

Reavis v County of Westchester
2021 NY Slip Op 33253(U)
March 25, 2021
Supreme Court, Westchester County
Docket Number: Index No. 60276/2018
Judge: Linda S. Jamieson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X
TIFFANY BROOK REAVIS,

Index No. 60276/2018

Plaintiff,

DECISION AND ORDER

-against-

COUNTY OF WESTCHESTER, WESTCHESTER
COUNTY HEALTH CARE CORPORATION
(WCHCC), WESTCHESTER COUNTY MEDICAL
CENTER (WMC), WESTCHESTER MEDICAL
CENTER HEALTH NETWORK (WMC HEALTH),
THE BRICKMAN GROUP LTD. LLC, BRIGHTVIEW
LANDSCAPES LLC, HEALTHCARE PARKING
SYSTEMS OF AMERICA, INC., GREENWAY
PROPERTY SERVICES, INC., EMPIRE
LANDSCAPING & SNOW PLOWING, INC., C.M.
LAWN SERVICE, INC., d/b/a C.M. LANDSCAPING
INC.,

Defendants.

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The following papers numbered 1 to 13 were read on these motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Notice of Motion, Affirmation and Exhibits	2
Notice of Motion, Affirmation and Exhibits	3
Notice of Motion, Affirmation and Exhibits	4
Affirmation and Exhibits in Opposition	5
Memorandum of Law in Opposition	6
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Affirmation in Opposition	9
Affirmation in Reply	10
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Affirmation in Reply	12
Affirmation and Exhibit in Reply	13

There are four motions for summary judgment before the Court in this trip-and-fall action. The Court previously granted the unopposed motion for summary judgment dismissing defendant C.M. Lawn Service, Inc. ("CM") from the action.

The Brickman Group Ltd. LLC and Brightview Landscapes LLC (collectively, "Brickman") bring the first motion. Pursuant to contract, Brickman "was to provide all general labor and contracting services to the premises of Westchester County Medical Center at the Valhalla, New York location." According to Brickman, "The contract does not require movants to perform and [sic] repairs to the subject parking garage facility nor is there any affirmative requirement that movants were to inspect the garage for any defects." (Emphasis omitted). There is no dispute that Brickman's contract had ended in March 2017, several months prior to the accident.

The second motion was filed by defendant Empire Landscaping & Snow Plowing, Inc. ("Empire"). Empire, a landscaping contractor, began working at the site only 13 days prior to the accident. Defendant Greenway Property Services Inc. ("Greenway")

filed the third motion for summary judgment. Greenway states, without contradiction, that it did not commence working at the site until six months after the accident. As plaintiff failed to oppose this motion, it is granted.

Plaintiff filed the final motion. She seeks summary judgment on the issue of liability against all of the Westchester defendants: the County of Westchester, Westchester County Health Care Corporation, Westchester Medical Center and Westchester Medical Center Health Network (collectively, the "Westchester defendants"). Plaintiff also seeks to dismiss the Westchester defendants' first affirmative defense, sounding in comparative negligence.

Background

The accident occurred on June 13, 2017, at around 6:30 p.m. Plaintiff had finished her shift as a trauma surgeon at the Westchester defendants' hospital, and was returning to her car in the parking garage. Although she had parked that day on the third level, she forgot that she had done so, and was looking for her car on the second level (where she typically parked) at the time of her accident. There is no dispute that the area in which Dr. Reavis tripped was different from the rest of the surface of the parking deck; nearly-contemporaneous photos submitted to the Court by various parties show that there was a square cut out of the surface and then filled in. There is also no dispute that

within that square there was some deterioration in the surface. Although no one measured the deterioration, it is not insignificant. Various parties opine that it was different depths: a bit less than half an inch, about half an inch and close to an inch deep.

In her motion for summary judgment, plaintiff asserts that the Westchester defendants "engaged in a number of different types of periodic inspections and tours of the grounds of the Valhalla campus, including the parking garage, ostensibly for safety purposes." They also took prospective contractors around with them so that they could understand what they were bidding on. Plaintiff asserts, with some deposition testimony as evidence, that various contractors were aware of the poor condition of the garage decks, and that they had made the Westchester defendants aware of this. The Westchester defendants' witness testified at his deposition that after plaintiff's accident, he inspected the area. He testified that the area was "an uneven walking surface."

According to Brickman, it was not responsible for the inspection or repairs of any of the surfaces of the campus, including the garage decks. Its representatives testified at their depositions that it was only responsible for snow removal and de-icing on walkways and sidewalks, landscaping and emptying garbage cans. They also testified that its subcontractor, former

defendant CM, was responsible for the snow removal and de-icing in garages and on roadways. Neither Brickman nor CM was responsible for repairs to any surfaces, Brickman contends; if they were to do this, it would be a separate work order and charge. There is no evidence that Brickman (or CM, for that matter) ever did any repair work in the garage at issue.

As stated, Empire only began working at the site 13 days prior to the accident. There is no dispute that it had not done any repair work in the garage prior to the accident.

Analysis

"In a premises liability case, a defendant property owner who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the condition that allegedly caused the accident nor had actual or constructive notice of its existence. To provide constructive notice, a dangerous condition must be visible and apparent and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it." *Shehata v. City of New York*, 128 A.D.3d 944, 946, 10 N.Y.S.3d 265, 267-68 (2d Dept. 2015). Similarly, a "contractor may be held liable for injuries to a third party where, in undertaking to render services, the contractor entirely displaces the duty of the property owner to maintain the premises in a safe condition, the injured party relies on the contractor's continued performance under the

agreement, or the contractor negligently creates or exacerbates a dangerous condition." *Mathey v. Metro. Transp. Auth.*, 95 A.D.3d 842, 843-44, 943 N.Y.S.2d 578, 581 (2d Dept. 2012).

The Court begins with the Empire motion. Empire contends that it was only responsible for "lawn maintenance and general grounds keeping including maintenance of flower beds and litter collection." Empire acknowledges that the contract also provided for additional work upon request by the Westchester defendants, but asserts that it "was neither requested nor authorized to perform any extra work and/or repair of any paved or concrete surface in the parking garage prior to the plaintiff's accident." As a result, Empire contends that it "neither failed to perform their contractual duties nor created or exacerbated a dangerous condition. There is no claim that EMPIRE exacerbated the alleged condition nor that they launched a force or instrument of harm. The contract to provide landscaping services does not in and of itself put EMPIRE in the position of owing a general duty to keep premises in a safe condition. Thus, EMPIRE owes no such duty of care to the plaintiff herein." This suffices to establish Empire's prima facie entitlement to summary judgment. *Briggs v. Pick Quick Foods, Inc.*, 103 A.D.3d 526, 526, 962 N.Y.S.2d 46, 47 (1st Dept. 2013) ("A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous

condition, nor had actual or constructive notice of its existence. Upon such showing, the burden shifts to the party opposing the motion to raise a triable issue of fact as to the creation of the defect or notice thereof.”).

In response, plaintiff points out that although the contract is silent on this subject, the bid documents, which are incorporated into the contract, do require Empire to “conduct daily grounds safety rounds’ and communicate identified safety hazards in writing to” the Westchester defendants. Because it had this obligation, plaintiff argues, “Empire assumed a duty of care, and in failing to exercise reasonable care in the performance of its duties, clearly increased the risk of harm to individuals traversing the parking garage, including the plaintiff.” (Quotation omitted). Specifically, plaintiff contends, “Empire commenced the performance of its duties at the Valhalla campus approximately 13 days before the subject incident occurred. During that time, therefore, pursuant to its acknowledged contractual duties, defendant Empire performed at least thirteen grounds safety inspections, and was present on all three levels of the parking garage on at least thirteen occasions. In the performance of these duties, defendant Empire failed to identify and report” the defect.

While this may all be true, it is also true that Empire, “by its mere failure to inspect, did not launch a force or instrument

of harm." *Vasquez v. Port Auth. of New York & New Jersey*, 100 A.D.3d 442, 955 N.Y.S.2d 1, 2 (1st Dept. 2012). As the Second Department has explained it, "Generally, the breach of a contractual obligation to maintain and inspect building premises is not sufficient in and of itself to impose tort liability upon the promisor with respect to noncontracting third parties." *Marchetti v. Allstate Conveyor Serv., Inc.*, 67 A.D.3d 748, 749, 888 N.Y.S.2d 597, 598 (2d Dept. 2009). The *Marchetti* Court went on to explain that "The Court of Appeals, however, has recognized three situations in which a party such as the defendant may be said to have assumed a duty of care, and thus potentially may be liable in tort to third persons such as the injured plaintiff: (1) where the contracting party, in failing to exercise reasonable care in the performance of its 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.*

None of these three exceptions apply to Empire. There is no evidence that it launched an instrument of harm, or "entirely displaced" the Westchester defendants' duty to maintain the premises safely. Nor does plaintiff even contend that she relied on Empire's performance of its duties. Accordingly, the Court

grants Empire's motion for summary judgment, and dismisses it from the action.

Similarly, the Court also grants Brickman's motion for summary judgment dismissing it from the action. Brickman's contract - which was even more limited than Empire's, in that they did not contractually agree to provide anything other than snow removal, garbage collection and landscaping services - terminated in May 2017, before the accident occurred. Plaintiff argues, however, that "through its custom and practice, [Brickman] assumed a duty to inspect and report hazardous conditions and safety concerns on the Valhalla campus, inclusive of the second-floor parking garage." The same reasoning applies to defeat this argument. As the Court of Appeals has explained, there are only three instances in which

a duty of care to noncontracting third parties may arise out of a contractual obligation or the performance thereof. In such cases, the promisor is subject to tort liability for failing to exercise due care in the execution of the contract. The first is where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk. . . . The second set of circumstances giving rise to a promisor's tort liability is where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation. Third, we have imposed tort liability upon a promisor where the contracting party has entirely displaced the other party's duty to maintain the premises safely. In contrast to the first exception, the promisor under such circumstances may indeed be liable for failing to make conditions safer for the injured party.

Church ex rel. Smith v. Callanan Indus., Inc., 99 N.Y.2d 104, 111-12 (2002). As none of these exceptions applies in these circumstances, Brickman's motion for summary judgment is also granted.

Finally, the Court turns to plaintiff's motion for summary judgment seeking a finding of liability against the Westchester defendants. Plaintiff asserts that "the subject defect clearly constituted a dangerous and defective condition, pursuant to the applicable law, codes, standards, and good and accepted safety practice, as analyzed by plaintiff's expert, Douglas Peden, R.A. Further, the Westchester defendants both caused and created such defective condition and also had constructive knowledge of it, based upon the record evidence."

The problem with all of plaintiff's assertions and conclusions is that none of them is actually proven as a matter of law. While it is clear that the area in which plaintiff fell was in a deteriorated condition, the Court is not prepared to conclude based on the photographs, testimony and other evidence presented to it that it was obviously dangerous and defective. At the same time, while it appears likely that this defect was not trivial - triviality being a conclusion which the Westchester defendants urge the Court to make - this is a question better suited for the jury to determine. *Maldonado v. 2121 Shore Condo.*, 138 A.D.3d 789, 790, 30 N.Y.S.3d 185, 187 (2d Dept. 2016)

("A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses.")

Nor has plaintiff proven, as a matter of law, that "the Westchester defendants both caused and created such defective condition and also had constructive knowledge of it." Indeed, while the Westchester defendants admit that they were familiar with the condition of that area, they contend that they did not need to take any steps to repair it because it was not inherently dangerous. Again, this issue is for the jury to determine.

With respect to plaintiff's motion to dismiss the comparative negligence defense, the Westchester defendants argue that there is ample evidence to demonstrate that plaintiff was not looking where she was going at the time of the accident. In response, plaintiff argues that she cannot be liable because "it is not as if plaintiff was faced with the task of avoiding a single defect in the subject parking garage, given that virtually the entire subject parking garage was damaged, dangerous and 'deteriorated or destroyed.'" They go on to state that "Given the circumstances plaintiff was faced with as she came upon the subject parking garage, the defendants' liability, and the absence of plaintiff's, is clear." It is not so clear to the

Court. This aspect of the motion is also denied. The jury can decide who bears the responsibility for this accident.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
March 25, 2021



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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