CATHERINE A. ROBERTS and JON A. ROBERTS, wife and husband, Plaintiffs vs. CROWN AMERICAN CORPORATION and CROWN AMERICAN FINANCIAL PARTNERSHIP, Defendants vs. D. L. SHINDLEDECKER EARTH MOVERS, INC., SO-FRO FABRICS, INC., t/d/b/a SO-FRO FABRICS and/or HOUSE OF FABRICS AND HOUSE OF FABRICS, INC., Additional Defendants FRANKLIN COUNTY BRANCH CIVIL ACTION A.D. 1993 - 484

Roberts v. Crown American v. Shindledecker Earth Movers et al.

Summary judgment - slip and fall - duty of defendant towards plaintiff - worker's compensation immunity for plaintiff's employer

1. Summary judgment must be granted if, after completion of discovery, plaintiff has failed to produce evidence of facts essential to the cause of action. Failure to adduce such evidence establishes that there is no genuine issue of material fact.

2. In a negligence slip and fall case, plaintiff must produce sufficient evidence to show that defendant had a duty towards her.

3. Where plaintiff is a store employee who fell on snow and ice while taking out trash to the dumpster which belonged to the store, but was located on the property of the mall, the mall may have a duty towards plaintiff, even though the store was instructed to remove the dumpster; such duty may exist if the mall did not provide an alternative method of trash removal.

4. No summary judgment will be granted to plaintiff's employer on the basis of worker's compensation immunity, where the contract between employer-store and defendant-mall owner provides for indemnification by the store in case of personal injury on mall property.

Robert F. Claraval, Esquire, Counsel for plaintiffs
Jeffery D. Wright, Esquire and Stacy L. Wilson, Esquire, Counsel for Defendant Crown American et al.
Christian S. Erb, Jr., Esquire, Counsel for Additional Defendants

OPINION AND ORDER

Walker, P.J., December 30, 1997:

Factual and Procedural Background

This suit is based on an incident at the Chambersburg Mall parking lot, where Plaintiff Catherine Roberts fell. She was employed as a clerk for So-Fro Fabrics in the Chambersburg Mall from September 1992, when the store opened, until her fall on February 23, 1993. On that day, she worked the 4.00 p.m. to 9.30 p.m. shift. Shortly before closing, at approximately 9.25 p.m., plaintiff, as part of her duties, went outside to throw out a trash bag in

the dumpster. This dumpster was located on the mall parking lot, approximately 10 to 15 feet off the sidewalk. On that particular day, the conditions were icy. The sidewalk had been cleared, but the portion of the parking lot where the dumpster was located was covered with ice and snow. Plaintiff carefully went over to the dumpster, but when she lifted the lid, her leg gave out from underneath her and she fell, sustaining injuries.

Plaintiff filed a complaint, alleging negligence on the part of Defendant Crown American, the owner of the mall. Crown American joined Shindledecker Earth Movers, the contractor for the snow removal, So-Fro Fabrics, plaintiff's employer, and House of Fabrics as additional defendants. Two motions for summary judgment were filed. One was filed by Defendant Crown American, arguing that it did not have a duty towards plaintiff. Plaintiff's opposition to the motion for summary judgment was joined by additional Defendant Shindledecker Earth Movers, Inc. Additional Defendants So-Fro Fabrics, Inc. and House of Fabrics, Inc., also filed a motion for summary judgment. So-Fro Fabrics' motion was based on the argument that it paid worker's compensation to plaintiff, which was the plaintiff's exclusive remedy against it. House of Fabrics argues that it is not related to this suit in any way, and that it is entitled to be removed from the suit. Both Defendant Crown American and additional Defendant Shindledecker Earth Movers oppose their motion for summary judgment.

This court heard argument on both motions on October 2, 1997. For the reasons set forth below, the court hereby denies both the motions for summary judgment by Crown America and So-Fro Fabrics, and grants summary judgment to House of Fabrics.

Discussion

1. Crown American's motion for summary judgment

When a motion for summary judgment has been filed, the court must review the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Ertel v. Patriot-News Co.*, 544 Pa. 93, 98-99, 674 A.2d 1038 (1996). Summary judgment may be granted only where the right is clear and free of

doubt. *Ducko v. Chrysler Motor Corp.*, 433 Pa. Super. 47, 639 A.2d 1204 (1994).

A motion for summary judgment may be granted if, after the completion of discovery relevant to the motion, the plaintiff has failed to produce evidence of facts essential to the cause of action which in a jury trial would require the issues to be submitted to a jury. *Pa.R.C.P. 1035.2(2)*. The Pennsylvania Supreme Court has stated that the "mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial." *Ertel*, at 100. Thus, the "non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to summary judgment." *Ertel*, at 101-102.

In order to establish a prima facie case for negligence by Defendant Crown American, plaintiff must show (1) that defendant had a duty toward plaintiff; (2) a breach of that duty; (3) a causal connection between the breach of duty and plaintiff's injuries; and (4) damages. *Orner v. Mallick*, 515 Pa. 132, 135, 527 A.2d 521 (1987). The main issue for purposes of this motion for summary judgment is the question whether Defendant Crown American owed a duty to plaintiff. In order to defeat this motion, plaintiff must produce evidence to show that Crown American had such duty towards her.

The deposition testimony shows that there are only two ways for the tenant stores in the mall to remove their trash. The mall required the anchor stores to have their own dumpsters on the mall property. (Notes of deposition testimony of Michael McCleary, at 18-19). The other stores were supposed to participate in the trash pick-up policy, whereby the mall maintenance crew would drive through the corridors at certain times and pick up the trash which was put there by the stores. (N.T. of McCleary, at 16). It seems clear, from the evidence on the record, that Crown American, as the mall owner, had a duty to provide trash disposal to its tenant stores in one of those two ways. It seems equally clear that the mall would have a duty to provide a clear and safe path to the dumpsters belonging to the stores which disposed of their trash this way. However, if Crown American would provide for a different method of trash removal, such as the mall trash pick up

method, it would not have a duty to provide a safe path to a dumpster on its property.

Plaintiff in this case has shown that her employer, one of the mall's tenants, had a dumpster on the mall property, which was used for purposes of trash disposal. There is not sufficient evidence on the record to show that Crown American did provide an alternative to So-Fro Fabric's trash removal. While Crown American contends that So-Fro Fabrics was not an anchor store, and thus was required to use the mall trash pick-up method, there is no evidence on the record to show that this trash pick-up service was ever provided to So-Fro Fabrics. There appears to be a genuine issue of material fact regarding any alternative trash disposal available to So-Fro Fabrics. In the absence of undisputed evidence showing that the mall fulfilled its duty by providing an alternative to disposal of So-Fro Fabric's trash other than in its dumpster, this court finds that Crown American may have had a duty to ensure a safe passage to So-Fro Fabric's dumpster. Therefore, this court will resolve the material issue of the existence of Crown American's duty in plaintiff's favor.

Crown American, in its brief in support of the motion for summary judgment, also argues that no duty existed towards plaintiff, because it was relieved of such duty since the dangerous condition on its property (the snow and ice) was known and obvious to the plaintiff.

Under the Restatement of Torts, a "possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge and obviousness." *Restatement (Second) Torts § 343A (1965)*. Crown American refers to a case decided by the Pennsylvania Supreme Court, which held that because the plaintiff was aware of the ice present on the defendants' parking lot before traversing it, the defendants were alleviated of any duty towards the plaintiff. *Carrender v. Fitterer*, 503 Pa. 178, 186, 469 A.2d 120 (1983). However, the Supreme Court also noted that there were other parking spaces available for plaintiff to park in, which were not covered by ice. Thus, it was reasonable for defendant to expect that any invitees on their property would recognize the danger and choose to park in another, clear spot. *Carrender*, at 186.

In the underlying case, on the other hand, it is a disputed question whether an alternative method of trash removal, which would obviate the need for plaintiff to go to the dumpster, was available to So-Fro Fabrics and plaintiff. Since the existence of an alternative path is a material fact under the law as stated in *Carrender*, this court will deny Defendant Crown American's motion for summary judgment at this time.

