

Cribbs v Corporate Woods 11 Co., L.P.

2022 NY Slip Op 32544(U)

May 16, 2022

Supreme Court, Albany County

Docket Number: Index No. 904481-16

Judge: Denise A. Hartman

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MARY JUDE CRIBBS AND JAMES CLINTON
CRIBBS, III,

Plaintiffs,

-against-

CORPORATE WOODS 11 COMPANY, L.P.,
CORPORATE WOODS 11 Co., L.P., CORPORATE
WOODS, LLC, CORPORATE WOODS PARTNERS,
PICOTTE REAL ESTATE, INC., PICOTTE
MANAGEMENT COMPANY, INC., PICOTTE
DEVELOPMENT COMPANY, L.P., PICOTTE
ASSOCIATES, LLC, PICOTTE COMPANIES,
UNISTRESS CORP., GILBANE, INC., GILBANE
BUILDING COMPANY, AND GILBANE
DEVELOPMENT COMPANY,

Defendants.

DECISION AND
ORDER

Index No. 904481-16

UNISTRESS CORPORATION,

Third Party Plaintiff,

-against-

PRECAST SERVICES, INC.,

Third Party Defendant.

HON. DENISE A. HARTMAN, AJSC

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(No Appearance on These Motions.)

Hartman, J.

This negligence action arises out of an incident that occurred on August 27, 2013, in the parking garage owned by defendant Corporate Woods 11 Co., L.P. (Corporate Woods) and managed by defendant Picotte Management Company (Picotte). Plaintiff, and her husband, derivatively, allege that she tripped and fell when her right foot got stuck in an expansion joint while walking on the upper deck of the parking garage. The complaint also asserted claims against Unistress Corp. (Unistress), which in 2011 contracted with the Corporate Woods/Picotte defendants to serve as their general contractor to replace the upper deck of the parking garage. The Corporate Woods/Picotte defendants asserted cross claims against Unistress. And Unistress commenced a third-party action against defendant Precast Services, Inc. (Precast), which it had subcontracted for crane operation and removal and erection of the precast concrete sections that comprise the deck of the parking garage.

By Decision and Order dated September 2, 2021, as modified on reargument by Decision and Order dated December 20, 2021, this Court addressed the parties' motions seeking summary judgment on the various claims, cross claims and third-party claims asserted in this case. Relevant here, the Court (1) denied Unistress's motion for summary judgment dismissing plaintiffs' complaint and all cross claims against it; (2) denied plaintiff's motion for summary judgment against Unistress, Corporate Woods,

and Picotte; and (3) denied Precast's motion for summary judgment dismissing Unistress's third-party complaint against it for contractual indemnification and failure to procure liability insurance. Plaintiffs have since stated that they are withdrawing all direct claims against Unistress. Unistress and Precast appealed this Court's decisions and orders denying their requests for summary judgment. The case is scheduled for trial on September 26, 2022.

Unistress now moves (Motion # 9) to sever from trial the Corporate Woods/Picotte defendants' cross claims against it, and its third-party claims against Precast. Plaintiffs join in the request for severance. Picotte opposes the request. The Corporate Woods/Picotte defendants have also filed a motion in limine (Motion # 10) to preclude reliance on alleged code violations and evidence of a prior incident on the upper deck of the parking garage, which plaintiffs oppose. And plaintiffs have filed a motion in limine (Motion # 11) to preclude defendants from adducing evidence of the certificate of occupancy, which the Corporate Woods/Picotte defendants oppose.

Background

The facts underlying this case are more fully recounted in this Court's decisions and orders of September 2, 2021 and December 20, 2021. To summarize, plaintiff worked in a commercial office building with an attached parking garage owned by defendant Corporate Woods. Plaintiff alleges that she tripped and fell when her right foot stuck in one of the main expansion

joints while walking on the upper deck of the parking garage. She claims that the expansion joint created an unsafe condition that caused her injury.

In 2011, the Corporate Woods/Picotte defendants contracted with general contractor Unistress to replace the upper deck of the parking garage. Unistress subcontracted with third-party defendant Precast for the crane operation and removal and erection of the precast concrete sections that comprise the deck of the parking garage. Unistress subcontracted with a nonparty for the caulking, sealing, and installation of the expansion joints throughout the garage, including replacement of the two main expansion joints which traversed the length of the original upper deck of the garage.

