

Robinson v Executive Assoc. N. I, L.L.C.

2021 NY Slip Op 32924(U)

October 21, 2020

Supreme Court, Rockland County

Docket Number: 031183/2017

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory time period 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.

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PENA-EMILIA ROBINSON and MALCOLM ROBINSON,

Plaintiffs,

DECISION AND ORDER

Index No.: 031183/2017

-against-

EXECUTIVE ASSOCIATES NORTH I, L.L.C.,
EXECUTIVE ASSOCIATES NORTH II, L.L.C.,
EXECUTIVE ASSOCIATES NORTH III, L.L.C.,
EXECUTIVE ASSOCIATES NORTH IV, L.L.C.,
EXECUTIVE ASSOCIATES IX, L.L.C.,
EMPIRE EXECUTIVE INN, L.L.C., EMPIRE
EXECUTIVE INN MANAGEMENT
COMPANY, L.L.C., and ASCAPE LANDSCAPE
& CONSTRUCTION CORP.,

Motion Sequence # 4

Defendants.

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The following papers, numbered 1 to 6, were read on the summary judgment by Defendants Executive Associates North II, LLC and Executive Associates North IV, LLC (collectively “Defendants North II and IV”), pursuant to CPLR § 3212:

Notice of Motion/Affirmation in Support/Exhibits(A-Q).....	1-2
Affirmation in Opposition(Cambareri)/Exhibits(1-4).....	3
Affirmation in Partial Opposition(Meenagh).....	4
Reply Affirmation/Exhibit(R)/Affidavit in Support.....	5-6

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

In this action, Plaintiff Pena-Emilia Robinson seeks damages she allegedly sustained from a slip and fall accident on January 12, 2015. Ms. Robinson alleges that she slipped and fell on an icy exterior portion of a common sidewalk/walkway located at “2 Executive Boulevard,

Suffern, NY 10901” (the “Premises”). Ms. Robinson seeks damages for negligence and her husband, Mr. Robinson, seeks damages for loss of consortium against the property owner and snow removal contractor of the Premises. Defendant Executive Associates North II (“Defendant North II”), the owner of the Premises, had a contract with Defendant Ascape Landscaping & Construction Corp (“Ascape”) to provide snow removal services on the Premises (“Snow Removal Contract”). In response to the Complaint, Defendants North II and IV filed an Answer with a crossclaim against all co-defendants for contractual indemnification. Likewise, Defendant Ascape filed its Answer with a crossclaim for contribution and common law indemnification against Defendants North II and IV.

Now, before the Court is Defendants North II’s and IV’s motion for summary judgment. They seek judgment as a matter of law on Plaintiffs’ Complaint and Ascape’s Crossclaims by alleging that they owed no duty to Ms. Robinson because of the storm in progress doctrine. Defendant North IV also seeks summary judgment dismissing the action as against it, alleging that it is not the property owner of the Premises and, thus, owed no duty to maintain the Premises in a safe manner. As an initial matter, the Court addresses whether to grant summary judgment to Defendant North IV for lack of duty.

Standard for Summary Judgment

“As we have stated frequently, the proponent of 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]. “Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact.” *Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]. Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011]. Further, a motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or

where there are issues of credibility.” *Scott v Long Island Power Auth.*, 294 AD2d 348 [2d Dept 2002]. “Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact.” *Kahan v Spira*, 88 AD3d 964, 966 [2d Dept 2011].

Whether to Grant Defendant North IV Summary Judgment Based Upon Lack of Duty

“Liability for a dangerous condition on real property must be predicated upon a defendant's ownership, occupancy, control, or special use of the subject property (see, *Morrison v Gerlitzky*, 282 AD2d 725).” *Hilliard v Roc-Newark Assocs.*, 287 AD2d 691, 693 [2d Dept 2001].

Both Defendants North II and IV allege that Defendant North IV had no duty to maintain the location of Ms. Robinson’s accident. They submit a copy of the deed of 2 Executive Boulevard and John Jovan’s deposition. Jovan testified on behalf of Defendants North II and IV, property manager for both entities. He testified that Defendant North II owns the property located at 2 Executive Boulevard and that Defendant North IV owns the property at 4 Executive Boulevard. When shown pictures of the location of Ms. Robinson’s fall, Jovan testified that the location depicts 2 Executive Boulevard, owned by Defendant North II only. He further testified that the Snow Removal Contract for 2 Executive Boulevard was by and between Defendant North II and Ascape.

The Court finds Defendant North IV established their prima facie burden that Defendant North IV did not own, manage, supervise, operate, control or make special use of the walkway where Ms. Robinson allegedly slipped and fell. Notably, co-Defendant North II, who owns the Premises where Ms. Robinson slipped and fell, joins in this argument to dismiss the action as against Defendant North IV. Although Plaintiffs’ counsel invites the Court to search the record and assure that Defendant North IV owed no duty to Ms. Robinson, the Court declines to partake in such judicial activism and perform the work of counsel. Consequently, summary judgment on Ms. Robinson’s negligence cause of action is granted as to Defendant North IV. Because Ms. Robinson’s cause of action is not viable, Mr. Robinson’s derivative causes of action cannot be sustained either. *See Flanagan v Catskill Regional Med Ctr*, 65 AD3d 563 [2d Dept 2009]. As such, the Court limits its analysis to the remaining moving defendant, North II. Next, the Court

addresses whether to grant Defendant North II summary judgment based on the storm in progress doctrine.

Whether to Grant North II Summary Judgment Based Upon the Storm in Progress Doctrine

“A defendant may be held liable for a slip-and-fall incident involving snow and ice on its property only upon a showing that the defendant created a dangerous condition or had actual or constructive notice of it.” *Salvanti v Sunset Indus. Park Assocs.*, 27 AD3d 546 [2d Dept 2006][internal citations omitted]. “Under the so-called ‘storm in progress’ rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm.” *Marchese v Skenderi*, 51 AD3d 642 [2d Dept 2008][internal citations omitted].

In this action, North II alleges that it owed no duty to Ms. Robinson because the storm in progress doctrine applies here. Defendant North II relies on, *inter alia*, its expert witness, Certified Consultant Meteorologist (“CCM”) Thomas Else, to allege that the precipitating freezing rain prior to and during the time of Ms. Robinson’s accident was the cause of her fall. In opposition, Plaintiffs relies on, *inter alia*, their own the weather report and affidavit of their expert witness Howard Altschule, who is also a CCM. While Altschule agrees with Else that it was precipitating freezing rain during Ms. Robinson’s fall, he also opines that there was pre-existing snow/ice also present on exposed, untreated, and undisturbed surfaces on the Premises. Altschule opined that Plaintiff’s fall was caused by the dangerous and slippery condition caused by the precipitation that accumulated on top of pre-existing snow/ice. Else disagrees with this conclusion and, instead, opines that any pre-existing snow/ice would have been treated and gone because of Ascape’s actions of salting and pre-salting the Premises prior to Ms. Robinson’s fall. Furthermore, Ms. Robinson’s deposition testimony included contradictory statements as to whether it was precipitating the day of her fall.

Based upon the foregoing, the Court finds that there is a triable issue of material fact as to whether prior ice/snow, as opposed to solely the alleged precipitation itself, caused Ms. Robinson’s fall. *See Mike v 91 Payson Owners Corp.*, 114 AD3d 420 [1st Dept 2014]; *Cf. DeVito v Harrison House Assoc.*, 41 AD3d 420, 421 [2d Dept 2007][finding that plaintiff’s

allegation that she slipped on old ice failed to raise a triable issue of fact where plaintiffs “did not submit any evidence to substantiate their claim that the weather conditions prior to the accident date could have resulted in the creation of icy patches in the area where the accident occurred”. Moreover, any contradictory statements within Ms. Robinson’s deposition, as well as the conflicting opinions of the expert meteorologists, are triable issues of fact for the jury to determine. *Bautista v Kysor/Warren*, 96 AD3d 982, 983 [2d Dept 2012]; *Arroyo v Clarke*, 148 AD3d 479 [1st Dept 2017]. Therefore, the Court denies Defendant North II’s argument for summary judgment based on the storm in progress doctrine. Next, the Court addresses whether to grant Defendant North II summary judgment as to Ascape’s crossclaims for contribution and indemnification.

Whether to Grant North II Summary Judgment on the Crossclaims

“The party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability.” *Arriola v City of New York*, 128 AD3d 747, 749 [2d Dept 2015][internal citations omitted]; *Brown v Two Exchange Plaza Partners*, 76 NY2d 172 [1990]. Likewise, “an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties[.]” *Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1030 [2d Dept 2009][internal citations omitted].

Defendant North II alleges that it owed no duty to Ms. Robinson, and as such Ascape’s crossclaims for contribution and indemnification must be dismissed and that its own crossclaim for contractual indemnification should be granted. However, as discussed above, issues of fact remain with respect to the negligence, if any, of both Defendant North II and Defendant Ascape. Therefore, the Court denies Defendant North II summary judgment for any of the crossclaims for contribution and indemnification. Conversely, because Defendant North IV has been granted summary judgment on Plaintiffs’ causes of action, summary judgment is appropriate for Defendant North IV on Ascape’s crossclaims.

Based upon the foregoing, it is

ORDERED that Plaintiffs' complaint is dismissed as against Defendant Executive Associates North IV; and it is further,

ORDERED that Defendant Ascape Landscape & Construction Corp.'s cross-claims are dismissed as against Defendant Executive Associates North IV; and it is further,

ORDERED that the remaining relief sought in instant motion for summary judgment is denied.

The parties are hereby advised of a pre-trial conference on **November 13, 2020 at 10:30 am.**¹

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
October 21, 2020

E N T E R



HON. ROBERT M. BERLINER, J.S.C.

To:
Counsel of record via NYSCEF

¹ The conference will occur virtually *via Microsoft Teams*. Plaintiff's counsel is directed to file a letter to the Court via NYSCEF confirming the availability and providing the contact information of all counsel of record.