Antinello v Columbia 16 NS, LLC
2014 NY Slip Op 30514(U)
March 4, 2014
Supreme Court, Albany County
Docket Number: 913-12
Judge: Joseph C. Teresi

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

PATRICK ANTINELLO,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 913-12
RJI NO. 01-12-107955

COLUMBIA 16 NS, LLC; BBL DEVELOPMENT GROUP, LLC, individually and d/b/a BBL MANAGEMENT GROUP, LLC; BBL CONSTRUCTION SERVICES, LLC; BBL ALBANY MT MANAGEMENT, LLC; COLUMBIA 16 NEW SCOTLAND INC.; COLUMBIA 16 NS II LLC; 25 MONROE STREET, LLC; BBL MANAGEMENT GROUP, LLC,

Defendants.

BBL MANAGEMENT GROUP, LLC and COLUMBIA 16 NS II LLC,

Third-Party Plaintiffs,

-against-

SKYVIEW LANDSCAPES INC.,

Third-Party Defendant.

Supreme Court Albany County All Purpose Term, January 31, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Conway & Kirby, LLP
Nicholas Battaglia, Esq.
Attorneys for Plaintiff
9 Cornell Road
Latham, New York 12110

Corrigan, McCoy & Bush, PLLC
Scott Bush, Esq.
Attorney for Defendants Columbia 16 NS LLC, BBL Development Group, LLC individually and d/b/a BBL Management Group, LLC, BBL Albany MT Management LLC, Columbia 16 NS II, LLC, 25 Monroe Street, LLC and BBL Management Group, LLC and Third Party Defendants
220 Columbia Turnpike
Rensselaer, New York 12144

Carter, Conboy, Case, Blackmore, Maloney & Laird
Adam Cooper, Esq.
Attorneys for Third Party Defendant
20 Corporate Woods Blvd.
Albany, New York 12211

TERESI, J.:

On March 1, 2011, while working as a valet, Plaintiff slipped on ice that had formed on the sidewalk adjacent to 16 New Scotland Avenue, Albany, New York (hereinafter "Premises"). He fell to the ground and was injured. Columbia 16 NS, LLC admits that it owned the Premises where Plaintiff fell and BBL Management Group, LLC admits that it was responsible for its maintenance. (hereinafter collectively "Defendants"). At the time of the fall, by a Service Agreement dated November 1, 2010 (hereinafter "Service Agreement"), Defendants had contracted with Skyview Landscapes, Inc. (hereinafter "Skyview") to provide specific snow and ice removal services at the Premises.

Plaintiff commenced this action seeking to recover the damages he sustained in his fall. Issue was joined by Defendants, who commenced a third-party action against Skyview. Issue was then joined by Skyview in the third party action. Discovery has been completed, a note of issue filed and a jury trial date certain is set (March 31, 2014).

Defendants, along with BBL Development Group, LLC, BBL Albany MT Management

LLC, Columbia 16 NS II, LLC, and 25 Monroe Street, LLC[1], now move for summary judgment dismissing the complaint. Plaintiff opposes the motion. Similarly, Skyveiw moves for summary judgment dismissing the third party complaint and Defendants oppose the motion. On this record, because Defendants failed to establish their entitlement to judgment as a matter of law, their motion is denied. Skyview, however, demonstrated its entitlement to summary judgment and Defendants raised no triable issue of fact.

Considering first Defendants' motion, they bear the initial burden of demonstrating that they "maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition." (Tate v Golub Properties, Inc., 103 AD3d 1080, 1081 [3d Dept 2013], quoting Managault v Rensselaer Polytechnic Inst., 62 AD3d 1196 [3d Dept 2009]). Such "burden may not be met by pointing to gaps in plaintiff's proof" (DiBartolomeo v St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept 2010]), and all evidence is viewed in a light most favorable to Plaintiff. Only if the Defendants establish their right to judgment as a matter of law will the burden then shift to Plaintiff to raise a triable issue of material fact. (Zuckerman v City of New York, 49 NY2d 557 [1980]).

Here, Defendants failed to proffer sufficient evidentiary proof of their entitlement to judgment as a matter of law. Among other submissions, they supported their motion with the deposition testimony of their Property Manager, Pascal Adiletta (hereinafter "Adiletta"), and their Building Technician, Clint Byron (hereinafter "Byron"). In addition, Defendants submitted

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[1] To the extent that BBL Development Group, LLC, BBL Albany MT Management LLC, Columbia 16 NS II, LLC, and 25 Monroe Street, LLC claim that they "do not belong in this case," because they offered no admissible proof to establish that they neither own nor control the Premises they failed to demonstrate their entitlement to judgment as a matter of law.

the deposition transcripts of Skyview's President, Michael Scaringe (hereinafter Scaringe"), and its Manager of Maintenance Operations, David Campolieto (hereinafter "Campolieto").[2] They also attached Plaintiff's deposition testimony, with the photographs he identified as depicting the scene of his fall.

The Complaint and Bill of Particulars define Plaintiff's negligence claims: Defendants allegedly failed to maintain the Premises in a reasonably safe condition, had actual or constructive notice of the ice that caused Plaintiff's fall and created the ice condition. Plaintiff's deposition testimony further explains his claims. Plaintiff, when viewing pictures of the scene taken right after his fall, described the area as being covered with "ice and other kids of mud, dirt, salt." The pictures submitted confirm his characterization. They show piles of snow next to the building located on the Premises, surrounded by uneven ice sheets and chunks extending onto the sidewalk, and unidentifiable debris on the sidewalk. The sidewalk where Plaintiff fell also has a wet or icy appearance, as contrasted with another portion of the sidewalk that appears dry in the photographs. Plaintiff explained that the ice/debris condition existed prior to his fall.

In view of Plaintiff's claims, the Adiletta and Byron testimony failed to demonstrate, as a matter of law, that Defendants reasonably maintained the Premises. By Adiletta and Byron's testimony Defendants effectively admitted their responsibility for the condition of the Premises' sidewalk. Neither individual, however, specifically recalled inspecting and maintaining the Premises's sidewalk on the day of, but prior to, Plaintiff's fall.

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[2] Although Adiletta, Scaringe and Campolieto's deposition transcripts were unsigned, because they were certified and no objection was raised, each is admissible and considered. (Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept 2012]; Pavane v Marte, 109 AD3d 970 [2d Dept 2013]).

Byron's testimony, viewed in its entirety, was marked by a distinct lack of recollection. At the relevant time, Defendants employed Byron to perform general maintenance at the Premises. Byron explained, in detail, his daily inspection routine. He did not testify, however, that he actually followed such procedure on the day Plaintiff fell. Rather, when asked if he had a "specific recollection of doing the inspection" he stated "I would. If I'm there, I would." Such conclusory answer does not establish, as a matter of law, that he actually followed his normal procedure. Instead, it reinforces the balance of his deposition transcript in which he testified to his not having a specific recollection of his inspection. Nor did he offer any details of his observations of the Premises' sidewalk, other than his equivocal recollection that there was snow on the sidewalk that morning. Then, later in his deposition, when asked what he "saw during [his] inspection on that day," his response was: "[n]othing that would stand out in my mind." Importantly, Byron offered no testimony explaining the maintenance, if any, he performed on the Premises' sidewalk prior to Plaintiff's fall. He stated "I can't recall" when asked for his "specific recollection of doing any snow or ice removal th[e] morning prior to the fall."

Adiletta's testimony is likewise unavailing. Adiletta confirmed that Byron was Defendants' single employee tasked to performed daily inspections and maintenance of the Premises. Adiletta offered no testimony about his own observations of the Premises' sidewalk or his performing any maintenance on it, prior to Plaintiff's fall. He had no knowledge of how long the subject ice / debris condition existed prior to Plaintiff's fall.

While Defendants' employees' depositions established neither the condition of the Premises' sidewalk prior to Plaintiff's fall nor the maintenance performed on it, Skyview's employees' depositions did. Campolieto testified that, approximately three hours prior to

Plaintiff's fall, he observed the sidewalk's "icy" condition. When questioned about the extent of the ice and shown a picture of the sidewalk where Plaintiff fell, he agreed that ice "would be in the entirety of the sidewalk area." Such area, according to Campolieto, was subject to recurring icing because it was a low spot on the Premises during melt and refreeze cycles. Scaringe too stated that the area where Plaintiff fell was a "problem spot" for ice accumulation. After seeing the icy condition, Campolieto testified that he "salted that bad spot." He preformed no further maintenance, however. He did not shovel the ice or melted ice from the sidewalk area, or testify to his removing it at all. Instead, he left before the ice was fully melted. When asked: "before you left was all the ice gone?" He stated, "Yes, it was just about gone, yes." Then, when asked "[i]n what area would the ice still have been located," Campolieto said "I don't know. What I'm saying, it was about gone. Maybe three more minutes later it was gone." This speculative assertion does not demonstrate that the sidewalk was cleared of its hazardous condition prior to Plaintiff's fall. On this record, in light of the photographic evidence of the sidewalk at the time of Plaintiff's fall, Defendants failed to resolve all factual issues surrounding their reasonable maintenance. (Hagin v Sears, Roebuck and Co., 61 AD3d 1264 [3d Dept 2009]; Managault v Rensselaer Polytechnic Inst., supra).

Moreover, Defendants offered no proof that they did not create the dangerous condition. Because the photographs of the incident area, which was a recognized "problem spot," are considered in a light most favorable to Plaintiff, Defendants failed to demonstrate that their snow/ice removal efforts did not create the condition that caused Plaintiff's fall. (San Marco v. Village/Town of Mount Kisco, 16 NY3d 111 [2010]; Urban v City of Albany, 90 AD3d 1132, 1133 [3d Dept 2011]).

