Schwartz v CVS
2013 NY Slip Op 33324(U)
December 10, 2013
Sup Ct, Suffolk County
Docket Number: 10-35406
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 10-35406

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 6-21-12 (#003)
MOTION DATE 9-27-12 (#005)
MOTION DATE 10-24-12 (#006)
ADJ. DATE 11-12-13
Mot. Seq. # 003 - MD
005 - XMD
006 - MD

JILL M. SCHWARTZ,

Plaintiff,

-against-

CVS, CVS PHARMACY, INC., BERTO, LLC AND ENTERPRISE ASPHALT PAVING, INC.,

Defendants.

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Upon the following papers numbered 1 to 51 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 28; Notice of Cross Motion and supporting papers 29 - 31; Answering Affidavits and supporting papers 32 - 38; Replying Affidavits and supporting papers 39 - 51; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 003) by defendant Berto, LLC, the cross motion (#005) by defendant CVS Albany LLC, s/h/a CVS and CVS Pharmacy, Inc., and the motion (# 006) by defendant Enterprise Asphalt Paving, Inc. are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 003) by defendant Berto, LLC for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the cross motion (#005) by defendant CVS Albany LLC, s/h/a CVS and CVS Pharmacy, Inc. for summary judgment dismissing the complaint and on its cross claims against defendant Berto, LLC for contractual and common-law indemnification is denied; and it is further

ORDERED that the motion (# 006) by defendant Enterprise Asphalt Paving, Inc. for summary judgment dismissing the complaint and all cross claims against it is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Jill Schwartz, on August 10, 2009 at approximately 10:00 p.m. when she slipped and fell in the parking lot at the CVS store located at 2 East Jericho Turnpike in Huntington Station, New York, leased and operated by defendant CVS Albany LLC, s/h/a CVS and CVS Pharmacy, Inc. ("CVS"), and owned by defendant Berto, LLC. ("Berto"). Prior to the accident, Berto hired defendant Enterprise Asphalt Paving, Inc. ("Enterprise") to sealcoat the parking lot, which was completed on the day of the accident. The gravamen of the complaint is that defendants were negligent in failing to properly maintain, manage and control its property, creating a hazardous condition.

Berto now moves (# 003) for summary judgment on the basis that it was an out-of-possession owner with no contractual obligation to repair or maintain the parking lot where the accident occurred as there was a written lease agreement requiring the tenant to maintain the subject area. Berto also contends that the plaintiff has failed to establish that it created the claimed hazardous condition, or had actual or constructive notice of any such condition on its premises. Moreover, Berto argues that the plaintiff failed to identify the cause of her accident. In support, Berto submits, *inter alia*, the pleadings, the bills of particulars, a lease agreement between Berto and CVS, a letter dated March 4, 2004 from Jericho Huntington CVS, L.L.C. to Berto, and the transcripts of the deposition testimony given by plaintiff, CVS's representatives, James Halleran and Tonya Magnussen, Berto's representative, Patricia Bellissimo, and Enterprise's representative, Alan Siris.

At her examination before trial, plaintiff testified to the effect that on the night of the accident, she went to the CVS store in Huntington Station approximately between 7:30 p.m. and 8:30 p.m. to drop off film for developing. She observed that there were no painted lines designating parking spots. The parking lot was not slippery at that time, and she had no difficulty traversing the parking lot entering or leaving the store. After she returned home, there was a heavy rain at about 9:30 p.m. At approximately 10:00 p.m., she went back to the CVS store to pick up her film, and parked in the same spot where she previously parked. She observed that the parking lot was wet, and it "seemed blacker" than earlier in the evening. Exiting her vehicle, she, looked straight, and had taken five steps towards the store, when her left leg slipped out, causing her to fall to the ground. As she was on the ground, she observed what "seemed to be oily stuff" on the ground.

