

Rivera v G.C. Plus Inc.
2011 NY Slip Op 33992(U)
October 6, 2011
Supreme Court, Bronx County
Docket Number: 304429/09
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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LUZ RIVERA,

Index No. 304429/09

Plaintiff,

Submission Date 7/27/11

-against -

G.C. PLUS INC., VORNADO REALTY TRUST,
VORNADO REALTY L.P., VNO BRUCKNER
PLAZA LLC,

DECISION and ORDER

Defendants.

Present:
Hon. SHARON A.M. AARONS

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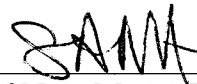
Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause and Exhibits Annexed-----	1
Answering Affidavit and Exhibits-----	2
Reply Affidavit and Exhibits-----	3

Upon the foregoing papers and due deliberation, the Decision and Order on this motion is as follows:

Defendant G.C. Plus Inc.'s motion for an order dismissing the complaint and cross-claims against it pursuant to CPLR § 3212 and defendants Vornado Realty Trust, Vornado Realty L.P. and VNO Bruckner Plaza, LLC ("Vornado defendants") cross-motion for the same relief and for summary judgment as to the indemnification are both decided in accordance with the annexed decision and order of the same date.

Dated: October 6, 2011



SHARON A. M. AARONS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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LUZ RIVERA,

Plaintiff,

-against -

G.C. PLUS INC., VORNADO REALTY TRUST,
VORNADO REALTY L.P., VNO BRUCKNER
PLAZA LLC,

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DECISION and ORDER

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Upon the foregoing papers and due deliberation, the Decision and Order on this motion is as follows:

Defendant G.C. Plus Inc. (“GC Plus”) moved for an order dismissing the complaint and cross-claims against it pursuant to CPLR § 3212. Defendants Vornado Realty Trust, Vornado Realty L.P. and VNO Bruckner Plaza, LLC (“Vornado defendants”) cross-moved for the same relief and for summary judgment as to the indemnification. The court accepts the Vornado defendants’ explanation for the late filing of the cross-motion and excuses the delay. GC Plus’s motion is granted only to the extent discussed below. Vornado defendants’ cross-motion is granted only to the extent discussed below. Vornado defendants’ motion for summary judgment on the issue of indemnification is denied.

This action stems from injuries plaintiff sustained on December 23, 2008, when she slipped and fell on ice in the parking lot at the Bruckner Plaza Shopping Center (“the subject property”). Plaintiff testified that she fell on black ice that was covered with dirty ice.

In support of its motion GC Plus submitted a copy of the pleadings; deposition transcripts of the plaintiff, Joseph Lizardi, owner of GC Plus, David Clark, a witness for GC Plus, and Pasquale Natale, a witness for the Vornado defendants. In support of their motion, the Vornado defendants submitted the same

exhibits listed above; an affidavit by James Curtain, Vice President of Risk Management for Vornado Realty Trust; contract between Vornado Property and GC Plus and an invoice from GC Plus to Vornado Realty Trust.

The witnesses for both GC Plus and the Vornado defendants testified that there was a contract between them whereby GC Plus would remove snow from the subject property, after two inches of snow fall between 11:00 p.m. and 8:000 a.m. Mr. Natale testified that someone from Vornado would inspect after GC Plus removed the snow. GC Plus removed snow and salted the subject property on December 21, 2008, and returned the next day to do more salting.

Defendants Vornado Realty Trust and Vornado Realty L.P. submitted an affidavit from James Curtain, Vice President of Risk Management for Vornado Realty Trust who stated that Vornado Realty Trust and Vornado Realty L.P. did not own or manage the subject property. The property is owned by VNO Bruckner Plaza, LLC. Vornado Realty Trust is a general partner of Vornado Realty L.P. which is a member of VNO Bruckner Plaza, LLC. A member of a limited liability company is not liable for the obligations of the company solely by reason of being such a member, except where the action is to enforce the members rights. Limited Liability Company Law §§ 609, 610. *Matias v. Mondo Props. LLC*, 43 A.D.3d 367, 841 N.Y.S.2d 279 (1st Dept. 2007). As such, Vornado Realty L.P. is not the property party to this action. On the other hand, there is a question of fact as to Vornado Realty Trust involvement with the property in light of the invoice from GC Plus to Vornado Realty Trust regarding the snow removal at the subject property.

A defendant moving for summary judgment in a slip and fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury. *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 856 N.Y.S.2d 573 (1st Dept. 2008). In order to establish liability for a hazardous condition, a plaintiff must demonstrate that the owner created, or had

actual or constructive notice of the dangerous condition which precipitated the injury. *Id.*, at 50 A.D.3d 500. Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition. *Ross v. Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 927 N.Y.S.2d 49 (1st Dept. 2011). Here, Mr. Natale testified that after GC Plus performed their snow removal, an employee of Vornado would do an inspection. Hence, Vornado Realty Trust and VNO Bruckner Plaza, LLC had either actual or constructive notice of the condition of the parking lot.

Generally, a snow removal contractor's contractual obligation, standing alone, will not give rise to tort liability in favor of third parties unless: (1) the snow removal contractor has entirely displaced the owner's duty to maintain the premises safely; (2) the plaintiff detrimentally relied on the continued performance of the snow removal contractor's duties; or (3) the snow removal contractor, in failing to exercise reasonable care in the performance of its duties, launched a force or instrument of harm. *Castro v. Maple Run Condominium Assn.*, 41 A.D.3d 412, 837 N.Y.S.2d 729 (2nd Dept. 2007). Here, the snow removal contract did not displace the owner's duty to maintain the premises safely as the snow removal contract was not an exclusive and comprehensive contract intended to displace the owner duty of care. The owner did not relinquish its right to inspect the property after the snow removal. *Lehman v. North Greenwich Landscaping, LLC*, 16 N.Y.3d 747, 942 N.E.2d 1046, 917 N.Y.S.2d 621 (2011). Plaintiff did not detrimentally rely on the contract as she had no notice of it. *Castro*, 41 A.D.3d 413. Furthermore, there is no evidence that GC Plus launched a force or instrument of harm and thus created or exacerbated a hazardous condition since there is nothing in the record establishing that the icy condition existed when the contractor remove the snow from the parking lot and salted a day or two before the plaintiff's accident. *Id.*

A landowner, may not delegate its duty to keep its premises in a safe condition with regard to third

parties. Rather, its recourse is to secure an indemnification agreement from the party to whom it delegates specific responsibilities, and allocate the risk of liability to third parties by the procurement of liability insurance for their mutual benefit. *Hughey v. RHM-88, LLC*, 77 A.D.3d 520, 912 N.Y.S.2d 175 (1st Dept.2010). When one sophisticated commercial entity agrees to indemnify another through the employment of insurance, that agreement is enforceable. *Morel v. City of New York*, 192 A.D.2d 428, 597 N.Y.S.2d 8 (1st Dept.1993). Here, GC Plus procured liability insurance as a term of the contract with the Vornado defendants. GC Plus raised a triable issue of fact as to whether a contract was in effect at the time of plaintiff's accident.

Defendant GC Plus's motion for summary judgment for dismissal of the complaint only is granted. Its motion for dismissal of the cross-motions against it is for indemnification is denied. Vornado defendants' motion for summary judgment on the issue of indemnification is denied. It is hereby,


ORDERED, that all causes of action in the complaint against defendant G.C. Plus are dismissed; it is further

ORDERED, that the cross-claims by the Vornado defendants against G.C. Plus as to indemnification remains; it is further

ORDERED, that all causes of action and cross-claims against Vornado Realty L.P are dismissed; and it is further

ORDERED, that Vornado defendants serve a copy of this order with notice of entry on all parties within thirty (30) days of the date of this order.

Dated: October 6, 2011



SHARON A. M. AARONS, J.S.C.