

Pinho v Condos Bros. Constr. Corp.

2016 NY Slip Op 32537(U)

December 2, 2016

Supreme Court, Suffolk County

Docket Number: 11-17286

Judge: Peter H. Mayer

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INDEX No. 11-17286

CAL. No. 15-01627MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-25-16 (003)

MOTION DATE 2-9-16 (004)

MOTION DATE 2-16-16 (005)

ADJ. DATE 4-15-16

Mot. Seq. # 003 - MG

004 - Mot D

005 - MG

-----X
CARLOS PINHO,

Plaintiff,

- against -

CONDOS BROTHERS CONSTRUCTION
CORP., DROESCH HUNTINGTON
PROPERTY LLC., STALCO
CONSTRUCTION, INC., and WATRAL
BROTHERS, INC.,

Defendants.
-----X

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CONDOS BROTHERS CONSTRUCTION
CORP.,

Third-Party Plaintiff,

- against -

DROESCH HUNTINGTON PROPERTY
LLC.,

Third-Party Defendants.
-----X

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DROESCH HUNTINGTON PROPERTY LLC,

Second Third-Party Plaintiff,

- against -

STALCO CONSTRUCTION, INC., and
 WATRAL BROTHERS, INC.,

Second Third-Party Defendants.

X

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by third party defendant/ second third- party plaintiff Droesch Huntington Properties dated January 7, 2016, and supporting papers; by the defendant/third-party plaintiff Condos Brothers Construction Corp, dated January 19, 2016, and supporting papers (including Memorandum of Law dated January 19, 2016); by defendant/ second third-party defendant Stalco Construction, Inc., dated January 18, 2016, and supporting papers; (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by plaintiff, dated March 9, 2016; Affirmation in Opposition by defendant/second third- party defendant Stalco Construction, Inc., dated , April 13, 2016(4) Reply Affirmation by defendant/second third-party defendant Stalco Construction, Inc., dated April 14, 2016, and supporting papers; (5) Other ____ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant/third-party defendant/second third-party plaintiff Droesch Huntington Property, LLC for summary judgment dismissing the amended complaint as against it, the third- party complaint, and any cross claims insofar as asserted against it is granted; and it is further

ORDERED that the motion by defendant/third-party plaintiff Condos Brothers Construction Corp. for summary judgment dismissing the amended complaint and all claims or cross claims insofar as asserted against it, and afor the imposition of costs and sanctions against Droesch Huntington Property, LLC, Stalco Construction, Inc. and Watral Brothers, Inc. is granted to the extent that the amended complaint and all claims insofar as asserted against it are dismissed, but is otherwise denied; and it is further

ORDERED that the motion by second third-party defendant Stalco Construction, Inc. for summary judgment dismissing the amended complaint and the second third-party complaint of defendant Droesch Huntington Property, LLC is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Carlos Pinho on February 1, 2011, when he slipped and fell on ice in a parking lot located at 1675 Jericho Turnpike Huntington, in the County of Suffolk, allegedly due to the negligence of the named defendants.

Now defendant/third-party defendant/second third-party plaintiff Droesch Huntington Property, LLC (“Droesch”) moves for summary judgment dismissing the amended complaint as against it, the third-party complaint, and any cross claims insofar as asserted against it. In support of the motion it submits, *inter alia*, copies of the pleadings, the verified bills of particulars, the deposition transcripts of plaintiff and Robert Holden, and an invoice dated January 31, 2011. Defendant/third-party plaintiff Condos Brothers Construction Corp. (“Condos Brothers”) also moves for summary judgment dismissing the amended complaint and all claims or cross claims insofar as asserted against it, and awarding costs and sanctions against Droesch, Stalco Construction, Inc., and Watral Brothers, Inc. In support of the motion it submits, *inter alia*, the pleadings and the verified bills of particulars; the deposition transcripts of plaintiff, Paul Condos, Robert Holden, Thomas Brine, Robert Pihlkar, Anthony Carlo, Raymond Dellysse, Michael G. Bjertnes, and Thomas Watral; and a copy of the affidavit of Robert Holden, dated January 6, 2016. Defendant/second third-party defendant Stalco Construction, Inc. (“Stalco”) also moves for summary judgment dismissing the amended complaint and the second third-party complaint as asserted against it. In support of the motion it submits, *inter alia*, its attorney’s affirmation, the pleadings, the verified bills of particulars, and the deposition transcripts of the plaintiff, Paul Condos, Robert Holden, Michael G. Bjertnes, Thomas Watral, Robert Pihlkar, Anthony Carlo, and Raymond Dellysse. Plaintiff has filed opposition papers to the motion of Stalco, which include its attorney’s affirmation and the affidavit of George Wright, dated March 9, 2016.

