Angelis v Holbrook Realty, LLC
2018 NY Slip Op 31155(U)
June 7, 2018
Supreme Court, Suffolk County
Docket Number: 11-11939
Judge: Neil Sanford Berland
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SHORT FORM ORDER

COPY

INDEX No. 11-11939
CAL. No. 17-00031OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD N. BERLAND
Acting Justice Supreme Court

MOTION DATE 5-2-17 (004)
MOTION DATE 6-6-17 (005 & 006)
ADJ. DATE 10-10-17
Mot. Seq. # 004 MD
005 MD
006 MD

STEVE ANGELIS, AN INFANT BY HIS MOTHER AND NATURAL GUARDIAN, DIANE ANGELIS, AND DIANE ANGELIS, INDIVIDUALLY,

Plaintiffs,

- against -

HOLBROOK REALTY, LLC., AND A&R YOGURT, INC., AND T. YOUNG'S PAVING, LLC,

Defendant.

A&R YOGURT, INC.,

Third-Party Plaintiff,

- against -

AND T. YOUNG'S PAVING, LLC,

Third-Party Defendant.

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Upon the following papers numbered 1 to 87 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; 25 - 38; 39 - 57; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 58 - 71; 72 - 73; 74 - 76; 77 - 79; Replying Affidavits and supporting papers 80 - 87; Other sur reply; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 004) by defendant/third-party defendant T. Young's Paving, LLC, for summary judgment dismissing the complaint, cross-claims and third-party complaint against it is denied; and it is further

ORDERED that the motion (# 005) by defendant Holbrook Realty, LLC, for summary judgment dismissing the complaint and the cross-claims against it and for summary judgment on its cross-claim for contractual indemnification and for failure to procure insurance coverage against A&R Yogurt, Inc., is denied; and it is further

ORDERED that the motion (# 006) by defendant/third-party plaintiff A&R Yogurt, Inc., for summary judgment dismissing the amended complaint and the cross-claims against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by infant plaintiff Steve Angelis (the "infant plaintiff" or "SA") on November 28, 2010, at approximately 10:00 p.m., when he tripped and fell over a "lip" in the paved surface of the east parking lot of the premises located at 630 Portion Road in Ronkonkoma, New York (the "premises"). At the time of the infant plaintiff's accident, the premises were owned by defendant Holbrook Realty, LLC ("Holbrook") and leased to defendant-third-party plaintiff A&R Yogurt, Inc. ("A&R Yogurt"), which operated a Nathan's Famous and TCBY frozen yogurt shop there. Some time prior to the accident, defendant-third-party defendant T. Young's Paving, LLC ("Young's Paving") had repaved a portion, but not all, of the east parking lot, and plaintiffs allege that the infant plaintiff tripped over the lip that was created along the edge where the new layer of blacktop met the older surface. The amended complaint asserts claims against the defendants for negligence in failing properly to maintain, manage and control the premises and in creating a hazardous condition there. In their bills of particulars, plaintiffs aver that the parking lot where the infant plaintiff fell was "uneven, raised and lumpy" and inadequately illuminated.

Young's Paving, which was impleaded into the action by defendant A&R Yogurt and then named as an additional defendant in the amended complaint, now moves for summary judgment in its favor dismissing the amended complaint, the third-party complaint and all cross-claims against it, contending that it was not negligent and that there is no triable issue of fact as to the absence of any liability on its part for the injuries claimed by the infant plaintiff. In support of its motion, Young's Paving submits, *inter alia*, the pleadings, the bill of particulars that plaintiffs propounded in response to its demand, the transcripts of the parties' deposition testimony and the lease agreement between Holbrook and A&R Yogurt.

At his deposition, SA testified that he had gone to the shop earlier in the evening with his cousin, who was employed there as a manager. It was light out when he arrived, but he "wasn't really paying attention" and did not see the lip. He stayed at the shop with his cousin for a number of hours, until

approximately 10:00 p.m., when his cousin locked up the shop and the two headed toward the cousin's car, which was parked in the east lot. The light on the east side of the building was out, and the parking lot was "pitch-black." SA testified that his cousin was walking ahead of him and that as his cousin was getting into the car, SA tripped and fell. Hid cousin came over and helped him up and then used the light on his cell phone to illuminate the spot where SA had fallen, which revealed a two- to three-inch high lip, with the asphalt below the lip lighter in color than the area above the lip.

Peter Petrakis ("Petrakis"), the co-owner and a manager of Holbrook Realty, testified that Holbrook had purchased the premises, including the building and the parking lots on the east and west sides of the building, in 2007, subject to A&R Yogurt's lease and tenancy. At that time, A&R Yogurt was operating the TCBY store and Nathan's restaurant there, which was run by Lee Ann Esposito ("Esposito"), one of the principals of A&R Yogurt. Petrakis testified that it was the tenant's responsibility to maintain the parking lot, including repairing and resurfacing it. Before the accident that is the subject of the current litigation occurred, he had had a conversation with Esposito regarding resurfacing the parking lot. He testified that he told Esposito she had to pay the paving company and that he "would do something as a credit for some of that money." He recalled that he "gave her some form of a credit" as a courtesy, but he could not recall how much. Shortly after the paving work was done, Petrakis made a routine visit to the premises. He testified that he did not see any line of demarcation in the east parking lot where the new paving met the existing paving, that he did not "think there was any difference in height," and that "they rolled it together . . . you know, it's as smooth as you're going to get," and that he was satisfied with the job.

At his deposition, Thomas Young testified that Young's Paving is, as its name indicates, a paving contractor, that he is its only member, and that in 2010, Young's Paving performed paving work on a portion of the premises's east parking lot. On the morning of the day he did the paving there, he had been performing paving work several blocks away at a transmission shop, and he anticipated that he would have material left over from that work. He sent his son to find a location nearby for a paving job to utilize the material, and his son spoke with a woman at the premises. They got the job - up to that point, only his son had been involved in dealing with the customer, including negotiating the price - and he repaved a portion of the parking lot using "the only material we had available." When he asked the individual at the premises - he could not recall the gender - if he or she wanted to "finish the job," he believes he was told that they did not have any "more funds available to do any more work. Thus, half of the parking lot was repaved and the remaining half was left as it was. Young further testified that after the fresh asphalt had been compressed with a roller, the difference in height between the newly repaved area and the existing area was about a half inch, and that "we always level the edges down" and "smooth it out." He also testified, however, that notwithstanding such efforts, "[n]o matter what patch you do, there's always going to be that bit of a lip."

"Generally, a contractual obligation" - to a landowner or occupier - "standing alone will not give rise to tort liability in favor of a third party" (***Zaslow v. City of New York***, 124 A.D.3d 642, 643 [2d Dept 2015], *citing* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]. *See* ***Bodenmiller v Thermo Tech Combustion, Inc.***, 80 AD3d 719, 719, 915 NYS2d 312 [2d Dept 2011]; ***Schwint v Bank St. Commons, LLC***, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]). Nonetheless, the Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her 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 another party's duty to maintain the premises safely (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Baker v Buckpitt***, 99 AD3d 1097, 952 NYS2d 666 [3d Dept 2012]). Therefore, as part of its prima facie showing, a contracting defendant seeking summary judgment in its favor is required to negate the applicability of those ***Espinal*** exceptions that have been expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars (*see* ***Mathey v Metropolitan Transp. Auth.***, 95 AD3d 842, 844, 943 NYS2d 578 [2d Dept 2012]; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 214, 905 NYS2d 226 [2d Dept 2010]).

Here, it is evident that the second and third ***Espinal*** exceptions are inapplicable: the paving work Young's Paving performed in the premises's east parking lot was indisputably a one-time undertaking such that there could not have been any detrimental reliance by either of the plaintiffs upon Young Pavings' "continued performance" of any duties, while it is also indisputable that Young's Paving's limited contractual undertaking to perform paving on the parking lot was not a comprehensive and exclusive property maintenance obligation thath entirely displaced the property owner's duty to maintain the premises safely (*see* ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; ***Katz v Pathmark Stores***, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]).

