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SHORT FORM ORDER

ORIGINAL WHEN BLUE

INDEX No. 11-2123
CAL. No. 14-00280OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 3-27-14 (002)
MOTION DATE 5-22-14 (003, 004, 005)
ADJ. DATE 8-19-14
Mot. Seq. # 002 - MG # 004 - MD
003 - MD # 005 - MD

WARREN GOODMAN and LYNN GOODMAN,

Plaintiffs,

- against -

TOWN OF ISLIP, COUNTY OF SUFFOLK, FIFTH AVENUE PAVING, STANDARD PARKING and ECH-MACARTHUR AIRPORT, LLC.,

Defendants.

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Upon the following papers numbered 1 to 79 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; 9 - 25; 26 - 42; 43 - 59; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 60 - 67; 68 - 75; Replying Affidavits and supporting papers 76 - 77; 78 - 79; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purpose of this determination these motions for summary judgment (# 002) by defendant Fifth Avenue Parking, (# 003) by defendant ECH-MacArthur Airport, (# 004) by defendant Town of Islip, and (# 005) by defendant Standard Parking are consolidated and decided together; and it is further

ORDERED that the motion (# 002) by defendant Fifth Avenue Paving for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

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

ORDERED that the motion (# 004) by defendant Town of Islip for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion (# 005) by defendant Standard Parking for summary judgment dismissing the complaint and all cross claims against it is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Warren Goodman on January 2, 2010 at approximately 5:30 p.m. when he slipped and fell on ice in the long term parking lot of Islip MacArthur Airport in Ronkonkoma, New York, while walking to his vehicle. Plaintiff stated in her bill of particulars that the parking lot was "dimly lit," alleging that the defendants failed to properly illuminate the parking lot. Prior to the accident, Standard Parking entered into a snow removal contract with Fifth Avenue Paving.

Defendant Fifth Avenue Paving moves (# 002) for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. Fifth Avenue Paving contends that it neither created the alleged dangerous condition nor had actual or constructive notice of the condition. In support, Fifth Avenue Paving submits, *inter alia,* the pleadings, the bill of particulars, and the transcripts of the deposition testimony given by plaintiffs Warren Goodman and Lynn Goodman and Alan McKeever, a representative of Fifth Avenue Paving.

At his deposition, plaintiff Warren Goodman testified to the effect that on the night of the accident, he walked from the terminal to the long term parking lot at the MacArthur Airport, where he parked his vehicle. It appeared that the parking lot was plowed, but he did not observe any salt or sand on the ground. While walking in the middle of the lane and passing approximately three quarters of the way to the next division of the parking lot, he slipped and fell on black ice. The area of ice was "fairly large" because he "had trouble getting up" and "couldn't get any traction." Prior to the accident, he did not notice any ice in the area of the accident. Although he has no recollection as to whether the light pole in the area of the accident was illuminated at the time of the accident, he testified that it was "very dark" and not "well-lit."

At her deposition, plaintiff Lynn Goodman testified to the effect that as she walked in the long term parking lot on the night of the accident, about five feet behind her husband, she did not observe any ice, sand or salt on the ground. Her husband suddenly slipped and fell to the ground. As she approached him slowly, she started slipping. She testified that "it wasn't light enough to see where I was going, it was very dark."

At his deposition, Alan McKeever testified that he is the owner of Fifth Avenue Paving. Fifth Avenue Paving was hired by Standard Parking to provide snow removal services for the parking lots of MacArthur Airport in 2009. After Fifth Avenue Paving performs snow removal operations, Standard Parking always visually inspects its work. When Standard Parking calls Fifth Avenue Paving to salt the exits and entrances on the parking lot, Fifth Avenue Paving just "automatically do[es] that on every lot." McKeever testified that on December 31, 2009, Fifth Avenue Paving performed snow plowing operations

on the parking lots for three hours and spread one box of salt. According to Fifth Avenue Paving's invoice, on January 2, 2010, it applied only salt to the long term parking lot without performing any snow removal services. McKeever testified that he had no personal recollection of the day of the accident.

As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties (*see* ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]; ***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 1103, 915 N.Y.S.2d 103 [2d Dept 2010]). However, in ***Espinal v Melville Snow Contrs.***, (98 NY2d 136, 746 NYS2d 120 [2002]), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*id.*).

Here, Fifth Avenue Paving established its prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff was not a party to its snow-removal agreement, and, therefore, it owed no duty to the plaintiff (***see Foster v. Herbert Slepoy Corp.***, 76 AD3d 210, 214, 905 NYS2d 226; ***Diaz v Port Auth. of NY & NJ***, ***supra***). In opposition, the plaintiff failed to raise a triable issue of fact as to whether any of the three situations described in ***Espinal*** "wherein the party who enters into a contract to render services may be held liable in tort to a third party" applied to the circumstances of this case (***Schwint v. Bank St. Commons, LLC***, 74 AD3d at 1313, 904 NYS2d 220; ***see Espinal v. Melville Snow Contrs.***, 98 NY2d at 141, 746 NYS2d 120, 773 NE2d 485).

As to the first exception, when a party, including a snow removal contractor, 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]). The evidence established that on the day of the accident, Fifth Avenue Paving laid salt as they were instructed to do by Standard Parking. Fifth Avenue Paving had no duty to monitor the condition of the parking lot and there is no admissible evidence in the record that it performed any further work at the accident location that may have created the black ice condition that caused the plaintiff's accident.

As to the second exception, the plaintiff testified that he had never heard of Fifth Avenue Paving prior to the accident, rendering inapplicable the exception concerning detrimental reliance on the continued performance of the contracting party's duties. Finally, Fifth Avenue Paving's limited contractual undertaking to provide snow removal services 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]).

Thus, the plaintiff failed to raise a triable issue of fact by proof in admissible form as to whether any of the three situations described in *Espinal* applied to the circumstances of this case (***Diaz v. Port Authority of N.Y. & N.J.,*** 120 AD3d 611, 990 NYS2d 882; ***Schwint v. Bank St. Commons, LLC***, 74 AD3d at 1313,

904 NYS2d 220; ***Foster v Herbert Slepoy Corp.,*** 76 AD3d 210, 905 NYS2d 226; ***see Espinal v. Melville Snow Contrs.***, 98 NY2d at 141, 746 NYS2d 120, 773 NE2d 485).

Accordingly, Fifth Avenue Paving's motion for summary judgment is granted.

Defendant ECH-MacArthur Airport, LLC ("ECH-MacArthur") moves (# 003) for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. ECH-MacArthur contends that it was an out-of-possession owner with no contractual obligation to repair or maintain the subject parking lot. ECH-MacArthur also contends that it neither created the alleged dangerous condition nor had actual or constructive notice of the condition. In support, ECH-MacArthur submits, *inter alia,* the pleadings; the bill of particulars; the transcripts of the deposition testimony given by plaintiffs Warren Goodman and Lynn Goodman, James Terence Hennessey, a representative of the Town, Alan McKeever, a representative of Fifth Avenue Paving, and Paul Mullady, a representative of Standard Parking; a copy of the contract between Town of Islip and ECH-MacArthur; and a copy of the subcontract between ECH-MacArthur and Standard Parking.

At his deposition, James Terence Hennessey testified to the effect that he is the deputy commissioner of aviation and transportation for the Town of Islip ("Town"). The Town owns MacArthur Airport, and ECH-MacArthur is an equity partner. Hennessey testified that the Town had a lease agreement with ECH-MacArthur for the parking lots of the airport, that Standard Parking is the operator of the parking lots on behalf of ECH-MacArthur, and that there is no contract between the Town and Standard Parking. He further testified that while the Town is not responsible for the maintenance and operation of the paid parking lots, Standard Parking is responsible for the maintenance and operation of the parking lots. He also testified that the Town is not responsible for snow and ice removal in the long term parking lot.

At his deposition, Paul Mullady testified to the effect that he is employed by Standard Parking as a facility manager. He testified that at the time of the accident, the Town owned MacArthur Airport, that ECH-MacArthur had an interest in the parking facility at the airport, and that Standard Parking operated only three parking lots of the airport for ECH-MacArthur, a daily parking lot, a short term parking lot, and a long term parking lot. Standard Parking entered into a contract with Fifth Avenue Paving, effective January 2, 2010, to perform snow and ice removal operation at said parking lots. In January 2010, Standard Parking's employee, Brian Emer, performed snow and ice removal operations at the parking lots. He would use shovels, a truck with a plow, and calcium chloride. Mullady testified that although Emer performed snow removal in the long term parking lot prior to the day of the accident, he had no recollection as to whether Emer removed snow or ice in the long term parking lot on the day of the accident. Fifth Avenue Paving performs snow removal operations only after Standard Parking directs it to do so. In January 2010, Mullady visually inspected the parking lots twice a day. On January 2, 2010, he recalled ordering a salting of all three lots, and Fifth Avenue Paving applied salt to the lots in the early evening or the late afternoon.

Article 14 "Duties: Repair and Maintenance" of the contract between Town of Islip and ECH-MacArthur provides, in relevant part, that ECH-MacArthur shall, at its expense, keep all equipment owned and/or installed by it on the premises in good repair and operating condition; keep the premises clean and free from all trash and debris, and plow the snow; and "(x) repair or resurface all parking areas, curbs,

walkways and roadways within the Premises." Article 14 also provides that Town shall at its expense be responsible for "maintenance and replacement of all signs and other equipment and improvements outside the Premises, repair or resurfacing of all roadways and parking areas outside the Premises and replacement of light ballasts."

The introductory paragraph of the subcontract between ECH-MacArthur and Standard Parking provides, in relevant part, that the Town and ECH-MacArthur are parties to the contract wherein the Town has granted to ECH-MacArthur the exclusive right to operate all of the public parking facilities of MacArthur Airport. Paragraph 1.04 provides that ECH-MacArthur reserves to itself the right to view and inspect the premises, and to make any repairs or to take such other action as it deems necessary for the protection and preservation of the premises (or any portion thereof), and that Standard Parking shall afford the Town access and rights of entry to the premises. Paragraph 18.01(c) provides that Standard Parking shall comply with all obligations of ECH-MacArthur set forth in the Article of the contract, entitled "Duties: Repair and Maintenance" except subsection (x) thereof. Paragraph 18.01(e) provides that Standard Parking shall provide the Town unrestricted access to the premises, provided, however, the Town shall not unreasonably interfere with Standard Parking's operation of the premises. Accordingly, it is concluded that the Town reserved to itself the ultimate responsibility to repair light ballasts in the parking lot, and that ECH-MacArthur reserved to itself the ultimate responsibility to repair all parking areas.

A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only if it created the dangerous condition or had actual or constructive notice of the condition (*see* ***Devlin v Selimaj***, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; ***Morreale v Esposito***, 109 AD3d 800, 801, 971 NYS2d 209 [2d Dept 2013]; ***Gushin v Whispering Hills Condominium I***, 96 AD3d 721, 721, 946 NYS2d 202 [2d Dept 2012]). Thus, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Dhu v New York City Hous. Auth.***, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; ***Cruz v Rampersad***, 110 AD3d at 670, 972 NYS2d 302 [2d Dept 2013]; ***Santoliquido v Roman Catholic Church of Holy Name of Jesus***, 37 AD3d 815, 830 NYS2d 778 [2d Dept 2007]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see* ***Dhu v New York City Hous. Auth.***, *supra*; ***Oliveri v Vassar Bros. Hosp.***, 95 AD3d 973, 943 NYS2d 604 [2d Dept 2012]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]). 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]).

Once possession of a property has been transferred to a tenant, an out-of-possession landlord will not be held liable for injuries that occur or defective conditions in existence on leased premises unless the landlord retains control over the premises, or is contractually bound to repair unsafe conditions (*see* ***McElroy v Bernstein***, 72 AD3d 757, 898 NYS2d 471 [2d Dept 2010]; ***Euvino v Loconti***, 67 AD3d 629, 888

NYS2d 571 [2d Dept 2009]; ***Valenti v 400 Carlls Path Realty Corp.***, 52 AD3d 696, 861 NYS2d 357 [2d Dept 2008]). Control may be evidenced by a lease provision 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., LLC***, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]).

Here, the critical question is whether exclusive control of the premises passed to Standard Parking from ECH-MacArthur (*see* ***Feder v Caliguira***, 8 NY2d 400, 208 NYS2d 970 [1960]; ***Women's Interart Ctr., Inc. v New York City Economic Dev. Corp.***, *supra*; ***Mirasola v Advanced Capital Group, Inc.***, 73 AD3d 875, 905 NYS2d 180 [2d Dept 2010]; ***Matter of Dodgertown Homeowners Assn. v City of New York***, 235 AD2d 538, 652 NYS2d 761 [2d Dept 1997]). Pursuant to said contract and subcontract, ECH-MacArthur reserved the right to inspect the premises and to make any repairs as it deemed necessary. Thus, exclusive control of the premises did not pass to Standard Parking. Here, ECH-MacArthur has failed to establish its entitlement to judgment as a matter of law. There are issues of fact as to whether a dangerous condition existed on the subject parking lot so as to create liability on the part of ECH-MacArthur; 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 plaintiff Warren Goodman was comparatively negligent (*see* ***Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]). The court has considered ECH-MacArthur's remaining claims and found them to be without merit. Accordingly, the motion by ECH-MacArthur for summary judgment is denied.

The Town moves (# 004) for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. The Town contends that it was an out-of-possession owner with no contractual obligation to repair or maintain the parking lot where the accident occurred. The Town also contends that it neither created the alleged dangerous condition nor had actual or constructive notice of the condition. In support, the Town submits the identical evidence submitted in the motion by ECH-MacArthur.

Here, while the Town's representative testified that the Town is not responsible for the maintenance of the parking lots, Article 14 of the contract provides that the Town is responsible for "repair or resurfacing of all roadways and parking areas outside the Premises and replacement of light ballasts." The evidence established that the Town is contractually bound to repair an inadequate lighting condition in the subject parking lot. Thus, to establish its entitlement to judgment as a matter of law, the Town is required to show that it did not cause an improper lighting condition which allegedly contributed to the accident and that it had no actual or constructive notice of such condition in reasonably sufficient time to remedy it (*see* ***Ever Win, Inc. v 1-10 Indus. Assoc., LLC***, *supra*; ***Danielson v Jameco Operating Corp.***, 20 AD3d 446, 800 NYS2d 421 [2d Dept 2005]; ***Park v Caesar Chemists***, 245 AD2d 425, 666 NYS2d 679 [2d Dept 1997]). Plaintiff Warren Goodman testified that at the time of the accident, it was "very dark" and not "well-lit," and plaintiff Lynn Goodman testified that "it wasn't light enough to see" and "it was very dark." Here, the Town has failed to establish its entitlement to judgment as a matter of law. There are issues of fact as to whether an improper lighting condition existed on the subject parking lot so as to create liability on the part

of the Town; 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 plaintiff Warren Goodman was comparatively negligent (*see* ***Bruker v Fischbein***, *supra*). The court has considered the Town's remaining claims and found them to be without merit. Accordingly, the Town's motion for summary judgment is denied.

Standard Parking moves (# 005) for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. Standard Parking contends that it neither created the alleged dangerous condition nor had actual or constructive notice of the condition. In support, Standard Parking submits the identical evidence submitted in the motion by ECH-MacArthur.

Here, Standard Parking has failed to establish its entitlement to judgment as a matter of law. Standard Parking's facility manager testified that its maintenance person performed snow and ice removal operations at the subject parking lot prior to the day of the accident, and that he visually inspected the parking lot twice a day in January 2010. To meet its initial burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see* ***Feola v City of New York***, 102 AD3d 827, 958 NYS2d 208 [2d Dept 2013]; ***Williams v SNS Realty of Long Is., Inc.***, 70 AD3d 1034, 895 NYS2d 528 [2d Dept 2010]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]). Standard Parking did not proffer evidence demonstrating when the subject parking lot was last cleaned or inspected relative to the time of the subject accident. 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 Standard Parking; whether it performed snow removal operation in the area of the accident prior to the accident; 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 plaintiff Warren Goodman was comparatively negligent (*see* ***Bruker v Fischbein***, *supra*). The court has considered Standard Parking's remaining claims and found them to be without merit. Accordingly, Standard Parking's motion for summary judgment is denied.

Dated: DEC 31 2014

A.J.S.C.

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