Plaintiff testified that he has been employed by Florence Building Materials (“Florence”) for nine years with the title of “driver/warehouse.” He testified that Florence is located at 1647 Jericho Turnpike, Huntington. He testified that his accident occurred on February 1, 2011, at approximately 6:55 a.m., in the employee parking lot, which is located behind a beverage place called “Big Z’s.” He testified that it was cold that morning, and there had been a significant snowfall four or five days earlier. He testified that he observed ice as soon as he entered the parking lot. Plaintiff testified that after he parked, he exited his vehicle and proceeded to walk toward the steps that exit the parking lot. He testified that he immediately began slipping on the ice, walked until he was approximately five to ten feet away from the steps and then slipped and fell. He testified that prior to his fall he was looking at the ground and the entire lot was covered in ice. He did not see any salt or sand on the parking lot. He testified that he had previously complained about the icy parking lot to his supervisor, Thomas Brine. He testified that after the snowfall and several days prior to his accident he saw a payloader moving and piling snow. He believed that the payloader had been brought by defendant Condos Brothers because he saw a trailer belonging to Condos Brothers, although he never saw the payloader on the trailer or being removed from the trailer.

Paul Condos testified on behalf of Condos Brothers, which he stated has been in business for 20 years and predominantly performs heavy construction, demolition, excavation, masonry, drainage and asphalt work. The company owns trucks, a payloader, and a large burgundy colored trailer that is used, along with a green Peterbuilt truck, to transport the payloader. He testified that while the company did

not normally perform snow removal services, it did occasionally, upon request. Such service would only be provided pursuant to a written agreement. He testified that he did not recall performing any snow removal services during the winter of 2010-2011, and, specifically, that Condos brothers did not perform any snow removal at Florence Building Material. He testified that he checked company records for snow removal contracts during this period and found none. Mr. Condos testified that he was familiar with the company named Stalco, having worked along with that company during four or five different jobs. Stalco was acting as the general contractor at the Florence Building Materials demolition job site at the time Condos Brothers were there to perform the demolition work. Mr. Condos identified the contract entered into by Condos Brothers and Stalco (as well as other contractors) for the Florence Building Materials demolition job. The section with regard to Condos Brothers reads: "Separate collapsed structure from south building. Demolition of collapsed warehouse structure, removal of all debris." He testified that their work had nothing to do with the area 1,500 feet away from their job where plaintiff's accident occurred.

Robert Holden, president of Florence, testified on behalf of Droesch. He testified that Droesch owned the property located at 1675 Jericho Turnpike and that Florence owns the property located at 1647 Jericho Turnpike. A third company, Ramrod Realty, owns the center parcel at 1667 Jericho Turnpike. He testified that the 1675 Jericho Turnpike property housed the Big Z beverage building, as well as the employee parking lot, where plaintiff's accident occurred. Mr. Holden testified that the 1647 Jericho Turnpike property owned by Florence is where Florence's building supply warehouse is located, and that Florence's operations spanned the properties located at 1647, 1667 and the rear portion of 1675 Jericho Turnpike. The property at 1667 Jericho Turnpike was Florence's showroom and warehouse. 1647 Jericho Turnpike had an office building for Florence's corporate office, as well as the corporate offices of Ramrod Realty and Droesch. He testified that in 2011 there was a lease in effect whereby Droesch leased the property to Florence, with Florence being responsible for all exterior maintenance and snow plowing for all three properties, including the parking lot at the rear of the property at 1675 Jericho Turnpike where plaintiff fell. He testified that Florence's own employees sometimes plowed the snow in the employees parking lot, and that it was sometimes plowed by a company called J. S. Construction. Mr. Holden testified that he was aware that Condos Brothers had entered into a written agreement with Stalco, the general contractor, to work on the site where the building collapsed, and that the nature of the work was demolition of the damaged structure. He testified that he was aware that Stalco had been hired to remove snow from the 1647 Jericho Turnpike property in order to access the area. He testified that he reviewed a Stalco invoice which indicated that defendant Watral was responsible for all snow and ice removal at the demolition site. He testified that he was the person in charge of the entire project encompassing the collapsed building and that he never received any invoices from Condos Brothers relative to any snow plowing or snow and ice removal. He also testified that neither Florence or Droesch had received any such invoices from Condos Brothers.

Thomas Brine testified he was employed by Florence as a yard manager, overseeing trucks, deliveries, inventory and union employees, and, as such, was plaintiff's supervisor. He became aware of plaintiff's accident because plaintiff reported it to him upon entering the warehouse. He testified that he was not aware of any icy condition in the parking lot prior to plaintiff's accident, and no one had reported to him that they were having any difficulty walking in the parking lot. Mr. Brine further

testified that he parked in the same parking lot. He testified that he did not know who would have plowed the parking lot, and that he did not see any payloaders on the property prior to plaintiff's accident. He testified that any time there is a snowfall all of the walkways and steps were salted by Florence employees.

