Valencia v Woodgate Vil. Condominium

2018 NY Slip Op 33273(U)

December 7, 2018

Supreme Court, Suffolk County

Docket Number: 15-8633

Judge: Sanford N. Berland

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SHORT FORM ORDER

INDEX No. 15-8633

CAL. No. 17-01652OT

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

PRESENT:

Hon. SANFORD N. BERLAND
Acting Justice Supreme Court

MOTION DATE 1-16-18
ADJ. DATE 5-15-18
Mot. Seq. # 001 - MotD

FRANCISCO VALENCIA,

Plaintiff,

- against -

WOODGATE VILLAGE CONDOMINIUM, THE WOODGATE VILLAGE BOARD OF MANAGERS and ALL ISLAND LANDSCAPING & MASONRY DESIGN, INC.,

Defendant.

WOODGATE VILLAGE CONDOMINIUM and THE WOODGATE VILLAGE BOARD OF MANAGERS,

Third-Party Plaintiffs,

- against -

ALL ISLAND LANDSCAPING & MASONRY DESIGN, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment : Notice of Motion and supporting papers 1 - 17 ; Answering Affidavits and supporting papers 18 - 22; 23 - 26 ; Replying Affidavits and supporting papers 27 - 28 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant/third-party defendant All Island Landscape & Masonry Design, Inc., for summary judgment dismissing the complaint and the third-party complaint against it is granted to the extent provided herein, and is otherwise denied.

This action was commenced by plaintiff Francisco Valencia to recover damages for injuries he allegedly sustained on March 3, 2015, when he slipped and fell on ice. The alleged location of plaintiff's fall was the sidewalk near a parking lot servicing his residence, known as 200 Springmeadow Drive, Holbrook, New York. Plaintiff's residence constituted a portion of a condominium complex owned by defendants/third-party plaintiffs Woodgate Village Condominium and The Woodgate Village Board of Managers (collectively, Woodgate). Defendant/third-party defendant All Island Landscape & Masonry Design, Inc. (All Island) is alleged to have performed snow removal services at the subject premises. Woodgate filed a third-party complaint against All Island, asserting claims for breach of contract and indemnification. All Island asserts a cross claim and a counterclaim against Woodgate for contribution and/or indemnification.

All Island now moves for summary judgment in its favor as to both complaints, arguing that as a third-party contractor, it is not liable for plaintiff's injuries and that Woodgate is not entitled to indemnification. In support of its motion, All Island submits copies of the pleadings, transcripts of the parties' deposition testimony, a copy of a contract between All Island and Woodgate, a copy of a "snow service log" and copies of snow removal invoices.

Plaintiff testified that at between 4:30 a.m. and 5:00 a.m. on the date in question, he was rolling a small piece of luggage from his residence to his motor vehicle, located in the condominium complex's parking lot more than 100 feet away. He indicated that it was dark out and the temperature was 20 degrees Fahrenheit. Asked when precipitation had last occurred, plaintiff stated that approximately "five to eight" inches of "freezing rain [and] snow" had fallen "a day or so prior." Plaintiff testified that he observed snow and ice "everywhere" and that the complex's walkways did not appear to have been shoveled. He stated that only "10 to 20 percent" of the concrete walkways was visible, with the balance coated in snow and ice, which also became "denser" the closer he got to the parking lot. Plaintiff testified that while the snow on the sidewalks was no longer "five to eight" inches deep, it was more than one inch. He indicated that the sidewalks were in the same condition when he had arrived home at approximately 6:00 p.m. the previous evening and that he did not see any man-made piles of snow on the sides of the walkway to indicate shoveling had occurred. Upon further questioning, plaintiff testified that he saw snow "everywhere" at 7:00 a.m. the prior morning.

Plaintiff stated that while he was walking on the sidewalk at a point approximately five feet from his truck, his right leg slid forward, causing him to fall backwards onto the concrete. Questioned as to a statement contained in an incident report, in which he wrote that snow and ice on the complex's sidewalks was "improperly removed" and "improperly cleared," plaintiff testified that he intended those phrases to mean that the snow and ice was "all still there." Plaintiff further testified that he believes the "unevenness" of the sidewalk's concrete flags also contributed to his fall. However, plaintiff indicated that he never made

any complaints regarding snow removal, uneven sidewalk flags, or inadequate lighting at the subject premises prior to this incident.

