

**Lanoce v Kempton**

2001 NY Slip Op 30063(U)

August 15, 2001

Supreme Court, Suffolk County

Docket Number: 18337/1994

Judge: Donald Kitson

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SUPREME COURT - STATE OF NEW YORK  
PART 29 SUFFOLK COUNTY

Present:

Hon DONALD KITSON  
Justice

MOTION DATE: 05/10/01  
05/28/01  
SUBMIT DATE: 06/14/01  
MOTION NO.: 006 MOT D  
007 MOT D  
008 MD

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EDWARD LANOCE,

Plaintiff,

- against -

MAURICE KEMPTON, HENRY J. PASE JR. a/ka/a,  
HENRY J. PASE, MAURICE F. BEHRENS, JR.,  
CITIBANK, N.A., and TEMCO BUILDING  
MAINTENANCE INC.,

Defendants.

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\_\_\_\_\_  
TEMCO BUILDING MAINTENANCE, INC.,

Third-party plaintiff,

- against -

LONG ISLAND SNOW REMOVAL,

Third-Party Defendant.

The Court in its deliberations herein has considered:

1. Notice of Motion and supporting papers of third-party defendant;
2. Notice of Motion and supporting papers of defendant, TEMCO BUILDING MAINTENANCE, INC.
3. Notice of Motion and supporting papers of defendants, MAURICE KEMPTON, HENRY J. PASE JR. a/k/a,

- HENRY J. PASE, Jr. and CITIBANK, N.A.;
4. Affirmation in Opposition and Memorandum of Law by defendants, KEMPTON, PASE and CITIBANK, N.A.;
  5. Affidavit in Opposition and in Reply by third-party defendant;
  6. Reply Affidavit of third-party defendant;
  7. Affirmation in Opposition to Cross-Motion of defendant, TEMCO BUILDING MAINTENANCE, INC.;
  8. Reply Affirmation of TEMCO BUILDING MAINTENANCE INC.;
  9. Reply Affirmation and Memorandum of Law of defendants, KEMPTON, PASE and CITIBANK, N.A.

Third-party defendant seeks summary judgment. Defendant, TEMCO BUILDING MAINTENANCE, INC. also seeks summary judgment dismissing the plaintiff's complaint and all cross-claims as against this defendant pursuant to **CPLR §3212**. Defendant, CITIBANK, N.A., seeks summary judgment pursuant to **CPLR §3212** for a conditional judgment as against defendant/third-party plaintiff, TEMCO BUILDING MAINTENANCE, INC.

Plaintiff commenced this action for injuries sustained when he slipped and fell on ice on a sidewalk that surrounds the CITIBANK building. Defendant, TEMCO BUILDING MAINTENANCE, INC. (TEMCO) had a written agreement with CITIBANK to provide services which included interior cleaning and snow removal. TEMCO and third-party defendant, LONG ISLAND SNOW REMOVAL, (LISR) had an oral agreement by which LISR would perform snow removal and salting at CITIBANK branches, including the branch in question.

These motions for summary judgment are based on the deposition testimony of Stephen Taylor, who testified on behalf of TEMCO as its General Manager and William Grosso, who testified on behalf of LISR as a principal of LISR. TEMCO and LISR agreed that LISR would perform snow removal after getting a call from Stephen Taylor indicating the work that needed to be done. LISR argues that it did not owe duty to plaintiff or TEMCO and that there has been no showing that LISR was negligent, warranting summary judgment.

The incident involving plaintiff's fall occurred on January 11, 1994. According to its invoices, LISR performed snow removal on January 7<sup>th</sup> and 8<sup>th</sup> and then did some additional salting on January 7<sup>th</sup> and 9<sup>th</sup> of that year. Counsel for LISR also argues that there has been no proof as to the origin of the ice upon which plaintiff fell.

The agreement between CITIBANK and TEMCO was to automatically plow parking lots when there was snowfall of two (2) inches or above. If there were less than two inches of snowfall, it was at CITIBANK's discretion to contact TEMCO for snow removal services. TEMCO also argues that it owed no duty to the plaintiff by virtue of the contract with CITIBANK. Counsel for TEMCO maintains that there was no intention on the part of the parties to displace entirely the property owner's duty to maintain the property and place it in the sole responsibility of the contractors, citing **Palka v Servicemaster Management Services Corp., 83 NY2d 579, 611 NYS2D 817 (1994)**. Counsel also submits that TEMCO is entitled to common law indemnification from LISR because LISR provided all the snow removal work.

Counsel for CITIBANK states that the agreement between CITIBANK and TEMCO clearly provides that the contractor will be responsible for the removal of snow from sidewalks and walkways adjoining the bank. Said contract further provides that the contractor "will apply sand and/or ice melt in sufficient quantities so as to alleviate any hazardous icy conditions". It is only snow plowing of the parking lots that is triggered by the two (2) inch standard. Counsel therefore argues that the agreement is comprehensive and exclusive with respect to snow and ice removal from the walkways. There is also an indemnity provision in the contract.

Summary judgment is a drastic remedy which should not be granted if there is any doubt as to the existence of a triable issue. (**Barclay v Denckla**, 182 AD2d 658, 582 NYS2d 252 (2<sup>nd</sup> Dept., 1992)) It is well-settled that the movant has the burden of proof to demonstrate the absence of any material issues of fact. (**Tessier v New York City Health and Hospitals Corporation**, 177 AD2d 626, 576 NYS2d 331 (2<sup>nd</sup> Dept., 1991)) Thereafter, the opposing party must produce evidentiary proof, in admissible form, which demonstrates that a trial is required because of material questions of fact. (**Taylor-Warner Corp. v Minskoff**, 167 AD2d 382, 561 NYS2d 797 (2<sup>nd</sup> Dept., 1990))

The agreement between TEMCO and CITIBANK is clear on its face. CITIBANK is contractually entitled to a conditional judgment over against TEMCO for any judgment which may be rendered against CITIBANK as the result of the plaintiff's claim based upon the duties to be performed by TEMCO pursuant to its written contract with CITIBANK only in the event it is found that CITIBANK was not solely negligent. The Court does find that such an agreement would be unenforceable if it were shown that CITIBANK was negligent in part. (see, **General Obligations Law §5-322.1; Connolly v Brooklyn Union Gas Co.**, 168 AD2d 477, 562 NYS2d 718 (2<sup>nd</sup> Dept. 1990)), **appealed denied 78 NY2d 864, 578 NYS2d 879 (1991)**)

Counsel for TEMCO argues that summary judgment is not warranted on contractual indemnity or common law indemnity in favor of CITIBANK because there is an issue as to any negligence by CITIBANK. According to the testimony of Ms. Judy Roberts, CITIBANK's Assistant Manager, the manager would look and inspect the exterior of the branch for snow and ice when the branch opened. The Court notes that it has not been provided with the entire deposition transcript of Ms. Roberts. At this juncture, the Court finds that defendant/CITIBANK has not made a prima facie showing of entitlement to summary judgment. Counsel for CITIBANK merely states that there is no evidence of negligence on the part of this defendant; however, absent the full transcript of Ms. Roberts and any information as to what the manager would do in the event of noticing ice on the premises, summary judgment is precluded.

The Court finds that third-party defendant, LISR, has not made out a prima facie showing of entitlement to summary judgment on the issue of negligence. The deposition testimony of Mr. Grosso was extremely vague. Mr. Grosso does not know if he used subcontractors for removal at the CITIBANK location. He had no documents regarding snow removal at the premises except billing records. The billing records do not provide much information either as Mr. Grosso testified that sometimes the bills would

be dated the date of the storm itself but sometimes they could be dated a day or two later (**see, deposition transcript of Mr. Grosso at pages 20-23**). As such, the motion of LISR for summary judgment on its third-party complaint is denied. The Court finds that there is an issue of common law indemnification as to any negligence by LISR. The Court does dismiss the causes of action asserted by TEMCO for contractual indemnification and failure to procure insurance, there being no opposition thereto.

TEMCO's motion and LISR's motion for summary judgment against plaintiff are granted. The testimony of the plaintiff was that he fell while he was walking very slowly and carefully on an area that was icy all over (**see, plaintiff's deposition transcript at page "8"**). The Court does find, however, that TEMCO and LISR owed no duty to the plaintiff by virtue of the snow removal contract with defendant CITIBANK and the agreement with TEMCO as it never shifted in its entirety its duty as a property owner to maintain the premises to these two defendants. (**see, Palka v Servicemaster Management Services Corp., supra; Arnhold v Pyramid Management Group, Inc., 260 AD2d 518, 688 NYS2d 251 (2<sup>nd</sup> Dept., 1999)**). Accordingly, TEMCO and LISR are entitled to summary judgment as against plaintiff. Based on the foregoing plaintiff's complaint as against TEMCO BUILDING MAINTENANCE, INC. and any claims by plaintiff as against LISR, are hereby dismissed.

TEMCO is not granted summary judgment on its common law indemnification claim in the third-party action because no determination has been made as to any negligence by LISR.

The foregoing constitutes the ORDER of this Court.

DATE August 15, 2001

  
J.S.C.