Because Defendants did not meet their prima facie burden "the sufficiency of plaintiffs' proof" need not be addressed (Kropp v Corning, Inc., 69 AD3d 1211 [3d Dept 2010]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]) and Defendants' motion for summary judgment is denied.

Turning to Skyview's motion, it demonstrated its entitlement to summary judgment of Defendants' contractual indemnification[3] claim.

Skyview "made a prima facie showing of entitlement to summary judgment dismissing [Defendants'] contractual indemnification claim by demonstrating that it fulfilled its duties under the contract and that plaintiff's accident was not caused by or sustained in connection with the performance of [the contract] or by conditions created thereby, such that the indemnification provision was not triggered." (Perales v First Columbia 1200 NSR, LLC, 88 AD3d 1213, 1214 [3d Dept 2011], quoting Kogan v North St. Community, LLC, 81 AD3d 429 [3d Dept 2011][internal quotation marks and citations omitted]; Kearsey v Vestal Park, LLC, 71 AD3d 1363 [3d Dept 2010]).

The Service Agreement sets forth Skyview's specific obligations. It required Skyview to: "Plow entire business lot upon the accumulation of one and one-half inches (1 ½") of snowfall;... to be completed by 6:30 am provided the storm has ended;... Parking lot, sidewalk and stairs will be cleared of snow and ice by plowing, salting... shoveling, etc. - so as to maintain a wet appearance - throughout the day." According to the testimony of Adiletta, who negotiated the Service Agreement on Defendants' behalf, Skyview was required to perform these services

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[3] Defendants' opposition papers, by focusing solely on contractual indemnification, clarified the type of indemnification claim they are making.

without notification when it was snowing. In periods between precipitation, Adiletta added, Skyview was only required to perform the above services if Defendants requested service. Scaringe agreed. He stated that Defendants were "responsible... for making sure the sidewalks were free of snow and ice between days of precipitation" and that Skyview had no obligation to do so unless Defendants requested their services.

On this record, Skyview demonstrated that it did not breach its obligations. As is uncontested, it did not snow either the day before or the day of Plaintiff's fall. As such, on the day of Plaintiff's fall, the Service Agreement did not require Skyview to perform any snow or ice removal at the Premises unless Defendants made a request. Defendants, however, made no such request. Neither Adiletta nor Byron recalled making a request, and Campolieto stated that he received no request for service. Although Skyview was under no contractual obligation to do so, it is uncontested that Campolieto visited the Premises approximately three hours before Plaintiff's fall. At that time he treated the sidewalk where Plaintiff fell with a de-icing agent. According to Campolieto, his treatment of the area was Skyview's way of "just doing good service." Such gratuitous service cannot constitute a breach of the Service Agreement. Relatedly, Defendants made no request to remove the snow and ice in the vicinity of Plaintiff's fall to prevent the thaw / refreeze cycle. Again, for Skyview to be contractually obligated to perform such service Defendants were required to make a request. Because they did not, Skyview did not breach its contract with Defendants by piling snow and ice next to the Premises' sidewalk.

On this record, Skyview met its prima facie burden.

With the burden shifted, Defendants raised no triable issue of material fact. First,

because Defendants' attorney's affidavit is not based upon "personal knowledge of the operative facts [it is of no]... probative value" and raises no issue of fact. (2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392 [3d Dept 2009]; Groboski v Godfroy, 74 AD3d 1524 [3d Dept 2010]; Chiarini ex rel. Chiarini v County of Ulster, 9 AD3d 769 [3d Dept 2004]). Defendants' characterization of Scaringe and Campolieto's deposition testimony is likewise unavailing. As explained above, neither individual testified to facts that would constitute a breach of the Service Agreement. Lastly, Defendants' interpretation of the Service Agreement was not based upon its written terms and raised no material issue of fact.

Accordingly, Skyview's motion is granted.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: ~~February~~ March 4, 2014
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Amended Notice of Motion, dated January 2, 2014; Notice of Motion, dated December 30, 2013; Affidavit of Scott Bush, dated December 30, 2013, with attached Exhibits 1-20.
2. Affirmation of Nicholas Battaglia, dated January 24, 2014, with attached Exhibits A-B; Affidavit of Conrad Hoffman, dated January 22, 2014, with attached Exhibits A-B; Affidavit of Howard Altschule, dated January 22, 2014, with attached Exhibits A-B.
3. Affidavit of Scott Bush, dated January 29, 2014.
4. Notice of Motion, dated December 31, 2013; Affidavit of Adam Cooper, dated December 30, 2013, with attached Exhibits A-L.
5. Affidavit of Scott Bush, dated January 22, 2014.
6. Affidavit of Adam Cooper, dated January 30, 2014.