintenance staff at the Amsterdam location. Noboas explained that the duties of the maintenance staff include cleaning offices, bathrooms, and shoveling snow from the “little front part of the building” which is considered to be “their area” of the concrete.

The lease agreement between the landlord Site-A and the tenant ASCNYC dated July 1, 2010, states in pertinent part:

Tenant shall, at its own expense, make replacements to the sidewalk and curbs adjacent to demised premise as set forth in Exhibit B where made necessary by negligence or willful misconduct of its tenant, its agent, employees, customers, or contractors, and tenant shall keep said sidewalks and curbs from dirt, rubbish, snow and ice.

On October 3, 2019, Justice Billings analyzed this lease agreement during prior discovery motion practice. Her decision states in relevant part that:

Third-party plaintiffs may not exclusively rely on the lease, because it imposes responsibility on the tenant to maintain only the sidewalk flags immediately adjacent to its doorway and not the other public exterior portions of the premises and specifically imposes responsibility on the landlord to clear snow and ice from the parking area exterior to the lease premises.

As such, the court has previously determined that the duty to remove snow and ice from the accident location rested with the landlord and is the law of the case.

With respect to the weather conditions from March 12, 2015 through March 20, 2015, defendant submits the affidavits of certified meteorologist Howard Altschule. Based upon the weather records and climatological data, Altschule opined that no snow fell at the incident location from March 12, 2015 through March 19, 2015. Specifically, on March 19, 2015 at approximately 1:45 p.m., the Doppler radar images indicated that no precipitation fell at the location of plaintiff’s alleged accident, the sky was clear, and the temperature was 37 degrees fahrenheit. Altschule further stated that no snow or ice was present on exposed, untreated, and undisturbed surfaces since at least 8:00 a.m. on March 19, 2015. On March 20, 2015, the Doppler radar images indicated that mostly continuous light to moderate and heavy snow fell from 11:33 a.m. through 11:56 p.m. During this time, approximately 4.1 inches of new snow accumulated. Additionally, from 11:33 a.m. through 1:45 p.m. less than 1.0 inch of snow accumulated.

Generally, a landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and does not commence until a reasonable time after the storm has ended (*see Sherman v New York City Thruway Authority*, 27 NY3d 1019 [2016]). "The rule is designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds simply re-cover the walkways as fast as they are cleaned, thus rendering the effort fruitless" (*see Powell v MLG Hillside Associates, L.P.*, 290 AD2d 345 [1st Dept 2002]). Where the evidence in the record is clear that the accident occurred while the storm was still in progress, defendants may avail themselves of the rule as a matter of law (*id.*). Indeed, evidence of a storm in progress presents a prima facie case for dismissal (*id.*). However, even during an ongoing snow storm, while ordinarily there would be no duty to remove snow, if one takes steps to remove snow and ice, liability may result if those efforts create a hazardous condition or exacerbate a natural hazard created by the storm (*see Suntken v 226 West 75th St. Inc.*, 258 AD2d 314 [1st Dept 1999]).

Thus, even if a storm was in progress at the time of the incident, the deposition testimony submitted raises issues of fact as to whether Site A employees "negligently performed snow and ice removal operations" when they shoveled the snow out of the driveway the morning of the accident and or "created or exacerbated a dangerous condition" (*see Pipero v New York City Transit Authority*, 69 AD3d 493 [1st Dept 2010]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]).

In addition to summary judgment, defendants/third-party plaintiffs also move for an order granting summary judgment on their third-party claims for contractual and common law indemnification.

Entitlement to full "contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify" (*see Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483 [1st Dept 2010]). Common law indemnification "requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*id.*).

The lease agreement states in pertinent part that:

Landlord or its agents shall not be liable for any damage to property of tenant or of others entrusted to employees of the building, nor for loss of, or damage to, any property of tenant by theft or otherwise, nor for any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence or willful misconduct of landlord, its agents or employees.

Likewise, defendants/third-party plaintiff's claims for contractual and common law indemnification also fails since defendants/third-party plaintiffs have not met their prima facie

burden entitling them to summary judgment and have not established that they are free from negligence.

Accordingly, it is ORDERED that defendant/third-party plaintiffs' motion for summary judgment is denied in its entirety; and it is further


ORDERED that, plaintiff's cross motion seeking leave to amend the pleadings to reflect the correct date of accident is granted; and it is further

ORDERED that the amended pleadings reflecting the correct date of accident shall be e-filed and deemed served upon all parties within 30 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Index No.: 159922/15

4/8/2021
DATE


RICHARD G. LATIN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INC		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> LIJDES TRANSFER/REASSIGN			