

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25411
W/prt

_____AD3d_____

Argued - November 16, 2009

PETER B. SKELOS, J.P.
RANDALL T. ENG
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2009-01540

DECISION & ORDER

Eileen Schultz, plaintiff-respondent, v Bridgeport & Port Jefferson Steamboat Company, defendant-respondent, S & S Complete Landscaping Corp., appellant.

(Index No. 19953/04)

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville, N.Y. (Aimee D. Drexler of counsel), for appellant.

Siben and Siben LLP, Bay Shore, N.Y. (Alan G. Faber of counsel), for plaintiff-respondent.

Lennon, Murphy & Lennon, LLC, New York, N.Y. (Kevin J. Lennon of counsel), for defendant-respondent.

In a consolidated action to recover damages for personal injuries, the defendant S & S Complete Landscaping Corp. appeals from an order of the Supreme Court, Suffolk County (Costello, J.), dated January 15, 2009, which denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

ORDERED that the order is reversed, on the law, with one bill of costs, and the appellant's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted.

December 15, 2009

Page 1.

SCHULTZ v BRIDGEPORT & PORT JEFFERSON STEAMBOAT COMPANY

The plaintiff was injured when she slipped and fell on a patch of ice in the parking lot of a ferry terminal operated by the defendant Bridgeport & Port Jefferson Steamboat Company (hereinafter Bridgeport). The plaintiff subsequently commenced an action against Bridgeport, among others, and thereafter commenced a separate action against the defendant S & S Complete Landscaping Corp. (hereinafter S & S), Bridgeport's snow removal contractor. The two actions were consolidated, and Bridgeport asserted cross claims against S & S sounding in common-law negligence, contribution, and contractual indemnification.

“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, in failing to exercise reasonable care in the performance of its duties, launched a force or instrument of harm; (2) the plaintiff detrimentally relied on the continued performance of the snow removal contractor's duties; or (3) the snow removal contractor has entirely displaced the owner's duty to maintain the premises safely” (*Castro v Maple Run Condominium Assn.*, 41 AD3d 412, 413; *see Espinal v Melville Snow Contrs. Inc.*, 98 NY2d 136, 140).

The Supreme Court should have granted that branch of the motion of S & S which was for summary judgment dismissing the complaint insofar as asserted against it. S & S made a prima facie showing that its contract to provide snow removal services was not comprehensive and exclusive (*see Lattimore v First Mineola Co.*, 60 AD3d 639, 642-643; *Linarello v Colin Service Systems, Inc.*, 31 AD3d 396). Moreover, S & S made a prima facie showing that the plaintiff did not detrimentally rely on the continued performance of its alleged contractual duties (*see Wheaton v East End Commons Assoc.*, 50 AD3d 675; *Castro v Maple Run Condominium Assn.*, 41 AD3d at 413; *Bugiada v Iko*, 274 AD2d 368, 369) and that it did not launch a force or instrument of harm which created or exacerbated a hazardous condition (*see Murphy v M.B. Real Estate Dev. Corp.*, 280 AD2d 457; *Pavlovich v Wade Assocs.*, 274 AD2d 382). In opposition, the plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

The Supreme Court also should have granted that branch of the motion of S & S which was for summary judgment dismissing the cross claims. S & S established, prima facie, that it was entitled to judgment as a matter of law dismissing the common-law indemnification claim by demonstrating that the plaintiff's accident was not due solely to its negligent performance or nonperformance of an act solely within its province (*see Roach v AVR Realty Co., LLC.*, 41 AD3d 821, 824; *Murphy v M.B. Real Estate Dev. Corp.*, 280 AD2d 457; *Oppenheim v One Sch. St. Prof'l Corp.*, 263 AD2d 472, 473; *Keshavarz v Murphy*, 242 AD2d 680). In opposition, Bridgeport failed to raise a triable issue of fact. Furthermore, in opposition to the prima facie showing by S & S that it was entitled to summary judgment dismissing the contribution claim, Bridgeport failed to demonstrate either that S & S owed Bridgeport a duty of care independent of its contractual obligations, or that S & S owed the plaintiff a duty of care (*see Wheaton v East End Commons Assoc.*, 50 AD3d at 678; *Roach v AVR Realty Co., LLC.*, 41 AD3d at 824; *Baratta v Home Depot USA*, 303 AD2d 434, 435). The Supreme Court also should have granted that branch of S & S's motion which was for summary judgment dismissing the contractual indemnification claim, since the agreement between Bridgeport and S & S contained no express indemnification provisions, and an indemnification clause could not be implied from the language of that agreement (*see generally*

Hooper Assoc. v AGS Computers, 74 NY2d 487, 491-492; *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744).

SKELOS, J.P., ENG, BELEN and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court