

Tomala v Islandia Expressway Realty, LLC
2021 NY Slip Op 32973(U)
March 31, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 607518/2017
Judge: Paul J. Baisley, Jr.
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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.
-----X

ADAM TOMALA,

Plaintiff,

-against-

ISLANDIA EXPRESSWAY REALTY, LLC, 2929
CH LLC, 2929 NASSIM LLC, NAMDAR REALTY
GROUP, LLC, CARLOS VALENTIM, d/b/a CI
FINE LANDSCAPES, ROGERIO VALENTIM d/b/a
CI FINE LANDSCAPES,

Defendants.

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INDEX NO.: 607518/2017
MOTION DATE: 6/25/2020
MOTION SEQ. NO.: 002 MG

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ORDERED that the motion (motion sequence no. 002) for summary judgment by defendants Carlos Valentim d/b/a CI Fine Landscapes, and Rogerio Valentim d/b/a CI Fine Landscapes and the motion (motion sequence no. 003) for summary judgment by defendants Islandia Expressway Realty, LLC, 2929 CH LLC, 2929 Nassim, LLC, and Namdar Realty Group, are consolidated for the purposes of this determination; and it is further

ORDERED that defendants' motions for summary judgment are granted.

This is an action in which plaintiff seeks recovery for personal injuries allegedly sustained on December 30, 2016 at approximately 5:30 a.m. in the parking lot of 2929 Express Drive North, Islandia, New York. On that date, plaintiff, a Suffolk County police officer, alleges that he slipped and fell on ice and/or black ice in the parking lot. Plaintiff alleges that he was handling a 911 dispatch call at the time of the accident. Specifically, plaintiff was responding to a disabled motor vehicle on Motor Parkway, the roadway adjacent to the subject parking lot. Islandia Expressway Realty, LLC, 2929 CH LLC, 2929 Nassim, LLC, and Namdar Realty Group, LLC ("Islandia Expressway") are the owners of the subject property. Carlos Valentim d/b/a CI Fine Landscapes, and Rogerio Valentim d/b/a CI Fine Landscapes ("Fine Landscapes") were retained to perform snow removal services at the property.

Defendants Fine Landscapes now move for summary judgment asserting that they cannot be liable in tort for any alleged breach of the snow services contract between Fine Landscapes and the property owner, Islandia Expressway, as plaintiff was not a party to or an intended beneficiary of the contract; and as such, Fine Landscapes did not owe plaintiff a duty of care. In support of

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their motion, Fine Landscapes submits copies of the pleadings, preliminary conference order, note of issue, transcript of plaintiff's examination under oath, deposition transcript of Islandia Expressway by George Tasso, deposition transcript of Rogerio Valentim, various photographs of the subject accident location, services contract between owner and Fine Landscapes, and meteorological records.

Defendants Islandia Expressway cross-move for summary judgment, contending that defendants did not create the subject condition nor did they have actual or constructive notice of the condition. Defendants further contend that they are entitled to summary judgment on their cross-claims against co-defendants Fine Landscapes for contractual and common law indemnification, contribution and breach of contract.

In opposition, plaintiff submits that the defendants are liable under the New York State Property and Maintenance Code Section 302.3, and that both the defendant owners and contractor are liable for the piling of the snow that melted into an icy stream.

Plaintiff testified at an examination under oath on January 23, 2019 that the subject accident occurred on December 30, 2016 at approximately 5:30 a.m. at 29-29 Express Drive North, Islandia, New York. At the time of the incident, it was dark, cold, and freezing. He did not believe it had snowed or rained within a 24 hour period prior to the accident; he believed it had snowed "a couple of weeks" before the accident. The parking lot was dimly lit and "very dark." He was responding to a call regarding a disabled vehicle. After initially speaking with the driver of the disabled vehicle and thereafter walking back to his own car, plaintiff was again walking from his car to check on the driver of the disabled vehicle when he slipped and fell on ice. Prior to falling, he did not notice whether there were any icy conditions in the parking lot. He did not see any snow on the blacktop area of the parking lot at any time nor did he see any salt or ice melt on the blacktop area of the parking lot. After he fell, plaintiff noticed that the ice was "pretty thick" and dirty. Plaintiff testified that the ice he slipped on was part of a long "stream of ice" leading from the top of the elevation of the parking lot down in a wide manner. He believes the stream of ice was coming from where the snow was piled on the grass adjacent to the parking lot. He never saw water flowing from the snow bank and he couldn't recall whether there was snow spilling off of the grassy area onto the blacktop.

Rogerio Valentim testified at a deposition on behalf of Fine Landscapes. He testified that the service agreement for the property in question includes snow removal. The contract directed Fine Landscapes to provide snow removal services according to set amounts of snow fall accumulation. If the snow fall is less than one and one-half inches, Fine Landscapes was required to provide de-icing at the premises. The property manager would tell Fine Landscapes where to push and pile the snow. Mr. Valentim never saw the alleged frozen stream prior to the accident. He never had any conversations with anyone from the premises complaining about areas of ice in the parking lot. Fine Landscapes was on a "call basis" with relation to snow removal at the lot

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which meant after an event of snow, Fine Landscapes would not return to the property unless they were called back to the premises.

George Tasso testified on behalf of Islandia Expressway at a deposition held on July 16, 2019. He is employed by Islandia Expressway as a building engineer at 2929 Express Drive North. Tasso testified that Central Islip Landscapes is responsible for snow removal in the parking lot at this location. Tasso identified the signed service contract between Islandia Expressway and Fine Landscapes. Pursuant to the contract, if any piles of snow are large, Islandia Expressway would instruct Fine Landscapes on where to pile the snow. Mr. Tasso's duties included inspecting the subject location after Fine Landscapes had plowed.

The certified meteorological records from the U.S. Department of Commerce establish that it had last snowed on December 17, 2016, nearly two weeks prior to the subject accident, at which time it snowed three inches. The certified weather records further indicate that the temperature from December 17, 2016 to the date of accident ranged between 42 to 62 degrees and that three days prior to the incident that the high temperature was 62 degrees.

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 eliminate any material issues of fact from the action. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v. 20th Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. NYU Medical Center, supra.*; *Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such proof has been offered the burden shifts to the opposing party, who, in order to defeat the motion for summary judgment must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. V. Aeroxon Products*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept. 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v. Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept. 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law.

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (*Pulka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 (1976); *Palsgraf v. LIRR*, 248 NY 339(1928)). He must further demonstrate that defendant's acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (*Sheehan v. City of New York*, 40 NY2d 496, 387 NYS2d 92 [1976]).

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A landowner owes a duty to another on his land to keep it in a reasonably safe condition (*Basso v. Miller*, 40 NY2d 233, 386 NYS2d 564 (1976); *Smith v. Taylor*, 279 AD2d 566, 719 NYS2d 686 [2nd Dept. 2001]). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (*Martinez v. Santoro*, 273 AD2d 448, 710 NYS2d 374 (2nd Dept. 2000); *Sadler v. Town of Hurley*, 288 AD2d 805, 720 NYS2d 613 [3rd Dept. 2001]). Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present a party cannot be held liable for injury caused by the defective or dangerous condition on the property (*Balsam v. Delma Engineering Corp.*, 139 AD2d 292, 532 NYS2d 105 [1st Dept. 1988]; *Pappalardo v. NY Health & Racket Club*, 279 AD2d 134, 718 NYS2d 287 [1st Dept., 2000]).

A plaintiff may only recover when he is able to show that the defendants either created the condition which caused the accident or had actual or constructive notice of the condition (*Anderson v. Klein Foods*, 139 AD2d 904, 527 NYS2d 897 [4th Dept. 1988]; *Moss v. JNK Capital*, 211 AD2d 769, 621 NYS2d 679 [2nd Dept. 1995]). Constructive notice may be inferred where the alleged defect was visible and apparent for a sufficient length of time prior to the accident so as to permit the defendant to discover and remedy it (*Fasolino v. Charming Stores*, 77 NY2d 847, 567 NYS2d 640 [1991]).

Generally, a third-party contractor is not liable in tort to an injured plaintiff (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120[2002]; *Nachamie v. County of Nassau*, 147 AD3d 770, 47 NYS3d 58 [2nd 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, supra*, 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 (*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 (*Palka v. Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 611 NYS2d 817 [1994]).

Here, Fine Landscapes established its *prima facie* entitlement to summary judgment by demonstrating that plaintiff was not a party to the snow removal contract, and therefore, Fine Landscapes did not owe him a duty of care (*Bryan v. CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 26 NYS3d 207 [2nd Dept. 2016]; *Diaz v. Port Auth. of NY & NJ*, 120 AD3d 611, 990 NYS2d 882

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[2nd 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 [2nd Dept. 2016]; *Foster v. Herbert Slepoy Corp.*, 76 AD3d 210, 905 NYS2d 226 [2nd Dept. 2010]). As plaintiff has not submitted competent proof establishing that one of the *Espinal* exceptions applies to the instant matter, he has failed to raise a triable issue of fact. Accordingly, the motion of Fine Landscapes for summary judgment dismissing the complaint against it is granted.

An owner or possessor of property has a duty to maintain its property “in reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Basso v. Miller*, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). In slip and fall cases involving snow and ice, a property owner is not liable unless he or she created the defect, or had actual or constructive notice of its existence (*Castillo v. Silvercrest*, 134 AD3d 977, 24 NYS3d 86 [2nd Dept. 2015]; *Smith v. Hariri Realty Assoc., Inc.*, 109 AD3d 897, 971 NYS2d 451 [2nd Dept. 2013]; *Gil v. Manufacturers Hanover Trust Co.*, 39 AD3d 703, 704, 833 NYS2d 634 [2nd Dept. 2007]). 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 the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*Mercedes v. City of New York*, 107 AD3d 767, 968 NYS2d 519 [2nd Dept. 2013]).

To constitute constructive notice, a hazardous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to afford the defendant a reasonable opportunity to discover and remedy it (*Gordon v. American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; *Perez v. New York City Hous. Auth.*, 75 AD3d 629, 906 NYS2d 299 [2nd Dept. 2010]). Plaintiff has failed to establish that the defendants had actual or constructive notice of the alleged defective condition. Plaintiff’s theory that the defendants are liable for the piling of the snow that melted into an icy stream is speculative and not supported by the meteorological evidence (*Urena v. NYCTA*, 248 AD2d 377, 669 NYS2d 662 [2nd Dept. 1998]).

In light of the foregoing, defendants’ contentions regarding contractual indemnity are moot. Defendants’ motions for summary judgment are granted.

Dated: March 31, 2021



J.S.C.