Gambino v FBG Wall LLC
2025 NY Slip Op 33175(U)
August 19, 2025
Supreme Court, New York County
Docket Number: Index No. 159549/2020
Judge: Leslie A. Stroth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH — *Justice* — PART 12M

INDEX NO. 159549/2020

MOTION DATE N/A, N/A

MOTION SEQ. NO. 004 005

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ROSANNA ANTOLINO GAMBINO, ANTHONY GAMBINO,

Plaintiff,

- v -

FBG WALL LLC,WALMART, INC.,RD MANAGEMENT LLC,HARRIMAN COMMONS, LLC,D&D GENERAL CONTRACTING & PROPERTY MAINTENANCE INC, JOHN DOE

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 108, 109, 110, 111, 116, 117, 118, 121, 122
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 112, 119, 120, 123
were read on this motion to/for JUDGMENT - SUMMARY.

FACTUAL BACKGROUND

This action arises from a slip-and-fall incident that occurred on January 19, 2020, in the parking lot of the Walmart Supercenter located at Harriman Commons, in Harriman, New York. Plaintiff Rosanne Antolino Gambino ("Plaintiff") alleges that as she exited her vehicle in the store's parking lot, she slipped on a patch of black ice and fell, sustaining serious personal injuries. Plaintiff's husband, Anthony Gambino, asserts a derivative claim for loss of consortium.

According to Plaintiff's deposition testimony, the ice patch was wider than her body and extended beneath the tire area of her vehicle. (NYSCEF Doc No. 88 at 37-38) Plaintiff testified that she did not see the ice before stepping out of her car but observed it immediately after falling. (Id. at 40) She further stated that no salt, sand, or other ice-melting product had been

applied to the area. (Id. at 39). Plaintiff alleges that photographs taken after the accident purport to show the presence of a thin, clear layer of ice. (NYSCEF Doc No. 107).

Plaintiffs submit the expert meteorological report of Paul Heppner, who opines that the icy condition formed at least 36 hours before the incident due to prior precipitation, and that the area remained shaded by vehicles, preventing natural melting. (NYSCEF Doc No. 104). Plaintiffs further rely on testimony from Walmart managers acknowledging that multiple slip-and-fall accidents on ice occurred each winter season, and that Walmart did not routinely apply ice melt products, instead relying on D&D General Contracting & Property Maintenance, Inc. ("D&D") for snow removal services.

D&D was retained by Walmart pursuant to a Master Services Agreement to provide snow and ice removal in the parking lot. (NYSCEF Doc No. 101). Under the contract, D&D was responsible for plowing snow, relocating snow piles as directed, and applying bluestone dust or other material to mitigate icy patches. D&D asserts that its responsibilities were limited and that Walmart retained control over monitoring and requesting additional treatment if conditions changed during the day.

Defendants have also submitted the expert affidavit of meteorologist Mark Kramer, who disputes Heppner's conclusions, opining that it is speculative to assert that the ice was present for 36 hours. (NYSCEF Doc No. 110). Kramer contends the condition could have formed shortly before the accident through the natural process of melting and refreezing caused by parked cars and daytime temperature fluctuations.

The record further reflects deposition testimony from Walmart personnel indicating that snow piles were placed in various areas of the parking lot at Walmart's direction, and that runoff from such piles could freeze and create patches of ice. D&D witnesses testified that their crews

applied bluestone dust in accordance with the contract, but Plaintiffs dispute whether this was adequately performed.

In Motion Sequence 004, Plaintiffs seek summary judgment on liability, relying on deposition testimony, expert meteorological reports, and contractual provisions imposing maintenance obligations. In Motion Sequence 005, Defendant D&D moves for summary judgment dismissing the Complaint and all cross-claims, arguing that it owed no duty to Plaintiff under *Espinal v Melville Snow Contractors*, 98 NY2d 136 (2002), and that Walmart's indemnification claim fails absent a complete, enforceable contract. Plaintiffs and Walmart oppose, asserting that issues of fact exist concerning D&D's role in snow placement, its application of bluestone dust, and the overall management of the parking lot.

LEGAL STANDARD

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims and no disputed issues of fact, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest" (*Ferber v Sterndent Corp.*, 51 NY2d 782, 783 [1980]). The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted (*See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, [1st Dept 1990]).

To establish constructive notice of a dangerous condition, a plaintiff must demonstrate that " the condition was visible and apparent and existed for a sufficient period of time before the

accident to allow defendants to discover and correct it. (*Laster v Port Auth. of New York and New Jersey*, 251 AD2d 204, 205 [1st Dept 1998]).

Where competing expert opinions are offered, issues of credibility and weight of the evidence must be resolved at trial. (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 27 [1st Dept 2009]).

A snow removal contractor's duty is limited under *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]. Absent a comprehensive and exclusive maintenance obligation, a contractor does not owe a duty to third parties unless "(1) [...]the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2)[...]the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3)[...]the contracting party has entirely displaced the other party's duty to maintain the premises safely." (Id. at 140) (internal quotations and citations omitted).

DISCUSSION

Plaintiffs' Summary Judgment Motion (Motion Sequence 004)

Plaintiffs argue that the icy condition that caused Ms. Gambino's fall had existed long enough to give Defendants constructive notice and that Defendants failed to take reasonable measures to remedy it. In support, Plaintiffs rely on Ms. Gambino's testimony describing a patch of black ice in the parking lot, photographs taken after the fall, and the expert report of meteorologist Paul Heppner, who opined that the ice was present for more than 36 hours before the accident. Plaintiffs also highlight Walmart's own deposition testimony that multiple slip-and-fall incidents on ice had occurred in prior winters and that ice-melt materials were not consistently applied in the lot.

However, issues of fact remain. Defendants submit a competing expert report from Mark Kramer, who concludes that the ice could have formed shortly before the accident through melting and refreezing around parked cars. Ms. Gambino herself testified that she did not notice the ice until after she fell, raising questions about whether the condition was visible and apparent before the accident. These conflicting accounts create a genuine dispute as to whether the condition existed for a sufficient period of time to permit discovery and correction.

Further issues of fact remain regarding Defendants' inspection and maintenance practices. Walmart employees testified that snow piles were placed in the lot and that runoff could re-freeze into ice patches, but they also indicated that inspections were performed periodically. Whether Walmart's response to the weather conditions was adequate, and whether its actions or omissions were a proximate cause of the fall, are issues that must be resolved by the trier of fact.

As issues of fact remain, Plaintiffs have not established their entitlement to judgment as a matter of law. Accordingly, Plaintiffs' motion for summary judgment must be denied.

D&D's Motion for Summary Judgment (Motion Sequence 005)

D&D contends that it is entitled to summary judgment because it did not create the condition, had no duty to Plaintiff under its contract, and that Walmart retained ultimate responsibility for the premises. D&D points to testimony that it performed plowing and applied bluestone dust when directed, but that Walmart controlled inspections and decided when additional treatment was necessary.

D&D has not, however, resolved all issues of fact related to its possible contribution to the hazard underlying Plaintiff's claims. Plaintiffs argue that snow piles created by D&D's plowing caused runoff, which later froze in the area where Plaintiff fell. Testimony also reflects

disputes as to whether D&D adequately applied bluestone dust and whether such applications were sufficient to address icy patches. These issues bear directly on whether D&D's performance increased the risk of harm.

Moreover, triable issues of fact exist under the first and third *Espinal* exceptions. As to the first, Plaintiffs argue that D&D's plowing created snow piles in the Walmart parking lot that generated runoff, which later froze into the black ice patch on which Plaintiff slipped. Walmart employees testified that such runoff and refreezing were a recurring problem, and Plaintiffs contend that D&D's application of bluestone dust was sporadic or inadequate. This evidence could support a finding that D&D's performance of its contractual duties created or exacerbated a dangerous condition, thereby "launching a force or instrument of harm."

With respect to the third exception, the scope of D&D's contractual obligations is disputed. While D&D characterizes its role as limited, Plaintiffs and Walmart contend that its scope was broader, encompassing both plowing and treatment of ice throughout the lot. This divergence in interpretation and practice presents issues of fact which are not resolvable on a motion for summary judgment.

The second Espinal exception, detrimental reliance, does not appear directly applicable on this record, as Plaintiff herself had no knowledge of or reliance on D&D's work. Nonetheless, the disputes under the first and third exceptions are sufficient to preclude summary judgment.

Moreover, there are factual disputes regarding whether D&D's responsibilities under the Master Services Agreement displaced Walmart's duty to maintain the lot.

Finally, D&D argues that Walmart's indemnification claim fails because the governing contract is incomplete. Yet the existence, scope, and enforceability of that agreement are themselves disputed factual issues inappropriate for summary judgment.

For these reasons, D&D has not met its burden of showing that no triable issues of fact exist, and its motion for summary judgment must also be denied.

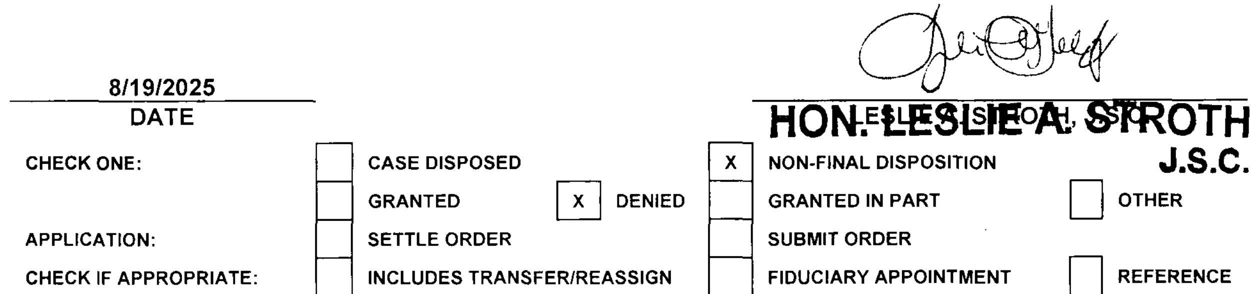
The court has considered the remaining arguments of the parties and finds such unavailing.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for summary judgment (Motion Sequence 004) is denied in its entirety; and it is further

ORDERED that Defendant D&D General Contracting & Property Maintenance, Inc.'s motion for summary judgment (Motion Sequence 005) is denied in its entirety.

The foregoing constitutes the decision and order of the Court.



8/19/2025
DATE

HON. LESLIE A. STROTH
J.S.C.

CHECK ONE:	☐	CASE DISPOSED			☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☒	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE