Moore v Federation of Orgs. for the N.Y. State Mentally Mentally Disabled, Inc.
2018 NY Slip Op 30970(U)
May 2, 2018
Supreme Court, Suffolk County
Docket Number: 12-19399
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 12-19399
CAL. No. 17-01288OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 10-25-17 (001, 002)
ADJ. DATE 12-13-17
Mot. Seq. # 001 - MG
002 - MG; CASEDISP

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DANA MOORE,

Plaintiff,

- against -

FEDERATION OF ORGANIZATIONS FOR THE NEW YORK STATE MENTALLY DISABLED, INC., and GREEN HORIZON, INC.,

Defendants.

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Upon the following papers numbered 1- 86 on these motions for summary judgment: Notice of Motion and supporting papers 1-62; 68-82; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 63-65; 83-84; Replying Affidavits and supporting papers 66-67; 85-86 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 001) by defendant Federation of Organizations for the New York State Mentally Disabled, Inc., and the motion (seq. 002) by defendant Green Horizon, Inc., are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Federation of Organizations for the New York State Mentally Disabled, Inc. for summary judgment dismissing the plaintiff's complaint and dismissing defendant Green Horizon, Inc.'s cross claim against it is granted; and it is further

ORDERED that the motion by defendant Green Horizon, Inc., for summary judgment dismissing the plaintiff's complaint and dismissing the cross claim of Federation of Organizations for the New York State Mentally Disabled, Inc. is granted.

Plaintiff commenced this action against defendant Federation of Organizations for the New York State Mentally Disabled, Inc. (hereinafter Federation) to recover damages for injuries she allegedly sustained from a slip and fall accident that occurred on January 28, 2011, in a parking lot located at 11 Farmingdale Road, West Babylon, New York. Plaintiff subsequently served an amended summons and complaint to include Green Horizon as a defendant. The complaint alleges that defendants were negligent in failing to remove snow and ice from a parking lot and in failing to warn plaintiff of the alleged dangerous condition.

Federation now moves for summary judgment dismissing the plaintiff's complaint and dismissing Green Horizon's cross claims on the grounds that plaintiff was a trespasser to whom it did not owe a duty of care. Federation further argues that it did not have notice of the alleged dangerous condition. In support of the motion, Federation submits copies of the pleadings, the bill of particulars, and transcripts of the parties' deposition testimony.

Plaintiff testified that she lives in an apartment complex and typically parks her vehicle in one of its parking lots. She testified that on the evening of January 27, 2011, she parked her vehicle in a parking lot across the street from the apartment complex, as the apartment's parking lot was full. She testified that she has parked her vehicle in the subject parking lot on five or six previous occasions, and that there are no signs or barricades prohibiting parking. Plaintiff testified it was not snowing or raining on the evening of January 27, 2011 or on the morning of the incident, and she did not observe any snow or ice on the ground. She stated it had snowed a few days prior, and there was snow on the grassy area between the curb and the parking lot. Plaintiff testified that she was walking towards her vehicle at approximately 7:40 a.m. on the date of the incident, and that she observed salt on Little Neck Road. She testified that as she walked on the driveway leading into the parking lot, she was able to observe the parking lot, and she did not see any snow or ice on the ground. She testified that as she approached the passenger side of her vehicle, she slipped and fell on ice. She testified that the ground did not look wet and, when questioned about the characteristics of the ice condition, such as its size, color, and thickness, she was unable to answer. In her errata sheet, she states that the ice was white. Plaintiff also was asked whether she felt or observed any wetness on her clothing, and she replied "no."

Beau Gardon testified that he is employed as a facilities manager for Federation and is responsible for maintaining its properties. He testified that he hired Green Horizon for snow removal services, and that it plows the subject parking lot when snow accumulations exceed two inches. He testified further that he performs a visual inspection after the services are performed, and that if he is unsatisfied he contacts Green Horizon to perform remedial services. Gardon was shown an invoice with his signature on it that indicated that snow removal services were performed in the subject parking lot on January 27, 2011. He testified further that he did not receive any complaints about the condition of the parking lot.

Michael Huebner testified that he is one of the owners of Green Horizon, a family owned business, and that Green Horizon has been providing snow removal services for Federation at the subject location since 1997. He testified that his brother Greg was responsible for plowing the subject parking lot and also cleared the sidewalks with a snow blower. He testified that Green Horizon's trucks have snow plows and sand spreaders, and that after the snow is plowed and the ground is cleared to the asphalt, sand is spread as part of its regular procedure. He testified that on January 27, 2011, he was notified by Federation that the building would be closed the entire day due to a snow storm, so snow removal procedures commenced later in the day. Huebner testified that in such instances, he does not have to ensure the parking lot is cleared until 8:00 a.m. the following day. He was shown invoices from Federation which indicate there was substantial snow accumulations on January 27th and that Green Horizon performed snow removal services in the subject parking lot.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320; ***Zuckerman v City of New York***, 49 NY2d 557). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Id*). The failure to meet such burden requires denial of the motion regardless of the sufficiency of the papers in opposition (*see* ***JMD Holding Corp. v Congress Fin. Corp.***, 4 NY3d 373; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849).

A landowner who holds its property open to the public has a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507; ***Basso v Miller***, 40 NY2d 233). Distinctions in an injured plaintiff's status as an invitee, licensee, or trespasser which dictate the duty of care on the part of a property owner have been abolished (***Basso v Miller***, 40 NY2d 233). Rather, a single standard of reasonable care is employed (*Id*). However, while a plaintiff's status does not dictate the duty owed, his or her purpose on the property is relevant in determining whether the injury was foreseeable (*see* ***Pulka v Edelman***, 40 NY2d 781). Federation did not demonstrate that it was unforeseeable that someone would park in the lot overnight. Therefore, Federation's argument that it did not owe a duty of care to plaintiff as a trespasser on its property is without merit.

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Mercedes v City of New York***, 107 AD3d 767). "To constitute constructive notice, a hazardous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the

accident to afford the defendant a reasonable opportunity to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837; ***Perez v New York City Hous. Auth.***, 75 AD3d 629).

Here, Federation established its entitlement to judgment as a matter of law by submitting evidence sufficient to demonstrate that it did not create or have actual or constructive notice of the alleged icy condition that caused plaintiff to fall (*see* ***Hall v Staples the Off. Superstore E., Inc.***, 135 AD3d 706; ***Sweeney v Doria***, 95 AD3d 1298; ***Cantwell v Fox Hill Community Assn. Inc.***, 87 AD3d 1106; ***Aurilia v Empire Realty Assocs.***, 58 AD3d 773). Gardon testified that he did not receive any complaints about the condition of the parking lot. Plaintiff acknowledges that she did not see the ice until she fell to the ground, which establishes that the ice was not visible and apparent giving defendants little chance to discover and remedy the condition (***Ronconi v Denzel Assocs.***, 20 AD3d 559). Indeed, plaintiff testified that she did not see any snow or ice in the parking lot the night before the incident or before she fell.

Having established its prima facie entitlement to summary judgment, the burden shifts to plaintiff to proffer evidence in admissible form raising a triable issue of fact (***Zuckerman v City of New York***, 49 NY2d 557). In opposition, plaintiff submits an affirmation by her attorney and records from the National Climatological Data Center with climatological data from John F. Kennedy International Airport. Counsel argues that the records establish "there was ice on the ground at the time of the accident." The records, however, are not from a weather station closest to the site of the alleged accident. More significantly, the records are not authenticated (*see* CPLR 4528; 4540 [a]). Even if the records were admissible, they are insufficient to raise a triable issue of fact, as the records are not probative of whether an icy condition existed at the time of the incident and whether defendants had notice of it.

It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065; ***Burns v City of Poughkeepsie***, 293 AD2d 435). As plaintiff has failed to submit competent proof to raise a triable issue of fact as to whether the icy condition was visible or apparent and existed for a sufficient amount of time for the defendants to discover and remedy it prior to plaintiff's accident, Federation's motion for summary judgment dismissing the complaint and cross claim against it is granted (*see* ***Kulchinsky v Consumers Warehouse Ctr., Inc.***, 134 AD3d 1068).

Green Horizons, Inc., a third-party contractor for snow removal services, also moves for summary judgment. Generally, a third-party contractor is not liable in tort to an injured plaintiff (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136; ***Nachamie v County of Nassau***, 147 AD3d 770). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Liability may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v***

Melville Snow Contrs., *id,* quoting ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168), thereby creating an unreasonable risk of harm to others or increasing the existing risk; (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579).

Here, no allegations against Green Horizons are contained in the complaint or bill of particulars alleging that any of the ***Espinal*** exceptions apply. Therefore, Green Horizons established its entitlement to summary judgment by demonstrating that plaintiff was not a party to the snow removal agreement; therefore, it did not owe her a duty of care (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955; ***Hsu v City of New York***, 145 AD3d 759; ***Barone v Nickerson***, 140 AD3d 1100; ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611).

Having established a prima facie case, the burden shifts to plaintiff to submit sufficient proof to raise a triable issue of fact regarding the applicability of one or more of the ***Espinal*** exceptions (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210). In opposition, plaintiff has failed to raise a triable issue of fact. Accordingly, Green Horizon's motion for summary judgment dismissing the complaint and cross claim against it is granted.

Dated: May 2, 2018

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION