

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EVELYN D. KEATING and)
TIMOTHY M. KEATING,)
husband and wife)
) C.A. No. N11C-12-180 CLS
Plaintiffs,)
)
v.)
)
BEST BUY STORES, LP, a)
foreign limited liability)
company, and MARINELLI)
MASONRY, INC., a Delaware)
Corporation,)
)
Defendants.)
)
BEST BUY STORES, LP,)
)
Third-Party Plaintiff)
)
v.)
US MAINTENANCE, INC., an)
EMCOR CORPORATION,)
)
Third-Party Defendant.)

Date Submitted: December 23, 2013

Date Decided: March 28, 2013

On Defendant Windsor I, LLC's Motion for Summary Judgment. **DENIED.**

ORDER

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Scott, J.

Introduction

Before the Court is Defendant Windsor I, LLC's ("Windsor") Motion for Summary Judgment in this slip-and-fall case involving a property owned by Windsor and leased to Best Buy Stores, LP ("Best Buy"). The Court has reviewed the parties' submissions. For the reasons that follow, Windsor's motion is **DENIED.**

Background

On December 21, 2009, at about 8:30 a.m., Plaintiff Evelyn Keating ("Plaintiff") slipped and fell on ice while walking on a sidewalk in the front entrance of a Best Buy store located at 2201 Farrand Drive in Wilmington, Delaware. Under the lease (the "Lease") between Windsor and Best Buy, Windsor leased "[t]he premises and improvements and appurtenances (the 'Premises') located at the existing Channel Home Center (the 'Shopping Center')." ¹ The Lease also included the legal description of the Shopping Center and an outline of the Shopping Center in a diagram. ² Paragraph 38 of the Lease stated:

Lessor will maintain in good order, condition and repair all parking areas and other areas used in common by tenants of the Shopping Center (the "Common Area"), and Lessor hereby grants to Tenant, its agents, employees and invitees, the nonexclusive right to use the Common Area in common with other tenants of the Shopping Center. In each Lease Year Tenant shall pay Lessor, as additional rent, its proportionate share of Lessor's Operating Costs (as hereinafter defined)...

¹Best Buy, Ex. A., Lease, ¶ 1.

² *Id.* at ¶ 1; Exhibits A and B of the Lease.

As used herein, the term “Lessor’s Operating Costs” shall mean actual expenses reasonably incurred by Lessor for maintain the Common Areas in the manner required of Lessor hereunder including, all costs and expenses of repairing, lighting and cleaning (provided that Tenant shall not be required to pay its portion of any cost to sweep or clean the parking lot more than two (2) times per year unless Tenant requests that Lessor sweep or clean the parking lot more than two (2) times per year, Tenant shall pay for such sweeping or cleaning); removal of snow, ice and debris...³

The “Common Areas” referred to in Paragraph 38 were not expressly defined in the Lease.

Plaintiff and her husband (“Plaintiffs”) filed this suit for negligence on December 20, 2011 against Best Buy, Windsor and Marinelli Masonry, Inc. (“Marinelli”).⁴ Plaintiffs alleged that Marinelli performed snow and ice services, but the claim has since been dismissed.⁵

On January 7, 2013, Best Buy filed an Amended Answer and a third-party claim against Third-Party Defendant U.S. Maintenance, Inc. (“USM”). Best Buy asserted that Best Buy hired USM to perform snow and ice removal during 2009.⁶ While this motion for summary judgment was pending, Best Buy encountered some difficulties with USM during discovery.⁷

Parties’ Contentions

³ Best Buy, Ex. A, (emphasis added).

⁴ Evelyn and Timothy Keating have also asserted a claim for loss of consortium.

⁵ Order dated May 24, 2013.

⁶ See Windsor Mot., Ex. H.

⁷ Best Buy’s Second Motion to Compel, dated Dec. 2, 2013, Trans. ID. 54631801; Order, dated December 12, 2013; See Best Buy Motion for Sanctions, Trans. ID. 54967130, dated Feb. 7, 2014.

The parties dispute whether the sidewalk is a “common area” under Paragraph 38 of the Lease for which Windsor would have had responsibility to maintain. Windsor argues that it held no duty to remove snow and ice from the sidewalk because it is not a common area. Windsor points out that only Best Buy and its invitees used the sidewalk since Best Buy was the only tenant in the Shopping Center. Windsor further argues that the only evidence suggesting that Windsor I had such a duty “has been refuted by Best Buy’s own Third-party Claim against Third-party Defendant, U.S. Maintenance, Inc. and documentary evidence produced through discovery.”⁸

Plaintiffs and Best Buy filed separate responses in opposition to Windsor’s motion, insisting that the “Common Areas” in Paragraph 38 include the sidewalk. Best Buy argued that, if reasonable minds could differ as to the meaning of “Common Areas,” summary judgment is inappropriate. Plaintiffs argue that Windsor’s argument that the third-party claim against USM shows that Windsor held no duty to Plaintiff fails under Delaware law. Plaintiffs explain that Windsor, as the land owner, could not delegate all responsibility to maintain the premises in a safe condition for business invitees.⁹ Plaintiffs also assert that the motion is premature since discovery relating to USM’s responsibility was ongoing.

⁸ Windsor Mot., at ¶ 15.

⁹ Pls. Resp., at ¶4 (citing *Argoe v. Commerce Square Apartments Ltd. Partnership*, 745 A.2d 251, 256 (Del. Super. 1999)).

Plaintiffs, Best Buy, and Windsor each rely upon deposition testimony to support their arguments as to whether or not Windsor was responsible for snow and ice removal. The depositions relied upon were of Robert Stella, a representative of Windsor, Daniel Manning, Best Buy's corporate representative, and Roberto Martinez and Maurice Gattis, former Best Buy managers.

Standard of Review

Summary judgment is to be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹⁰ When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party.¹¹ Where there is a material fact in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment is inappropriate.¹² If a motion for summary judgment is properly supported, the burden shifts to the non-moving party to show that there are material issues of fact.¹³

Discussion

¹⁰ Superior Court Rule 56; *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

¹¹ *Bailey v. City of Wilmington*, 766 A.2d 477, 479 (Del. 2001).

¹² *Tew v. Sun Oil Co.*, 407 A.2d 240,242 (Del. Super. 1979).

¹³ *State v. Regency Group, Inc.*, 598 A.2d 1123, 1129 (Del. Super. 1991).

In a claim for negligence, the plaintiff must show that the defendant owed the plaintiff a duty of care.¹⁴ The question of “whether a duty exists is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined by the court.”¹⁵ “If no duty exists, ‘a trial court is authorized to grant judgment as a matter of law.’”¹⁶

Delaware courts often turn to the language of relevant agreements, such as a lease, to determine whether a party held a duty to plaintiffs in slip-and-fall cases involving snow and ice.¹⁷ In *Spence v. Layaou*, a case discussed by the parties, the plaintiff, a Delaware Transit Corporation (“DTC”) employee, slipped and fell on snow or ice while exiting his car in a parking lot on a property shared by DTC and DelDOT.¹⁸ DTC entered into a contract for snow and ice related services with a contractor which, in turn, hired a subcontractor.¹⁹ The Court considered, *inter alia*, whether the contractor and subcontractor were responsible for the area where plaintiff fell based on the terms in the relevant agreement, “all parking lots” and

¹⁴ *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007)(quoting *New Haverford P'ship v. Stroot*, 772 A.2d 792, 798 (Del.2001) (“plaintiff must establish that ‘defendant owed plaintiff a duty of care; defendant breached that duty; and defendant’s breach was the proximate cause of plaintiff’s injury.’”))

¹⁵ *Id.* (quoting *Fritz v. Yeager*, 790 A.2d 469, 471 (Del.2002)).

¹⁶ *Id.*

¹⁷ See e.g., *Spence v. Layaou Landscaping, Inc.*, 2013 WL 6114873, at *6-8 (Del. Super. Oct. 31, 2013); *Booker v. White Oak Condominium Ass’n, Inc.*, 2007 WL 2677065, at *2 (Del. Super. Aug. 28, 2007).

¹⁸ *Layaou*, 2013 WL 6114873 at *1.

¹⁹ *Id.* at *1-2.

“the front employee parking lot.”²⁰ Applying the objective theory of contracts, the Court found that the terms were ambiguous since DTC and DeIDOT shared the property. Therefore, the terms could be interpreted as meaning that DTC was responsible for “all” of the lots or only those that DeIDOT was not responsible for.²¹ The Court stated that, ““where reasonable minds could differ as to the contract’s meaning, a factual dispute results and the fact-finder must consider extrinsic evidence,’ and ‘[i]n those cases, summary judgment is improper.’”²²

The courts also follow the general principle that a “landlord ... has a duty to remove ice and snow from common approaches, passageways, and walkways” over which the landlord retains control.²³ Where a landowner makes a contract, “other than a lease” “with another organization to perform the duties of land ownership on behalf of the landowner,” the landowner does not automatically escape liability.²⁴ Similarly, commercial tenants “owe[] a duty to business invitees ‘to exercise due care to keep the property in a reasonably safe condition as to any condition which is known to the business operator or which should have been known in the exercise of reasonable care or diligence.’”²⁵

²⁰ *Id.*

²¹ *Id.* at *7.

²² *Id.* at *6 (quoting *GMG Capital Invest., LLC v. Athenian Venture Partners, L.P.*, 36 A.3d 776, 783 (Del. 2012)).

²³ *Booker*, 2007 WL 2677065 at *2.

²⁴ *See Argoe*, 745 A.2d at 255.

²⁵ *Russel v. S & S Mgmt., Inc.*, 1994 WL 149239, at *2 (Del. Super. Mar. 2 1994)(quoting *Woods v. Prices Corner Shopping Ctr.*, Del. Super., 451 A.2d 574, 575 (1967)).

While *Russell v. S & S Management, Inc.* did not involve snow or ice, the facts there are analogous to the facts here. There, a plaintiff slipped and fell in a landscaped area at the base of an exit ramp leading out of a restaurant located inside a shopping center.²⁶ S & S Management, Inc. (“S&S”) leased the building within which the restaurant was located from the owner, First State Plaza, Associates, L.P. (“First State”).²⁷ When S & S argued that it held no duty to the plaintiff, this Court evaluated whether the ramp and area where plaintiff fell were places which First State had control over and whether they constituted a “common area” for which First State was solely responsible for under the lease.²⁸ The Court also considered whether S & S could reasonably expect the restaurant’s patrons to use the ramp and landscaped area.²⁹ Based on the owner’s representative’s deposition testimony that the owner often sent a person responsible for removing dangerous conditions, the Court found that the owner assumed a duty to maintain the ramp and landscaped area.³⁰ The Court also concluded that “[t]he issue of whether or not the ramp and landscaped area in which Plaintiff fell constitute[d] a ‘common area’ as defined by the Lease Agreement, [was] an issue upon which reasonable minds could differ.”³¹

²⁶ *Id.* at *1.

²⁷ *Id.*

²⁸ *Id.* at *3-4.

²⁹ *Id.* at *4.

³⁰ *Id.* at *3.

³¹ *Id.* at *4.

Here, the Lease expressly provided that Windsor was responsible for maintaining the “common areas” in good condition. However, the Lease does not define what constitutes a common area. It is reasonable to interpret the terms “Common Areas” to include the sidewalk in the front entrance, but, since it was exclusively used by Best Buy and its business invitees, it may also be reasonable to conclude that the sidewalk was not a “Common Area.” This conclusion is supported by conflicting deposition testimony. For example, although Robert Stella testified that Windsor bore no responsibility for removing snow or ice on the sidewalk,³² he also stated that that “[a]ll the common areas are within the scope of Best Buy’s perimeter, which is the entire parking lot; sidewalks, building, everything.”³³ Daniel Manning testified that Best Buy interpreted the common areas to include the sidewalk in the front entrance.³⁴ Therefore, whether the sidewalk was a “Common Area” is subject to reasonable differing interpretations. Consequently, summary judgment is inappropriate on this issue.

Viewing the facts in a light most favorable to Plaintiffs and Best Buy, the Court also finds that issue of fact exists as to whether Windsor retained control over the sidewalk. Daniel Manning testified that, when snow and ice had not been removed, the store’s representatives would notify a retail facilities entity which

³² Pls. Ex. E, Stella Dep., at 82:7-19; Windsor Ex. B, Stella Dep., at 7:3-10.

³³ Pls. Ex. C, Stella Dep., at 25: 13-20.

³⁴ Best Buy, Ex. B, Manning Dep., at 20:1-3

would, in turn, contact the landlord who was responsible for removal.³⁵ On the other hand, Robert Stella testified that Windsor did not have an employee who was responsible for ensuring that the sidewalks were clear from snow and that inspections were performed for the parking lot, but not specifically for the front sidewalk.³⁶ The Court also notes that Roberto Martinez testified that Best Buy employees would buy salt from a hardware store and lay the salt on the sidewalk, but would not sweep or shovel.³⁷ The conflicting deposition testimony demonstrates that an issue of fact exists as to which party exercised control over the sidewalk in the front entrance.

Conclusion

As discussed above, reasonable minds could differ as to the meaning of “common areas” in the Lease and an issue of fact exists as to whether Windsor exercised control over the sidewalk in the front entrance of the premises. For those reasons, Windsor’s Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/Calvin L. Scott
Judge Calvin L. Scott, Jr.

³⁵ Manning Dep, at 20:4-21:5

³⁶ Stella Dep, at 82:13-19.

³⁷ Windsor Ex. F, Martinez Dep., at 40:4.