Colapietro v Retail Property Trust
2012 NY Slip Op 31372(U)
May 17, 2012
Sup Ct, Suffolk County
Docket Number: 08-22143
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 08-22143
CAL. No. 11-01867OT

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-12-11
ADJ. DATE 2-27-12
Mot. Seq. # 001 - MG; CASEDISP

---X

MARIANNE COLAPIETRO,

Plaintiff,

- against -

THE RETAIL PROPERTY TRUST, SIMON PROPERTY GROUP, INC. and CONTROL BUILDING SERVICES, INC.,

Defendants.

---X

STEVEN COHN, P.C.
Attorney for Plaintiff
One Old Country Road, Suite 420
Carle Place, New York 11514

O'CONNOR, O'CONNOR, HINTZ & DEVENEY, LLP
Attorney for Defendants
One Huntington Quadrangle, Suite 3C01
Melville, New York 11747

Upon the following papers numbered 1 to 20 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 18 ; Replying Affidavits and supporting papers 19 - 20 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on January 22, 2008 at approximately 3:57 p.m. when she slipped and fell on snow and ice while walking on the sidewalk leading from the employee entrance/exit of Macy's to the parking lot at the Walt Whitman Mall (Mall) located at 160 Walt Whitman Road, Huntington, New York. Defendant The Retail Property Trust (Retail Property Trust) owns and operates the Mall. At the time of the incident, plaintiff was employed as a Macy's sales associate. Plaintiff claims that defendants were negligent in, among other things, causing, permitting or allowing a dangerous, icy and slippery condition to exist on the premises, failing to properly and adequately warn of the condition, failing to place any signs, cones or barricades, and failing to remedy or remove the condition. In addition, plaintiff claims that defendants had actual and constructive notice of the alleged dangerous condition.

Defendants now move for summary judgment dismissing plaintiff's complaint on the ground that the snow storm that had been in progress while plaintiff was inside the Mall had ended too short a period of time prior to plaintiff's fall for defendants to remedy the alleged hazardous condition created during the storm. Defendants also assert that in any event, defendants Retail Property Trust and Simon Property Group, Inc. (Simon Property Group) did not create or have actual or constructive notice of the alleged dangerous condition. They inform that defendants Retail Property Trust and Simon Property Group retained defendant Control Building Services, Inc. (Control Building Services) to perform snow and ice removal and cleaning services on the sidewalks of the Mall. Defendants argue that defendant Control Building Services did not owe plaintiff a duty of care inasmuch as plaintiff was not a party to the service agreement and defendant Control Building Services did not launch a force or instrument of harm, plaintiff did not rely to her detriment on its continued performance of its duties, and the service agreement was not a comprehensive and exclusive property maintenance contract. Defendants' submissions in support of the motion include the supplemental summons and amended complaint, defendants' answer to amended complaint, plaintiff's bill of particulars, the deposition transcripts of plaintiff, Deborah J. Weber on behalf of defendant Simon Property Group, and Jose Contreras on behalf of defendant Control Building Services, the affidavit of Deborah J. Weber, and the service agreement dated December 31, 2004 between Retail Property Trust and Control Building Services.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, *supra* at 324, citing to ***Zuckerman v City of New York***, *supra* at 562).

As the proponents of the motion for summary judgment, the owner defendant Retail Property Trust and the property manager defendant Simon Property Group have the burden of establishing, prima facie, that they neither created the snow and ice condition nor had actual or constructive notice of the condition (*see* ***Smith v Christ's First Presbyt. Church of Hempstead***, 93 AD3d 839, 941 NYS2d 211 [2d Dept 2012]; ***Meyers v Big Six Towers, Inc.***, 85 AD3d 877, 925 NYS2d 607 [2d Dept 2011]). This burden may be sustained by presenting evidence that there was a storm in progress when the injured plaintiff allegedly slipped and fell (*see id.*). Under the "storm in progress" rule, an owner or party in control of real property will not be held liable for accidents occurring on the property as a result of the accumulation of snow and/or ice until a reasonable period of time has passed, following the cessation of the storm, within which the owner or party in control has the opportunity to ameliorate the hazards caused by the storm (*see* ***Sfakianos v Big Six Towers, Inc.***, 46 AD3d 665, 846 NYS2d 584 [2d Dept 2007]; ***Russo v 40 Garden St. Partners***, 6 AD3d 420, 775 NYS2d 327 [2d Dept 2004]).

There is no duty to remove snow and ice while a storm is in progress (***Grau v Taxter Park Assocs.***, 283 AD2d 551, 724 NYS2d 497 [2d Dept 2001], *appeal denied* 96 NY2d 721, 733 NYS2d 373

[2001]). In addition, a lull in the storm does not impose a duty on the owner or party in control of real property to remove the accumulation before the storm ceases in its entirety (*see* ***Dowden v Long Is. R. R.***, 305 AD2d 631, 759 NYS2d 544 [2d Dept 2003]; *see also* ***Sanders v Wal-Mart Stores, Inc.***, 9 AD3d 595, 780 NYS2d 417 [3d Dept 2004]). Also, there is no duty to warn of icy conditions during a storm in progress (*see* ***Wheeler v Grande'vie Sr. Living Community***, 31 AD3d 992, 993, 819 NYS2d 188 [3d Dept 2006]). On a motion for summary judgment, the question of whether a reasonable time has elapsed from the end of a snow storm may be decided as a matter of law by the court, based upon the circumstances of the case (*see* ***Valentine v City of New York***, 57 NY2d 932, 457 NYS2d 240 [1982]; ***Lanos v Cronheim***, 77 AD3d 631, 909 NYS2d 101 [2d Dept 2010]). A two-hour interval between the cessation of the snow storm and the occurrence of the accident has been determined not to be a reasonable period of time to correct the hazard caused by the storm (*see* ***Lanos v Cronheim***, *supra*).

A contractor or subcontractor's limited contractual undertaking to provide snow removal services generally does not give rise to a duty of care to persons not a party to the contract, absent evidence that the contractor or subcontractor assumed a comprehensive maintenance obligation entirely displacing the other party's duty to maintain the premises safely, or created or exacerbated a dangerous condition or launched a force or instrument of harm, or that the plaintiff detrimentally relied on the contractor's continued performance of its obligation (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Georgotas v Laro Maintenance Corp.***, 55 AD3d 666, 865 NYS2d 651 [2d Dept 2008], *lv denied* 12 NY3d 703, 876 NYS2d 704 [2009]).

Plaintiff testified at her deposition on February 5, 2010 that she arrived at work on the day of her accident at 9:20 a.m., that her normal work hours for that day were 9:30 a.m. to 3:00 p.m., and that she was wearing a regular shoe on her right foot and a blue open-toed boot with a rubber sole underneath on her left foot, following surgery to correct a hammertoe and bunion in August 2007. In addition, she testified that during her ride to work the weather was clear, with no precipitation, and she could not recall when there had previously been any precipitation. Plaintiff recalled that the parking lot was clear, the sidewalks were not wet, and that she walked without event from her car to the employee's entrance of Macy's. She stated that while looking out of a window at Macy's between 12 p.m. and 1 p.m. she saw big snowflakes and observed that the snow was sticking to the ground, and that at approximately 2 p.m. when looking out of a window at Macy's she observed men spreading salt on the sidewalk of the second floor parking lot, and when asked whether it was still snowing at 2 p.m. she responded "I think so." Plaintiff explained that her accident occurred when she left Macy's at almost 3:15 p.m. after clocking out at 3:04 p.m., that she and another female employee walked out together, that it was no longer snowing, that she did not know when it had stopped snowing, and that there was "a thin coating" of snow on the sidewalk. According to plaintiff, she fell at a point halfway between the employee entrance and the parking lot when her right foot went out, she went sideways, and her left knee hit the concrete. She further stated that it was snow with ice underneath that caused her to fall based on her observation after her fall of a wet, clear mound of ice, approximately one inch thick with an area of approximately six inches, where the snow had been wiped away by her foot. Plaintiff added that she observed several ice patches in the area between the employee entrance and the parking lot, that a Macy's security guard was a witness to her fall, and that mall security personnel took photographs of the scene and then put down ice melt.

Deborah J. Weber testified at her deposition on March 5, 2010 that she was employed by Simon Property Group as the Mall Manager on the date of the incident and that part of her duties involve maintenance of the physical property, which includes landscaping and snow removal. In addition, she testified that an outside contractor, Control Building Services, performed maintenance for the Mall. Ms. Weber also testified that maintenance of the sidewalk area abutting the Mall at the exterior of Macy's, a tenant of the Mall, was the responsibility of Simon Property Group, and included snow and ice removal. According to Ms. Weber there were shovels and spreaders available at the Mall. She stated that every employee of the contractor and Simon Property Group was responsible for "calling out" any perceived dangerous condition, but that there would be no documentation, instead someone would be sent out to remedy the condition. Ms. Weber also stated that she was aware of prior complaints of snow or ice accumulation on the Mall sidewalks but could not remember specifically if she received any of those complaints between January 1 and January 22, 2008. She further stated that a complaint of snow and ice conditions would not generate a document but a slip and fall incident from snow and ice would generate an incident report. Ms. Weber explained that defendant Simon Property Group did not have its own incident report and that an incident report with Simon Property Group's name listed on top would be completed and maintained by the Mall's security contractor in their office at the Mall. She did not know if she was present on the premises on the date of the incident.

