Febrllet v Island Headquarters Operators, LLC
2018 NY Slip Op 31500(U)
July 3, 2018
Supreme Court, Suffolk County
Docket Number: 15-9762
Judge: Martha L. Luft

COPY

SHORT FORM ORDER

INDEX No. 15-9762
CAL. No. 17-00643OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 9-22-17
ADJ. DATE 11-14-17
Mot. Seq. # 002 - MD

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CAROLAINDY FEBRILLET,

Plaintiff,

- against -

ISLAND HEADQUARTERS OPERATORS, LLC, ISLANDIA OPERATORS, LLC, CA INC., and JONES LANG, LASALLE AMERICAS, INC.,

Defendants.

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JONES LANG, LASALLE AMERICAS, INC,

Third-Party Plaintiff,

- against -

MAPLE HOLLOW NURSERY, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 18 read on this motion for summary judgment: (1) Notice of Motion/ Order to Show Cause by defendants, and supporting papers 1-12 ; (2) Affirmation in Opposition by plaintiff, and supporting papers 13-16 ; (3) Reply Affirmation and supporting papers 17-18; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for, inter alia, summary judgment dismissing the complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on March 9, 2015, when she slipped and fell on ice in the parking lot of a commercial building known as One CA Plaza, Islandia, New York, which is owned by defendant Island Headquarters Operators, Inc., operated as Islandia Operators, LLC, and leased to CA Inc. (collectively referred to as Island Headquarters). Defendant Jones Lang, LaSalle Americas, Inc. (Jones Lang) is the building manager and hired third-party defendant Maple Hollow Nursery, Inc. (Maple Hollow) to perform snow and ice removal services at the subject property. By her amended complaint, plaintiff alleges that the defendants were negligent, *inter alia*, in failing to remove ice and snow from the premises, and in permitting a dangerous condition to exist on their premises. In its third-party complaint against Maple Hollow, Jones Lang seeks damages for breach of contract, contribution, indemnification and attorney fees.

Defendants now move for summary judgment dismissing the complaint on the ground that they did not create or have actual or constructive notice of the icy condition that allegedly caused plaintiff to slip and fall, and that the "storm in progress" rule precludes them from being held liable for plaintiff's injuries. Defendants also contend that the alleged dangerous condition was "open and obvious," and that there was no duty to warn plaintiff of any alleged hazardous condition on their property. In support of the motion, defendants submit copies of the pleadings, transcripts of the parties' deposition testimony, the affidavit of Steven Roberts, and climatological records. Plaintiff opposes the motion, arguing, among other things, that defendants failed to establish a prima facie case of entitlement to summary judgment. Plaintiff's submissions in opposition include her sworn affidavit and an attorney's affirmation.

At her deposition, plaintiff testified that on the day of the accident, at approximately 7:50 a.m., she slipped and fell on ice in the parking lot located at defendants' premises. She testified that the ice was gray in color and circular shaped. Plaintiff testified that just prior to her accident, she observed the alleged icy condition on the ground, warned her co-worker and, a few seconds later, her left foot slipped on the ice. Plaintiff testified that when she fell, she realized that she observed ice in the same location a few days earlier. She further testified that the weather was clear and that there was no precipitation on the day of her accident. Plaintiff testified that she did not recall when it last snowed, but that snow was "pushed to one side" of the parking lot. She testified that the photographs offered at her deposition accurately depicted the parking lot and the location where she fell. Plaintiff stated that she did not complain about the icy condition in the parking lot and that she was unaware of any complaints about it made to anyone at the building prior to her accident. She testified that she did not observe any snow or ice removal activities at the subject premises, and that there was no salt or sand on the ground.

At his deposition, Thomas Casey, the assistant facility manager for Jones Lang, testified that his

duties include inspection of the grounds, supervision of the contractors, and maintenance of the building located on Island Headquarters' property. He testified the property, about 60 acres in size, includes four large parking lots and two deck garages. He testified that Maple Hollow performs snow removal services, and was responsible for plowing and applying salt on the subject property. He testified that the snow removal procedures after a snowstorm include the plowing of snow into piles in a designated area, the application of salt to any area where snow melted and froze overnight, and daily inspections conducted by himself and Maple Hollow. Casey testified that he would oversee snow removal activities, verbally communicate recommendations to Maple Hollow, including where to pile snow in the parking lot, and identify areas that required salting. He testified that he was told about plaintiff's accident, but that he did not recall inspecting the subject area, the weather conditions, ice accumulation, salting of the parking lot or the location where the snow was piled on that day. He stated that he did not have any written records of snow removal or salting of the subject property. He also testified that the photographs offered at plaintiff's deposition accurately depicted the parking lot where her accident occurred. Casey testified that he did not recall any complaints about snow or ice accumulation in the subject parking lot, and that he was unaware of any injuries related to snow or ice prior to plaintiff's accident. He explained that the employees and tenants of the building could notify him of any dangerous conditions by email or telephone, and that he would then contact Maple Hollow to treat the specific area. He stated that he did not recall any request for snow removal or salt on the day of plaintiff's accident.

At his deposition, Kenneth Larson, President of Maple Hollow, testified that he had a written contract agreement with Jones Lang to conduct snow and ice removal at the subject property. He explained that he was responsible for shoveling, plowing and applying sand and salt to the subject property twenty-four hours a day, seven days a week. Larson testified that his snow removal procedures would commence after the accumulation of two to three inches of snow, and that he would plow the snow to a designated area, salt-sand before and after a snowstorm, and inform Casey when he completed his services. He stated that he would make daily inspections for snow and ice that melted and froze overnight and would apply salt-sand to those areas of the property. Larson stated that he was informed about plaintiff's accident, but that he did not have any recollection of his snow removal procedures or of observing ice in the parking lot on that day. He testified that the last snowfall before the subject accident was on March 5, 2015, resulting in an accumulation of approximately eight inches, and he recalled removing snow from the property at that time. He testified that he received no previous complaints regarding his snow and ice removal performance from defendants, employees or tenants at the property prior to plaintiff's accident.

In his report, Steven Roberts, a certified meteorologist, stated that he performed a site weather analysis report of the weather conditions for March 3, 2015 through March 9, 2015 for the subject property. He states that he reviewed data and records from the National Oceanic and Atmospheric Administration and that his review showed that on March 9, 2015, there was approximately 6.5 inches of snow and ice presented on untreated, undisturbed, and exposed surfaces at the property. This snow and ice accumulation was a result of events that occurred on and prior to March 5, 2015 and an ongoing event that occurred on that day. He stated that on March 3, 2015, approximately 10 inches of snow was present at the start of the day, precipitation fell in the form of snow, sleet, and freezing rain and, due to melting and compaction, approximately 8.5 inches of snow and ice was present at the end of that day. On March 5, 2015, an additional 7.2 inches of snow and sleet fell and, due to melting and compaction,

there was 6.5 inches of snow and ice present at midnight. On March 6, 2015 through March 8, 2015, there was no precipitation of snow or ice that fell on those days. On March 9, 2015, precipitation fell in the form of light rain, light freezing rain, and light snow from approximately 5:40 a.m. through 6:45 a.m., with light rain continuing through 8:30 a.m.; temperatures was near 39 degrees in Fahrenheit and only a trace (less than one tenth of an inch) of snow and freezing rain fell on that day. Mr. Roberts opines, with a reasonable degree of meteorological certainty, that the ice present at the time of plaintiff's accident was the result of events that occurred on or prior to March 5, 2015, as well as events ongoing at that time.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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]). Upon the proponent establishing a prima facie showing of entitlement to a summary judgment, the burden shifts to the opponent to proffer evidence in admissible form sufficient to establish a material issue of fact requiring a trial; however, mere conclusions and unsubstantiated allegations are insufficient (***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In a slip-and-fall case involving snow and ice, a property owner is not liable unless he or she created the defect, or had actual or constructive notice of its condition (***Castillo v Silvercrest***, 134 AD3d 977, 24 NYS3d 86 [2d Dept 2015]; ***Flores v BAJ Holding Corp.***, 94 AD3d 945, 942 NYS2d 202 [2d Dept 2012]; ***Olivieri v GM Realty Co. LLC***, 37 AD3d 569, 830 NYS2d 284 [2d Dept 2007]). A property owner has a duty to maintain his or her property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]), and has a duty to warn or protect against an open or obvious condition on property which, as a matter of law is inherently dangerous (***DiVietro v Gould Palisades Corp.***, 4 AD3d 324, 771 NYS2d 527 [2d Dept 2004]; ***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]). A defendant who moves for summary judgment in a slip-and-fall case involving snow and ice 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 (***D'Esposito v Manetto Hill Auto Serv., Inc.*** 150 AD3d 817, 54 NYS3d 429 [2d Dept 2017]; ***Castillo v Silvercrest***, *supra*). "To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist, for a sufficient length of time prior to the accident to permit defendant to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; *see* ***Feola v City of New York***, 102 AD3d 827, 958 NYS2d 208 [2d Dept 2013]). However, under the "storm in progress" rule, a property owner will not be held responsible for an accident caused by snow or ice that accumulates on its premises due to a storm until a reasonable period of time has passed following the storm to allow the owner an opportunity to remedy it (***McCurdy v KYMA Holdings, Inc.***, 109 AD3d 799, 971 NYS2d 137 [2d Dept 2013]; ***Fahey v Serrotta,*** 23 AD3d 335, 806 NYS2d 70 [2d Dept 2005]. The rule does not apply when an adequate amount of time has passed since the cessation of a storm (***Fenner v 1011 Rte. 109***, 122 AD3d 669, 996 NYS2d 341 [2d Dept 2014]; ***McBryant v Pisa Holding Corp.***, 110 AD3d 1034, 973 NYS2d 757 [2d Dept 2013]).

Here, defendants' submissions failed to establish either a "storm in progress" or that they lacked constructive notice of the condition in the parking lot *(see* ***Morales v Davidson Apts., LLC***, 157 AD3d 884, 67 NYS3d 495 [2d Dept 2018]; ***Ndiaye v Nep W 119th St. L.P.***, 124 AD3d 427, 1 NYS3d 50 [1st Dept 2015]; ***Fenner v 1011 Route 109 Corp.***, *supra*]). As to the "storm in progress" defense, the unsworn expert's report submitted by Mr. Roberts was not in admissible form and, therefore, is insufficient to meet defendants' prima facie burden (*see* ***Banco Popular N. Am. v Victory Taxi Mgt.***, 1 NY3d 381, 774 NYS2d 480 [2002]; ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]). Additionally, although Mr. Roberts averred that he reviewed relevant weather records, including records from the National Oceanic Atmospheric Administration that established a storm in progress at the time of plaintiff's accident, those records were not submitted with his report. As such, his report lacks probative value (*see* ***Cotter v Brookhaven Mem. Hosp. Med. Ctr., Inc.***, 97 AD3d 524, 947 NYS2d 608 [2d Dept 2012]; ***Schuster v Dukarm***, 38 AD3d 1358, 831 NYS2d 619 [4th Dept 2007]). In any event, even if the court were to consider the report, the courts finds it insufficient to establish the applicability of the "storm in progress" rule (*see* ***Caldwell v S & S Levittown***, LLC., 70 AD3d 881, 895 NYS2d 202 [2d Dept 2010]).

As to lack of constructive notice, there was no evidence submitted by defendants' as to whether there was snow or ice was removed from the subject area, when the area was last cleaned or inspected, or whether the ice formed so close in time to plaintiff's accident that they could not reasonably have been expected to clean or remedy the condition prior to the accident (*see* ***Gordon v American Museum of Natural History***, *supra*; ***Feola v City of New York***, *supra*; ***Medina v La Fiura Dev. Corp.***, 69 AD3d 686, 895 NYS2d 98 [2d Dept 2010]).

As to the branch of defendants' motion for summary judgment in favor of Jones Lang on its third-party claim against Maple Hollow for contractual indemnification, a right to indemnification arises out of a contract, express or implied, between the indemnitor and the indemnitee, and can be sustained only if the indemnitor breached some duty owed to the indemnitee (*see* ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; ***Charles v William Hird & Co., Inc.***, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]). Here, defendants have not established prima facie entitlement to indemnification and the award of attorney fees (*see* ***Morris v Home Depot USA***, 152 AD3d 669, 59 NYS3d 92 [2d Dept 2017]; ***Reimold v Walden Terrace, Inc.***, 85 AD3d 1144, 926 NYS2d 153 [2d Dept 2011]; ***McAllister v Construction Consultants L.I., Inc.***, 83 AD3d 1013, 921 NYS2d 556 [2d Dept 2011]; ***Schultz v Bridgeport & Port Jefferson Steamboat Co.***, 68 AD3d 970, 891 NYS2d 146 [2d Dept 2009]). The contract between Jones Lang and Maple Hollow provides that Maple Hollow is obligated to:

> [D]efend, indemnify and hold harmless Owner and Manager from and against any and all liabilities, obligations, claims, demands, causes of action, losses, expenses, damages, fines, judgments, settlement and penalties, including, without limitation, costs, expenses and attorney fee's incident thereto, arising out of, based upon, or occasioned by or in connection with Service Contractor's performance (or failure to perform) the contract duties...

Defendants have failed to demonstrate that Maple Hollow failed to perform its obligations under the snow removal contract provision regarding its snow removal activities. The testimony of Thomas Casey and Kenneth Larson related only to defendants' general method of snow and ice removal

procedures for the parking lots and roadways. And though the pretrial testimony indicates there were no previous complaints regarding Maple Hollow's snow removal, plaintiff's testimony as to the existence of the condition prior to her accident raise issues of fact and credibility for the fact finder to resolve.

Accordingly, the motion is denied.

Dated: 7/3/18

Martha L. Cfo
A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**