2. So-Fro Fabrics's motion for summary judgment

Additional Defendant So-Fro Fabrics is plaintiff's employer, and a tenant of Defendant Crown American in the Chambersburg Mall. In the addition to the grounds raised by Defendant Crown American, which have been discussed and disposed of above, So-Fro Fabrics argues that summary judgment should be granted in its favor because it is liable to plaintiff under the Worker's Compensation Act, which is plaintiff's exclusive remedy against her employer. Defendant Crown American argues that summary judgment should be denied on the basis of a provision in the lease agreement, which provides in relevant part:

> Section 10.01 Indemnification and waiver of claim
>
> (a) Tenant will defend and, except to the extent caused by the negligence of Landlord, . . . will indemnify Landlord and Agent and save them harmless from and against any and all claims, actions, damages, liability and expense . . . in connection with . . . personal injury . . . arising from, related to, or in connection with the occupancy or use by Tenant of the demised premises or any part of Landlord's property . . . or occasioned wholly or in part by act or omission of Tenant, its contractors, subcontractors, subtenants, licensees or concessionaires, or its respective agents, servants, or employees.

Under the Worker's Compensation Act, an employer is generally immune from suit brought by an employee for an injury occurring at work. *77 Pa.C.S.A. § 481(a)*. However, an exception is made where the employer has made an express agreement to indemnify a third party for damages. *77 Pa.C.S.A. § 481(b)*. All that is necessary by the language of the statute is a written agreement where the employer agrees to be liable to a third party. *Szysmanski-Gallagher v. Chestnut Realty*, 409 Pa. Super. 323, 326-327, 597 A.2d 1225 (1991). In that case, an employee of a credit union fell on

the stairs connecting the credit union to a unit leased to a realty company. She sued the realtor, who joined her employer, the credit union, as an additional defendant. The lease agreement between the realtor and credit union provided in relevant part that the lessee "agrees to be responsible for and to relieve lessor from all liability by reason of any damage or injury to any person or thing which may arise from . . . the use . . . of any stairways . . ., whether such damage, injury, use, misuse, or abuse be caused by or result from the negligence of lessor, his servants or agents or any other person or persons whatever." *Szysmanski*, at 331. The Superior Court held that this agreement contained express language of indemnity, and therefore that summary judgment in favor of the employer had been improperly granted. *Id*, at 332.

Similarly, in the underlying case, there is language in the lease provision between Crown American and So-Fro Fabrics which contains express language of indemnity. The lease agreement specifically requires So-Fro Fabrics to indemnify Crown American for any claims of personal injury arising from So-Fro Fabric's use of Crown American's property, to the extent that the injury involved is not caused by the negligence of Crown American. There is a genuine issue of material fact as to the negligence of Crown American towards plaintiff, and therefore there is a possibility that So-Fro Fabrics may be liable for indemnification to Crown American for damages and expenses to the extent that Crown American is found to be not negligent. Therefore, this court denies So-Fro Fabric's motion for summary judgment.

3. House of Fabric's motion for summary judgment

Additional Defendant House of Fabrics moves for summary judgment on the basis that it has no connection to the suit, since it was neither a party to the lease with Crown American, nor plaintiff's employer. There appears to be no connection of House of Fabrics to this case, and Defendant Crown American has not provided the court with any grounds to show why House of Fabrics should remain a party in this suit. This court therefore grants summary judgment in favor of Additional Defendant House of Fabrics.

ORDER OF COURT

December 30, 1997, after having reviewed the parties briefs' and supplemental briefs, this court enters the following order:

1. Because this court finds that a genuine issue of material fact exists as to Crown American's duty to the plaintiff, Defendant Crown American's motion for summary judgment is denied.

2. Because this court finds that a genuine issue of material fact exists as to indemnity of additional Defendant So-Fro Fabrics to Defendant Crown American, So-Fro Fabric's motion for summary judgment is denied.

3. Because this court finds that House of Fabrics has no connection to this suit, additional Defendant House of Fabric's motion for summary judgment is granted.