**Gonzalez v Cali So. W. Realty Assoc. L.P.**

2017 NY Slip Op 33394(U)

June 29, 2017

Supreme Court, Westchester County

Docket Number: Index No. 52799/2017

Judge: Orazio R. Bellantoni

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PRESENT:

**HON. ORAZIO R. BELLANTONI**
**JUSTICE OF THE SUPREME COURT**

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YESENIA GONZALEZ,

Plaintiff(s),

- against -

CALI SO. WEST REALTY ASSOCIATES L.P., MACK-CALI SUB XIV, INC. f/n/a/ CALI SUB XIV, INC., MACK-CALI REALTY CORPORATION, LASCON INC. and MACK-CALI SO. WEST REALTY ASSOCIATES L.L.C.,

Defendant(s).

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**ORDER**
Index No.: 52799/2017
Motion Date: 4/26/17

Defendant Lascon Inc. (Lascon) moves (#001) for an order, granting summary judgment in its favor. Defendants Cali So. West Realty Associates L.P. (SW LP), Mack-Cali Sub XIV, Inc. f/n/a Cali Sub XIV, Inc. (Sub XIV), Mack-Cali Realty Corporation (M-C), and Mack-Cali So. West Realty Associates L.L.C. (SWRA LLC) (collectively, Mack-Cali) cross-moves for an order, granting Mack-Cali summary judgment, dismissing the complaint and all cross-claims, or, in the alternative, granting Mack-Cali conditional indemnification on its contract against Lascon, granting summary judgment dismissing the complaint and cross-claims as to SW LP, Sub XIV, and M-C.

The following papers were read:

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| Notice of Motion (#001), Affirmation, and Exhibits (14) | 1-16 |
| Affirmation in Opposition and Exhibits (11) | 17-28 |
| Affirmation in Opposition, Exhibits (3), and Memo of Law | 29-33 |
| Affirmation in Reply | 34 |
| Notice of Cross-Motion (#002), Affirmation, Exhibits (16), and Memo of Law | 35-53 |
| Affirmation in Opposition and Exhibits (12) | 54-66 |
| Affirmation in Reply, Exhibit, and Memo of Law | 67-69 |

By way of background, plaintiff commenced this action to recover damages for personal injuries allegedly sustained on January 15, 2014 when she slipped and fell on exterior steps leading from the rear entrance of the premises known as 100 Corporate Boulevard South, Suite 111, Yonkers, New York. Lascon and Mack-Cali now move for, among other things, summary judgment.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In support of its motion, Lascon proffers various evidence, including the deposition transcripts from plaintiff, a non-party building engineer, and Lascon's president and owner as well as photos taken on the date of the subject accident, and Lascon's contract for the removal of snow and ice from the Premises. Lascon notes that on the date of the accident Lascon had a contract with Mack-Cali to perform snow and/or ice removal at the Premises. Lascon contends that its contractual undertaking does not expose it to liability and that none of the exceptions to this rule are applicable. Lascon also notes that plaintiff testified at her deposition that as she was descending the subject stairs, she only saw water on the stairs and after she fell allegedly observed ice. Lascon also notes that the non-party building engineer, Eric Gordos, testified at his deposition that he came upon plaintiff shortly after the accident, observed no ice on the stairs, and took photos of the subject stairs, which he contends reveal no ice, but merely the salt. In addition, Lascon contends that, regardless, there is no evidence that Lascon caused or created the subject condition or had actual or constructive notice of the subject condition.

It is well settled that a contractual obligation will not generally give rise to tort liability to a third party with three exceptions: "(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 Contractors, Inc.*, 98 NY2d 136, 140 [2002], internal citations and quotation marks omitted). Here, Lascon has failed to demonstrate, *prima facie*, that its performance of snow and ice removal did not amount to the "launch[ing] of a force or instrument of harm." The Court notes that the submitted photographs, in their attached quality, do not demonstrate the absence of snow and ice on the subject stairs. In addition, Lascon has failed to demonstrate, prima

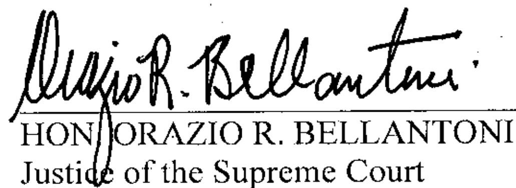
facie, that it did not entirely displace Mack-Cali's duty to address the snow and/or ice conditions on the Premises. Accordingly, Lascon's motion for summary judgment is denied.

In support of their motion, Mack-Cali proffers various evidence and contends, among other things, that SW LP and Sub XIV had no jural existence on the date of the accident and M-C did not possess or control the Premises on the date of accident. In addition, Mack-Cali contends that its contract with Lascon entirely displaced its snow and ice removal obligations and, regardless, there is no evidence that Mack-Cali caused or created the subject condition or had actual or constructive notice of the subject condition. In opposition, plaintiff proffers, among other things, an affidavit from Lavelle Cook, a co-worker of plaintiff who avers that she had made a verbal complaint to Mack-Cali about icy conditions at the subject location at least three hours prior to the accident and that when she came upon plaintiff after the accident, there was still ice at the subject location and no salt. Ms. Cook also averred that Mr. Gordos took no photographs of the subject stairs at this time.

It is well settled that "[t]o demonstrate its entitlement to summary judgment in a slip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it" (*Molloy v Waldbaum, Inc.*, 72 AD3d 659, 659–60 [2d Dept 2010]). Here, plaintiff has succeeded in raising a triable issue of fact as to whether SWRA LLC had actual or constructive notice of the subject condition for a sufficient length of time to remedy it. Plaintiff has failed to raise a triable issue of fact as to whether SW LP, Sub XIV, and M-C had any duty vis-à-vis the Premises. Accordingly, SWRA LLC's motion for summary judgment is denied and the motion for summary judgment filed by SW LP, Sub XIV, and M-C is granted.

This matter is scheduled for a Settlement Conference on August 8, 2017 at 9:15 a.m. in Courtroom 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York.

Dated: June 29, 2017
White Plains, New York



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