Ciccone v Woodrow Plaza, LLC
2020 NY Slip Op 30572(U)
January 21, 2020
Supreme Court, Richmond County
Docket Number: 151043/2018
Judge: Wayne M. Ozzi
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

CHRISTINE CICCONE,

Plaintiff,

-against-

WOODROW PLAZA, LLC, WOODROW PLAZA LLC #2, SOUTH SHORE PAVING, LLC and STARBUCKS COFFEE COMPANY,

Defendants.

---X

IAS PART 23

Present:

HON. WAYNE M. OZZI

DECISION AND ORDER

Index No.: 151043/2018

Motion No. 002

The following numbered 1 through 4 were marked submitted on October 31, 2019

Papers Numbered

Notice of Motion Seeking Summary Judgment Dismissing Plaintiff's Complaint Made By Defendant South Shore Paving
Affirmation in Support, with Exhibits
(dated August 28, 2019) 1

Affirmation of Salvatore J. DeSantis, Esq., in Opposition to Defendant's Motion, with Exhibits
(dated September 4, 2019) 2

Affirmation of Joseph A. Romagnolo, Esq. in Opposition to Defendant's Motion
(dated September 17, 2019)..3

Reply Affirmation, with Exhibit, in Support of Defendant's Motion
(dated October 30, 2019) 4

Defendant South Shore Paving, LLC ("South Shore Paving") moves under CPLR §3212 for an Order granting summary judgment dismissing Plaintiff's Complaint and all cross-claims against it. The Court denies the Motion.

FACTS

Plaintiff alleges she fell in the parking lot of 1243 Woodrow Road, Staten Island NY 10309 (the "Premises") at approximately 7:00 A.M. on August 9, 2017, Plaintiff testified during her examination before trial that she parked her car on Woodrow Road, crossed a small embankment, and walked across a dirt area including some landscaping to enter the parking lot located at the Premises. Plaintiff was crossing the parking lot to enter the Starbucks in the strip mall at the Premises. Plaintiff testified further that after she took three to six steps on the parking lot's blacktop surface, her legs gave out from under her, causing her to fall and sustain severe and permanent injuries. Plaintiff testified that the blacktop "was so slippery and I ended up covered in tar or whatever that was." (South Shore Paving's Affirmation in Support of Motion, Exhibit K, Page 18).

At her deposition, Plaintiff was shown a still shot taken from a video that showed Plaintiff's accident, which is attached as South Shore Paving's Exhibit F. Plaintiff identified herself in the still shot, which shows Plaintiff entering the parking lot after walking through the landscaping. South Shore Paving notes that this image shows caution tape was not in place at the time of Plaintiff's fall. (South Shore Paving's Reply, Exhibit A).

Defendants Woodrow Plaza, LLC, and Woodrow Plaza, LLC #2 (together "Woodrow") own the Premises, which contains a strip mall that leases to various entities, including Starbucks Coffee Company ("Starbucks"). Woodrow's managing member Leonello Savo testified that

Woodrow requested an estimate from South Shore Paving concerning paving maintenance for the parking lot involving applying a sealer to the asphalt. Mr. Savo testified Woodrow received a one-page invoice for the work performed from South Shore Paving, which is the only written instrument signifying the agreement between the entities. South Shore Paving billed Woodrow Plaza LLC 2 for seal coating and paving in the amount of $36,901.50.

Denis Sagaria, the owner of South Shore Paving, testified during his examination before trial that a crew from South Shore Paving cleared the area subject to sealing by using a leaf blower and then barricaded the area using caution tape, cones, and other barriers approximately thirty to forty minutes before applying the seal on the night of August 8, 2017. (South Shore Paving's Affirmation in Support of Motion, Exhibit H, Page 17). Mr. Sagaria anticipated removing barricades surrounding the freshly sealed area and opening the area to cars between 9:30 and 10:00 AM after the seal coating dried. Mr. Sagaria testified he and two South Shore Paving employees remained on the Premises until Mr. Savo's workers showed up between 6:00 and 7:00 A.M. after completing the sealing project (23). While Mr. Sagaria testified that he spoke to Mr. Savo's workers that morning, he did not remember the content of such conversation and stated that "they know the deal. We were doing this for weeks." (24). Mr. Sagaria testified that he might have been on the Premises when Plaintiff fell at 7:11 A.M. but was unaware of the incident until Mr. Savo notified him.

Mr. Sagaria maintained that he did not remove any of the cones or caution tape before leaving the Premises that morning. Plaintiff's counsel showed Mr. Sagaria a still photograph taken from the property's surveillance system during his deposition. The photograph shows Plaintiff crossing the parking lot approximately at 7:11 AM and neither cones nor caution tape impeded her path. Plaintiff's counsel asked Mr. Sagaria if the caution tape had been removed between

approximately 11:00 PM the night before and the morning of the incident. Mr. Sagaria answered "Yes. They must have been." (South Shore Paving's Affirmation in Support of Motion, Exhibit H, Page 28). Mr. Sagaria conceded he did not know how the caution tape and cones were removed but stated it was most likely Mr. Savo's workers who had done it. When asked about his understanding of how the cones or caution tape would be removed from the area, Mr. Sagaria testified that Woodrow Plaza said they would do it. (31).

