Burkes v Hines Reit Three Huntington Quadrangle LLC
2019 NY Slip Op 33660(U)
November 14, 2019
Supreme Court, Suffolk County
Docket Number: 16-4286
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

COPY

INDEX No. 16-4286
CAL. No. 18-02113OT

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 2-13-19 (001)
MOTION DATE 3-13-19 (002)
ADJ. DATE 4-24-19
Mot. Seq. # 001 - MD
002 - MotD

BARBARA BURKES,

Plaintiff,

- against -

HINES REIT THREE HUNTINGTON QUADRANGLE LLC, INNOVATIVE DESIGNS & MAINTENANCE, LLC, and MAC-NAIL-IT, INC.,

Defendants.

INNOVATIVE DESIGNS & MAINTENANCE, LLC,

Third-Party Plaintiff,

- against -

MAC-NAIL-IT, INC.,

Third-Party Defendant.

TINARI, O'CONNELL & OSBORN, LLP
Attorney for Plaintiff
320 Carleton Avenue, Suite 6800
Central Islip, New York 11722

WILSON, ELSNER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendants Hines Reit Three Huntington Quadrangle LLC and Innovative Designs & Maintenance, LLC
1133 Westchester Avenue
White Plains, New York 10604

MAZZARA & SMALL, P.C.
Attorney for Defendant
1698 Roosevelt Avenue
Bohemia, New York 11716

Upon the following papers numbered 1 to 75 read on these motions for summary judgment: Notice of Motion and supporting papers 1 - 19; 38 - 55; Answering Affidavits and supporting papers 20 - 31; 32 - 33; 56 - 57; 58 - 69; Replying Affidavits and supporting papers 34 - 35; 36 - 37; 70 - 72; 73 - 75; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Hines REIT Three Huntington Quadrangle LLC and Innovative Designs & Maintenance, LLC, for summary judgment dismissing the complaint, the cross claims, and the counterclaims against them is denied; and it is further

ORDERED that the motion by defendant/third-party defendant Mac-Nail-It, Inc., for summary judgment dismissing the complaint, the third-party complaint, and the cross claims against it is granted to the extent provided herein, and is otherwise denied.

This action was commenced by plaintiff Barbara Burkes to recover damages for personal injuries she allegedly sustained on February 14, 2014, when she slipped and fell on ice in a parking lot located at 3 Huntington Quadrangle, Melville, New York. It is undisputed that defendant Hines REIT Three Huntington Quadrangle LLC (Hines) owned the subject premises, that Hines contracted with defendant/third-party plaintiff Innovative Designs & Maintenance, LLC (Innovative) to provide property management services at the subject premises, and that Innovative contracted with defendant/third-party defendant Mac-Nail-It, Inc. (Mac) to provide snow plowing services for the subject parking lot. Hines asserts a cross claim against Innovative for indemnification. Innovative asserts cross claims against Hines for contribution, contractual indemnification, and breach of contract, as well a third-party claim against Mac for contribution, common law indemnification, contractual indemnification, and breach of contract. Mac then asserted a cross claim against Hines for contribution, and a counterclaim against Innovative for contribution. Plaintiff also served an amended complaint asserting a direct claim against Mac.

Hines and Innovative now move for summary judgment in their favor, arguing that they did not owe plaintiff a duty at the time of her alleged fall because there was a storm in progress or, in the alternative, that they did not have notice of the alleged dangerous condition. In support of their motion, Hines and Innovative submit, among other things, transcripts of the parties' deposition testimony, copies of invoices, and certified meteorological records.

Mac also moves for summary judgment in its favor, arguing that it owed no duty of care to plaintiff, that it does not fall within one of the exceptions to ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, and that, following its completion of its plowing/salting/sanding work, it had no duty to monitor the subject parking lot for ice formation. In support of its motion, Mac submits, among other things, a copy of a "building services contract" between Hines and Innovative, a copy of a "proposal/agreement" between Mac and Innovative, copies of invoices, and handwritten notes.

Plaintiff testified that she arrived at the subject premises at approximately 8:25 a.m. on the date in question, and that it was "a clear day, cold." She stated that she parked her motor vehicle in the subject parking lot, observed snow on the "side grassy areas," and walked into the nearby office building to commence her workday. Plaintiff indicated that she did not go outside again until approximately 5:45

p.m., when leaving for the day. She stated that she exited the building using the same route she used to enter it that morning, walking down a concrete sidewalk toward the subject parking lot. Plaintiff testified that as she stepped off of the concrete walkway onto the parking lot surface, her foot slipped and she fell to the ground. She stated that while on the ground, she looked around and discovered that she was lying on "a sheet of ice" at least two feet by two feet in size. Upon questioning, plaintiff denied ever having seen the ice in question prior to slipping on it.