By affidavit dated November 8, 2011, Ms. Weber adds that from October 2007 through January 22, 2008 she never personally received any complaints concerning the condition of the sidewalk and/or a snow or ice condition located on the sidewalk, and was never notified of any prior accidents involving snow or ice upon the sidewalk where plaintiff's accident occurred. In addition, Ms. Weber avers that a review of Mall records reveals that from October 2007 through January 22, 2008 the Mall never received any complaints regarding the condition of the sidewalk and/or a snow or ice condition located thereon, and was not advised of any prior accidents involving snow or ice on the sidewalk where plaintiff's accident occurred. She also states that the attached service agreement is a true and accurate copy that was in full force and effect on the date of the subject incident.

At his deposition on July 27, 2011, Jose Contreras testified that on the date of the subject incident he was employed by Control Building Services as a supervisor of its housekeeping staff comprised of 12 to 13 people. In addition, he testified that Control Building Services was responsible for clearing the snow and ice from the sidewalk surrounding the Mall under direction from Ms. Weber's assistant, that there were ten temporary Control Building Services staff members, separate from the housekeeping staff, employed solely for snow removal, and that said employees would be called in by the director of the Mall. Mr. Contreras stated that he was responsible for walking the grounds to determine where snow or ice removal was required. According to Mr. Contreras, there was a shop on the first floor where shovels, five or six snow blowers, salt, and 10 or 15 spreaders would be stored. He explained that the housekeeping staff would be responsible for spreading salt at the five main entrances to the Mall when snow began to fall prior to calling in the extra staff to clear the main and employee entrances. Mr. Contreras informed that two inches of snow was required prior to calling in the extra staff for snow removal. Mr. Contreras also stated that snow and ice removal by his staff was not documented, that his work hours were 7 a.m. to 3:30 p.m., and that his staff had two shifts, one group worked from 7 a.m. to 3:30 p.m. and another group worked from 3:30 p.m. to 12:00 a.m. Mr. Contreras informed that after his shift ended, no one else assumed his post as supervisor. He did not remember if

he was working on January 22, 2008 or if he was ever advised that a woman slipped and fell on snow or ice on January 22, 2008 or any complaints of prior slip and fall incidents on snow or ice on the sidewalk area outside of the Mall.

Paragraph 15 of Exhibit A of the service agreement relates to snow removal and indicates that defendant Control Building Services "will provide light snow and ice removal in such areas as entrances and sidewalks as within the budget. This shall be defined as removal by method of broom, shovel, and/or ice melt" and that "[i]n some instances," it "will be responsible to utilize existing equipment for the purpose of drive lane, parking lot and main entrance snow removal, as well as, the spreading of ice melt in the above-mentioned areas."

Here, defendants did not submit any climatological records in support of their motion (*see* CPLR 4528). However, accepting as true plaintiff's deposition testimony that she believed that it was still snowing at 2 p.m. but that the snow had ended by 3:15 p.m. when she left Macy's and that her accident occurred at 3:57 p.m. as alleged in her bill of particulars, defendants established their prima facie showing of entitlement to judgment as a matter of law (*see* ***Lanos v Cronheim***, *supra*; ***Sfakianos v Big Six Towers, Inc.***, *supra*; ***DeMasi v Radbro Realty***, 261 AD2d 354, 689 NYS2d 207 [2d Dept 1999]). Defendants demonstrated that even if the snow storm had ended shortly after 2 p.m., they would have had at most two hours to remedy the snow and ice condition prior to plaintiff's fall at 3:57 p.m. thereby establishing that, regardless of the notice issue, defendants did not have sufficient time from the cessation of the storm to remedy the condition (*see* ***Lanos v Cronheim***, *supra*; ***Edwards v DeMatteis Corp.***, 306 AD2d 309, 760 NYS2d 658 [2d Dept 2003]; *see also* ***Coyne v Talleyrand Partners, L.P.***, 22 AD3d 627, 802 NYS2d 513 [2d Dept 2005], *lv denied* 6 NY3d 705, 812 NYS2d 34 [2006]).

The burden then shifted to plaintiff to raise a triable issue of fact as to whether the precipitation from the storm in progress was not the cause of her accident (*see* ***Meyers v Big Six Towers, Inc.***, *supra*; ***Alers v La Bonne Vie Org.***, 54 AD3d 698, 863 NYS2d 750 [2d Dept 2008]; ***DeVito v Harrison House Assocs.***, 41 AD3d 420, 837 NYS2d 726 [2d Dept 2007]). Plaintiff must raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where she fell which existed prior to the storm, rather than precipitation from the storm in progress, and that defendants had actual or constructive notice of the preexisting condition (*see* ***Meyers v Big Six Towers, Inc.***, *supra*).

Moreover, defendant Control Building Services demonstrated its prima facie entitlement to judgment as a matter of law merely by submitting proof that plaintiff was not a party to the service agreement and that it therefore owed no duty of care to plaintiff (*see* ***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]). Once defendant Control Building Services made its prima facie showing, the burden shifted to plaintiff to come forward with evidence sufficient to raise a triable issue of fact as to the applicability of one or more of the three exceptions to the general rule (*see id.*).

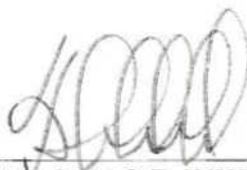
In opposition to the motion, plaintiff contends that defendants are unable to state the last time that they inspected the accident location prior to the cessation of the snow fall and thus cannot prove that they lacked sufficient time prior to the cessation of the storm to remedy the dangerous condition or that they lacked notice of the condition. In addition, she contends that the existence of an approximately one

inch thick patch of ice is evidence that it was at the subject location for a substantial period of time prior to the accident such that it should have been discovered and treated with salt. Plaintiff also argues that defendants' reliance on plaintiff's uncertain response to the question of whether it was snowing at 2 p.m. rather than probing further and submitting an affidavit of an expert is insufficient to meet their burden that a reasonable time had not elapsed from the end of the snow storm. She further contends that the service agreement between defendants Retail Property Trust and Control Building Services is a comprehensive and exclusive maintenance agreement under whose terms defendant Control Building Services is liable. In support of her opposition to the motion, plaintiff submits a copy of the accident report generated after her fall.

Plaintiff failed to raise a triable issue of fact in opposition to the motion (*see* ***Smith v Christ's First Presbyt. Church of Hempstead***, *supra*; ***Meyers v Big Six Towers, Inc.***, *supra*). She failed to raise a triable issue of fact as to whether she slipped on snow-covered ice from a previous storm and whether defendants had actual or constructive notice of the preexisting condition (*see* ***Smith v Christ's First Presbyt. Church of Hempstead***, *supra*; ***Zimmer v Kimco Realty Corp.***, 6 AD3d 528, 774 NYS2d 389 [2d Dept 2004]; ***Dowden v Long Is. R. R.***, *supra*). In addition, plaintiff's claim that the snow-covered ice patch existed for a sufficiently long time, as evidenced by its thickness and size, to have provided constructive notice and a sufficient amount of time to remedy the condition is based upon mere speculation (*see* ***Zimmer v Kimco Realty Corp.***, *supra*; ***Bertman v Board of Mgrs. of Omni Ct. Condominium I***, 233 AD2d 283, 649 NYS2d 799 [2d Dept 1996]). Moreover, plaintiff did not submit any evidence to establish that defendants had an adequate period of time following the cessation of the storm to remedy the dangerous condition (*see* ***Russo v 40 Garden St. Partners***, *supra*). Defendants satisfied their burden under the "snow in progress" rule with evidence of plaintiff's own observations, her affirmative response of "I think so" to the deposition query of whether it was still snowing at 2 p.m., without the necessity of also establishing lack of notice (*see* ***Sfakianos v Big Six Towers, Inc.***, *supra*; ***Edwards v DeMatteis Corp.***, *supra*; ***DeMasi v Radbro Realty***, 261 AD2d 354, 689 NYS2d 207 [2d Dept 1999]). Furthermore, even if the service agreement between defendants Retail Property Trust and Control Building Services was an exclusive and comprehensive maintenance agreement that entirely displaced the owner's or property manager's duty to maintain the premises safely, defendant Control Building Services successfully established its entitlement to judgment as a matter of law under the "storm in progress" rule (*see* ***Coyne v Talleyrand Partners, L.P.***, *supra*).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: 5/17/12



THOMAS F. WHELAN, J.S.C.