Gazal v Rechler Equity Partners

2016 NY Slip Op 30368(U)

February 25, 2016

Supreme Court, Queens County

Docket Number: 9829/13

Judge: Howard G. Lane

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This opinion is uncorrected and not selected for official publication.

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

RAPHAEL GAZAL and AMELIA GAZAL, Plaintiffs,	Index Number 9829/13
-against-	Motion Date November 6, 2015
RECHLER EQUITY PARTNERS, et al., Defendants.	Motion Cal. Nos. 42 & 43
RECHLER EQUITY B-1, LLC, incorrectly sued herein as RECHLER EQUITY PARTNERS and RECHLER EQUITY B-1, LLC, Third-Party Plaintiffs,	Motion Seq. Nos. 3 & 4
-against-	
CREATIVE LAWN & GROUNDS LTD., Third-Party Defendant.	

The following papers numbered 1 to 22 read on this motion by defendant/third-party plaintiff Rechler Equity B-1, LLC s/h/a Rechler Equity Partners and Rechler Equity B-1, LLC (Rechler) for summary judgment dismissing the complaint against it and for conditional summary judgment on its third-party claims for contractual and common-law indemnification, breach of contract to procure insurance, and for attorney's fees and costs against third-party defendant Creative Lawn & Grounds, LTD (Creative); and on this motion by defendant We Sell Cellular, Inc. (We Sell Cellular) for summary judgment dismissing the complaint against it.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1 - 8
Answering Affidavits - Exhibits	9 - 16
Reply Affidavits	17 - 22

Upon the foregoing papers it is ordered that the motions are determined as follows:

On February 11, 2013, plaintiff Raphael Gazal was allegedly injured when he slipped and fell on ice in the parking lot of the property owned by Rechler and occupied by several stores, including We Sell Cellular, the lessee of said premises. Rechler contracted with Creative to perform snow and ice removal services in the parking lot of the subject property. Plaintiff Raphael Gazal, and his wife suing derivatively, subsequently commenced the within action against defendants. Thereafter, on November 12, 2013, Rechler instituted a third-party action against Creative, alleging causes of action for contractual indemnification, common-law indemnification, recovery of attorney's fees and defense costs, and breach of contract to procure insurance.

We Sell Cellular established its entitlement to judgment as a matter of law that it did not own, control, or make a special use of the area where plaintiff Raphael Gazal's accident occurred. It is well-settled that liability for injuries sustained as a result of a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property (*see Rodgers v City of New York*, 34 AD3d 555 [2006]). First, there is no allegation that We Sell Cellular created the dangerous condition of snow and ice which allegedly caused plaintiff Raphael Gazal's accident.

Furthermore, in support of its motion, We Sell Cellular argues that Rechler, the owner of the subject premises, is responsible for snow and ice removal in the area where plaintiff Raphael Gazal's accident occurred. Paragraph 4 of the subject lease states, in pertinent part, "[o]wner shall maintain and repair the exterior of and the public portions of the building." Paragraph 47 of the rider to the lease agreement between Rechler and We Sell Cellular also states, in relevant part,

> "[t]enant agrees to pay, upon Landlord's demand therefor, as additional rent, an amount equal to Tenant's Proportionate Share of 'Landlord's Cost' of maintenance and repair of the Building and the landscaped, parking and other common areas thereof. The term 'Landlord's Cost,' as used herein, shall be deemed to include, without limiting the generality of the foregoing, ... snow and ice removal . . . ."

Plaintiff Raphael Gazal's deposition testimony indicates that he slipped and fell on ice in the parking lot area of the subject premises, which falls within Rechler's maintenance obligation under the lease terms. It is noted that, to the extent that Rechler contends that We Sell Cellular's summary judgment motion should be denied because it failed to properly authenticate the lease, such contention is without merit as attaching the subject lease to an attorney's affirmation is sufficient to admit the lease (*see DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146 [2003]). Additionally, Mark O'Laughlin, Rechler's director of property operations, testified at his deposition that Rechler contracted with

Creative to perform snow and ice removal services for the subject property, that, prior to the date of such contract, Rechler was responsible for snow and ice removal on the exterior portions of the property, and that We Sell Cellular did not have any obligations regarding snow and ice removal at the premises.[1]

Rechler's additional contention that We Sell Cellular made a "special use" of the area of the parking lot where plaintiff Raphael Gazal fell because it was used exclusively by We Sell Cellular as a loading area for the distribution of cellular telephones is also insufficient to raise a triable issue of fact as to whether We Sell Cellular owed a duty of care to plaintiffs. Although We Sell Cellular might have been the predominant user of the area of the parking lot where plaintiff Raphael Gazal's accident occurred, there is no evidence in the record showing that a "special use" of that area was created for We Sell Cellular for its exclusive benefit or that We Sell Cellular exercised exclusive possession or control over the use of the area (*see Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619 [2005]). Based on the foregoing, the motion by We Sell Cellular for summary judgment dismissing the complaint against it is granted.

The court will now address that branch of the motion by Rechler for summary judgment dismissing the complaint insofar as asserted against it. A defendant who moves in a slip-and-fall case bears the initial burden of making a prima facie showing that it did not create the dangerous condition which caused the accident or had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Frazier v City of New York*, 47 AD3d 757, 758 [2008]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Here, in support of its motion, Rechler initially argues that plaintiff Raphael Gazal was unable to identify the specific cause of his accident. However, contrary to Rechler's assertion, plaintiff Raphael Gazal testified at his deposition that his "foot got caught on the slab of ice and [he] skidded and fell right on the dumpster." Plaintiff Raphael Gazal further testified that, a

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[1] Contrary to Rechler's contention, the unsigned deposition transcripts annexed to We Sell Cellular's motion papers are admissible since no party challenged the accuracy of the testimony as transcribed and each transcript was certified as accurate by a notary (*see Martin v City of New York*, 82 AD3d 653 [2011]). Moreover, with respect to plaintiff Raphael Gazal and Mr. O'Laughlin's depositions, Rechler, on its own summary judgment motion, attached copies of the same deposition transcripts as well as copies of the CPLR 3116 notices from the attorneys for plaintiff Raphael Gazal and Rechler, dated June 25, 2015 and July 14, 2015, respectively.

few seconds after he fell, he looked at the ground and observed a large patch of ice.

In any event, Rechler established its prima facie entitlement to judgment as a matter of law by demonstrating that there was a storm in progress at the time of plaintiff Raphael Gazal's accident. A defendant may be held liable for a dangerous condition on its premises caused by the accumulation of snow or ice upon a showing that it had actual or constructive notice of the condition and that a reasonably sufficient time had lapsed since the cessation of the storm to take protective measures (*see Sabatino v 425 Oser Ave., LLC*, 87 AD3d 1127 [2011]). Under the storm in progress rule, "a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*Marchese v Skenderi*, 51 AD3d 642 [2008]; *see Scarlato v Town of Islip*, ___ AD3d ___, 2016 NY Slip Op 00176 [2d Dept 2016]). Moreover, "[a] lull in the storm does not impose a duty to remove the accumulation of snow or ice before the storm ceases in its entirety" (*Rabinowitz v Marcovecchio*, 119 AD3d 762 [2014]). But, "if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied" (*Mazzella v City of New York*, 72 AD3d 755 [2010]). Here, Rechler submitted certified climatological data and the expert affidavit of Thomas Else, a meteorologist, who stated that, on the date of plaintiff Raphael Gazal's accident, there was freezing rain from 6:00 a.m. to 9:00 a.m. and, following the period of freezing rain, adverse weather conditions, including rain and patchy fog, continued throughout the morning and tapered off to a drizzle by the time the subject accident occurred at approximately 12:00 p.m., continuing for several hours thereafter (*see e.g. Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618 [2013]; *Thompson v Menands Holding, LLC*, 32 AD3d 622 [2006]).

The burden, thus, shifted to plaintiffs to demonstrate that the icy condition which caused plaintiff Raphael Gazal's accident existed prior to the storm and that Rechler had actual or constructive notice of the hazard (*see Harvey v Laz Parking Ltd, LLC*, 128 AD3d 1203 [2015]; *O'Neil v Ric Warrensburg Assoc., LLC*, 90 AD3d 1126 [2011]). In opposition to Rechler's summary judgment motion, plaintiffs relied on the expert affidavit of George Wright, a meteorologist, who utilized meteorological records for the relevant area and concluded that there was a winter storm that produced between 17 and 18 inches of snow, sleet, and freezing rain from February 8 - 9, 2013, that there was no snow, sleet, or freezing rain at the subject premises from February 9, 2013 at approximately 8:15 a.m. through the time of plaintiff Raphael Gazal's accident on February 11, 2013 at approximately 12:00 p.m., and that there was no new ice formation or snow accumulation at any time on February 11, 2013. Therefore, in Mr. Wright's opinion, the ice and snow upon which plaintiff Raphael Gazal slipped and fell formed

prior to the winter storm which occurred from February 8 - 9, 2013 and was present for more than two (2) days, or 51 hours, before the subject accident. Notably, although plaintiffs' expert report was exchanged after the note of issue and certificate of readiness was filed, a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment (*see Abreu v Metropolitan Transp. Auth.*, 117 AD3d 972 [2014]; *Rivers v Birnbaum*, 102 AD3d 26, 31 [2012]). Thus, the fact that the disclosure of plaintiffs' expert report took place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely (*see Rivers*, 102 AD3d at 41). Plaintiffs submitted Mr. Wright's expert affidavit in opposition to Rechler's timely motion for summary judgment, and Rechler had the opportunity to refute Mr. Wright's conclusions in its reply papers. In addition, there is no evidence of prejudice to Rechler from plaintiffs' late disclosure of their expert. In view of the foregoing, this court finds that plaintiffs' proof is sufficient to demonstrate a triable issue of fact as to whether plaintiff Raphael Gazal fell on a preexisting icy condition and whether Rechler had a reasonable period of time in which to take corrective measures prior to the accident (*see e.g. Burniston v Ranric Enters. Corp.*, 134 AD3d 973 [2015]; *Mike v 91 Payson Owners Corp.*, 114 AD3d 420 [2014]). As such, that branch of Rechler's motion for summary judgment dismissing the complaint against it is denied.

Rechler demonstrated, prima facie, its entitlement to conditional summary judgment on its third-party cause of action for contractual indemnification against Creative. In opposition, Creative failed to raise a triable issue of fact. A court may render a conditional judgment on the issue of indemnity pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed (*see State v Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757 [2001]). The right to contractual indemnification depends upon the specific language of the contract (*see George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2008]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances (*id.*). Here, paragraph nine of Rechler's snow removal service contract with Creative stated that,

> "Contractor shall indemnify and save harmless Manager, Owner, the ground lessee(s) of the Buildings, if any, and each of their agents and employees against and from any and all claims by or on behalf of any persons or entities arising from the performance or management of any Services at the Buildings, and will further indemnify and save harmless Manager, Owner, the ground lessee(s) of the Buildings, if any, and each of their agents and

> employees against and from any and all claims or losses arising from any condition of or at the Buildings due to or arising from any act or omissions or negligence of Contractor or any of Contractor's Related Parties and against and from all costs, expenses, and liabilities incurred in connection with any such claim or loss or action or proceeding brought thereon (including reasonable attorney fees and costs) . . . ."

In support of its motion, Rechler argues that it contracted its responsibilities for snow removal in the parking lot to Creative and that, if it is found liable, it must be indemnified by Creative pursuant to the snow removal services contract. Exhibit B of the snow removal services contract states that Creative is required to "[p]low all parking lots and roadways by means of truck, plow skid steer or pay loader." At his deposition, Mr. O'Laughlin testified that Creative was responsible for snow and ice removal in the rear loading area of the parking lot where plaintiff Raphael Gazal slipped and fell. Likewise, when shown the same photographs of the area where plaintiff Raphael Gazal's accident occurred, John Vandermaas, president of Creative, testified at his deposition that, pursuant to its snow removal services contract with Rechler, Creative was responsible for performing snow removal services in that area. Additionally, the plain language of the snow removal services contract requires Creative to indemnify Rechler for any and all claims arising out of its performance of the contract as well as for any and all claims arising from any condition due to an act, omission, or negligence of Creative. Given the broad scope of the indemnification clause in the snow removal services contract, this court finds that Creative is, as a matter of law, required to indemnify Rechler if Rechler is held responsible for plaintiff Raphael Gazal's accident.

Rechler is also entitled to indemnification for attorney's fees and costs incurred in the defense of this action. As discussed above, the instant action arises out of Creative's performance of the snow removal services contract between Rechler and Creative. Pursuant to that contract, Creative agreed to defend and indemnify Rechler for any and all claims arising out of Creative's performance of the contract and for any and all claims arising from any condition due to an act, omission, or negligence of Creative. The plain and unambiguous terms of the contract do not condition Creative's obligation for attorney's fees and costs on a finding of fault (*see e.g. McCleary v City of Glens Falls*, 32 AD3d 605 [2014]; *Sand v City of New York*, 83 AD3d 923 [2011]).

Turning to that branch of Rechler's motion for conditional summary judgment on its third-party claim for common-law indemnification against Creative, Rechler failed to demonstrate its prima facie entitlement to judgment as a matter of law. Summary judgment on a claim for common-law indemnification is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved (*see Coque v Wildflower Estates Developers, Inc.*, 31 AD3d 484, 489 [2006]).

To be entitled to common-law indemnification, Rechler was required to demonstrate that no negligent act or omission on its part contributed to plaintiff Raphael Gazal's injuries and that its liability, therefore, is purely vicarious (*see Bryde v CVS Pharmacy*, 61 AD3d 907, 909 [2009]; *Coque*, 31 AD3d at 489). As previously discussed, there are issues of fact as to whether plaintiff Raphael Gazal fell on a preexisting icy condition and whether Rechler had a reasonable period of time in which to take corrective measures prior to the accident. Under these circumstances, a conditional order of common-law indemnification would be premature at this juncture (*see e.g. Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2009]; *George*, 61 AD3d at 930; *Bryde*, 61 AD3d at 909).

Rechler failed to establish its entitlement to conditional summary judgment on its third-party cause of action for breach of contract to procure insurance against Creative. A party seeking summary judgment on an alleged failure to procure insurance naming it as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with (*see Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738 [2003]). In this case, paragraph ten of the snow removal services contract between Rechler and Creative requires Creative to maintain commercial general liability insurance naming Rechler as an additional insured. However, the e-mails sent to Creative's insurer which are annexed to Rechler's motion papers do not demonstrate that Creative failed to comply with that contractual provision (*see Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2014]; *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 556 [2014]; *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 756 [2014]; *Mathey v Metropolitan Transp. Auth.*, 95 AD3d 842, 845 [2012]).

Accordingly, that branch of Rechler's motion for conditional summary judgment on its third-party cause of action for contractual indemnification is granted. In all other respects, Rechler's motion is denied. The motion by We Sell Cellular for summary judgment dismissing the complaint against it is granted.

Dated: February 25, 2016

Howard G. Lane, J.S.C.