Rizzi v. Mehuron's Market, No. 148-3-05 Wncv (Teachout, J., May 22, 2007)

STATE OF VERMONT
WASHINGTON COUNTY

BRITA RIZZI and ERNEST RIZZI	)	
	)	**Washington Superior Court**
	)	**Docket No. 148-3-05 Wncv**
v.	)	
	)	
MEHURON'S MARKET LTD.	)	
	)	
v.	)	
	)	
IRENE MEHURON et al.	)	

DECISION
Motions for Summary Judgment

Plaintiffs have sued Defendant Mehuron's Market Ltd. for injuries resulting from Plaintiff Brita Rizzi's fall on ice in front of Defendant's store. There are several third party defendants. Some of them are the owners of the store premises, which includes the sidewalk in front of the store. The owners lease it to Mehuron's Market Ltd. The premises are located in a shopping center owned by third party defendant Glentoran Corp. Third party defendant Marian Baraw manages the center for Glentoran. Marian Baraw is a realtor with an office at Mountain Associates Realty. Mehuron's Market Ltd.'s third party complaint is against Glentoran Corp, Marian Baraw, Mountain Associates Realty, the owners, and individuals who performed maintenance work for the shopping center.

Two motions for summary judgment are pending. All material facts within the scope of both motions are undisputed.

Defendant Mehuron's Market Ltd.'s Motion for Summary Judgment

Mehuron's Market Ltd. relies on terms in the deed from Glentoran to the current property owners. Glentoran reserved "the right and easement to use . . . sidewalks," and covenanted to provide maintenance services, including snow plowing and "general clean-up," for "the common areas and facilities serving grantees." Grantees under the deed (the owners in this suit)

covenanted to pay a periodic fee for such services, and have done so.

Mehuron's Market Ltd. argues that under the deed covenants, Glentoran had control of the common areas in the shopping center, and was obligated to provide winter maintenance. Mehuron's Market Ltd. argues that it had no control over the sidewalk area, and is therefore entitled to judgment on Plaintiff's premises liability claim against it.[1]

As to the claim that Defendant has no liability to Plaintiff because of the covenants, Mehuron's Market Ltd. operated a store on the leased premises. No facts establish that the sidewalk in front of the store, owned by the owner/lessors, was excluded from the leased premises. Mehuron's Market Ltd., as a business occupying property, has a non-delegable duty to ensure that its premises are in a safe and suitable condition for its customers. *Debus v. Grand Union Stores of Vermont*, 159 Vt. 537, 546 (1993) *Garafano v. Neshobe Beach Club, et al.* 126 Vt. 566, 570, 575 (1967). "The policy rationale is to place responsibility for maintenance of the land on those who own *or control* it, with the ultimate goal of keeping accidents to the minimum level possible." *Dalury v. S-K-I, Ltd.*, 164 Vt. 329, 335 (1995) (emphasis added). Defendant's own actions in providing maintenance in addition to that performed by Glentoran, including de-icing, is consistent with its legal duty to make its store premises, including the sidewalk, safe for its patrons.

Mehuron's Market Ltd. is not entitled to a ruling that as a matter of law, it had no duty to Plaintiff. While Glentoran assumed certain responsibilities under the deed covenants, the deed did not, and could not, relieve Mehuron's Market Ltd. of its own duty to its customers as a matter of law. Mehuron's Market Ltd's motion for summary judgment on Plaintiff's complaint is denied.

Motion of Third Party Defendants Glentoran Corp, Marian Baraw, & Mountain Associates Realty

Mehuron's Market Ltd. relies, for its third party claim against all third party defendants, on the deed provisions referenced above. Claims in the third party suit are for negligence, breach of contract, and indemnity.

The undisputed facts show that Glentoran, through its agents, provided maintenance services over the years to the sidewalk in front of the store. In addition, it installed gutters to attempt to prevent ice buildup from water that dripped from the store roof at the end of the sidewalk.[2] Mehuron's Market Ltd. also provided maintenance services in the sidewalk area. For example, store employees routinely checked the sidewalk in front of the store and applied de-icer when necessary.

In the motion for summary judgment, Defendant Mountain Associates Realty states that although Marian Baraw is one of its realtors and works out of its office as a realtor, it has no

[1] Alternatively, it argues that it is entitled to judgment on its indemnification claim against Glentoran. This alternative claim is addressed below in relation to the summary judgment motion of third party defendants.
[2] It appears undisputed that the fall occurred outside the market door and not at the spot where ice forms from water dripping off the roof.

involvement with managing the shopping center premises. Mehuron's Market Ltd. has produced no countervailing facts. Mountain Realty Associates is entitled to summary judgment.

Third party defendants Glentoran and Marian Baraw seek summary judgment on the negligence claim on the ground that as joint tortfeasors with Mehuron's Market Ltd., they are not obligated to contribute to a judgment obligation incurred by Mehuron's Market Ltd. They rely on *Howard v. Spafford*, 132 Vt. 434 (1974). Mehuron's Market Ltd.'s argument is that it has no duty to maintain the sidewalk at all, and thus cannot be a joint tortfeasor. It argues that it does not own the sidewalk, and that Glentoran was responsible for maintenance of the sidewalk. It also cites several cases in which store owners in shopping centers were not liable for common areas under the control of the shopping center owner. It argues that it had no duty to advise Glentoran of a dangerous condition, as it was Glentoran's responsibility to monitor and maintain the sidewalk.

For the reasons stated above in relation to the Motion for Summary Judgment of Mehuron's Market Ltd., the court rejects this argument, and concludes that Mehuron Market Ltd. has a duty to its patrons based on its operation of a business on its leased premises, which included the sidewalk. Glentoran and Baraw had overlapping duties to maintain the sidewalk with Mehuron Market Ltd. Pursuant to the law set forth in *Howard v. Spafford*, Plaintiffs were entitled to their choice of defendants. Since they chose Mehuron Market Ltd., Glentoran and Marian Baraw, as joint tortfeasors, are not obligated to contribute, and are entitled to summary judgment on Count I (negligence) of the third party complaint.

Glentoran and Marian Baraw argue that they are entitled to judgment under Counts II (breach of contract) and Count III (indemnity), as there is neither an express indemnity agreement nor a basis upon which to imply indemnity.

The first question is whether the covenant in the deed is a sufficient basis upon which to imply an indemnification obligation. In the deed to the owners of the premises leased to Mehuron's Market Ltd., Glentoran included a reservation of use of the sidewalks, an agreement to provide snowplowing and general clean-up in common areas, and a separate covenant to provide those services to "the common areas and facilities serving Grantees" in exchange for payment of a fee. These provisions do not clearly establish exclusive responsibility with Glentoran. If the parties had intended a complete allocation of all risk and responsibility to Glentoran, that could have been reflected in the language of the instrument. Instead, the language is consistent with a maintenance contract for a fee without an allocation of risk to shift duties that are otherwise established by law.

Without explicit language shifting the risk, and in view of the fact that ownership of the sidewalk was conveyed to the grantees, the terms of the covenants cannot be interpreted as an agreement for Glentoran to assume full and sole responsibility for the sidewalk area in front of the store. Mehuron's Market Ltd., as a business owner, had its own obligation as a matter of law to provide safe premises for its patrons, as discussed above. Under these circumstances, an indemnification obligation cannot be implied from the covenant provisions in the deed. Defendants are entitled to summary judgment on the breach of contract claim in Count II.

As to the implied indemnity claim in Count III, Glentoran and Baraw seek summary judgment based on *White v. QLLA*, 170 Vt 25 (1999) on the basis that Mehuron's Market Ltd. took an active part in the negligence that is the subject of Plaintiff's claim. It is undisputed that not only did Mehuron's Market Ltd. routinely apply de-icer in front of the store when necessary, a store employee did so at 6:00 p.m. on the day of the incident, and Plaintiff fell on the ice at 7:50 p.m. The sidewalk was a part of the premises Mehuron's Market Ltd. leased from the owners. The facts do not show that it took no part in the negligence. Moreover, Mehuron's Market Ltd. does not have facts to show that a pattern of conduct had developed that demonstrates both parties' reliance on the allocation of exclusive responsibility to Glentoran. Under these circumstances, an indemnification obligation will not be implied. *White v. QLLA.*

The court concludes that neither Glentoran nor Marian Baraw had an obligation of implied indemnity to Mehuron's Market Ltd. based on consideration of the circumstances. Glentoran and Baraw are entitled to summary judgment on the indemnity claim in Count III.

ORDER

For the foregoing reasons,

1) The Summary Judgment Motion of Third Party Defendants Glentoran Corp, Marian Baraw, and Mountain Associates Realty, filed January 16, 2007, is *granted;*

2) The Summary Judgment Motion of Defendant Mehuron's Market Ltd., filed February 1, 2007, is *denied;* and

3) A status conference will be scheduled to update the pretrial schedule. If a stipulated pretrial scheduling order is submitted prior to the status conference, it may not be needed.

Dated at Montpelier, Vermont this 22nd day of May 2007.

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Mary Miles Teachout
Superior Court Judge