At his deposition, James Halleran testified to the effect that on the day of the accident, he was a store manager of the subject CVS store, and that he had filled in for store manager Ms. Magnussen for four or five months. He testified that CVS is not responsible for the subject parking lot. If there was a

problem in the parking lot, he would call the "CVS Fixx Line," which would determine if it was a landlord's problem or a CVS issue. In August 2009, the subject parking lot was sealed and restriped. However, he did not know who made the decision to reseal the parking lot. Before the work began, he discussed with the supervisor of the resealing company "what they were doing" and "what the time frame was." After the resealing work was done in the area of the accident in the morning, he and an assistant manager walked on the parking lot at about 4:00 p.m. and observed that the sealed area was dry and that it was not slippery or sticky. He had no recollection as to whether the resealing work took place on the same day that Ms. Magnussen returned from her leave.

At her deposition, Tonya Magnussen testified to the effect that at the time of the accident, she was a store manager of the CVS store. On the day of the accident, she returned to work after a leave since January 2009. Mr. Halleran told her that the parking lot was being sealcoated that day. The sealcoating took place prior to the time she arrived at work at 8:00 a.m. She stated that she was not aware who was responsible for maintaining the parking lot, and that when there was a problem, she would call the "fix line," an internal CVS line, which would handle the problem.

At her deposition, Patricia Bellissimo testified to the effect that she is the operations manager of Degiaimo Group, which was formerly known as Boca Development. Berto is one of the entities that partially owns the Degiaimo Group. At the time of the accident, Degiaimo Group managed the property, on which the subject CVS store was located, for Berto. Ms. Bellissimo identified a lease agreement which became effective on April 11, 2001 for the subject property where Berto was the landlord and CVS was the tenant. She testified that pursuant to paragraph 33 of the agreement, the tenant was responsible for the striping and resealing of the parking lot. Ms. Bellissimo also identified a letter dated March 4, 2004 sent by Jericho Huntington CVS, L.L.C. to Berto. According to the letter, Berto would undertake the maintenance of the parking lot, including the restriping and resealing of the parking lot. She was not sure whether Berto hired Enterprise to perform the restriping and resealing for the subject CVS store.

At his deposition, Alan Siris testified to the effect that he is the president of Enterprise, which is an asphalt paving contractor. Enterprise was hired by Degiaimo Group to restripe and reseal the parking lot of the subject CVS store. Before he started the project, Degiaimo Group approved the work, and during the construction, the work performed at each phase was approved. Mr. Siris testified that it took five days to complete the work including patching and filling cracks, sealcoating and restriping. He testified that with regard to a newly sealed lot, he considers the possibility of rain because the rain could wash it away. On the day of the accident, the final resealing was finished between 1:00 p.m. and 2:00 p.m. He drove by it three or four times to check out the work. At about 5:00 p.m., he last visited the area of the parking lot where the accident happened and observed that the sealant was dry.

Paragraph 33 (a) of the lease agreement between Berto and CVS provides, in relevant part that "[w]ith respect to the parking and other exterior areas of the Premises, Tenant shall perform the following, pursuant to good and accepted business practices throughout the Term: repairing, re-striping, resealing, and maintaining the parking areas."

A letter dated March 4, 2004 from Jericho Huntington CVS, L.L.C. to Berto stated, in relevant part, that "[e]ffective January 1, 2003, Berto shall maintain the lawn sprinkler system, parking lot and the landscaping required at the premises in accordance with the terms hereof," and that "[t]his letter and the provisions contained herein shall in no way be deemed an amendment modification or supplement to the Lease."

While, to prove a prima facie case of negligence in a case involving a fall, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition (*see* ***Williams v SNS Realty of Long Is.***, 70 AD3d 1034, 895 NYS2d 528 [2d Dept 2010]), the defendants, as the movants in this case, are required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (*see* ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2d Dept 2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358, 671 NYS2d 494 [2d Dept 1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.*** 84 NY2d 967, 622 NYS2d 493 [1994]). Moreover, the issue of actual or constructive notice is irrelevant where the defendant had a duty to conduct reasonable inspections of the premises and failed to do so (*see* ***Weller v Colleges of the Senecas***, 217 AD2d 280, 635 NYS2d 990 [4th Dept 1995]; ***Watson v New York***, 184 AD2d 690, 585 NYS2d 100 [2d Dept 1992]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Clark v AMF Bowling Ctrs., Inc.***, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; ***Moons v Wade Lupe Constr. Co.***, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Fasano v Green-Wood Cemetery***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]). In addition, generally, an out-of-possession owner or lessor is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions (*see* ***Lawrence v Celtic Holdings, LLC***, 85 AD3d 874, 925 NYS2d 172 [2d Dept 2011]; ***Fuentes v Ardenwood Enterprises***, 74 AD3d 1279, 903 NYS2d 237 [2d Dept 2010]; ***Lalicata v 39-15 Skillman Realty Co., LLC***, 63 AD3d 889, 882 NYS2d 185 [2d Dept 2009]). Control of the premises may be evidenced by lease provisions making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises (*see* ***Fernandez v Town of Babylon***, 72 AD3d 636, 897 NYS2d 510 [2d Dept 2010]; ***Taylor v Lastres***, 45 AD3d 835, 847 NYS2d 139 [2d Dept 2007]; ***Ever Win, Inc. v 1-10 Indus. Assoc.***, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]).

