SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-00951

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, OGDEN, AND DELCONTE, JJ.

CARI CHIAZZESE, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

5775 MAELOU DRIVE, LLC, DEFENDANT-RESPONDENT,
MICHAEL LAING AND MICHAEL LAING, DOING BUSINESS
AS PROFESSIONAL LANDSCAPES, DEFENDANTS-APPELLANTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (JACOB A. PIORKOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered June 13, 2022. The order granted the motion of defendant 5775 Maelou Drive, LLC, for summary judgment and denied the motion of defendants Michael Laing and Michael Laing, doing business as Professional Landscapes for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this personal injury action seeking damages for injuries that she sustained in a slip and fall accident that occurred in a parking lot owned by defendant 5775 Maelou Drive, LLC (Maelou Drive), and leased to plaintiff's employer, a nonparty tenant. Defendants Michael Laing and Michael Laing, doing business as Professional Landscapes (collectively, Laing defendants), were contracted by the tenant to provide snow plowing and salting services for the parking lot. Plaintiff appeals, as limited by her brief, from that part of an order granting Maelou Drive's motion for summary judgment dismissing the amended complaint against it. The Laing defendants appeal, as limited by their brief, from that part of the same order denying their motion for summary judgment dismissing the amended complaint against them. We affirm.

With respect to plaintiff's appeal, we reject plaintiff's contention that Maelou Drive is not entitled to summary judgment dismissing the amended complaint against it on the ground that it is as an out-of-possession landlord. "Landowners generally owe a duty of

care to maintain their property in a reasonably safe condition, and are liable for injuries caused by a breach of this duty" (*Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 142 [2019]; *see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]). However, "a landowner who has transferred possession and control [i.e., an out-of-possession landlord] is generally not liable for injuries caused by dangerous conditions on the property" (*Henry*, 34 NY3d at 142 [internal quotation marks omitted]; *see Gronski*, 18 NY3d at 379). "[W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, we look not only to the terms of the agreement but to the parties' course of conduct—including, but not limited to, the landowner's ability to access the premises—to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law" (*Gronski*, 18 NY3d at 380-381).

Here, we conclude that Maelou Drive met its initial burden on the motion of establishing that it was an out-of-possession landlord that had relinquished control of the premises and was not obligated to perform repairs or maintenance of the premises, including removal of snow (*see Adolf v Erie County Indus. Dev. Agency*, 174 AD3d 1519, 1519 [4th Dept 2019]; *Sexton v Resinger*, 70 AD3d 1360, 1361 [4th Dept 2010]). In support of its motion, Maelou Drive submitted, inter alia, the lease agreement between itself and its tenant, which provided that the tenant was responsible for all maintenance and repair of the premises, and the snow removal contract that its tenant subsequently executed with the Laing defendants (*see Tarantelli v 7401 Willowbrook Rd. Assoc., LLC*, 13 AD3d 1184, 1184 [4th Dept 2004]).

Contrary to plaintiff's contention, the deposition testimony of Maelou Drive's corporate representative did not create a question of fact whether Maelou Drive was the landlord or merely a tenant that operated a business at the property, because Maelou Drive submitted an errata sheet sworn to by the corporate representative wherein the representative stated that he misunderstood some questions during the deposition and corrected his answers to reflect that Maelou Drive owned the property and was actually the landlord. Further, the corporate representative's testimony, as corrected by the errata sheet, is supported by documentary evidence submitted in support of the motion, including the lease between Maelou Drive and the tenant. Additionally, "[t]he fact that [Maelou Drive] . . . retained the right to visit the premises [and direct the tenant to perform maintenance and repairs necessary to comply with the lease and governing regulations] is insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord" (*Ferro v Burton*, 45 AD3d 1454, 1455 [4th Dept 2007] [internal quotation marks omitted]; *see Schwegler v City of Niagara Falls*, 21 AD3d 1268, 1269-1270 [4th Dept 2005]).

We also reject plaintiff's contention that Maelou Drive owed a non-delegable duty to maintain the parking area in a reasonably safe condition. While there are exceptions to the general rule that an out-of-possession landlord does not have a duty to maintain its

property in a reasonably safe condition where the out-of-possession landlord: (1) "rents premises for a public use when [it] knows, or should have known, that they are in a dangerous condition at the time of the lease" (*Fuller v Marcello*, 38 AD3d 1162, 1163 [4th Dept 2007] [internal quotation marks omitted]; *see Brady v Cocozzo*, 174 AD2d 814, 814 [3d Dept 1991]); (2) "is contractually obligated to repair the premises"; or (3) "has reserved the right to enter the premises to make repairs, and liability is based on a significant structural or design defect that violates a specific statutory safety provision" (*Weaver v DeRonde Tire Supply, Inc.*, 211 AD3d 1503, 1504 [4th Dept 2022], *appeal dismissed* 39 NY3d 1149 [2023]), none of those exceptions have been established here.

In light of our determination that Maelou Drive is entitled to summary judgment dismissing the amended complaint against it, plaintiff's remaining contentions are academic.

With respect to the Laing defendants' appeal, we conclude that Supreme Court properly denied their motion. "As a general rule, a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party" (*Bregaudit v Loretto Health & Rehabilitation Ctr.*, 211 AD3d 1582, 1583 [4th Dept 2022] [internal quotation marks omitted]). There are, however, " 'three situations in which a party who enters into a contract to render [snow removal] services may be said to have assumed a duty of care–and thus be potentially liable in tort–to third persons [who slipped on snow or ice:]' . . . [1] where the contracting party fails to exercise reasonable care in the performance of [their] duties and thereby 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' " (*Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 760-761 [4th Dept 2006], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

We agree with the Laing defendants that the snow removal contract was not so comprehensive and exclusive that it entirely displaced the duty of the tenant to maintain the premises because the contract defined the snowfall conditions that required the Laing defendants to plow, and provided that additional plowing and salting would be performed "upon [the tenant's] request" (*Espinal*, 98 NY2d at 141; *see Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1396-1397 [4th Dept 2017]). We also agree with the Laing defendants that they established that plaintiff did not detrimentally rely on their snow removal services because plaintiff testified at her deposition that she did not know the identity of the snow removal contractor or what was required by the snow removal contract (*see Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 [2d Dept 2010]).

However, we reject the Laing defendants' contention that there is no question of fact whether they launched a force or instrument of harm. Assuming, arguendo, that the Laing defendants met their initial burden on their motion with respect to that issue, in her affidavit in

opposition to the Laing defendants' motion, plaintiff averred that "the amount of ice in the parking lot had increased . . . because the snow piles behind [her] car would melt throughout the day due to the sunshine, and freeze when the sun went down," which raises a question of fact whether the Laing defendants "create[d] the allegedly dangerous condition" and thereby launched a force or instrument of harm (*Britt v Northern Dev. II, LLC*, 199 AD3d 1434, 1436 [4th Dept 2021]; *see Bregaudit*, 211 AD3d at 1585; *Nicosia v Bucky Demelas & Son Landscape Contrs.*, 194 AD3d 826, 828 [2d Dept 2021]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court