MacIsaac v Amerada Hess Corp.
2016 NY Slip Op 32540(U)
November 4, 2016
Supreme Court, Suffolk County
Docket Number: 13-28306
Judge: W. Gerald Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 13-28306
CAL. No. 16-00119OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 6-13-16
ADJ. DATE 7-12-16
Mot. Seq. # 003 - MG

---X

STEPHEN MACISAAC,

Plaintiffs,

- against -

AMERADA HESS CORPORATION, and G. & M. DEGE, INC.,

Defendants.

---X

AMERADA HESS CORPORATION

Third-Party Plaintiff,

- against -

G. & M. DEGE, INC.,

Third-Party Defendant.

---X

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Upon the following papers numbered 1 to 32 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 19 ; Answering Affidavits and supporting papers 20 - 21, 22 - 24 ; Replying Affidavits and supporting papers 25 - 29, 30 - 32 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant G. & M. Dege, Inc. for summary judgment dismissing the complaint, the cross claim, and the third-party complaint against it is granted.

This action was commenced by plaintiff Stephen MacIsaac to recover damages for injuries he allegedly sustained on February 11, 2013, when a glass light fixture in a Hess gas station restroom fell on his head. Said gas station was owned by defendant Amerada Hess Corporation (Hess) and was located at 346 Montauk Highway, Wainscott, New York. Defendant G. & M. Dege, Inc. is a maintenance service that provided on-call repairs to certain Hess gas stations.

G. & M. Dege, Inc. (G&M) now moves for summary judgment in its favor, asserting that it owed no duty to plaintiff and that it was not required to indemnify Hess for incidents such as the one that is the subject of this action. In support of its motion, G&M submits copies of the pleadings, transcripts of the parties' deposition testimony, two photographs, copies of various receipts, and a copy of a "Hess Corporation Lighting Maintenance Scope" document.

Plaintiff alleges, by way of his bill of particulars, that G&M negligently maintained the subject light fixture, that it allowed said light fixture to be in a dangerous condition, that it created such dangerous condition, and that it had constructive notice of such dangerous condition. At his deposition, plaintiff testified that on the date in question, he entered the men's restroom of the Wainscott, New York Hess gas station. Plaintiff testified that immediately prior to his accident, he used the toilet, then walked to the sink to wash his hands. He stated that while he was walking to the sink to wash his hands, the overhead glass light fixture fell from the ceiling and struck him on the back-left corner of his head. He testified that he visited this particular Hess gas station approximately once a day to buy food, gas, and to use the restroom. Plaintiff indicated that the men's restroom was small, that it was intended for the use of one person at a time, that it was open to the public, and that it did not require a key for entry. He testified that the ceiling of the restroom was approximately 10 feet in height and had a single 6" "ball-shaped" lamp mounted on it, above the sink. Plaintiff explained that he had witnessed Hess employees mop the floor of the restroom approximately once a week, and knew the maintenance workers were Hess employees because they always wore a shirt with a Hess insignia on it.

Maria J. Herras was deposed on behalf of Hess. She testified that on the date in question she was working at the Wainscott Hess station as a manager. She recalled being present on the date of plaintiff's accident and that it occurred "before 11:00 a.m." She indicated that all of the station's employees were responsible for the cleanliness of the station and for changing restroom light bulbs when necessary. Regarding the restroom light fixture in question, Ms. Herras stated that it contains three light bulbs, that it is located directly in the center of the restroom's "high" ceiling, and that it would require a ladder to access. She explained that to change one of the light fixture's bulbs, one would turn a small knob on the fixture, then turn the glass fixture itself, which would allow it to be removed. She stated that she has personally changed the light bulbs in the gas station's restrooms, which have identical light fixtures, many times.

Ms. Herras testified that plaintiff came into the convenience store portion of the gas station, left, then returned some time later, complaining that the restroom light fixture had fallen on his head and that there was glass on the floor. She stated that she inspected the restroom in question, discovered the glass light fixture shattered on the restroom floor, and began a search for a replacement glass cover. She indicated that she could not find one at the gas station, so she called one of Hess's "contractors," G&M,

to replace it. She stated that, unless there happened to be a light bulb burned out at the time G&M was on premises, they would not play any role in replacing such light bulbs. She further stated that G&M only comes when called.

Angela Gallipoli Newham was deposed on behalf of G&M. She testified that she is a service manager for G&M, and that her duties include taking service calls, dispatching service calls, invoicing, ordering parts, and overseeing service technicians. She testified that G&M is a corporation that provides construction and maintenance of gas station equipment and that it has many gas station clients, in addition to the 74 Hess gas stations with which it conducts business in Nassau and Suffolk Counties. She explained that G&M has one "master" contract with Hess that applies to all of its gas stations on Long Island. She indicated that, regarding Hess gas station lighting, G&M does not make routine service calls or inspections; rather, G&M responds to requests for service initiated by the gas stations using a computer system called Officetrax. Furthermore, Ms. Gallipoli Newham testified that the light fixture in question was not installed by G&M, that it was already present at the time G&M began its relationship with the Wainscott Hess, and that G&M had never replaced any light bulbs in that fixture prior to plaintiff's accident.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]). It is well-established that there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care– and thus be potentially liable in tort– to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120 [2002] [internal quotation marks and citations omitted]).

G&M has established a prima facie case of entitlement to summary judgment. Here, it is undisputed that a contract existed solely between Hess and G&M. Both Hess and G&M agree that G&M was not obligated under the contract to perform regular inspections of the subject premises, and that, until a service order was placed by a Hess employee, it would not have any involvement in the day-to-day operations of the subject gas station. Thus, G&M demonstrated its occasional service visits were not so comprehensive as to displace Hess's duty to maintain the subject premises in a reasonably safe condition (*see* ***Espinal v Melville Snow Contrs.***, *supra*). In reference to G&M's performance of its duties, no evidence has been presented that suggests G&M "launched a force or instrument of harm" or created a dangerous situation. Plaintiff also has not raised a question as to whether he detrimentally relied upon the continued performance of G&M's duties, since no evidence was adduced that plaintiff was aware of the contract between Hess and G&M and "did not rely upon any past performance by the defendant, but rather [he] relied upon [his] own observations of the conditions as they existed on the [day] of [his] accident" (***Bugiada v Iko***, 274 AD2d 368, 369, 710 NYS2d 117 [2d Dept 2000]). G&M did not have a duty to remain on-site at the subject premises indefinitely to prevent loose lighting fixtures. Rather, as the record reflects, G&M's function was to perform requisitioned repairs at the subject premises, then depart. Even if the Court were to assume that G&M had a duty to inspect all light fixtures during any service call, in the six days that passed between when G&M left the subject premises and plaintiff's accident, any number of events could have occurred– none of which G&M had a duty to continuously inspect for. Any deficiencies in G&M's performance were Hess's duty to discover and correct (*see* ***Nallan v Helmsley-Spear, Inc.***, *supra*). G&M having met its prima facie burden, the burden then shifted to plaintiff and Hess to raise triable issues of material fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Both plaintiff and Hess oppose G&M's motion on the ground that the service agreement between Hess and G&M required G&M to inspect and repair the subject light fixture. Plaintiff's counsel also argues that there is a question of fact as to whether G&M displaced Hess's duty to maintain the premises in a safe condition. Hess asserts that G&M is contractually bound to indemnify it for plaintiff's alleged injuries. In opposition to G&M's motion, both plaintiff and Hess "incorporate by reference" the exhibits submitted by G&M in support of their summary judgment motion.

Plaintiff and Hess have failed to raise triable issues of fact sufficient to defeat G&M's motion for summary judgment (*see* ***Alvarez v Prospect Hosp.***, *supra*). It is clear that the service contract between Hess and G&M entitles Hess workers to place service calls to G&M and to have a G&M technician report to the premises to replace any burned-out or damaged light bulbs for a monthly fee of $135.79. The contract states that "routine" service calls will be responded to by G&M "not later than 5:00 p.m. of the 3rd business day after the call was dispatched," and that "emergency" calls to G&M must be "responded on-site within four (4) hours of dispatch." Absent from the contract are provisions mandating G&M routinely inspect the premises. While the contract does contain a provision stating that "[w]hen making a service call at any location, [G&M] will . . . inspect and repair all other items that are [G&M's] responsibility," the section of the contract describing the scope of G&M's responsibility regarding "[i]nterior lighting" lists only "bulbs, ballasts, circuit breakers, switches, outlets and wirings," none of which apply to the instant matter. Further, the indemnification provision in the service contract states it applies only to G&M's liability "arising out of work performed by" it. As there has been no

evidence presented by Hess that G&M "performed" any work on the subject light fixture, G&M has successfully established that plaintiff's alleged injury does not fall squarely within the purview of the contract's indemnification provision (*see generally* ***Salzman & Salzman v Home Ins. Co.***, 258 AD2d 455 [2d Dept 1999]).

Accordingly, G&M's motion for summary judgment dismissing all claims against it is granted.

Dated: NOV. 4, 2016

W. Gerard Asher
J.S.C.

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