Here, Berto has failed to establish its entitlement to judgment as a matter of law by demonstrating that it did not maintain control of the subject parking lot or that it was not obligated to maintain or repair the parking lot. There are questions of fact as to whether Berto has assumed responsibility to maintain the parking lot; whether a dangerous condition existed on the subject parking lot so as to create liability on the part of Berto; whether it had actual or constructive notice of the dangerous condition (*see* ***Rhodes-Evans v 111 Chelsea LLC***, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]); whether reasonable inspections were made on the premises prior to the accident (*see* ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]); and whether the plaintiff was comparatively negligent (*see* ***Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]).

In the alternative, Berto seeks summary judgment for contractual indemnification and common-law indemnification against CVS. CVS may be liable to Berto for common-law indemnification even in the absence of a duty running to the plaintiff, if the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of CVS (*see* ***Peycke v Newport Media Acquisition II***, 17 AD3d 338, 793 NYS2d 92 [2005]; ***Baratta v Home Depot USA***, 303 AD2d 434, 756 NYS2d 605 [2003]). Since there is a question of fact as to whether Berto has retained control over the subject parking lot, there is also a question of fact as to whether the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of CVS (*see* ***Franklin v Omni Sagamore Hotel***, 5 AD3d 348, 772 NYS2d 534 [2004]; ***Mitchell v Fiorini Landscape***, 284 AD2d 313, 726 NYS2d 673 [2001]). Moreover, Berto failed to establish its entitlement to summary judgment for contractual indemnification against CVS since a question of fact exists with respect to whether CVS breached the contract by failing to perform one or more of the services for which it was responsible (*see* ***Peycke v Newport Media Acquisition II***, *supra*; ***Baratta v Home Depot USA***, *supra*). These questions of fact preclude the granting of Berto's request for summary judgment for contractual and common-law indemnification against CVS.

Accordingly, the motion by Berto for summary judgment dismissing the complaint and all cross claims against it is denied.

CVS cross-moves (#005) for summary judgment dismissing the complaint against it on the ground that the plaintiff has failed to establish that it created the claimed hazardous condition, or had actual or constructive notice of any such condition on the subject parking lot. In support, CVS submits only an attorney's affirmation which attempts to adopt the arguments and evidence submitted in the motion by defendant Berto.

Here, CVS has failed to establish its entitlement to judgment as a matter of law. Paragraph 33 (a) of the subject lease agreement clearly indicates that CVS is responsible for maintaining the parking areas. There are questions of fact as to whether a dangerous condition existed on the subject parking lot so as to create liability on the part of CVS; whether it had actual or constructive notice of the dangerous condition (*see* ***Rhodes-Evans v 111 Chelsea LLC***, *supra*); whether reasonable inspections were made on the premises prior to the accident (*see* ***McCummings v New York City Tr. Auth.***, *supra*; ***Basso v Miller***, *supra*); and whether the plaintiff was comparatively negligent (*see* ***Bruker v Fischbein***, *supra*).

In the alternative, CVS seeks summary judgment on its cross claims against Berto for contractual indemnification. CVS contends that the subject lease agreement which provides CVS is responsible to maintain the parking lot was altered by the March 4, 2004 letter sent by Jericho Huntington CVS, L.L.C. to Berto. However, the letter stated that the "letter and the provisions contained" therein shall not be deemed "an amendment modification or supplement" to the subject lease agreement. Moreover, CVS failed to submit any other proof to support its claim that since 2004, Berto is responsible for maintaining the parking lot, except the deposition testimony of Patricia Bellissimo. CVS also seeks summary judgment for common-law indemnification against Berto. Berto may be liable to CVS for common-law indemnification even in the absence of a duty running to the plaintiff, if the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of Berto (*see* ***Peycke v Newport Media Acquisition II***, *supra*; ***Baratta v Home Depot USA***,

supra). Since there is a question of fact as to whether Berto has retained control over the subject parking lot, there is also a question of fact as to whether the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of CVS (*see* ***Franklin v Omni Sagamore Hotel***, *supra*; ***Mitchell v Fiorini Landscape***, *supra*). These questions of fact preclude the granting of CVS's request for summary judgment on its cross claims for common-law indemnification against Berto.

Accordingly, the cross motion by CVS for summary judgment dismissing the complaint and on its cross claims against Berto for contractual and common-law indemnification is denied.

Enterprise moves (#006) for summary judgment dismissing the complaint and all cross claims against it on the ground that it neither owed a duty of care to the plaintiff stemming from its sealcoating contract with Berto nor created a dangerous slippery condition which caused the plaintiff to slip and fall.

Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party. In general, contractual obligations will not create a duty toward a third-party unless (1) the third-party has reasonably relied, to his or her detriment, on the continued performance of the contracting party's duties under the contract; (2) the contract is so comprehensive and exclusive that it completely displaces the other contracting party's duty toward the third-party; or (3) the contracting party has launched a force or instrument of harm, thereby creating or exacerbating a dangerous condition (*see* ***Stiver v Good & Fair Carting & Moving***, 9 NY3d 253, 848 NYS2d 585 [2007]; ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Rubistello v Bartolini Landscaping, Inc.***, 87 AD3d 1003, 929 NYS2d 298 [2d Dept 2011]).

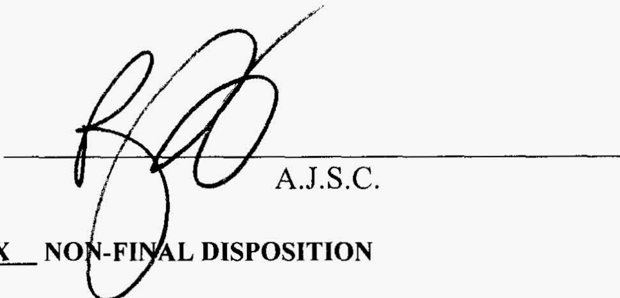
When a party, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Figueroa v Lazarus Burman Assoc.***, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]; ***Levine v Zarabi***, 243 AD2d 448, 663 NYS2d 68 [2d Dept 1997]). In order to make a prima facie showing of entitlement to judgment as a matter of law, Enterprise is required to establish that it did not perform any work related to the sealcoating in the parking lot whose condition caused plaintiff's injury or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (*see* ***Diaz v City of New York***, 93 AD3d 755, 940 NYS2d 654 [2d Dept 2012]; ***Schwint v Bank St. Commons, LLC***, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; ***Keese v Imperial Gardens Assoc., LLC***, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]).

Here, Enterprise's limited contractual undertaking to perform sealcoating on the parking lot is not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see* ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; ***Katz v Pathmark Stores***, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]). Nevertheless, Enterprise's submissions failed to establish its entitlement to judgment as a matter of law on this issue (*see* ***Keese v Imperial Gardens Assoc., LLC***, *supra*). Alan Siris testified that there was a possibility that rain could wash away the sealcoating work, and the final resealing was finished between 1:00 p.m. and 2:00 p.m. on the day of the accident. It is undisputed that there was a heavy rain

several hours after the final work was done. Plaintiff testified that after she fell, she observed something which "seemed to be oily stuff" on the parking lot. There are questions of fact as to whether Enterprise properly performed the sealcoating work related to the condition which caused plaintiff's injury (*see* ***Schwint v Bank St. Commons, LLC***, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; ***Prenderville v International Serv. Sys.***, 10 AD3d 334, 781 NYS2d 110 [1st Dept 2004]) and whether Enterprise exercised reasonable care under the circumstances.

Accordingly, the motion by Enterprise for summary judgment is denied.

Dated: 12/10/13



A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**