Couverthier v Prestige Props. and Dev. Co.
2019 NY Slip Op 30763(U)
February 14, 2019
Supreme Court, Bronx County
Docket Number: 300478/2014
Judge: Alison Y. Tuitt
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[* 1]

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

IRIS COUVERTHIER,

Plaintiff,

-against-

PRESTIGE PROPERTIES AND DEVELOPMENT CO., INC., PRESTIGE BAY PLAZA DEVELOPMENT CORP., BAY PLAZA REALTY, BAY PLAZA COMMUNITY CENTER, LLC and SP CENTER, LLC, B&N-1 BAY PLAZA LLC and B&N-2 BAY PLAZA, LLC, ROBERT LANDSCAPING & CONSTRUCTION, INC. and E.S. COMMERCIAL AND RESIDENTIAL, INC.,

Defendants.

INDEX NUMBER: **300478/2014**

Present:
Hon. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to

Read on this Defendants' Motions for Summary Judgment

On Calendar of **9/18/17**

Notices of Motion/Cross-Motion-Exhibits and Affirmations 1, 2, 3

Affirmations in Opposition 4

Reply Affirmations 5, 6

Upon the foregoing papers, defendants Prestige Properties and Development Co,, Inc., Prestige Bay Plaza Development Corp., Bay Plaza Community Center, LLC, SP B&N-2 Bay Plaza, LLC's (collectively "Prestige"), defendant Robert Landscaping and Construction, Inc.'s ("Robert Landscaping"), and defendant E.S. Commercial and Residential, Inc.'s ("E.S.") motions for summary judgment are consolidated for purposes of this decision. For the reasons set forth herein, E.S.'s motion is granted and the complaint and cross-claims against it are dismissed; Prestige's motion is granted in part and denied in part; and, Robert Landscaping's motion is granted.

The within action arises from an alleged accident on January 10, 2014 at which time plaintiff claims that she slipped and fell on ice in a parking lot of the Bay Plaza Mall located at 2100 Bartow Avenue, Bronx, New York. The Prestige defendants are the owners and property manager of the Bay Plaza Mall. Defendant Robert Landscaping performed snow removal services at the location and defendant E.S., an electrical contractor, also performed services for the Prestige defendants at Bay Plaza Mall.

Plaintiff testified that she worked as a customer service representative for Cablevision and worked at the call center located in the Bay Plaza Mall. On the date of the accident, plaintiff arrived at work at approximately 8:30 a.m., parked her car in the parking lot at Bay Plaza Mall, and walked into her office. The accident occurred at about 6:35 p.m., when plaintiff was walking back to the car after leaving work for the day. Plaintiff testified that it was "pitch black" and "really scary" in the parking lot because most of the lights in the light posts were out and had been out for more than one month. Plaintiff believes that the condition of the lights was reported to the traffic desk by her co-workers after they all discussed the issue. Plaintiff testified that she fell when she slipped on a patch of ice near the light pole marked "P6" which is where she usually parked. The light bulb was out on that light pole as well. Plaintiff did not see the ice patch before she fell, but once she was on the ground, she saw that it was an ice patch that was within a hole or depression in the asphalt. The pothole depression did not contributed to her fall, it was the ice. She described it as "a big patch of ice... about 2 to 3 by 4 to 5 feet and about an inch thick." Plaintiff testified that while walking in the lot the morning of the accident, she saw many different patches of ice around potholes and areas of depression/dents in the pavement that had been there for several days prior to the date of the accident, as well a six to seven foot pile of snow piled up against the light posts in the parking lot. She did not observe any snow, water, wetness, puddles or streaks of water on the surface of the parking lot.

Matthew Lucchese, property manager for Prestige, testified that Prestige was responsible for maintenance of the entire Bay Plaza Mall Shopping Center including the parking lots, and repairing potholes or depressions in the surface of the parking lots. He oversaw a staff of three people, including the site supervisor, Alberto Otero, and maintenance worker, Alex Leandro. As property manager, Mr. Lucchese was present at the Bay Plaza Mall, three to four days a week, and his duties included inspecting the parking lot, where he would drive around to make sure it was in good shape. Prestige and Bay Plaza Mall employees walked and drove around the parking lot after snow storms inspecting for ice patches, and Mr. Lucchese or Mr. Otero would spread salt if they came upon any ice in the lot. Mr. Lucchese had seen ice patches in the parking lot after a snow removal. In the event it was a small patch, Prestige would address it. If there were several patches, he

would call their snow removal contractor, Robert Landscaping, to address it. Robert Landscaping was responsible for removing snow from the parking lot, pursuant to a snow removal contact with Bay Plaza Mall. However, pursuant to the contact, Prestige would have to call Robert Landscaping when their services were needed; they did not automatically appear in case of snow, and were not required to. Once they performed their snow removal, Robert Landscaping did not return to monitor the parking lot and were not required to. Mr. Lucchese testified that the responsibility of monitoring the lot for freeze/re-freeze conditions belonged to Prestige and Ready Security, the security company responsible for monitoring the parking lot. Prior to plaintiff's accident on January 10, 2014, Robert Landscaping last removed snow from the Bay Plaza parking lot on January 3, 2014 and someone from Prestige inspected the work after they completed the snow removal. Thereafter, Prestige inspected the parking lot every day, at least four times a day, until the date of plaintiff's accident one week later. Mr. Lucchese testified that he had not received any complaints, and was not aware of any complaints regarding any snow and ice removal efforts prior to plaintiff's accident.

Mr. Lucchese further testified that Ready Security checked the light poles in the parking lot during their evening tours and noted if any bulbs were out and would then report it to Prestige. Alberto from Prestige would then call E.S. to take care of any bulbs that were out. If Prestige was notified that a light was out in the parking lot, they would contact E.S. to take care of it. Prestige did not have a contract with E.S. or any other entity to maintain the lighting in the parking lot. E.S. would charge Prestige for time and material, and submit an invoice for work performed. Mr. Lucchese testified that E.S. had no obligation to monitor the lights parking lot and absent receiving a call from Prestige, E.S. had no obligation to replace or repair any light bulbs or fixtures that were not working. Mr. Lucchese recalled being notified by Cablevision in the winter of 2013-2014 of lights being out in the parking lot. "Miguel's e-mailed me I can't tell you how many times. Their director of operations has e-mailed me, Glen has e-mailed me" regarding the lights being out in the parking lot in front of Cablevision.

Carlos Membreno, owner and President of Robert Landscaping, testified that he entered into a snow removal contact with Bay Plaza Community Center, LLC for snow removal services for the winter of 2013-2014. Pursuant to the contract, Robert Landscaping only went to the property when their services were requested by Prestige. After snow removal, Robert Landscaping always placed salt throughout the parking lot using salt spreaders and trucks. If cars were parked in the lot during snow removal, Mr. Membreno directed his employees to remove snow from between the cars with shovels and to spread salt in the areas around the cars. Pursuant to the contract, Robert Landscaping had no duty to monitor the condition of the parking lot after their

work was completed. Mr. Membreno was physically present whenever Prestige called them to the premises for snow removal services. A representative from Prestige always inspected, supervised and approved their work after it was completed. Mr. Membreno also personally inspects the lot after his crew is done. Per the invoice, there was a large snow storm from January 2nd though January 3rd . Mr. Membreno was called by Prestige, and he had eight trucks with plows, and eight bobcats, remove the snow from the parking lot. He was not asked to return to the premises after the snow removal, or at any time before January 10th. Mr. Membreno also testified that Prestige would spread "lots" of salt in the lot and Bay Plaza had their own salting machines and trucks.

Yehuda Atone, President of E.S., testified that E.S. performed worked at Bay Plaza, most of it involved repairing burning wire underground. On occasion, they would change a light bulb in the parking lot, but it was usually done by Prestige's management. E.S. was not responsible for monitoring the lights in the parking lot.

E.S. moves for summary judgment arguing that it cannot be liable to plaintiff for an injury that occurred in a parking lot owned, operated, maintained and controlled by defendants Prestige. E.S. further argues that they had no contractual obligation to maintain, repair or monitor the parking lot. Robert Landscape moves for summary judgment on the grounds that as a snow removal contractor, it owed no duty to the plaintiff. The Prestige defendants move for summary judgment arguing that it did not create, or have actual or constructive notice of any hazardous condition; several defendant entities are not proper parties to the action; and, the managing agent is not liable because it did not have complete and exclusive control over the premises.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion)

shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Prestige opposes E.S.'s motion arguing that there are material factual disputes as to whether plaintiff's slip and fall was caused by inadequate lighting from burnt out light posts and whether E.S. launched a force of instrument of harm causing the lighting outage by pulling underground wires. Plaintiff also opposes the motion, relying on Prestige's arguments in opposition to E.S.'s motion.

It is well-settled that a defendant may be held liable for negligence only when it breaches a duty of care owed to the plaintiff. In re New York City Asbestos Litigation, 786 N.Y.S.2d 26 (1st Dept. 2004) citing Sanchez v. State of New York, 99 N.Y.2d 247, 252 (2002); Strauss v. Belle Realty Co., 65 N.Y.2d 399, 402 (1985); Pulka v. Edelman, 40 N.Y.2d 781, 782 (1976). "In the absence of a duty running to the injured person, there can be no liability in damages, no matter how careless the conduct nor foreseeable the harm." Id., citing Lauer v. City of New York, 95 N.Y.2d 95, 100 (2000); Pulka, 40 N.Y.2d at 785. It is also well-settled law that a service contractor owes no duty of care to a non-contracting third-party out of its contractual obligations. Jackson v. Board of Education of the City of New York, 812 N.Y..2d 91 (1st Dept. 2006). However, there are three exceptions: where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and where the contracting party has entirely displaced the other party's duty to maintain the premises safely. Espinal v. Melville Snow Contractors, 98 N.Y.2d 136, 138-139 (2002); Church v. Callanan Industries, 99 N.Y.2d 104 (2002); Rothstein v. 400 East 54th Street Co., 857 N.Y.S.2d 100 (1st Dept. 2008); Colon v. Corporate Building Groups, Inc., 983 N.Y.S.2d 25 (1st Dept. 2014).

In Espinal, the Court of Appeals found that a snow removal contractor owed no duty of care to a person who slipped and fell on an icy parking lot that the contractor failed to properly clear of snow. Plaintiff alleged that contractor created icy condition by negligently removing snow from parking lot. The Court of Appeals, held that the contractor had no duty to monitor weather to see if melting and refreezing would create an icy condition. The Court noted that snow plowing operations could sometimes leave residual snow or ice on plowed area, and that failure to sand and salt area could possibly cause snow to melt and refreeze did not establish that contractor's snow removal activities created a dangerous icy condition or increase snow-related hazard which caused plaintiff to slip and fall.

E.S.'s motion for summary judgment is granted. E.S. did not have a contract with any of the Prestige or Bay Plaza entities for the work it performed with the lights. Moreover, the evidence clearly shows that E.S. had no obligation or responsibility for maintaining the lights in the parking lot. Since there was no contract, E.S. had no contractual obligation to maintain, make repairs or monitor the parking lot for light bulbs/fixtures in the Prestige parking lot for outages. In fact, Prestige's own witness, its managing agent, testified that E.S. had no obligation to monitor the lights parking lot and, absent receiving a call from Prestige, E.S. had no obligation to replace or repair any light bulbs or fixtures in the parking lot that were not working. There were no outstanding calls to E.S about non-working lights at the time of plaintiff's accident. It is also clear that E.S did not have a maintenance obligation that was "so comprehensive and exclusive" that it could be considered to have assumed a duty to keep the parking lot safe. Furthermore, there is no proof that E.S. launched a force or instrument of harm that caused plaintiff's injuries.

Robert Landscaping also argues that it is entitled to summary judgment because as a snow removal contractor, it did not have a duty of care to the plaintiff, and plaintiff cannot establish any of the Espinal exceptions apply. Although the Espinal Court acknowledged that a contractor who created or exacerbated a dangerous condition might be liable, neither plaintiff nor Prestige has offered any support for the allegations that Robert Landscaping's snow removal caused or exacerbated a hazardous condition in the parking lot. "Merely plowing snow and salting, after one inch falls or on request, as required by a contract, is insufficient to impose a duty of care toward a third person." Tamhane v. Citibank, N.A., 877 N.Y.S.2d 78 (1st Dept. 2009). In Tamhane, the snow contractor L.I.S.R. was hired to plow and salt the parking lot and sidewalks after one inch of snow fell or when requested. It was undisputed that all of the snow had been removed on March 2nd, and L.I.S.R. performed further salting on March 3rd after Citibank requested it. Plaintiff slipped on the morning March 4, 2006 on what he claimed was a transparent bit of ice. The First Department held that there was no reason to believe that L.I.S.R., as a snow removal subcontractor, either knew about a condition that occurred after it left the premises or had any obligation to do anything about it. The same is true here; there is no evidence that Robert Landscaping either knew that there were ice patches in the parking lot after it left the premises or that Robert Landscaping had any obligation to do anything about it. In Tamhane, the Court noted that although the defendant managing agent raised the possibility that based on the presence of ice on March 6th, L.I.S.R. either inadequately performed its function or somehow exacerbated a condition, for the trier of fact to reach such a conclusion would amount to rank speculation. The same is true here, but to a stronger degree. Robert Landscaping removed the snow on January 3, 2014, but plaintiff's accident did not happen until January 10,

2014, seven days after its snow removal services.

"The mere supposition that its snow-clearing activities one week before plaintiff's accident must have left behind the patches of ice that plaintiff claims to have observed is insufficient to establish the exception to Espinal's general rule that applies where the defendant 'launched a force or instrument of harm'"... Indeed, a similar claim was made in Espinal, and the Court rejected the plaintiff's reasoning that snow plowing can leave residual snow or ice; it remarked that " by merely plowing the snow, Melville cannot be said to have created or exacerbated a dangerous condition". Lenti v. Initial Cleaning Services, Inc., 860 N.Y.S.2d 42 (1st Dept. 2008) (Citations omitted).

Nor did plaintiff or Prestige show that Robert Landscaping completely absorbed Prestige's duty to maintain the premises safely, as the snow-removal contract required Robert Landscaping to perform service only pursuant to Prestige's request. Moreover, Mr. Lucchese testified that the responsibility for maintaining the entire Bay Plaza Mall, including the parking lot, belonged to Prestige, and Prestige's employees would inspect for ice patches after snow storms and would spread salt. Mr. Lucchese further testified that the responsibility for monitoring the lot for freeze/refreezing conditions belonged to Prestige. Additionally, Prestige had its own salt spreaders and trucks to deal with snow and/ice conditions when Prestige's services were not needed. Prestige would use its own employees, equipment and supplies to monitor and address any ice conditions that occurred in the parking lot after Robert Landscaping had removed snow following a storm. Finally, plaintiff offers no support for a claim that she detrimentally relied on Robert Landscaping's continued performance of its contractual obligation.

Robert Landscaping's snow-removal contract, standing alone, is insufficient to "trigger a duty of care running" to plaintiff. See, DeCanio v. Principal Bldg. Services Inc., 983 N.Y.S.2d 2 (1st Dept. 2014); Fung v. Japan Airlines Co., Ltd., 9 N.Y.3d 351 (2007). Plaintiff and Prestige fail to raise any issues of fact as to the Espinal exceptions. The only argument with any merit, that Robert Landscaping launched an instrument of harm, fails because mere plowing and salting, which is what Robert Landscape did here, is insufficient to impose a duty of care.

With respect to Prestige's motion for summary judgment, it argues that there are no facts in the record showing that it caused the condition that caused plaintiff's fall or that it had notice of the condition. Prestige further argues that the alleged ice patch was not visible and apparent as plaintiff herself testified that she did not see the ice before falling. Prestige contends that there are no records of anyone making any complaints regarding an ice condition or light outages in the parking lot on January 10, 2014. Additionally,

Prestige argues that it took reasonable steps to prevent falls. After Robert Landscaping performed snow and ice removal after the January 2-3, 2014 storm, Prestige and Ready Security both inspected the parking lot daily to make sure there was no snow and ice.

With respect to the individual defendants B&N-1 Bay Plaza, LLC, B&N-2 Bay Plaza, LLC, Prestige Bay Plaza Development Corp. and SP Center, LLC, Prestige argues that they are improper parties as they did not own or control the Bay Plaza Mall. Prestige argues that the only proper party among the named Prestige defendants is Bay Plaza Community Center, LLC, the owner of the Bay Plaza Mall. Regarding Prestige Properties and Development Co., Inc., the managing agent of the property, Prestige argues that it is entitled to summary judgment because its management was limited and subjected to the owner's repair disbursements and approvals, and thus, it did not have complete and exclusive control of the management and operation of the property. The branch of the motion seeking summary judgment dismissing the action against defendants B&N-1 Bay Plaza, LLC, B&N-2 Bay Plaza, LLC, Prestige Bay Plaza Development Corp. and SP Center, LLC is granted and there is no evidence that they owned or controlled the Bay Plaza Mall. The branch of the motion seeking dismissal of the action as against Bay Plaza Community Center, LLC and Prestige Properties and Development Co., Inc. is denied.

It is well-established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

Here, as the owner of the premises, Bay Plaza Community Center, LLC, had a non-delegable duty to provide plaintiff with at a reasonably safe parking lot. Plaintiff claims that they failed to do so as a result of two dangerous conditions on the premises; the ice patch and the "pitch black" condition of the parking lot. Regarding the snow and ice condition, plaintiff submits the expert reports of George Wright, meteorological expert; Robert Schwartzberg, professional engineer; and, John Allin, a "snow removal professional". This Court finds that it is not necessary to address the expert reports in denying the summary judgment motion to the

two remaining Prestige defendants, the owner and managing agent of the property. The evidence regarding the lighting conditions in the parking lot on the evening of the accident is sufficient to deny the motion. Mr. Lucchese testified that he recalled being notified by Cablevision in the winter of 2013-2014 of lights being out in the parking lot. "Miguel's e-mailed me I can't tell you how many times. Their director of operations has e-mailed me, Glen has e-mailed me". This clearly shows that defendants were on notice of the lack of light in the parking lot prior to plaintiff's accident.

Defendant Prestige Properties and Development Co., Inc.'s argument that it cannot be held liable as managing agent of the property is without merit. A managing agent may be held liable for nonfeasance only if it is in complete and exclusive control of the management and operation of the building. See, German v. Bronx United in Leveraging Dollars, Inc., 684 N.Y.S.2d 541 (1st Dept. 1999); Keo v. Kimball Brooklands Corp., 592 N.Y.S.2d 373 (1st Dept. 1993); Gardner v. 1111 Corp., 141 N.Y.S.2d 552 (1st Dept. 1955), aff'd, 1 N.Y.2d 758 (1956)(The law is clear that where a managing agent has complete and exclusive control of the management and operation of the building—in other words where he stands in the owner's shoes so to speak—he is liable for negligence just as the owner would be and cannot be excused by claiming that he was guilty only of nonfeasance). Here, Prestige Properties and Development Co., Inc. submits the affidavit of Charles Farmer who states that Prestige "does not have complete and exclusive control over the management and operation of the property displacing Bay Plaza Community Center, LLC". This statement is not accompanied with any facts. Moreover, defendant fails to submit the management contract between the parties, evidentiary support for its bare assertion. Nor does Prestige offer any other evidence showing that it did not have complete and exclusive control over the property. Mr. Farmer's bare, conclusory statement without any evidentiary support, is insufficient to show that defendant Prestige Properties and Development Co., Inc. did not have complete and exclusive control over the property at the time of plaintiff's accident. Thus, a triable issue of fact exists on this issue. It should be noted that in its Reply Affirmation, Prestige offered new affidavits and arguments that are not considered by the Court. The Court also declines to consider plaintiff's Sur-Reply papers.

This constitutes the decision and Order of this Court.

Dated: 2/14/19

A. Y. Tuitt

Hon. Alison Y. Tuitt