Robert Pihlkar testified that he was the warehouse manager for Florence and was also considered plaintiff's supervisor. He learned about plaintiff's accident through a written accident report. He testified that he was not aware of any complaints about ice in the parking lot and that Florence took care of icy conditions by sending people out there to salt. He testified that snow plowing was done by an outside company, J & S Construction, and by Florence employees if J & S "is not around." He testified that he saw a payloader on the premises that winter, but did not know to which business it belonged to.

Anthony Carlo testified that he was plaintiff's co-worker at Florence, and was in the employee parking lot when plaintiff fell. He testified that prior to plaintiff's accident the ice in the parking lot would melt during the day and re-freeze at night. He testified that the water came from snow piled at the top of the parking lot. He testified that he did not know what company created the snow piles, but that such piles were made with a front payloader. He also testified that Florence had a company, J. S. Contracting, which plowed the snow in the parking lot. He testified that on the day of plaintiff's accident the surface of the parking lot was covered with ice, and that he also had difficulty walking on it. He testified that he saw plaintiff after he fell, which occurred three or four steps from the stairs. He testified that no salt or sand had been placed in the parking lot prior to plaintiff's accident.

Raymond Dellysse testified that he was employed by Florence as warehouse worker and driver. He testified that Condos Brothers performed the demolition work on the Florence property after the partial collapse of one of the buildings. He testified that he believed it was Condos Brothers who pushed the snow into the pile at the end of the employees parking lot. However, he never actually observed employees moving snow in the parking lot, but he did see a payloader moving the snow.

Michael G. Bjertnes testified as a witness for Stalco, where he worked as a site supervisor. He testified when he arrived at the Florence work site, Watral was already on the site with a payloader and, possibly, a truck. He testified that Watral was moving snow from the western side of the property where the demolition was to take place, and transporting it with a payloader to the northeast corner of the property, where it was piled up. According to Mr. Bjertnes, the piles of snow were between 50 and 75 feet wide and 12 to 14 feet high. He testified that no other company was moving the snow. The following day, at Florence's request, Watral used trucks to remove snow from the property, rather than relocating it on the property. He testified that the decision to pile snow on the northeast side of property was made by Florence.

Thomas Watral, the president of defendant/second third party defendant Watral Brothers, Inc., testified that Stalco contracted with Watral to move the snow with a payloader so that Stalco could perform work at the Florence site. He testified that it was a Stalco employee who directed the payloader where to move snow on the site. He testified that when upon discovering that there was not enough room on the site for all of the snow, Watral began removing snow from the site using tractor trailers. He

testified that the snow removal was requested by Stalco. He further testified that Watral's payloaders do not have the company name marked on them.

The affidavit of Robert Holden states that Florence owns the property at 1647 Jericho Turnpike and leased the properties at 1667 and 1675 Jericho Turnpike; copies of the leases are annexed to his affidavit. He further states that pursuant to the lease agreements, Florence assumed all responsibility for control, maintenance, repair and supervision of the leased properties, including the parking lot where plaintiff fell. He states that, in light of this responsibility, as a general practice Florence hired J. S. Construction to remove snow from the subject parking lot. Mr. Holden states that at or about the time of plaintiff's incident, Florence had contracted with Stalco to demolish a collapsed warehouse and remove all debris from the leased properties.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Droesch has demonstrated its prima facie entitlement to summary judgment dismissing the amended complaint, the third-party complaint, and any cross claims insofar as asserted against it by establishing that it had no control over the portion of the subject property where plaintiff's injury occurred. A real property owner or person in possession or control of real property will be held liable for a slip-and-fall accident involving snow and ice on his or her property only when the defendant created a dangerous condition or had actual or constructive notice thereof (*Viera v Rymdzionek*, 112 AD3d 915, 977 NYS2d 406 [2d Dept 2013]; *see Cody v Dilorenzo*, 304 AD2d 705, 757 NYS2d 789 [2d Dept 2003]). However, an out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct (*see Garcia v Town of Babylon Indus. Dev. Agency*, 120 AD3d 546, 990 NYS2d 849 [2d Dept 2014]; *Wenzel v 16302 Jamaica Ave., LLC*, 115 AD3d 852, 982 NYS2d [2d Dept 2014]). The evidence submitted establishes that Droesch did not retain control over the property, as Florence assumed all responsibility for control, maintenance, repair and supervision of the leased properties, including the parking lot where plaintiff fell. Neither Plaintiff nor any other party has submitted any opposition to Droesch's motion.

Condos Brothers has also demonstrated its entitlement to summary judgment dismissing the amended complaint and all cross claims insofar as asserted against it by establishing that it did not breach any duty owed to plaintiff, and, in fact, had no connection at all with the circumstances that led to plaintiff's alleged injuries. Fundamental to recovery in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49 [1986]). A defendant will be held liable for a slip and fall involving snow and ice on its property only when it created the dangerous condition that caused the accident or had actual or constructive notice thereof (*Scott v Avalonbay Communities, Inc.*, 125 AD3d 839, 4 NYS3d 243 [2d Dept 2015]; *Gushin v Whispering Hills Condominium I*, 96AD3d 721, 946 NYS2d 202 [2d Dept 2012]; *Baines v G & D Ventures, Inc.*, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]). Condos Brothers have submitted evidence establishing that it was not responsible for creating the mound of snow in the employee parking lot, which caused the ice condition which plaintiff alleges was responsible for his accident. Its employees were not involved in creating the snow pile, and any testimony to the contrary was entirely speculative and without basis in fact. Neither plaintiff nor any other party has submitted any opposition to the portion Condos Brothers' motion seeking summary judgment dismissing all claims or cross claims asserted against it. Stalco, however, has submitted opposition to that portion of the motion which seeks costs and sanctions under NYCRR 130-1.1 against Watral, Droesch and Stalco for failure to execute a stipulation of discontinuance as against it. The Court declines to grant this portion of the motion as these parties refusal to do so was not frivolous or completely without merit in law prior to the parties submission of proof on these motions (*see Sanders v Aqua Chlor Enters., Inc.*, 90 AD3d 521, 934 NYS2d 406 [1st 2011]).

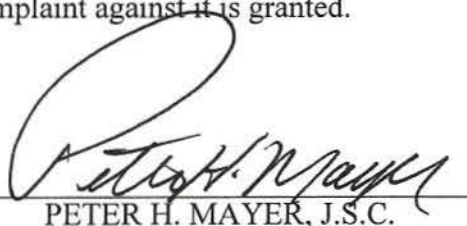
Stalco has also demonstrated its entitlement to summary judgment dismissing the amended complaint and the second third-party complaint as against it, by establishing that it had no right to control the manner in which the snow was moved and piled in the parking lot where plaintiff's alleged accident occurred. It has further been established that Florence assumed all responsibility for removal of snow and ice, including from the parking lot where plaintiff fell. Generally, "a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257, 869 NYS2d 356 [2008], quoting *Kleeman v Rheingold*, 81 NY2d 270, 273, 598 NYS2d 149 [1993]; *see Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 584 NYS2d 765 [1992]; *Calandrino v Town of Babylon*, 95 AD3d 1054, 944 NYS2d 286 [2d Dept 2012]). The underlying rationale for the rule is that "one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor" (*Kleeman v Rheingold*, *supra* at 274; *see Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 639 NYS2d 971 [1996]; *Begley v City of New York*, 111 AD3d 5, 972 NYS2d 48 [2d Dept 2013]; *Metling v Punia & Marx*, 303 AD2d 386, 756 NYS2d 262 [2d Dept 2003]). Thus, control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability (*see Calandrino v Town of Babylon*, *supra*; *Wecker v Crossland Group, Inc.*, 92 AD3d 870, 939 NYS2d 481 [2d Dept 2012]; *Araneo v Town Bd. for Town of Clarkstown*, 55 AD3d 516, 865 NYS2d 281 [2d Dept 2008]; *Gfeller v Russo*, 45 AD3d 1301 846 NYS2d 501 [4th Dept 2007]). Testimony was submitted establishing that

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Florence directed Stalco, which in turn directed Watral where the snow should be piled on the property; thus, Stalco did not control the manner in which this work was done. In opposition, plaintiff failed to raise any issue of fact. The affidavit of plaintiff's purported expert, George Wright, is inadmissible and will not be considered by the Court, since his opinions rely on uncertified climatological data, which is inadmissible and cannot be considered (*see McBryant v Pisa Holding Corporation*, 110 AD3d 1034, 973 NYS2d 757 [2d Dept 2013]; *Morabito v 11 Park Place LLC*, 107 AD3d 472, 967 NYS2d 694 [1st Dept 2013]).

Accordingly, the motion by Droesch for summary judgment dismissing the amended complaint as against it, the third-party complaint, and any cross claims insofar as asserted against it is granted. The motion by Condos Brothers for summary judgment dismissing the amended complaint and all claims or cross claims insofar as asserted against it, and awarding costs and sanctions against Droesch, Stalco and Watral is granted to the extent that the amended complaint and all claims or cross claims insofar as asserted against it are dismissed, but is otherwise denied. The motion by Stalco for summary judgment dismissing the amended complaint and the second third-party complaint against it is granted.

Dated: December 2, 2016


PETER H. MAYER, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION