Nigro v Mountain Shadows Home Owners Assn., Inc.
2020 NY Slip Op 35149(U)
December 3, 2020
Supreme Court, Rockland County
Docket Number: Index No. 031710/2019
Judge: Robert M. Berliner
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

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ANTHONY NIGRO,

Plaintiff,

-against-

MOUNTAIN SHADOWS HOME OWNERS ASSOCIATION, INC., TRIAM REALTY CORP., and LANDSCAPE MD INC.,

Defendants.

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DECISION AND ORDER

Index No.: 031710/2019

Motion Sequence # 2

The following papers, numbered 1 to 4, were read on the motion for summary judgment, pursuant to CPLR § 3212, by Defendant Landscape MD, Inc.:

Notice of Motion/Affirmation in Support/Exhibits(A-M) 1-2
Affirmation in Opposition 3
Reply Affirmation 4

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

This action arises out of a slip and fall accident, wherein Plaintiff Anthony Nigro allegedly sustained damages after slipping and falling in a parking lot of his residential complex located at 774 Foltim Way, Congers, New York ("the Premises") on February 13, 2019 at 12:15 am. Plaintiff alleges that he slipped on an ice patch on the ground that emanated from a snow pile, which existed for 4-6 weeks prior to his accident. Prior to his accident, on February 12, 2019 at approximately 12:00 pm, Plaintiff walked from his residence to his car parked in a parking spot across his residence. Plaintiff returned to his residence around 1:15 pm. He stated that he did not slip on any ice on the ground when he walked to and from his car at that time. Then, he left his residence again on February 13, 2019 at 12:15 am, which is when he allegedly fell, as he traversed the same area as he did earlier to get to his car. He maintains that the ice

patch he slipped on came from a snow pile located behind his car, in the parking spot where he parked his car. Plaintiff maintains that the snow pile was the height of the bed of his truck and was about 4-6 weeks old. Meteorological reports show that a winter weather advisory was in effect from the morning of February 12 through the morning of February 13. Plaintiff filed his Complaint for negligence against Defendants Mountain Shadows Home Owners Association, Inc. ("Mountain Shadows"), Triam Realty Corp. ("Triam Realty"), and Landscape MD, Inc. ("Landscape MD"). Mountain Shadows owns the Premises and Triam Realty manages the Premises. Further, Mountain Shadows contracted with Landscape MD to provide various services of snow removal and landscaping on the Premises ("Service Agreement").

Now, before the Court is Landscape MD's motion for summary judgment seeking to dismiss Plaintiff's Complaint as against it. It alleges that they are entitled to judgment as a matter of law because: (1) it owed no duty to Plaintiff because its Service Agreement does not create tort liability and none of the Espinal exceptions apply to hold Landscape MD liable for Plaintiff; and (2) the storm in progress doctrine applies to the circumstances of Plaintiff's fall such that Landscape MD's actions were not the proximate cause of Plaintiff's fall. First, the Court addresses Landscape MD's argument regarding breach of duty as it is dispositive of this application.

"As we have stated frequently, the proponent of a summary judgment motion 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]. "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." *Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]. Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011].

The Court of Appeals has held that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party (see Eaves Brooks, 76 N.Y.2d at 226)." *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002].

> "Nonetheless, the Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her 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 another party's duty to maintain the premises safely (see *Espinal v Melville Snow Contrs.*, 98 NY2d at 140; *Baker v Buckpitt*, 99 AD3d 1097, 1098, 952 NYS2d 666 [2012]). 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 (see *Mathey v Metropolitan Transp. Auth.*, 95 AD3d 842, 844, 943 NYS2d 578 [2012]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214, 905 NYS2d 226 [2010])."

Glover v John Tyler Enters., Inc., 123 AD3d 882 [2d Dept 2014]. A contracting defendant establishes his prima facie entitlement to summary judgment by negating the applicability of the *Espinal* exceptions that plaintiff expressly plead in her complaint or expressly set forth within her bill of particulars. *See Turner v Birchwood on the Green Owners Corp.*, 171 AD3d 1119 [2d Dept 2019]; *Sperling v Wyckoff Hgts. Hosp.*, 129 AD3d 826 [2d Dept 2015].

Here, Landscape MD submitted, *inter alia*, the affidavit of Certified Consultant Meteorologist ("CCM") Thomas Else,[1] meteorological reports, the depositions of the parties, and a copy of the Service Agreement. Landscape MD established that Plaintiff was not a party to the Service Agreement. Landscape MD also established that the first Espinal factor does not apply as it did not launch a force or instrument of harm in creating the alleged icy condition. Specifically, based on the meteorological reports, Else opined that the Premises were clear of any residual snow or snow piles due to the unseasonably mild weather and rain several days prior to February 12, 2019. As such, at the time of Plaintiff's fall, any ice or snow condition on the Premises could

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[1] Plaintiff alleges that the Court should not consider Else's affidavit because it fails to conform with CPLR § 2309 as it is notarized outside of New York State and does not include a certificate of conformity. However, this argument is without merit because "the absence of a certificate of conformity for an out-of-state affidavit is not a fatal defect." *Fredette v Town of Southampton*, 95 AD3d 940, 842 [2d Dept 2012]; *Mack-Cali Realty, L.P. v Everfoam Insulation Sys., Inc.*, 110 AD3d 680, 682 [2d Dept 2013].

not have resulted from a 4-6-week-old snow pile resulting from Landscape MD's prior snow removal operations. Furthermore, Landscape MD established that Plaintiff could not have detrimentally relied on the continued performance of its duties because he testified that he never heard of Landscape MD as of the day of his accident. *See Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 [2d Dept 2010]. Lastly, Landscape MD established that the Service Agreement did not entirely displace the property owner's duty to maintain the premises safely because it provided that Landscape MD began snow removal services when snow accumulation reached two inches on the Premises. *Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 901-02 [2d Dept 2011].

In opposition, Plaintiff failed to provide a triable issue of fact as to whether any of the *Espinal* exceptions apply to these circumstances. Even though Plaintiff testified that the ice patch he slipped on emanated from a 4-6-week-old snow pile plowed into a parking spot, his testimony alone is based on mere speculation and insufficient to raise a triable issue of fact. *See Scott v Avalonbay Communities, Inc.*, 125 AD3d 839, 841 [2d Dept 2015][finding that the plaintiff's "testimony was insufficient to raise a triable issue of fact as to whether the ice which allegedly caused the plaintiff to fall formed as a result of the melting and refreezing of a pile of snow plowed by (the defendant snow removal contractor)"]; *Cayetano v Port Auth. of N.Y. & N.J.*, 165 AD3d 1223, 1225 [2d Dept 2018]; *Reagan v Hartsdale Tenants Corp.*, 27 AD3d 716 [2d Dept 2006]. In his motion papers, Plaintiff fails to make any other argument that pertains to the applicability of the *Espinal* exceptions.

Based upon the foregoing, it is

ORDERED that Defendant Landscape MD, Inc's motion for summary judgment dismissing the Complaint as against it is granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
December 3, 2020

ENTER

HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF