Fraumeni v Centro Heritage SPE2 LLC

2013 NY Slip Op 32448(U)

October 4, 2013

Sup Ct, Suffolk County

Docket Number: 09-21415

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX No. 09-21415
CAL. No. 12-01911OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 2-27-13
ADJ. DATE 7-17-13
Mot. Seq. # 002 - MG
003 - MD
004 - MotD

LISA FRAUMENI, Plaintiff, - against - CENTRO HERITAGE SPE2 LLC, HERITAGE REALTY MANAGEMENT, INC., PARK LINE ASPHALT MAINTENANCE, INC. and KINGS PARK INDUSTRIES, INC., Defendants.	BUTTAFUOCO & ASSOCIATES Attorney for Plaintiff 144 Woodbury Road Woodbury, New York 11797 MELITO & ADOLESEN P.C. Attorney for Defendant Centro Heritage & Heritage Realty Management 233 Broadway, Suite 1010 New York, New York 10279-0118 MARKS, O'NEILL, OBRIEN & COURTNEY, PC Attorney for Defendant Park Line Asphalt 530 Saw Mill River Road Elmsford, New York 10523 CONWAY, FARRELL, CURTIN & KELLY, PC Attorney for Defendant Kings Park Industries 48 Wall Street, 20th Floor New York, New York 10005

Upon the following papers numbered 1 to 118 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause (002) and supporting papers 1 - 19; Answering Affidavits and supporting papers 20 - 41; Replying Affidavits and supporting papers 42 - 45; Notice of Cross Motion and supporting papers ____; Notice of Motion/ Order to Show Cause (003) and supporting papers 46 - 66; Answering Affidavits and supporting papers 67 - 86; Replying Affidavits and supporting papers 87 - 90; Notice of Motion/ Order to Show Cause (004) and supporting papers 91 - 110; Answering Affidavits and supporting papers 111 - 114; Replying Affidavits and supporting papers 115 - 118; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (002) by defendant Kings Park Industries, Inc. for an order granting summary judgment, the motion (003) by defendant Park Line Asphalt Maintenance, Inc. for an order granting summary judgment, and the motion (004) by defendants Centro Heritage SPE2 LLC and Heritage Realty Management, Inc. for an order granting summary judgment, are consolidated for the purposes of this determination; and, it is further

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ORDERED that the motion by defendant Kings Park Industries; Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims against it is granted; and, it is further

ORDERED that the motion by defendant Park Line Asphalt Maintenance, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is denied; and, it is further

ORDERED that the motion by defendants Centro Heritage SPE2 LLC and Heritage Realty Management, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them and making certain declarations is determined as follows.

This action arises out of a personal injury claim against defendants Centro Heritage SPE2 LLC ("Centro"), Heritage Realty Management, Inc. ("Heritage"), Park Line Asphalt Maintenance, Inc. ("Park Line"), and Kings Park Industries, Inc. ("Kings Park") by plaintiff Lisa Fraumeni, who allegedly sustained injuries on December 14, 2007 at approximately 7:10 a.m. when she slipped and fell on ice in the parking lot of a shopping center commonly referred to as Kings Park Plaza. The parking lot was owned by defendant Centro, defendant Heritage was a management company for contract purposes under a property investment trust under which defendant Centro operated. However, defendant Heritage did not exist at the time defendant Centro entered into a written snow and ice removal contract dated November 13, 2007 with defendant Park Line. In her verified complaint, plaintiff maintains that defendant Park Line had entered into a contract, prior to December 14, 2007, with defendant Centro for snow removal services within the parking lot in which plaintiff fell. Defendant Kings Park orally contracted with defendant Park Line for snow removal from the Kings Park Plaza parking lot. Plaintiff alleges that defendants were negligent in the ownership, operation, management, maintenance and control of the parking lot in that they caused, permitted, and allowed a dangerous condition to exist in and around the area where she fell. Plaintiff contends that defendants had knowledge of the unsafe and dangerous condition or that it had existed for so long a period of time that they should have known of its existence in time to have made the area safe before plaintiff's slip and fall.

Defendant Kings Park moves for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that it was not negligent in performing the maintenance required of it. Defendant Kings Park maintains that it had no duty to remove ice from the premises at or about the time when plaintiff fell. Defendant King Park asserts that its contract with defendant Park Line did not include a duty to apply sand, salt, or any other product to treat ice and that Park Line retained complete and total responsibility for the treatment and control of ice conditions.

Defendant Park Line moves for summary judgment dismissing the complaint and all cross claims against it claiming that it had no obligation to break up ice and that it fulfilled its obligation to apply salt and sand to the Kings Park Plaza shopping center parking lot prior to plaintiff's fall. It alleges that defendant Centro had a non-delegable duty to maintain the parking lot in a safe condition and that it was not obligated to perform ice removal since it had not snowed more than 1.1 inches. Additionally, defendant Park Line avers that a storm was in progress so that it was under no duty to prevent the condition of which plaintiff complains.

Defendants Centro and Heritage move for summary judgment dismissing the complaint and all cross claims against them. Defendant Centro alleges that it entered into a snow and ice removal contract with defendant Park Line and that as a result thereof, it seeks a declaration that there is a contractual defense and that defendant Park Line is obligated to defend and indemnify it. Defendant Heritage maintains that on the date of the accident it was not a managing agent nor a property manager for the shopping center and thus has no responsibility for plaintiff's accident.

Plaintiff argues that defendants Park Line and Kings Park submitted no evidence as to when they last conducted snow and ice removal or inspected the parking lot prior to plaintiff's accident. Additionally, plaintiff claims that their "snowstorm in progress" defense is belied by the evidence which established that there was no storm of any type in the almost twelve hours preceding the accident. Plaintiff maintains that questions of fact preclude summary judgment. She contends that there are questions regarding notice of the ice throughout the parking lot, whether defendants' inadequate snow/ice removal efforts created or exacerbated a dangerous condition, whether snow or ice removal was conducted by defendants on the day prior to plaintiff's fall and when they last conducted same, when defendants last inspected the parking lot prior to plaintiff's slip and fall, and whether the icy condition was visible and apparent and had existed for a sufficient length of time prior to plaintiff's accident to permit defendants to discover and remedy it.

In support of their motions, defendants include, *inter alia*, copies of the pleadings, the transcripts of pretrial depositions of plaintiff and each of the defendants, copies of invoices for snow and/or ice removal, and a copy of the 2007-2008 snow removal contract between defendants Centro and Park Line. Additionally, the motion by defendant Kings Park includes a copy of a transcript of the pre-trial deposition of non-party witness Robert Glaudino.

Pertinent portions of the November 13, 2007 "2007-2008 Snow Removal Contract Between (Centro Heritage SPE 2 LLC) and Park Line Asphalt Maintenance Inc. (Contractor)"[1] state as follows:

> OWNER: Centro Heritage SPE 2 LLC ...
> CONTRACTOR: Park Line Asphalt Maintenance Inc. ...
>
> 2. CONTRACT DOCUMENTS: The Contract Documents consist of this Contract, which includes the Exhibits, and Addenda referred to herein and attached hereto, all of which are incorporated herein by reference and form this Contract.
>
> ...
>
> 4. SUBCONTRACTS: All portions of Operations that Contractor does not perform directly shall be performed under subcontracts, with any use of a subcontractor approved in advance by Centro Heritage SPE 2 LLC.

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[1]The "Date" portion of the contract indicates October 30, 2007 however, defendant Park Line did not execute same until October 31, 2007 and defendant Centro executed same on November 13, 2007.

Contractor shall be responsible for the management and payment of any Subcontractors retained by Contractor to perform any of the Operations. Contractor shall remain fully responsible for any and all of its obligations and responsibilities under this Contract and shall not be relieved of any such obligations and responsibilities in the event that any Operations are subcontracted.

...

8. INDEMNIFICATION: to the fullest extent permitted by law, Contractor shall indemnify, defend, and hold harmless Centro Heritage SPE 2 LLC, Owner(s)...from and against any and all claims, demands, suits, proceedings, ... on account of bodily injury... sustained or alleged by any person or persons, ... directly or indirectly arising out of or resulting from or in any way connected with or related to Operations, attempted Operations, failure to perform Operations, completed Operations, or the work of any Subcontractor ... and whether of not such claims, demands, suits, or proceedings are just, unjust, groundless, false and fraudulent; and Contractor shall and does hereby assume and agrees to pay for the defense of all such claims, demands, suits, and proceedings, provided, however, that the Contractor shall not be required to indemnify Centro Heritage SPE 2 LLC, Owner(s),...against any such damages occasioned solely by the negligent acts or omissions of Centro Heritage SPE 2 LLC, Owner(s)... Contractor agrees to indemnify and hold Centro Heritage SPE 2 LLC, Owner(s)...harmless from any liability whatsoever in any connection with Operations performed or to be performed, regardless of fault and Contractor shall be solely responsible for any such claims.

...

Exhibit 1A

SNOW REMOVAL SPECIFICATIONS & BID FORM

SPECIFICATIONS FOR QUOTING TO PERFORM OPERATIONS

Prices will include the removal of snow from all drives, entrance ways, sidewalks, parking areas, walkways, loading docks, access drives, street entrances, miscellaneous areas (unless otherwise specified on attached site plan), and to also include all front and rear areas of the center.

For snowfalls of one (1) inch or less, parking lots, drives, entrance ways, loading docks, access drives, street entrances and miscellaneous areas will be treated with an ice control product (i.e. sand/salt). ...

Snow removal will be priced in the following increments: 1.1"-2"... All prices will include the initial sand/salt on asphalt surfaces, shoveling of all sidewalks and walkways and spreading of an ice control product on all sidewalk and walkway surfaces.

...

A per application price for the additional spreading of sand/salt on asphalt surfaces in the fire lanes and entire lot, ... will be provided.

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...

BID FORM

Pricing based on a per event basis, including any required de-icing of parking lots and/or sidewalks. ...

SNOW REMOVAL PRICING

0-1" $ Sand/Salt Kings Park Shopping Center

Entire lot to be sanded/salted and sidewalk/walkways to be cleared and treated with an ice control product.

...

Per application cost of sand/salt to asphalt surfaces $ _______

...

Additional Work:

Salt/Sanding of Parking Lot ________________ $ 650.00 each application

...

Kings Park: Attachment A "2007-2007(*sic*)" Snow Season

...

Additional Work:

- Salt/Sanding of Parking Lot $650.00 each application

...

Exhibit 1B

Specifications For Performing Operations

...

This Exhibit is part of the Contract.

...

V. OBLIGATIONS AND PROCEDURE:

(A) Contractor shall furnish all labor, machinery, materials, services, equipment, and supervision to perform Operations under the following circumstances and/or conditions:

(1) Whenever conditions warrant Operations

(a) Contractor is responsible for monitoring the conditions at the Property(ies) to determine when conditions warrant Operations.

(b) Contractor will immediately notify Centro Heritage SPE 2 LLC of the Operations to be performed and the labor, machinery, materials, and equipment being dispatched.

(2) At any time at the request of Centro Heritage SPE 2 LLC.

...

During her examinations before trial, plaintiff testified that on December 14, 2007 at approximately 7 a.m.. while walking from her car to Dan's Key Food, her place of employment, within

the Kings Park Plaza parking lot located at 66 Indian Head Road she slipped and fell on ice. She contends that there was an ice storm the day before her accident, that she had to chip ice off of her car to leave from work at about 1 p.m. on December 13, 2007, and that the storm had stopped before she left for work on the 14th. She maintains that prior to her fall while pulling into the lot, her vehicle "glided because it was a full sheet of ice, the whole parking lot." Plaintiff alleges that she was walking carefully from the car, that the assistant store manager, Bobby Glaudino, was screaming out to her to walk very slowly because the parking lot was in bad condition, and that as she was "walking carefully" her right foot slipped and she went up in the air coming down on her back and sustaining serious injuries.

James Farino, the president of defendant Kings Park, testified that defendant Kings Park was in the business of heavy and highway construction and snow removal at the time of plaintiff's accident. He admitted that defendant Kings Park had an oral contract for commercial snow removal with defendant Park Line for the Kings Park Plaza parking lot. As per his testimony, defendant Kings Park would supply a truck, a plow, and an operator, on demand, for defendant Park Line for a certain dollar fee per hour at 66 Indian Head Road, the Kings Park Plaza shopping center. He contended that salt and sanding was not part of the oral contract, that he had "no idea" who would be involved in salting or sanding, and that he sent an invoice to defendant Park Line for plowing done on December 13, 2007 and December 16, 2007.

The testimony of Richard Mailand, the president of defendant Park Line, revealed that it had entered into a contract for snow plowing and salt/sand treatment at the Kings Park Plaza parking lot with defendant Centro for the 2007-2008 winter season. He indicated that although defendant Park Line did have equipment to spread salt or sand in the event of an ice storm, it did not utilize equipment to break up ice. Mr. Mailand admitted that defendant Park Line had a verbal contract with defendant Kings Park for plowing the parking lot at Kings Park Plaza (wherein defendant Park Line would contact defendant Kings Park by telephone for services) and that defendant Kings Park did not perform salt/sanding activities at that location. He stated that defendant Park Line would take care of the salt and sand treatment for the parking lot. Mr. Mailand claimed that on all freezing or snow events, defendant Park Line would automatically salt/sand the entire parking lot at the start of the event, which would help the snow plow because it would keep the snow from sticking to the ground. He stated that the only records of snow removal kept by defendant Park Line would be invoices and that there were no records showing specifically when snow and ice removal was done. Mr. Mailand set forth that the Park Line invoice to Centro showed that snow plowing was done on the 13th and that salt/sand was applied on the 13th and 14th (Kings Park having plowed and Park Line having salted/sanded), although no records exist as to the time this was done. Finally, during his testimony, Mr. Mailand admitted that it was within defendant Park Line's sole discretion when to start salt and sand applications under the contract it had with defendant Centro.

John Fogarty, the property manager for defendant Centro at the time of plaintiff's accident, testified at an examination before trial that defendant Heritage, a management company, did not exist at the time the snow and ice removal contract was entered into between defendant Centro and defendant Park Line. He vouched that the defendant Centro was the owner of the Kings Park Plaza shopping center and that it hired a company to take care of issues regarding snow and ice at the shopping center. At the time of plaintiff's accident, defendant Centro had contracted with defendant Park Line for snow and ice removal according to Fogarty's testimony, and defendant Centro did not oversee the actual work

being done, nor did it typically do any type of inspection for snow and ice removal work, although it would on occasion inspect the property prior to approving payment of an invoice. Mr. Fogarty indicated that he did not know if defendant Park Line ever used sub-contractors to perform snow and ice removal work at Kings Park Plaza but believed that it had the right to sub-contract work pursuant to the contract without the need for approval from defendant Centro. In affidavits submitted in support of defendant Centro's motion and in opposition to the motions of defendants Kings Park and Park Line, John Fogarty attested that on December 14, 2007 he was employed as a property manager by defendant Centro, the owner of Kings Park Plaza shopping center, and that defendant Heritage was neither the owner nor the property manager of the shopping center at that time. He averred that defendant Heritage did not exercise control over and provided no direction, supervision or services to the said shopping center.

During his examination before trial, non-party witness Robert Glaudino, the assistant manager for Dan's Key Food, a supermarket within the Kings Park Plaza shopping center, on the date of plaintiff's accident, testified that a wintery mix of snow and rain was falling when he left work on December 13, 2007 at about 10:30 p.m. and that on the 14th at approximately 5 a.m., it was no longer snowing or raining, but that "everything was frozen." He indicated that on his way to work he found the side roads to be icy, but that the expressway and parkway had been "salted and sanded already." He claimed that upon his arrival at work on the 14th, the parking lot "was a sheet of ice" and that he had difficulty walking on it. Mr. Glaudino stated that noone had come during the night to clear the "slush" and it froze, that he did not see any snow or ice removal vehicles in the parking lot prior to plaintiff's accident, that when he observed plaintiff in the parking lot he yelled out to her to be careful, and that he observed plaintiff take a step, her body go flying up in the air, and land on her back. He thereafter observed two vehicles sanding the parking lot at approximately 8:45 a.m.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797.799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

To prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Scoppettone v ADJ Holding Corp.***, 41 AD3d 693, 839 NYS2d 116 [2d Dept 2007]; ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the

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accident to permit the defendant's employees to discover and remedy it (*see* ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [2d Dept 1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on 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]).

Here, defendant Kings Park has established that it is entitled to judgment as a matter of law. The testimony of its principal and that of defendant Park Line reveals that defendant Kings Park had no obligation to salt/sand or in any manner treat an ice condition in the parking lot. Plaintiff's testimony is clear and unequivocal that she fell on "a sheet of ice" over the entire parking lot, and that an accumulation or the improper removal of snow did not cause her fall. Accordingly, summary judgment is granted to defendant Kings Park and the complaint and all cross claims against it are dismissed.

However, defendant Park Line has failed to establish its prima facie entitlement to judgment as a matter of law (*see* ***Santoliquido v Roman Catholic Church of the Holy Name of Jesus,*** 37 AD3d 815, 830 NYS2d 778 [2d Dept 2007]; ***Pearson v Parkside Ltd. Liab. Co.***, 27 AD3d 539, 810 NYS2d 357 [2d Dept 2006]; ***Joachim v 1824 Church Ave., Inc.***, 12 AD3d 409, 784 NYS2d 157 [2d Dept 2004]). A question of fact exists as to whether it fulfilled its obligation under the contract with defendant Centro to salt and sand the parking lot "when conditions warrant." As the contract indicates that "[f]or snowfall of one (1) inch or less, parking lots ... will be treated with an ice control product," defendant Park Line's contention that it was not obligated to perform ice removal since it had snowed less that 1.1 inches is of no import. Portions of the contract required defendant Park Line to apply treatment for ice. Additionally, no evidence has been offered to show the time when the parking lot was allegedly plowed and/or salted and sanded on the 13th or 14th prior to plaintiff's accident. Both plaintiff and non-party witness, Robert Glaudino, attest that no precipitation was falling on the morning of plaintiff's accident. Therefore, a "storm in progress" defense presents issues that must be left to a trier of fact. Thus, since questions of fact exist with regard to defendant Park Line's duties under the contract and whether it had notice of the dangerous condition, summary judgment in its favor is inappropriate.

As to defendant Heritage, evidence has been offered which shows that it was not a property manager or owner of the premises where plaintiff was injured. Defendant Heritage having come forward with evidence to show that it is entitled to summary judgment dismissing the complaint, the burden shifted to plaintiff to produce evidence that a material issue of fact exists (*see* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiff has come forward with no evidence making such a showing. Accordingly, the portion of the motion which requests summary judgment dismissing the complaint and all cross claims as to defendant Heritage is granted.

That portion of the motion which requests summary judgment dismissing the complaint and all cross claims as to defendant Centro is denied, there existing questions of fact with regard to its negligence in failing to properly inspect its parking lot for ice (and request that defendant Park Line treat same) and as to whether it had actual or constructive notice of the alleged icy condition in the parking lot. The contract contains a clause which obliges defendant Park Line to furnish labor, materials, and equipment "[a]t any time at the request of Centro", thus defendant Centro may have been negligent in failing to request that the ice in the parking lot be treated prior to plaintiff's injury. Insofar as questions

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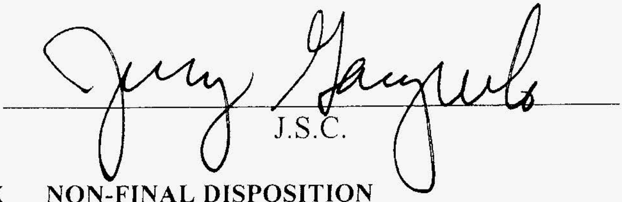
of fact exist as to the negligence of each of the defendants who are parties to the snow and ice removal contract, a declaration with regard to indemnification is improper at this time (the contract explicitly stating that defendant Park Line "shall not be required to indemnify Centro ... against any such damages occasioned solely by the negligent acts or omissions of Centro"), and is more properly a question reserved for the trial court. Thus, the motion of defendant Centro is denied in its entirety.

Dated: 10/4/13



J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**