The remaining ***Espinal*** exception is more problematic for Young's Paving. As the Court of Appeals wrote in ***Espinal v Melville Snow Contrs.***, *supra,* a contractor "who 'creates or exacerbates' a harmful condition" on the counter-party's premises "may generally be said to have 'launched it,'" and therefore may be liable for resulting injuries to third parties (98 NY2d at 142; *see also* ***Figueroa v Lazarus Burman Assoc.***, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]; ***Levine v Zarabi***, 243 AD2d 448, 663 NYS2d 68 [2d Dept 1997]). To make a prima facie showing of entitlement to judgment as a matter of law on this exception to the rule of contractor non-liability to third parties, Young's Paving was required to establish that the work it performed on the premises's east parking lot either did not create or exacerbate a dangerous condition or, even if it did, was not a proximate cause of plaintiff's injury (*see* ***Diaz v City of New York***, 93 AD3d 755, 940 NYS2d 654 [2d Dept 2012]; ***Schwint v Bank St. Commons, LLC***, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; ***Keese v Imperial Gardens Assoc., LLC***, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]). Young's Paving's submissions fail, however, to establish its entitlement to judgment as a matter of law on this issue (*see* ***Keese v Imperial Gardens Assoc., LLC***, *supra*).

In particular, although Young testified that when the work was completed, the height difference between the old surface and the new was only a half inch and that they "always level the edges down" and "smooth it out," and Petrakis testified that he did not observe any difference in height between the new pavement and the old pavement, Esposito, in contrast, testified that there was an "inch to an inch and a half" height difference between the sections, while the infant plaintiff testified that the lip he tripped over was two- to three-inches high, and even Young himself conceded that "[n]o matter what patch you do, there's always going to be that bit of a lip." Thus, there are questions of fact as to whether Young's Paving in fact created a lip in the premises's parking lot when it performed the paving work there, and, if so, the magnitude of that lip and whether the lip was a cause of SA's trip and resulting injury, and whether Young's Paving exercised reasonable care under the circumstances (*see* ***Schwint v***

Bank St. Commons, LLC, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; ***Prenderville v International Serv. Sys.***, 10 AD3d 334, 781 NYS2d 110 [1st Dept 2004]). Likewise, there are questions of fact with respect to Young Paving's alleged common law or contractual indemnification liability to S&A Yogurt (*see* ***Mikelatos v. Theofilaktidis,*** 105 A.D.3d 822, 823, 962 N.Y.S.2d 693 [2d Dept 2013]).

Accordingly, the motion by Young's Paving for summary judgment dismissing the complaint, the cross-claims, and the third-party complaint against it is denied.

Holbrook also moves for summary judgment, dismissing the complaint and the cross-claims against it, contending that it was an out-of-possession property owner with no contractual obligation to repair or maintain the parking lot where the accident occurred. In support of its motion, Holbrook submits, *inter alia*, the pleadings, the bill of particulars propounded by plaintiffs in response to Holbrook's demand, the transcripts of the parties' depositions and a copy of the lease agreement for the premises.

Article 20 of the lease agreement provides, in relevant part, that "TENANT shall keep the inside of the demised premises and the exterior doors, windows, display windows and window frames, as well as lighting, heating, air conditioning and electrical systems, of the demised premises in a clean and good order, condition and repair ... and shall also keep the premises in a clean, sanitary and safe condition." Article 24 of the subject lease agreement provides, in relevant part, that "Tenant will carry, at its own cost and expense, a complete general public liability policy of insurance ... and said policies shall name the Landlord as additional first party insured under the said policies."

Esposito, the treasurer of A&R Yogurt, testified that she had operated the TCBY frozen yogurt store and Nathan's restaurant at the premises since 2004 and that on several occasions prior to Young's Paving repaving a portion of the east parking lot - which she placed in 2008 or 2009 - she had told Petrakis, the landlord, that "the parking lot had to be redone. The entire parking lot needs to be redone. There was too many holes, dips." She testified that she expected the entire parking lot to be paved, but Young's Paving did not pave the entire parking lot and left a lip, which was dangerous. She testified, as noted above, that the height differential between the lip and the next piece of pavement was an inch to an inch-and-a- half. She also testified that at the end of the work, she gave a check in the amount of $3,000.00 to Young's Paving at Petrakis's request, and that he told her that she should "deduct it from the next month's rent." Moreover, she testified that the prior owner of the premises had installed the exterior light on the east side of the building, that she was not aware of any provision in the lease requiring A&R Yogurt to maintain that light and that all she knew about that was that "it's on at night." She also testified that A&R Yogurt has to name Holbrook as an additional insured on its insurance policy.

Once possession of a property has been transferred to a tenant, an out-of-possession landlord will not be held liable for injuries that occur or defective conditions in existence on leased premises unless the landlord retains control over the premises or is contractually bound to repair unsafe conditions (*see* ***McElroy v Bernstein***, 72 AD3d 757, 898 NYS2d 471 [2d Dept 2010]; ***Euvino v Loconti***, 67 AD3d 629, 888 NYS2d 571 [2d Dept 2009]; ***Valenti v 400 Carlls Path Realty Corp.***, 52 AD3d 696, 861 NYS2d 357 [2d Dept 2008]). Control may be evidenced by a lease provision making the landlord responsible

for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility for maintaining a particular portion of the premises (*see* ***Fernandez v Town of Babylon***, 72 AD3d 636, 897 NYS2d 510 [2d Dept 2010]; ***Taylor v Lastres***, 45 AD3d 835, 847 NYS2d 139 [2d Dept 2007]; ***Ever Win, Inc. v 1-10 Indus. Assoc., LLC***, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]).

Here, Holbrook has failed to establish that it did not maintain control of the subject parking lot or that it was not obligated to maintain or repair the parking lot (*see* ***Lee v Second Ave. Vil. Partners, LLC***, 100 AD3d 601, 953 NYS2d 259 [2d Dept 2012]; ***Lalicata v 39-15 Skillman Realty Co., LLC***, 63 AD3d 889, 882 NYS2d 185 [2d Dept 2009]). As a threshold matter, the lease between the landlord and the tenant is ambiguous as to which party is responsible for the maintenance and repair of the premises' parking lots (*see* ***Brown v Hampton Bay Fish Co.***, 119 AD3d 883, 989 NYS2d 871 [2d Dept 2014]). Moreover, Petrakis testified that he gave Esposito some form of a credit for the money she paid to Young's Paving for the paving work it performed in the parking lot, although at his deposition, he claimed that he did so as a courtesy. Nonetheless, Esposito testified that it was at Petrakis's request that she wrote A&R Yogurt's check to Young's Paving after Petrakis told her that she could deduct the amount from the next month's rent. Thus, there are questions of fact as to whether Holbrook had assumed or retained responsibility for maintaining the parking lot, whether a dangerous condition existed there so as to create liability on the part of Holbrook, whether it had actual or constructive notice of the dangerous condition (*see* ***Rhodes-Evans v 111 Chelsea LLC***, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]), and whether reasonable inspections were made on the premises prior to the accident (*see* ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]).

Holbrook also failed to establish its entitlement to summary judgment for contractual indemnification against A&R Yogurt, as the lease, again, is ambiguous with respect to which party is responsible for the maintaining the parking lot. In any event, even assuming that A&R Yogurt is responsible for maintaining the parking lot, a question of fact exists with respect to whether A&R Yogurt breached the contract by failing to perform one or more of the services for which it was responsible (*see* ***Peycke v Newport Media Acquisition II***, 17 AD3d 338, 793 NYS2d 92 [2d Dept 2005]; ***Baratta v Home Depot USA***, 303 AD2d 434, 756 NYS2d 605 [2d Dept 2003]). These issues preclude the granting of Holbrook's request for summary judgment for contractual indemnification against A&R Yogurt.

Holbrook further seeks summary judgment in its favor with respect to its cross-claim against A&R Yogurt for failing to procure insurance coverage naming Holbrook as an additional insured, and A&R Yogurt seeks summary judgment in its favor dismissing that cross-claim. Pursuant to Article 24 of the lease agreement for the premises, the tenant is required to maintain primary and umbrella liability insurance policies inter alia naming the landlord as an additional first-party insured. At her deposition, Esposito acknowledged that A&R Yogurt is required to name Holbrook as an additional insured on its insurance policy, but she did not bring the insurance documents with her and did not know whether Holbrook was so named. However, Holbrook has failed to submit any evidence demonstrating that it was not named as an additional insured in A&R Yogurt's insurance policies. Accordingly, Holbrook's and A&R Yogurt's motions for summary judgment, each seeking summary judgment in the respective

movant's favor with respect to Holbrook's cross-claim for failure to procure insurance coverage are both denied without prejudice to renewal upon a more complete record.

A&R Yogurt moves for summary judgment dismissing the complaint and the various cross-claims against it for contribution and indemnification on the ground that it did not violate any legal duty owed to plaintiffs, contending that it was not responsible for repairing the parking lot and did not create the alleged dangerous condition. In support of its motion, A&R Yogurt submits, *inter alia,* the pleadings, the bill of particulars propounded by plaintiff in response ot its demand, the transcripts of the parties' depositions and a copy of the lease agreement between the landlord and the tenant.

To impose liability on a defendant for a trip and fall allegedly caused by a dangerous condition on its premises, there must be evidence that the dangerous condition in fact existed and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time (*see* ***Wachovsky v City of New York***, 122 AD3d 724, 997 NYS2d 145 [2d Dept 2014]; ***Farren v Board of Edu. of City of New York***, 119 AD3d 518, 988 NYS2d 684 [2d Dept 2014]). To provide 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, 838, 501 NYS2d 646 [1986]; ***Fiore v Plainview Plaza, LLC***, 137 AD3d 1202, 28 NYS3d 419 [2d Dept 2016]; ***Pryzywalny v New York City Tr. Auth.***, 69 AD3d 598, 599, 892 NYS2d 181 [2d Dept 2010]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see* ***Sartori v JP Morgan Chase Bank, N.A.***, 127 AD3d 1157, 7 NYS3d 548 [2d Dept 2015]; ***Dhu v New York City Hous. Auth.***, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 598-599, 869 NYS2d 222 [2d Dept 2008]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Clark v AMF Bowling Ctrs., Inc.***, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; ***Moons v Wade Lupe Constr. Co.***, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Fasano v Green-Wood Cemetery***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]).

Here, A&R Yogurt has failed to establish its entitlement to judgment as a matter of law. As discussed above, the lease is ambiguous as to which party - Holbrook or A&R Yogurt - is responsible for maintaining the parking lot. Likewise, the lease is ambiguous concerning the parties' respective responsibility for maintaining the exterior lighting at the premises, as well as questions of fact concerning their actual or constructive notice that the lighting on the east side of the building allegedly was out, creating a dangerous condition there (*see* ***Rhodes-Evans v 111 Chelsea LLC***, *supra*), and whether reasonable inspections were made of the premises prior to the accident (*see* ***McCummings v New York City Tr. Auth.***, *supra*; ***Basso v Miller***, *supra*). The branch of A&R Yogurt's motion for summary judgment dismissing the cross-claims by Holbrook against it with respect to the claims for contractual indemnification and contribution is denied, as there are triable issues of fact with respect to A&R Yogurt's alleged negligence. Likewise, the branch of A&R Yogurt's motion for summary judgment dismissing the cross-claim for contribution asserted by Young's Paving is also denied, as, again, there are triable issues of fact with respect to A&R Yogurt's negligence.

The foregoing constitutes the decision and order of the court.

Dated: 6/7/2018

HON. SANFORD NEIL BERLAND, A.J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**