Mr. Savo testified that South Shore Paving advised him that the area would be dry by the morning of August 9, 2017. Mr. Savo maintained that after learning of Plaintiff's fall, he spoke to Mr. Sagaria about when the cones would be removed and the parking lot be opened. (Woodrow's Affirmation in Opposition, Exhibit A, Pages 26 - 27). During this conversation, Mr. Sagaria told Mr. Savo that the lot was dry, and the cones could be removed. Mr. Savo stated that after he spoke to someone from South Shore Paving between 8:00 and 9:00 A.M., the tape and cones closing off the parking lot entrances were removed. (38). Mr. Savo also stated that when he arrived at the Premises between 7:30 and 8:00 AM for a routine visit, he did not believe there were any cars in the parking lot.

Testimony from a nonparty witness provides additional support for Plaintiff's contention that no barriers existed near the location of her fall. Veronica Egan, a nonparty witness, employed at Starbucks, testified that when she arrived at work at 7:00 AM, only a single strand of caution tape existed in the front parking lot entrance on Woodrow Road. (South Shore Paving's Affirmation in Support of Motion, Exhibit I, Page 13). Ms. Egan testified there were no other warning signs in the parking lot indicating there was a slippery condition. Ms. Egan stated that while the parking lot was "normal," the day before the incident, the parking lot appeared wet on the morning of August 9, 2017. (19). When she went out to inspect the parking lot after Plaintiff

fell, Ms. Egan noticed that there were wet spots and a strong order coming off the area "like it was still very freshly put down. It as (sic) definitely not dry yet." (27).

DISCUSSION

Defendant South Shore Paving moves for an Order granting it summary judgment, arguing that as a third party, it is not liable to Plaintiff for her alleged injuries. "Summary judgment is a drastic remedy which should only be employed where there is no doubt as to the absence of triable issues." (*see Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept., 2011]). CPLR §3212 provides a motion for summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" and the motion "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." (*see CPLR §3212*). When deciding a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party. (*see Stukas v. Streiter*, 83 A.D.3d 18, 22 [2d Dept., 2011]). The function of the court on a motion for summary judgment is not to determine matters of credibility or to resolve issues of fact, but rather to determine whether such issues exist. (*see Kolivas v. Kirchoff*, 14 AD3d 493, 493 [2d Dept., 2005]). Once a movant meets its prima facie burden, the burden shifts to the nonmovant to raise a triable issue of fact. *(see Giannas v 100 3rd Ave. Corp.*, 166 AD3d 853, 857 [2d Dept., 2018]).

The general rule as it relates to third-party liability is that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 [2002]). In the seminal case of *Espinal v. Melville Snow Contrs.,* the Court of Appeals held that a contractor may subject itself to tort liability to a third party in three discreet factual situations "(1) where the contracting party, in failing to exercise

reasonable care in the performance of his duties, launche[s] a force or instrument or 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." *Id.* at 140.

The Appellate Division, Second Department applying *Espinal* held "as part of its prima facie showing, a contracting defendant is only required to negate the applicability of those *Espinal* exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars." (*Burger v Brickman Group Ltd., LLC,* 174 AD3d 568, 569 [2d Dept., 2019]) (internal citations omitted). The Appellate Division, Second Department holds a "launch of a force or instrument of harm" has been interpreted as requiring that the contractor exacerbate or create the dangerous condition and in accordance with *Espinal*, evidence must be provided that the contractor affirmatively left the premises in a more dangerous condition than it was found (*see Santos v Deanco Servs., Inc.,* 142 AD3d 137, 141-142 [2d Dept., 2016]; *Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 811 4824943 [2d Dept., 2013]).

Here, Plaintiff specifically alleged in her Bill of Particulars that Defendant South Shore created or exacerbated the slippery condition of the parking lot. (Defendant South Shore Affirmation in Support of Motion, Exhibit E, Pages 1-2). Therefore, Defendant South Shore is required to come forward with evidence negating the applicability of the first *Espinal* exception. (*See Burger*, *supra*). The Court finds that South Shore Paving has failed to negate the applicability of the first *Espinal* exception and therefore has not met its prima facie burden. The evidence shows that South Shore Paving applied a sealant to the parking lot before Plaintiff's fall and according to Ms. Egan, the parking lot was still wet before and after Plaintiff's fall. The photograph of Plaintiff walking through the lot and Ms. Egan's testimony demonstrate that caution tape and cones were

not present in the area where Plaintiff fell. Mr. Sagaria's testimony is also insufficient to overcome Defendant's burden; Mr. Sagaria testified that South Shore Paving was responsible for putting up caution tape and cones to block pedestrians and traffic. During his deposition, Mr. Sagaria could not account for why the photograph of Plaintiff in the parking lot shows there were no cones or caution tape. Instead, Mr. Sagaria could only guess that Mr. Savo's men removed them prior to Plaintiff's fall.

The Court finds that South Shore Paving has failed to show, prima facie, that the first *Espinal* exception does not apply. Therefore, South Shore Paving's Motion must be denied in its entirety without evaluating the papers submitted in opposition.

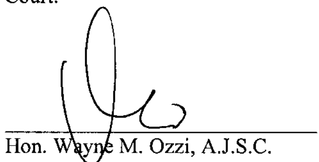
Accordingly, it is hereby:

ORDERED that Defendant South Shore Paving's motion seeking summary judgment is denied, and it is further

ORDERED that the parties are directed to appear for a conference before this Court on February 4, 2020 at 10AM at 18 Richmond Terrace, S.I., New York, 10301, Room 114

This constitutes the final Decision and Order of this Court.

Dated: January 24, 2020



Hon. Wayne M. Ozzi, A.J.S.C.