As approved by the project engineer, the specifications called for Precast to place the concrete panels leaving a “two-inch nominal” gap between them to allow installation of expansion joints. As designed, the two-inch nominal space would allow the installation of Watson Bowman ME-300 expansion joints, the price of which was incorporated into the contract pricing. Deviating from the project specifications, Precast’s installation of the new deck resulted in a space between the concrete panels that was not uniform and was, at least in some areas, wider than the upper limit for installation of the Watson Bowman ME-300 expansion joints. This presented Unistress and Precast with two options: Precast could adjust the width of the gap by re-installing the concrete panels; or the panels could be cut to create more uniform spacing to accommodate the

installation of the larger Watson Bowman ME-400 joints. The parties agreed to pursue the latter option and Precast agreed to accept a change order decreasing its payment to adjust for the increased price of the ME-400 expansion joints and additional materials and labor required to make the necessary changes. The concrete panels were cut and notched, and the larger ME-400 expansion joints were installed in the areas where the space exceeded the upper limit for the ME-300 model.

Analysis

Motion # 9

Unistress's Motion for Severance Is Granted.

Unistress moves pursuant to CPLR 603 to sever, for purposes of trial, the Corporate Woods/Picotte defendants' cross claims against Unistress and Unistress's third-party claims against Precast from plaintiffs' underlying negligence claims against the Corporate Woods/Picotte defendants. Plaintiffs, who have withdrawn their negligence claims against Unistress, join in the request for severance of the contract and indemnification claims asserted by and against the various defendants. Corporate Woods and Precast have taken no position on the motion for severance. Picotte opposes.

CPLR 603 provides: "In furtherance of convenience or to avoid prejudice, the Court may order a severance of claims" "[S]everance is a matter of judicial discretion and a 'trial court's determination will not be disturbed

absent abuse of discretion or prejudice to a party's substantial rights" (*Matter of Santander Consumer USA, Inc. v Autorama Enters., Inc.*, 2022 NY Slip Op 03041, *2 [3d Dept 2022], quoting *Matter of Green Harbour Homeowners' Assn. v Town of Lake George Planning Bd.*, 1 AD3d 744, 746 [3d Dept 2003]; see *State Farm Fire & Cas. Co. v Dayco Prods., Inc.*, 19 AD3d 923, 924 [3d Dept 2005]).

At trial, plaintiffs intend to produce evidence of the Corporate Woods/Picotte defendants's negligence in safely maintaining the premises. Specifically, plaintiffs are expected to attempt to prove that the owners allowed a defective condition to exist on the premises in 2013 which posed a hazard to pedestrians, specifically, the expansion joint was of a width and depth and in a location that could foreseeably result in injury to parking lot users/pedestrians. Unistress expects plaintiffs to elicit expert testimony that the alleged condition violated certain codes or rules applicable to property owners. And it expects plaintiffs to attempt to prove actual or constructive notice on the part of the owners of the alleged condition by reference to a prior incident. Unistress argues that plaintiffs will not be offering any proof at trial as to any negligent act on the part of Unistress or Precast.

In addition, Unistress points out, the voluntary discontinuance of plaintiffs' direct claims against Unistress has eliminated Precast's presence in plaintiffs' case in chief. Without severance, Unistress would have to defend

against the contractual-indemnity cross claim of the Corporate Woods/Picotte defendants without the ability to have the jury consider Unistress's third-party contractual indemnification claim against Precast at the same time. Unistress asserts that this scenario would result in prejudice both to itself, and to Precast, whose potential liability could be decided in its absence. On the other hand, severance of the cross claim would allow the jury to consider the plaintiffs' claims against the owner and property management company without the myriad of contractual indemnity issues overwhelming the proof. Moreover, Unistress points out, a potential defense verdict at trial would eliminate the need for any resolution of the contractual indemnity claims at all. And severance of the contract and indemnification claims at trial would eliminate the need for retrial if Unistress's and Precast's appeals are unsuccessful.

Supporting the motion for severance, plaintiffs confirm that they will attempt to prove that the Corporate Woods/Picotte defendants were negligent in failing to provide a safe means of ingress and egress from the parking garage to the office building. Plaintiffs argue trial on these issues will take less than a week, and that including the cross claims and third-party claims will substantially lengthen the trial and bring into play different issues regarding duty and construction standards that would be confusing to the jury. Finally, they argue that severance would further the interest of judicial economy

because trial and appeals regarding these claims may be unnecessary if the jury decides against plaintiffs in the severed action.

In opposition, Picotte argues that trial of all the claims – plaintiffs' claims against the Corporate Woods/Picotte defendants and those against Unistress – would further the interests of avoiding inconsistent verdicts and judicial economy. Picotte contends that proof of Unistress's oversight of the construction of the expansion joints is intertwined with plaintiffs' claims and Picotte's defense. Picotte further argues that it would suffer undue prejudice if they are not allowed to present evidence that they hired competent professionals to install the expansion joints and of the decision-making process involved in such installation. According to Picotte, this evidence will support Picotte's position that no hazard existed and, if it did, Picotte had no notice of it. Moreover, Picotte argues, Unistress will have to testify to rebut plaintiffs' claim that the expansion joint, as constructed, was in violation of the New York Property Maintenance Code. And, if the trier of fact were to find more than one party to be negligent, Picotte was, at most, passively negligent and the primary fault would lie with Unistress and its sub-contractors. If severed, Picotte contends, it would not be allowed to present a complete defense or evidence of properly apportioned fault.

Picotte argues further that plaintiffs' voluntary discontinuance against the construction defendants and abandonment of their improper construction

claims is an attempt to avoid having conflicting expert testimony at trial. Throughout the history of this case, all parties were on notice that the construction defendants intended to call their own experts, including Bernard P. Lorenz, P.E. As a result, Picotte did not retain its own expert to testify to the same thing. If the Court grants severance, Picotte maintains that it should be able to call Unistress' experts at trial to diminish any prejudice to Picotte, and without any prejudice to plaintiffs who were previously served with the applicable expert notices. Finally, Picotte argues that, if the Court grants severance, Unistress must remain on the trial verdict sheet to avoid additional prejudice to Picotte as Unistress was the general contractor and has been a named party in this matter from the onset.

The Court, in its discretion, will grant the motion for severance. Plaintiffs confirm that they are withdrawing their direct claims against Unistress, and that they intend to prove that the Corporate Woods/Picotte defendants were negligent in failing to provide a safe means of ingress and egress from the parking garage to the office building. Trial on such straightforward issues will likely take less than a week. To include the cross claims and third-party claims would substantially lengthen the trial and bring into play difficult issues regarding duty and construction standards, which may confuse the jury.

Moreover, to the extent that a jury were to find in plaintiffs' favor, the defendants will have their day in court to litigate contractual and indemnification issues which do not involve plaintiffs. They will have a full opportunity to present expert testimony and other evidence regarding construction and installation of the expansion joints as pertaining to their respective obligations. And, if the jury decides against plaintiffs in the severed, underlying action, trial and appeals regarding cross claims and third-party claims may be obviated.

Motion # 10
Corporate Woods/Picotte's Motion in Limine Is Denied.

The Corporate Woods/ Picotte defendants have filed a motion in limine to preclude plaintiff from offering at trial: (a) expert testimony regarding alleged violations of the American Society for Testing and Materials ("ASTM") standards and the New York Property Maintenance Code; (b) photographs of the location of plaintiff's injury taken years after the instant incident; and (c) testimony related to Betsy Vandenberg's 2011 accident at the parking garage.

(a) Evidence of Noncompliance with ASTM Standards and the New York Property Maintenance Code

Plaintiffs have responded that, since that are proceeding only against the Corporate Woods/Picotte defendants, they will not be offering evidence of the ASTM standards, which are construction standards at most applicable to the construction defendants. In plaintiffs' case against Corporate

Woods/Picotte, plaintiffs' expert seeks to testify only that the parking garage on the date of plaintiff's accident was not a safe walking surface and was in violation of the New York State Property Maintenance Code, establishing some evidence of the Corporate Woods/Picotte defendants' liability as property owners/managers for failing to maintain a safe means of ingress and egress to its buildings.

Since plaintiffs assert that they do not intend to adduce testimony about the ASTM standards in their direct case, the motion is to that extent rendered academic. To the extent that the motion seeks to preclude expert testimony regarding violations of the New York State Property Maintenance Code, defendants' motion is denied. Proof of a violation the Property Maintenance Code is admissible as some evidence of negligence in maintaining structures and premises in a safe condition (*see Tyrell v Pollak*, 163 AD3d 1232, 1234 [3d Dept 2018]; *Stancarone v Sullivan*, 167 AD3d 676, 678 [2d Dept 2018]).

(b) Photographs

As to the photographs, the Corporate Woods/Picotte defendants assert that plaintiffs are in possession of photographs purporting to depict the parking garage and expansion joint in the area where plaintiff was allegedly injured. During her deposition, plaintiff testified that she visited the premises in 2016, three years after the incident, with an inspector when the photographs were taken. Plaintiff did not know the specific date and time of the visit or

describe the weather or temperature on that date. And, defendants argue, due to the very nature of expansion joints, which are meant to contract and expand depending on the weather conditions and outside temperature, the photographs offer no probative value. Defendants also argue that plaintiff is in possession of photographs that she personally took of the expansion joint in questions on the date of the incident, which she later uploaded to her Facebook account. Hence, they argue, admission of photographs taken years after the incident will not aid the jury in its determination at trial.

But, as plaintiffs correctly argue, the standard for admissibility of a photograph is not when it was taken but whether a witness can identify the photograph as fairly and accurately depicting the scene at the time of the accident. To the extent that trial witnesses will take the stand and testify that the photographs depict the expansion joint fairly and accurately in the same condition as at the time of plaintiff's accident, such photographs may be admissible. And if a foundation is laid and the photographs are admitted, defendants can present contrary evidence and argument to try to undermine the weight given such photographs. Accordingly, defendants' current motion to preclude such photographic evidence is denied at this time.

(c) 2011 Accident Report

Finally, the Corporate Woods/Picotte defendants seek to preclude plaintiffs from offering an accident report for Betsy Vandenburg, who

apparently was injured in December 2011, several months after the completion of the construction of the parking garage and about 18 months before plaintiff's incident. Plaintiffs intend to offer the accident report as evidence that the Corporate Woods/Picotte defendants had notice of the unsafe condition of the parking garage surface. The 2011 accident report states that Betsy Vandenburg caught her foot in the expansion joint on the "west side of the upper deck," and that she "fell while walking from her car into the building, her heel got caught in the expansion joint opening [and she] sprained her right hand." According to plaintiffs, the photos attached to the 2011 accident report suggest that the expansion joint was of similar width and depth as existed when plaintiff caught her foot in it a year and a half later.

The Court denies defendants' motion to preclude admission of the 2011 accident report at this time. It is true that the contents of the report are hearsay and not admissible for their truth. But the existence of the report may bear on notice. Thus, to the extent that a proper foundation is laid, and the evidence presented at trial supports plaintiffs' assertion of relevance, and with appropriate limiting instructions, the accident report may be admissible on the issue of notice.

Motion # 11
Plaintiff's Cross Motion in Limine Is Denied.

Plaintiffs seek to preclude testimony about the issuance of the certificate of occupancy by the Town of Colonie. They contend that the testimony is irrelevant because the expansion joint that is the subject of this litigation was not completed when the Town of Colonie did its inspection on July 29, 2011 before issuing the certificate of occupancy. Plaintiffs also argue that such testimony, which it expects to be presented without foundation, would be prejudicial to plaintiffs' case. The Court denies plaintiffs' motion. Plaintiffs' arguments depend on the foundation and factual relevance presented at trial.

Accordingly, it is

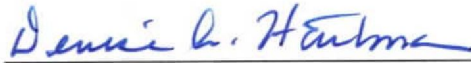
ORDERED that Unistress's motion to sever all cross claims and third-party claims is granted; and it is

ORDERED that the Corporate Woods/Picotte defendants' motion in limine is denied; and it is

ORDERED that the plaintiffs' motion in limine is denied.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for Unistress shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
May 16, 2022



HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court

Papers Considered
NYSCEF Doc. No.153-164; 176-193



05/17/2022