COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA

PATTI C. LLOYD, Plaintiff	:	NO. CV-19-0709
vs.	:	CIVIL ACTION - LAW
ECK FAMILY LIMITED PARTNERSHIP NO. 2 and E F LANDSCAPING AND BUILDING MAINTENANCE, LLC, Defendants	:	*Motion for Summary Judgment*

ORDER

AND NOW, having reviewed Defendant Eck Family Limited Partnership No. 2's Motion for Summary Judgment, filed April 27, 2020, and the relevant briefs in support and opposition, the Court hereby issues the following ORDER.[1]

Background

On November 24, 2018, Plaintiff slipped and fell on a patch of black ice when she stepped onto a sidewalk from the parking lot in front of a Dollar General store where she claims she was a business invitee. As a result of her fall, Plaintiff alleges that she sustained injuries including abrasions, contusions, and a torn left rotator cuff. She seeks both economic and non-economic damages.

Plaintiff filed her Complaint on May 1, 2019, which contains two counts of negligence, one against each of the above Defendants. Defendant Eck Family Limited Partnership No. 2 ("Eck Family") filed a cross-claim against Defendant E F Landscaping and Building Maintenance ("E F Landscaping") on May 24, 2019, which was later withdrawn. In her Complaint, Plaintiff alleges that Defendant Eck Family maintained control and was responsible for the maintenance of the premises on which she fell. She

[1] At the request of the parties, the argument scheduled for July 2, 2020 on the Motion for Summary Judgment has been removed from the calendar and this ruling is limited to the parties' filings.

further alleges that Defendant E F Landscaping had an oral contract with Defendant Eck Family to maintain the sidewalk on which she fell, which included snow and ice removal. Defendant E F Landscaping admitted that it is contracted to perform snow and ice removal for the sidewalks on the property. The discovery deadline was June 19, 2020.[2] Defendant Eck Family now files a Motion for Summary Judgment to which both Plaintiff and E F Landscaping responded. Moving Defendant argues that neither the Plaintiff nor Co-Defendant identified any evidence that proves it had a duty to maintain the sidewalk on which Plaintiff fell.

Standard of Review

Pursuant to Pennsylvania Rule of Civil Procedure 1035.2, summary judgment may be entered as a matter of law when:

1. There is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
2. After the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.[3]

"In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the

[2] This Motion for Summary Judgment was filed prior to the discovery deadline. However, "[s]ummary judgment may be entered prior to the completion of discovery in matters where additional discovery would not aid in the establishment of any material fact." *Manzetti v. Mercy Hosp. of Pittsburgh*, 776 A.2d 938, 950–51 (Pa. 2001). No party here has argued that additional discovery would aid them in establishing their position on summary judgment. Thus, this matter is ripe for decision.
[3] Pa.R.C.P. 1035.2.

existence of a genuine issue of material fact must be resolved against the moving party."[4] If the right to summary judgment is not clear and free from doubt, then the court cannot grant such judgment.[5]

Analysis

It is well settled that to establish a *prima facie* negligence claim, the Plaintiff must prove duty, breach, causation, and damages.[6] The issue here is one of duty; specifically, whether Defendant Eck Family had a duty to ensure that the sidewalk on which the Plaintiff fell was clear of any impediments.

In its Motion for Summary Judgment, Defendant Eck Family argues that the testimony of Keith Eck establishes that this duty fell solely on Defendant E F Landscaping. Mr. Eck is a part owner of Eck Family and the managing general partner of E F Landscaping. The following line of questioning occurred during Mr. Eck's deposition:

> Q Okay. So another entity was responsible for snow removal of the parking lot but your entity and in particular the EF Landscaping and Building Maintenance, LLC, was responsible for maintaining the sidewalk at the Dollar General?
>
> A Yes.[7]
>
> Q It's my understanding, though, that E F Landscaping had the contractual relationship with Dollar General to make sure that the sidewalk was safe is that right?
>
> A Yes.[8]

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[4] *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001).
[5] *Marks v. Tasman*, 589 A.2d 205, 206 (Pa. 1991) ("[a]n entry of summary judgment may be granted only in cases where the right is clear and free from doubt").
[6] *Wittrien v. Burkholder*, 965 A.2d 1229, 1232 (Pa. Super. 2009) ("[i]n any negligence case, the plaintiff must prove duty, breach, causation and damages").
[7] Deposition of Keith Eck at page 14, lines 17-22.
[8] Deposition of Keith Eck at page 22, lines 10-14.

Eck Family argues that based on the above testimony, there is no genuine issue of material fact that Defendant E F Landscaping is the sole entity that had the duty to remove ice from the sidewalk. Both Defendant E F Landscaping and Plaintiff argue that the entry of summary judgment based solely on the above testimony violates the *Nanty-Glo* rule.[9] In the alternative, they assert that Defendant Eck Family nevertheless retained control over the sidewalk and therefore also owed some duty to the Plaintiff.

a. *Nanty-Glo* Rule

It is well settled that Courts in Pennsylvania are bound to adhere to the rule set forth in *Borough of Nanty-Glo v. American Surety Co.*, which holds that when a party moves for summary judgment, it cannot rely solely on its own depositions or those of its witnesses to establish the non-existence of a genuine issue of material fact.[10] The Supreme Court of Pennsylvania has held that depositions "of the moving party or [its] witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the factfinder."[11]

Keith Eck is the managing general partner of Eck Family. Other than his testimony, there is no evidence to support that a contract existed between Eck Family and E F Landscaping for snow removal. To the contrary, there is evidence of a lease between Dollar General and Defendant Eck Family that shows that Eck Family held the duty to remove snow and ice from the sidewalks. Mr. Eck clearly has an interest in

[9] "However clear and indisputable may be the proof when it depends upon oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts . . . ." *Borough of Nanty-Glo v. American Surety Co. of New York*, 163 A. 523, 524 (Pa. 1932).
[10] *Id. See also Dearmitt v. N.Y. Life Ins. Co.*, 73 A.3d 578, 595 (Pa. Super. 2013) (holding that "courts are bound to adhere to the rule of [*Nanty-Glo*] which holds that a court may not summarily enter a judgment where the evidence depends upon oral testimony"); *Resolution Tr. Corp. v. Urban Redevelopment Auth. of Pittsburgh*, 638 A.2d 972, 975 (Pa. 1994).

protecting the company in which he is part owner. While it can be argued that Mr. Eck also has an interest in protecting E F Landscaping since he is the managing general partner, the Court could find no exception to the *Nanty-Glo* rule that would apply to these circumstances and the parties have pointed to none. Even though it is uncontradicted that an oral agreement existed between Eck Family and E F Landscaping for snow removal, this remains a credibility issue to be decided by the jury.

b. Reserved Control Exception

Plaintiff and Defendant E F Landscaping further argue that since Eck Family retained control of the sidewalk, it also owed a duty to the Plaintiff. Generally, a landlord out of possession is not liable for injuries to third parties occurring on the leased premises because the landlord has no duty to such people.[12] There are, however, several exceptions to this rule, one of them being the "reserved control exception."[13] This exception applies when a landlord has "reserved control over a defective portion of the leased premises or over a portion of the leased premises which is necessary to the safe use of the property" including, but not limited to, common areas such as shared steps or hallways.[14] Therefore, if a landlord retains control of a part of the leased premises and could have discovered a dangerous condition and the risk involved by

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[11] *Penn Ctr. House, Inc. v. Hoffman*, 553 A.2d 900, 903 (Pa. 1989) (emphasis added).
[12] *Jones v. Levin*, 940 A.2d 451, 454 (Pa. Super. 2007) (holding that liability is premised primarily on possession and control, and not merely on ownership).
[13] *Id.*
[14] *Id. See also* Restatement (Second) of Torts § 361 ("[a] possessor of land who leases a part thereof and retains in his own control any other part which is necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care (a) could have discovered the condition and the risk involved, and (b) could have made the condition safe").

exercising reasonable care, the landlord will be held liable unless a contrary provision exists in the lease.[15]

The lease between Dollar General and Defendant Eck Family states that the "Landlord shall at all times have the exclusive control and management of the Common Areas . . . . Landlord shall maintain or cause to be maintained, in keeping with industry-standard practices for similar shopping centers, the Common Areas in clean condition and good repair, including, but not limited to: (i) maintaining all . . . sidewalks . . . in good condition and repair (including . . . removing any ice, snow, or rubbish therefrom."[16] Defendant Eck Family's insurance company log notes regarding this incident state that "the landlord, our insured, is responsible for snow/ice removal."[17] It is clear from these documents that Eck Family may have in fact owed a duty to the Plaintiff. Whether there was a duty and whether that duty was breached remains a question for the jury.

Conclusion

For the reasons set forth above, the Court finds that a genuine issue of material fact exists as to whether Defendant Eck Family owed a duty to the Plaintiff and whether that duty was breached. Defendant's Motion for Summary Judgment is therefore **DENIED**.

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[15] *Leary v. Lawrence Sales Corp.*, 275 A.2d 32, 34 (Pa. 1971) ("it has long been established as a principle of landlord-tenant law that where the owner of real estate leases various parts thereof to several tenants, but retains possession and control of the common passage-ways and aisles which are to be used by business invitees of the various tenants, the obligation of keeping the common aisles safe for the business invitees is imposed upon the landlord and not upon the tenants, in the absence of a contrary provision in the lease or leases"); *Smith v. M.P.W. Realty Co.*, 225 A.2d 227, 229 (Pa. 1967) ("where the landlord retains control of a part of the leased premises, which is necessary to the safe use of the leased portion, he is liable to the lessee and others lawfully on the premises for physical harm caused by a dangerous condition existing upon that part over which he retains control, if by the exercise of reasonable care he could have discovered the condition and the risk involved, and made the condition safe").

IT IS SO ORDERED this 9th day of July 2020.

BY THE COURT,

_____
Eric R. Linhardt, Judge

ERL/ads
cc: Robert Elion, Esquire
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[16] *See* Defendant, E F Landscaping Exhibit D at Page 12, Section 7.1 and Page 13, Section 7.2.
[17] *See* Defendant, E F Landscaping, Exhibit E.