

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
SILVIA QUINONES,

Plaintiff,

-against-

DELI GROCERY, INC., and REMO FERRARA,

Defendants.
-----X

Index No.: 3457/06
Motion Date: 4/30/08
Motion Cal. No: 25
Motion Seq. No.: 1

The following papers numbered 1 to 21 read on this motion by defendant Remo Ferrara for an order granting him summary judgment, pursuant to CPLR 3212, and on this Cross Motion by co-defendant Deli Grocery 24, Inc., for an order granting it summary judgment dismissing the complaint and all cross claims asserted against it.

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Upon the foregoing papers, it is ordered that the motion and cross motion are disposed of as follows:

This is a negligence action to recover money damages for personal injuries allegedly sustained by plaintiff Silvia Quinones ("plaintiff"), as a result of her March 8, 2003 slip and fall on snow or ice on the sidewalk adjacent to the premises located at 63-02 Forest Avenue, Ridgewood, New York, that defendant Deli Grocery 24, Inc. ("Deli Grocery") leases from co-defendant Remo Ferrara ("Ferrara"), who acquired ownership of the property on August 6, 1999. Defendant Ferrara moves for summary judgment dismissing the complaint insofar as asserted against him and all cross claims, on the ground that defendant Deli Grocery had the responsibility for sidewalk maintenance,

and that it has the contractual obligation to indemnify him. Defendant Deli Grocery cross moves for summary judgment in its favor on the ground that it owed no duty to maintain the sidewalk and that it did not create the icy condition that caused plaintiff's slip and fall.

It is well-established that summary judgment should be granted only when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra. It is also well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected (citations omitted).” Juarez by Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628, 646 (1996).

1. Defendant Ferrara's motion for summary judgment

To establish a prima facie entitlement to summary judgment dismissing the complaint under the circumstances presented here, an owner must demonstrate that it relinquished control of the leased premises, and that it was not obligated under the terms of the lease to maintain or repair the leased premises. Bouima v. Dacomi, Inc., 36 A.D.3d 739 (2nd Dept. 2007); Dunitz v. J.L.M. Consulting Corp., 22 A.D.3d 45 (2nd Dept. 2005). Such an out-of-possession property owner is not liable for injuries that occur on the property unless the owner exercised some control over the sidewalk or was contractually obligated to repair the unsafe condition (see Flores v. Baroudos, 27 A.D.3d 517, 811 N.Y.S.2d 757; Beda v. City of New York, 4 A.D.3d 317, 772 N.Y.S.2d 339).” Rocco v. Marder, 42 A.D.3d 516 (2nd Dept. 2007); Nikolaidis v. La Terna Restaurant, 40 A.D.3d 827 (2nd Dept. 2007); Bouima v. Dacomi, Inc., supra; Flores v. Baroudos, 27 A.D.3d 517 (2nd Dept. 2006). “[A]n out-of-possession landlord is not liable for negligence with respect to the condition of property unless the landlord is contractually obligated to make repairs, maintain the premises, or has a contractual right to reenter to inspect and make needed repairs. Guzman v Haven Plaza Hous. Dev. Fund. Co., 69 N.Y.2d 559 (1987); Knipfing v V & J, Inc., 8 A.D.3d 628 (2nd Dept. 2004); Schiavone v 382 McDonald Corp., 251 A.D.2d 486 (2d Dept. 1998); Johnson v Urena Serv. Ctr., 227 A.D.2d 325, lv denied 88 N.Y.2d 814 (1996). In sum, as a general proposition, an out-of-possession landlord may be held liable for a third-party's injury on the premises based on the theory of constructive notice where the landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance, and repair, and there is a specific statutory

violation, and a significant design or structural defect that proximately caused the injury. Spencer v. Schwarzman, LLC, 309 A.D.2d 852(2nd Dept. 2003). See, also, Briggs v. Country Wide Realty Equities, Ltd., 276 A.D.2d 456 (2nd Dept. 2000)[“Constructive notice may be found where an out-of-possession landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists”]; Dunitz v. J.L.M. Consulting Corp., 22 A.D.3d 455 (2nd Dept. 2005); see, also, Rosas v. 397 Broadway Corp., 19 A.D.3d 574 (2nd Dept. 2005); Roveto v. VHT Enters., Inc., 17 A.D.3d 341 (2nd Dept. 2005); D’Orlando v. Port Auth. of New York & New Jersey, 250 A.D.2d 805 (2nd Dept. 1998); Stark v. Port Authority of N.Y. & N.J., 224 A.D.2d 681 (2nd Dept, 1996); Dalzell v. McDonald’s Corp., 220 A.D.2d 638 (2nd Dept. 1995); Pirillo v. Long Island Railroad, 208 A.D.2d 818 (2nd Dept. 1994) Roveto v. VHT Enters., Inc., 17 A.D.3d 341 (2nd Dept. 2005). The right of reentry alone, however, is insufficient to establish liability, which must be based on a significant structural or design defect that is contrary to a specific statutory safety provision (Lane v Fisher Park Lane Co., 276 AD2d 136 [2000]; Johnson v Urena Serv. Ctr., *supra*; Deebs v Rich-Mar Rlty. Assocs., 248 AD2d 185 [1998]; Velazquez v. Tyler Graphics, 214 AD2d 489 [1995]). With respect to a sidewalk, an out of possession owner cannot be held liable unless he exercised some control over the sidewalk or was contractually obligated to repair the unsafe condition (see, Flores v. Baroudos, 27 A.D.3d 517, 811 N.Y.S.2d 757; Beda v. City of New York, 4 A.D.3d 317, 772 N.Y.S.2d 339).” Rocco v. Marder, 42 A.D.3d 516, 517 (2nd Dept. 2007).

Here, defendant Ferrara established his prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against him by demonstrating that he relinquished control of the leased premises, and that, pursuant to the lease agreement, defendant Deli Grocery, as tenant, was responsible for “keep[ing] the sidewalk in front of and along side of the demised premises clean at all times and free of ice and snow.” Defendant Ferrara concludes that because he neither owned, occupied or controlled the sidewalk where plaintiff allegedly slipped and fell, he is entitled to summary judgment in his favor and dismissal of the complaint and all cross claims asserted against him. As the expressed and unambiguous language of the lease supports his contention that defendant Deli Grocery was contractually responsible for keeping the sidewalk free of ice and snow, and establishes defendant Ferrara as an out-of-possession landlord with a limited right of reentry, defendant Ferrara has established his prima facie entitlement to summary judgment against plaintiff dismissing the complaint. See, DeLeon v Port Authority of N.Y. and NJ, 306 A.D.2d 146 (2nd Dept. 2003); see also D’Orlando v Port Authority of N.Y. and NJ, 250 A.D.2d 805 (2nd Dept. 1998); Love v Port Authority of N.Y. and NJ, 168 A.D.2d 222 (2nd Dept. 1990). He also established his prima facie entitlement to summary judgment in his favor and against defendant Deli Grocery dismissing the cross claims by showing that the responsibility for the sidewalk reposed in defendant Deli Grocery. See, Thompson v. Port Authority of New York and New Jersey, 305 A.D.2d 581 (2nd Dept. 2003)[“There was no evidence that it retained a sufficient degree of control over the premises to provide a basis for liability.”]. Having established his prima facie entitlement to summary judgment, the burden then shifted to plaintiff and defendant Deli Grocery to raise a triable issue of fact, which, in not opposing that prong of the motion, they failed to do.

Moreover, as recently reiterated by the Appellate Division, Second Department, in Bisontt v. Rockaway One Co., LLC, 47 A.D.3d 862 (2nd Dept. 2008):

A property owner is under no duty to pedestrians to remove snow and ice that naturally accumulates upon the sidewalk in front of the premises unless a statute or ordinance specifically imposes tort liability for failing to do so (citations omitted). No such statute was in place in New York City prior to September 14, 2003, the effective date of a revision to the Administrative Code of the City of New York, which imposed tort liability on certain abutting landowners for the negligent failure to remove snow and ice (see Administrative Code of City of New York § 7-210, as added by Local Laws No. 49 (2003) of City of New York, § 1; Wu v. Korea Shuttle Express Corp., 23 A.D.3d 376, 808 N.Y.S.2d 82; Klotz v. City of New York, 9 A.D.3d 392, 781 N.Y.S.2d 357). Since the subject accident occurred before September 14, 2003, the code does not apply, and the defendants can only be held liable if they undertook snow removal efforts which made the naturally-occurring conditions more hazardous (see Reynolds v. Gendron, 28 A.D.3d 735, 812 N.Y.S.2d 898; Friedman v. Stauber, 18 A.D.3d 606, 795 N.Y.S.2d 612).

See, also, Klotz v. City of New York, 9 A.D.3d 392, 393-394 (2nd Dept. 2004); Negron v. G.R.A. Realty, Inc., 307 A.D.2d 282 (2nd Dept. 2003); Archer v. City of New York, 300 A.D.2d 518 (2nd Dept. 2002); Shivers v. Price Bottom Stores, Inc., 289 A.D.2d 389 (2nd Dept. 2001); Booth v. City of New York, 272 A.D.2d 357 (2nd Dept. 2000). Accordingly, that prong of defendant Ferrara's motion for summary judgment dismissing the complaint is granted, and the complaint and the cross claims hereby are dismissed as against him. Based upon the foregoing, the remaining branch of defendant Ferrara's motion seeking summary judgment in its favor against defendant Deli Grocery on the issue of contractual indemnification need not be considered and is denied as moot.

2. Defendant Deli Grocery's cross motion for summary judgment

It also is well settled that a "lessee of property abutting a public sidewalk is under no duty to pedestrians to remove snow and ice that naturally accumulates upon the sidewalk in front of the premises unless a statute specifically imposes tort liability for failing to do so." Klotz v. City of New York, 9 A.D.3d 392, 393-394 (2nd Dept. 2004); Archer v. City of New York, 300 A.D.2d 518 (2nd Dept. 2002); Booth v. City of New York, 272 A.D.2d 357 (2nd Dept. 2000). Liability will result only if, inter alia, it is shown that negligent or improper shoveling made the sidewalk more hazardous. Klotz v. City of New York, *supra*; Muro v. Romano, 301 A.D.2d 582 (2nd 2 Dept. 2003). To prevail on its motion for summary judgment, defendant Deli Grocery thus must establish its prima facie entitlement to summary judgment by submitting evidence which demonstrates either that it undertook no snow removal efforts in the area where the plaintiff fell or did not otherwise exacerbate

the snow and ice condition at that location. Archer v. City of New York, 300 A.D.2d 518 (2nd Dept. 2002). Here, the deposition testimony of Deli Grocery's employees establishes that, as a matter of custom and practice, Deli Grocery routinely undertook to remove snow at the location at issue. The issue therefore is whether the alleged snow removal efforts on the date at issue made the sidewalk more hazardous. See, Crudo v. City of New York, 42 A.D.3d 479 (2nd Dept. 2007); Shivers v. Price Bottom Stores, Inc., *supra*.

Defendant Deli Grocery submits the deposition testimony of plaintiff, who testified that she slipped and fell at 6:30 a.m. as she exited a deli at the corner of Bleeker and Forest Streets, although she had not observed any snow, ice or debris on the sidewalk when she entered the store. She further testified that the fall occurred when she took two steps out of the store and one step to the left and then slipped on a thin piece of ice, which she only observed after she fell. Also submitted were the deposition testimony of its employees, Ali Salem, who testified that he supervises the store, and that, when it snowed, he or other Deli Grocery employees would shovel snow and throw salt down on the sidewalk adjacent to Forest Avenue; and Mohammed Morchid, who testified that in March 2003, he worked the 12 a.m. to 12 p.m. shift at the store, and would clean with a shovel when there was snow on the sidewalk and put down salt after shoveling. Although Morchid first testified that he shoveled on the date of plaintiff's accident, he subsequently testified that he could not remember if he shoveled on the day in question and could not recall the condition of the sidewalk. Defendant Deli Grocery also submitted the Local Climatic Data Report issued by the National Climatic Data Center for La Guardia Airport that showed that on March 8, 2003, there was no precipitation and the temperature was 33 degrees Fahrenheit at 4 a.m. and 32 degrees to 7 a.m.; and that the last precipitation occurred on March 6, 2003, and on March 7, 2003, the maximum temperature was 33 degrees Fahrenheit. Based upon this evidence, Deli Grocery concludes that it did not create the alleged icy condition.

Without consideration of any opposing papers, defendant Deli Grocery's own submissions raise issues of fact as to who, if anyone, performed snow and ice removal in front of the subject premises, whether such removal was performed around the time of plaintiff's fall and whether such removal was performed negligently, thereby increasing the hazard inherent in the natural accumulation. See, Amendolace v. City of New York, 2 A.D.3d 659 (2nd Dept. 2003). Accordingly, defendant Deli Grocery's cross motion for summary judgment is denied.

Dated: July 14, 2008

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J.S.C.