Richard Koster, deposed on behalf of defendant Woodgate, testified that he was a member of Woodgate's maintenance staff on the date in question and had been for approximately 15 years prior to that date. He stated that the condominium complex is composed to 504 individual units and that while it employs All Island for snow removal services, its maintenance staff performs certain snow-related functions itself. Specifically, Mr. Koster stated that the Woodgate maintenance staff would remove snow and ice in handicapped parking areas, slanted curb "cut-outs," and "spot areas" near dumpsters left undone by All Island. He further stated that Woodgate owned snow shovels, snowblowers, and kept supplies of salt and sand on the premises for the maintenance staff's exclusive use.

Mr. Koster testified that Woodgate had a written contract with All Island in full force at the time of plaintiff's incident. Asked if there was any specific circumstance that would trigger All Island's commencement of snow removal activities at Woodgate, Mr. Koster replied in the negative, stating that "if there was a storm," cleanup would commence "as soon as the storm was over unless, ahead of time, they knew it was going to be six, eight inches [of snow accumulation]." However, when pressed, Mr. Koster indicated that All Island was only required to appear if snow accumulation had reached two inches or more. He testified that if lighter snow or some other weather condition caused the complex's sidewalks and roadways to become icy, Woodgate had the option of requesting All Island appear and salt those areas at an additional cost. Mr. Koster stated that it was the maintenance staff's regular practice to do a "drive-by" inspection of the complex each morning at approximately 8:00 a.m., looking for problems such as overflowing dumpsters, litter on the premises or property damage. He indicated that while maintenance employees performing the daily inspection generally would not look for snowy or icy sidewalks, if such a condition was observed, it would be corrected immediately with the application of salt and sand.

David Donofrio testified that he has been the president of All Island since 2007. He stated that it performs landscaping services in the summer months and snow removal services in the winter months. Mr. Donofrio indicated that All Island had a snow removal contract with Woodgate for the period from November 14, 2014 to November 2016. He testified that All Island reported to Woodgate only when snowfall accumulation was to exceed two inches, stating that its usual practice was to "pre-treat [the premises] with straight salt, followed behind with a straight salt application after the snow removal has been completed." He indicated that a salt/sand mixture would be applied "if there is any icing that could re-freeze or a curve intersection where [the client] want[ed] some sand as traction." Sidewalks, he stated, would be treated with calcium chloride. Mr. Donofrio testified that Woodgate's maintenance department addressed "any blow-over stuff from wind drifts [and] re-freezing" itself.

Upon being shown his "snow service log" from March 1, 2015, Mr. Donofrio testified that All Island "did snowplowing [at Woodgate] from 4:00 a.m. until 11:00 p.m" to address approximately five inches of snow accumulation. He stated that All Island applied "four yards [of a] sand/salt [mixure] at 5:00 p.m.," performed snow blowing from 5:00 p.m. until 11:00 p.m., and "applied calcium chloride to all sidewalks" during that six-hour period. Later in his deposition, however, Mr. Donofrio indicated that All Island did not arrive at Woodgate until approximately 5:00 p.m., when the snow accumulation was "just under" two inches. Questioned whether Woodgate had contacted All Island at any time between March 1, 2015 and March 3,

2015 to request additional services, or if All Island returned to the condominium complex on its own, Mr. Donofrio answered in the negative.

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" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). 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 (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of New York & New Jersey***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

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 real property owner "will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" (***Bader v Riv. Edge at Hastings Owners Corp.***, 159 AD3d 780, 780, 72 NYS3d 145 [2d Dept 2018], quoting ***Cuillo v Fairfield Prop. Servs., L.P.***, 112 AD3d 777, 778, 977 NYS2d 353 [2d Dept 2013]). A defendant has constructive notice of a hazardous condition on property "when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (***Mavis v Rexcorp Realty, LLC***, 143 AD3d 678, 678-679, 39 NYS3d 190 [2d Dept 2016]). To meet the initial burden on the issue of lack of constructive notice, a defendant "is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (*id.* at 679). Yet, while "a landowner owes a duty of care to keep his or her property in a reasonably safe condition, he [or she] will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter" (***Sherman v New York State Thruway Auth.***, 27 NY3d 1019, 1020-1021, 32 NYS3d 568 [2016], quoting ***Solazzo v New York City Tr. Auth.***, 6 NY3d 734, 735, 810 NYS2d 121 [2005] [internal quotation marks omitted]).

"A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties" (***Yvars v Marble Hgts. of Westchester, Inc.***, 158 AD3d 850, 850-851, 73 NYS3d 246 [2d Dept 2018], quoting ***Baratta v Home Depot USA***, 303 AD2d 434, 434, 756 NYS2d 605 [2d Dept 2003]). However, 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]).

Here, All Island established a prima facie case of entitlement to summary judgment in its favor as to plaintiff's complaint (*see* ***Reisert v Mayne Constr. of Long Is., Inc.***, ___AD3d___, 2018 NY Slip Op 06777 [2d Dept 2018]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). All Island demonstrated that as a third-party contractor, it owed no duty to plaintiff, that plaintiff was not a party to the snow removal contract, that its snow removal conformed to the terms of its contract and that its actions did not fall within any of the ***Espinal*** exceptions (*see* ***Santos v Deanco Servs., Inc.***, 142 AD3d 137, 35 NYS3d 686 [2d Dept 2016]). Having established its prima facie case, the burden shifted to the opposing parties to raise a triable issue of fact (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

However, as to its motion for summary judgment dismissing the third-party complaint, All Island has failed to eliminate all triable questions of material fact (*see* ***Aberman v Retail Prop. Trust***, 92 AD3d 703, 938 NYS2d 347 [2d Dept 2012]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). The right to contractual indemnification "depends upon the specific language of the contract, [and] [t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (***Shaughnessy v Huntington Hosp. Assn.***, 147 AD3d 994, 999-1000, 47 NYS3d 121 [2d Dept 2017][internal citations and quotations omitted]; *see Castillo v Port Auth. of New York & New Jersey*, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]). In a two-year "snow removal agreement" between Woodgate and All Island, dated November 14, 2014, All Island agreed to:

> indemnify and hold harmless [Woodgate] from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . but only to the extent caused by the negligent acts or omissions of [All Island] . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Thus, by the plain terms of the contract, All Island is obligated to indemnify Woodgate against all claims attributable to All Island's negligence. In the instant matter, plaintiff testified that he saw no evidence that any snow removal efforts were undertaken in the area he is alleged to have fallen. Should the finder of fact determine at trial that All Island negligently failed to remove snow and ice from such location, All Island would be responsible for indemnifying Woodgate against any award arising out of All Island's negligent acts (*see* ***Ginter v Flushing Terrace, LLC***, 121 AD3d 840, 995 NYS2d 95 [2d Dept 2014]; ***LaGuarina v Metro. Tr. Auth.***, 109 AD3d 793, 971 NYS2d 173 [2d Dept 2013]). Accordingly, that portion of All Island's motion seeking dismissal of Woodgate's third-party complaint is denied.

In opposition to that portion of All Island's motion for summary judgment dismissing plaintiff's complaint against it, plaintiff's counsel argues that questions of fact remain as to whether All Island "launched a force or an instrument of harm" and, thereby placed itself within the first of the ***Espinal*** exceptions. That argument is unavailing. As stated above, plaintiff testified he saw no evidence of snow removal efforts in the area of his alleged fall. "A snow removal contractor cannot be held liable for personal

injuries on the ground that the snow removal contractor's passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition" (***Trombetta v G.P. Landscape Design, Inc.***, 160 AD3d 677, 678, 73 NYS3d 230 [2d Dept 2018]). Further, plaintiff's claim that the icy condition was caused by thawing and re-freezing of snow All Island plowed more than 24 hours prior to his accident is speculative (*see* ***Cayetano v Port Auth. of New York & New Jersey***, ___AD3d___, 2018 NY Slip Op 07285 [2d Dept 2018]).

Woodgate also interposes opposition to All Island's motion, arguing that questions of fact remain as to whether All Island "launched a force or an instrument of harm," and whether it breached its contractual duties to Woodgate. As noted above, however, All Island had no duty, as a third-party contractor, to plaintiff absent evidence of an exception to ***Espinal***. No evidence has been adduced to demonstrate the applicability of any of those exceptions. Accordingly, the branch of the motion by All Island for summary judgment dismissing plaintiff's complaint against it is granted.

The foregoing constitutes the decision and order of the court.

Dated: 12/7/2018

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

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