Kimberly Melendez testified that she is employed as the comptroller of Commercial Building Maintenance, an owner of Innovative. She stated that on July 1, 2011, Innovative entered into a three-year contract with Hines to provide snow removal services for the subject parking lot. Ms. Melendez indicated that such contract provided for snow plowing and the spreading of a salt/sand mixture, but that Innovative's duties did not extend to the sidewalks adjacent to the parking lot. She explained, however, that in the event of a large snowfall, Ron Craddock, the "property manager" for Hines, would request that Innovative send laborers to work under his supervision in clearing the subject premises' sidewalks. Ms. Melendez testified that such instances would be memorialized in work orders and invoices. Her attention directed to certain invoices from February 2014, she indicated that employees of Innovative's subcontractor, Mac, were present at the subject premises on February 13, 2014, clearing 11 inches of snow, and on February 14, 2014, clearing 3.2 inches of snow.

John McNeill testified that he is the sole shareholder of Mac, and that Mac was hired by Innovative to provide snow plowing services at the subject parking lot. He indicated that Mac would begin its work automatically, upon snowfall of one inch or more. He further stated that after the snow was plowed to the outer perimeter of the parking lot, "away from the building," a salt/sand mixture would "always" be applied to the parking lot. Mac would then send an invoice to Innovative with pricing based upon the amount of snowfall reported by the National Weather Service. Upon questioning, Mr. McNeill averred that he and his wife kept a "snow log" in which they recorded weather conditions chronologically during snow storms. He indicated that entries in the snow log would be derived from both weather reports and his personal observations. Mr. McNeill testified the entries in the snow log indicate that snow began falling at 1:00 a.m. on February 13, 2014, and continued until approximately 1:00 p.m., when it changed to rain and hail; the rain and hail continued until 9:00 p.m., at which time it changed to all rain. Mr. McNeill testified that the snow log entry for 2:41 a.m. on February 14, 2014, reflects that it was snowing at such time, and that Mac "plowed and sanded" 13.5 inches of snow on that date. Upon being shown a Mac invoice billing for work it did at the subject parking lot on February 13, 2014 and February 15, 2014, he stated that 13 inches of snow were plowed on the 13th, 3.1 inches were plowed on the 15th, and there is "nothing documented" as to February 14, 2014.

A "real property owner, or a party in possession or control of real property, will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only when it created the alleged dangerous condition or had actual or constructive notice of it" (***Somekh v Valley Natl. Bank***, 151 AD3d 783, 784, quoting ***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 812). Thus, to establish its entitlement to summary judgment, "a property owner or party in possession must establish, prima facie, that it neither created nor had actual or constructive notice of the dangerous condition that allegedly caused the plaintiff to fall" (*id.* [internal quotation marks omitted]).

As a general rule, "a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties" (***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 810; *see* ***Espinal v Melville Snow Contrs.***, *supra*). 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.***, *supra* at 140 [internal quotation marks and citations omitted]).

Under the "storm in progress" rule, "a property owner will not be held liable in negligence for accidents occurring as a result of a slippery snow or ice condition occurring during an ongoing storm or for a reasonable time thereafter" (***Isabel v New York City Hous. Auth.***, 171 AD3d 714, 714 [internal quotation marks omitted]; *see* ***Sherman v New York State Thruway Auth.***, 27 NY3d 1019; ***Haxhia v Varanelli***, 170 AD3d 679). Here, the invoices generated by Innovative and Mac indicate a large amount of snow was cleared on February 13, 2014, and some snow was cleared on February 14, 2014. The climatological records reveal that precipitation fell for much of the day on February 13, 2014 but only 0.02 inches fell on February 14, 2014. Significantly, the hour-by-hour meteorological records submitted by Hines and Innovative indicate that zero precipitation fell between 8:00 a.m. and the time of the plaintiff's fall on February 14, 2014. In addition, plaintiff testified that while she saw snow accumulations on grassy surfaces, she observed no precipitation falling when she entered the building at the subject premises on the morning of February 14, 2014, nor when she left the building approximately nine hours later. Under these circumstances, Hines and Innovative failed to establish their entitlement to judgment as a matter of law pursuant to the storm in progress rule (*see* ***Casey-Bernstein v Leach & Powers***, 170 AD3d 651; ***Morris v Home Depot***, 152 AD3d 669).

Further, Hines and Innovative failed to establish a prima facie case that they lacked notice of the alleged dangerous condition in the parking lot. To demonstrate lack of constructive notice, "a defendant must produce evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned" (***Barrett v Aero Snow Removal Corp.***, 167 AD3d 519, 520 [internal quotation omitted]; *see* ***Lauture v Board of Mgrs. at Vista at Kingsgate, Section II***, 172 AD3d 1351). While no evidence of actual notice has been adduced, Hines and Innovative failed to submit evidence of when the incident location was last inspected and, thus, have not established a prima facie case of lack of constructive notice (*see* ***Ghent v Santiago***, 173 AD3d 693). Contrary to defendants' arguments, the fact that plaintiff failed to see the icy condition prior to her fall is "not conclusive" because she was looking forward and not downward (*see* ***Barrett v Aero Snow Removal Corp.***, *supra*).

Mac established its prima facie case of entitlement to summary judgment in its favor as to plaintiff's complaint (*see* ***Cayetano v Port Auth. of NY & New Jersey***, 165 AD3d 1223). It demonstrated through the deposition testimony of witnesses that it was hired by Innovative to perform limited snow and ice clearing services at the subject parking lot pursuant to contract. Thus, it proved, prima facie, that it owed plaintiff no duty (*see* ***Espinal v Melville Snow Contrs.***, *supra*). In establishing

its prima facie case, Mac was not required to show the inapplicability of any exception to *Espinal*, as no exceptions were pleaded in plaintiff's complaint or bills of particulars *(see* ***Burger v Brickman Group Ltd., LLC***, 174 AD3d 568; ***Sampaiolopes v Lopes***, 172 AD3d 1128).

In opposition to Mac's motion, plaintiff argues that triable issues remain as to whether Mac "launched a force or instrument of harm by creating and/or exacerbating a dangerous ice condition" in the subject parking lot. More specifically, plaintiff asserts that Mac's plowing of snow into piles adjacent to the area of plaintiff's fall could have "foreseeably resulted in a dangerous condition due to the melting and freezing process." However, plaintiff's claim is speculative and unsupported by sufficient evidence. By merely plowing the snow in accordance with the contract and leaving some residual snow or ice in the area, Mac cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm (*see* ***Fung v Japan Airlines***, 9 NY3d 351; ***Espinal v Melville Snow Contractors***, *supra*; ***Rudloff v Woodland Pond Condo Assn.***, 109 AD3d 810; ***Quintanilla v John Mauro's Lawn Service***, 79 AD3d 838; ***Foster v Herbert Slepoy Corp***, 76 AD3d 210). Accordingly, the branch of Mac's motion for summary judgment dismissing plaintiff's complaint against it is granted.

The branch of the motion for summary judgment dismissing the cross claims against Mac for contribution is also granted since there was no evidence that Mac owed either a duty of reasonable care to the plaintiff or a duty of reasonable care independent of its contractual obligations to Innovative (*see* ***Morris v Home Depot***, *supra*; ***Abramowitz v Home Depot***, 79 AD3d 675; ***Wheaton v East End Commons***, 50 AD3d 675). The branch of the motion to dismiss the cross claims for contractual indemnification is also granted. Indemnification provisions "are strictly construed, and the right to contractual indemnification depends upon the specific language of the contract" (***Davis v Catsimatidis***, 129 AD3d 766, 768). Although the contract indicated that Innovative would be named as an additional insured, there is no indemnification provision in the agreement (*see* ***Villon v Town Sports Int.***, 128 AD3d 609; ***Cunningham v North Shore Univ. Hosp.***, 123 AD3d 650). However, the branch of Mac's motion for summary judgment on the cross claims for common law indemnification is denied. The record indicates that the plaintiff fell as she stepped onto the parking lot and Innovative alleges that Mac was responsible for plowing the parking lot and applying salt and sand to the area. Thus, questions of fact exist as to whether the plaintiff's injuries were attributable to the negligence or nonperformance of an act that was solely within the province of Mac (*see* ***Abramowitz v Home Depot***, *supra*; ***Wheaton v East End Commons***, *supra*; ***Villon v Town Sports Int.***, *supra*).

Dated: November 14, 2019

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION