SHORT FORM ORDER

INDEX No. 02-23810
CAL. No. 06-01479-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-17-06 (#008 & #009)
10-30-06 (#007 & #010)
ADJ. DATE 1-9-07
Mot. Seq. # 007 - MG
008 - MG
009 - XMG; CASEDISP
010 - XMD

GEORGE GEORGOTAS, Plaintiff, - against - LARO MAINTENANCE CORPORATION, DEBENEDITTIS LANDSCAPING, INC. and PARKVIEW LANDSCAPING CO., Defendants.	TARTAMELLA, TARTAMELLA & FRESOLONE Attorneys for the Plaintiff 235 Brooksite Drive Hauppauge, New York 11733 WHITE, QUINLAN & STALEY Attorneys for Defendant Laro Maintenance 377 Oak Street, P.O. Box 9304 Garden City, New York 11530
DEBENEDITTIS LANDSCAPING, INC., Third-Party Plaintiff, - against - PARKVIEW LANDSCAPING CO., Third-Party Defendants.	O'CONNOR, O'CONNOR, HINTZ & DEVENEY Attys for Deft/Third-Pty Plaintiff Debenedittis One Huntington Quadrangle, Suite 3C01 Melville, New York 11747 ZAKLUKIEWICZ, PUZO & MORRISSEY Attys for Defendants Parkview Landscaping 2701 Sunrise Highway Islip Terrace, New York 11752

Upon the following papers numbered 1 to 80 read on these motions and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; 24 - 30; Notice of Cross Motion and supporting papers 31 - 39; 40 - 41; Answering Affidavits and supporting papers 42 - 57; 58 - 75; Replying Affidavits and supporting papers 76 - 80; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#007) by defendant/third-party plaintiff, Debenedittis Landscaping, Inc., for summary judgment dismissing the action pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (#008) by defendant/third-party defendant, Parkview Landscaping, Inc., for summary judgment dismissing the action on the ground that the Statute of Limitations has run is granted; and it is further

ORDERED that the cross motion (#009) by defendant, Laro Maintenance Corporation, for summary judgment dismissing the action pursuant to CPLR 3212 is granted; and it is further

ORDERED that the cross motion (#010) by defendant/third-party defendant, Parkview Landscaping, Inc., for summary judgment dismissing the third-party complaint is denied as academic inasmuch as the main action is dismissed.

In this negligence action, plaintiff, George Georgotas, seeks to recover damages for injuries he allegedly sustained on the morning of January 27, 2000 when he fell on a snow/ice condition located in the parking lot of the premises of his employer, non-party Bell Atlantic, located at 1130 Lincoln Avenue, in the Town of Islip, New York. Plaintiff alleges that his injuries were proximately caused by the negligence of defendants by their failure to completely clear the parking lot of snow, causing an uneven pile of snow to cause an obstruction to plaintiff and his subsequent injuries. The record reveals that plaintiff originally commenced the action by filing on September 17, 2002 as against Laro Maintenance Corporation (hereinafter referred to as "Laro") and Debenedittis Landscaping, Inc. (hereinafter referred to as "Debenedittis"). Debenedittis commenced a third-party action as against Parkview Landscaping Co. (hereinafter referred to as "Parkview") on or about October 21, 2005. Subsequently, plaintiff served a supplemental summons and amended complaint on January 17, 2006 and added defendant, Parkview Landscaping, Inc., as a party.

The record reveals that Bell Atlantic contracted with defendant Laro on or about August 22, 1997 to perform maintenance services at all of its one hundred sixty (160) properties in Queens and Long Island. The contract reveals that the services included janitorial services, grounds maintenance, snow removal, vertical delivery and pest control. However, in paragraph 1, the parties agreed that this was a non-exclusive agreement, and Bell Atlantic reserved the right to undertake all work on its own behalf or through any third party. In addition, Exhibit A, Technical Specifications reveals that Laro, the Contractor, would be responsible for working for and with a Bell Atlantic Property Manager under the contract. All work, schedules and reports were to be made available and subject to the approval of the Property Manager.

The record reveals that Laro subcontracted with Debenedittis on or about November 1, 1998 to perform snow removal services at the Bell Atlantic properties in Nassau and Suffolk

Counties. The subcontract revealed that Debenedittis would plow snow, spread ice melt and shovel the walkways. In addition, Debenedittis would coordinate with the Bell Atlantic Property Manager where on site relocation or piling of snow would occur. The subcontract also provided that Debenedittis would be considered as an independent contractor and not an agent or employee of Laro. The snow removal subcontract was essentially identical to the snow removal agreement between Laro and Bell Atlantic.

The record further reveals that Debenedittis subsequently subcontracted with Parkview in or about the fall of 1998 to perform snow removal services at the Bell Atlantic locations in Suffolk County which included the Lincoln Avenue building at issue. That subcontract revealed that Parkview would plow if the accumulation of snow averaged a depth of two inches. In addition, Debenedittis had the option of contracting with other subcontractors to perform the snow removal services if needed. Defendants Debeneditto and Laro move and cross-move for summary judgment dismissing the action on the ground that they had no duty to plaintiff. Defendant/third-party defendant, Parkview, moves for summary judgment dismissing the action as against it on the ground that the statute of limitations has run. Parkview also cross-moves separately for summary judgment dismissing the third-party action as against it.

Initially, the court will address the motion for summary judgment by Parkview on the ground that the Statute of Limitations has run. In support of the motion, defendant Parkview submits, among other things, the examination before trial transcript of Dennis O'Shaughnessy. O'Shaughnessy testified to the effect that he was an officer of the corporation, Parkview Landscaping Co., at the time of plaintiff's accident. He stated that Parkview contracted with Debenedittis Landscaping, Inc. from the fall of 1998 through the winter of 1999/spring of 2000 to perform snow removal services for the Lincoln Avenue premises and other locations in Suffolk County. He stated that Parkview also served other clients within Suffolk County, owned its own snow clearing equipment, employed its own workforce and paid its own workers' compensation insurance. Once the contractual relationship ended in 2000, there was no further contact with Debenedittis. In addition, Mr. O'Shaughnessy stated that he had no notice of plaintiff's fall until 2005 when his company was served with a third-party complaint. In opposition, plaintiff claims that the fact that Debenedittis required Parkview to place magnetized signs on their trucks proves that the two companies were united in interest and that Parkview became the alter-ego of Debenedittis.

A claim asserted against a new party will relate back to the date upon which a plaintiff's claim was previously interposed against the original named defendant despite the fact that the former was not named in the process served upon the latter only if (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all

the proper parties, the action would have been brought against the additional party united in interest as well (***Brock v Bua***, 83 AD2d 61, 443 NYS2d 407 [1981]); *see also*, ***Mondello v New York Blood Ctr.***, 80 NY2d 219, 590 NYS2d 19 [1992]; ***Buran v Coupal***, *supra* [modifying the third prong of the test as set forth in ***Brock v Bua*** by eliminating the requirement that plaintiff's mistake be "excusable"]).

Here, because the Statute of Limitations for negligence is three years (CPLR 214), it is clear that the instant action is untimely unless the relation-back doctrine applies. Once a defendant has established that the Statute of Limitations has run, the burden shifts to plaintiff to establish the application of the relation-back doctrine (***Ramos v Cilluffo***, 276 AD2d 475, 714 NYS2d 88 [2000]). The court notes that plaintiff has submitted insufficient evidence which would establish that Parkview is united in interest with Debenedittis inasmuch as the two companies are distinct entities with different addresses and under their agreement, Parkview was required to carry its own workers' compensation insurance. In addition, the contract was not exclusive and allowed Debenedittis to contract with other companies for snow removal at any time. Under these facts, the court, in its discretion, declines to apply the doctrine (***Snolis v Biondo***, 21 AD3d 546, 799 NYS2d 919 [2005]). Accordingly, the motion for summary judgment by Parkview dismissing the action as against it is granted.

In support of its motion for summary judgment, defendant Debenedittis contends that it had no duty to plaintiff inasmuch as the agreement executed by it with Laro was not an exclusive or comprehensive maintenance contract and, in any event, Debenedittis subcontracted the snow removal services to Parkview. Defendant submits, among other things, the pleadings; a copy of the agreement between Bell Atlantic and Laro; a copy of the agreement between Laro and DeBenedittis; a copy of the agreement between DeBenedittis and Parkview; a copy of the docuweather report; a copy of the billing records submitted by Parkview. The docuweather summary reveals that on January 25, 2000, snow fell with freezing rain and on January 26 and 27, there was no additional precipitation. On the date of plaintiff's fall, January 27, the temperature was 20 degrees. Parkview's billing records reveal that it on January 25, 2000, its employees plowed, sanded and salted after approximately four inches of snow accumulated at the site of plaintiff's fall.

Laro contends that summary judgment should also be granted as against it since it had no duty to plaintiff because its contract with Bell Atlantic was not a comprehensive maintenance contract in that it was required to submit plans, records and reports to the Bell Atlantic Property Manager. Defendant submits copies of the examination before trial testimonies of Frank Vino, Roy Debenedittis and plaintiff. In his examination before trial, Frank Vino testified that he was the Project Manager for Laro and his duties included overseeing the Verizon (Bell Atlantic) account which covered approximately 160 sites. However, he stated that the snow plowing was difficult in that the parking lot at the site was always full with employee vehicles and company trucks. Although he spoke with the Bell Atlantic property manager, nothing was done to improve the situation. He also stated that snow removal services were subcontracted in 1998 to

Debenedittis Landscaping, Inc. He stated that under that contract Debenedittis would provide all materials and employees necessary to perform and evaluate the snow removal.

Mr. Debenedittis, in his examination before trial, testified to the effect that his company entered into an agreement with Laro to perform snow removal services at the Lincoln Street site. However, no employee of his company performed any snow services at that site during the 1999/2000 snow season. He stated that he signed a subcontract with Dennis O'Shaughnessy of Parkview Landscaping to perform the snow removal. He further stated that his company did not use its equipment in performing the work at the site in question.

Plaintiff, in his examination before trial testified to the effect that on the morning of January 27, 2000, he drove into the parking lot of the Bell Atlantic building and found a parking space. He stated that the weather was clear but cold. He exited his vehicle and walked across the parking lot to the truck he would use that day, a bucket truck. He entered the truck from the driver's side, turned on the engine and exited the truck. He noticed that the ground was slippery behind the truck and retraced his steps to the front of the truck near a chain link fence to enter the building. He proceeded between the parked truck and the fence and walked past one or two vehicles to the corner of the fence. His feet slipped causing him to grab onto the fence and injure his back.

In opposition to the motion and cross motion, plaintiff submits, among other things, the examination before trial transcripts of non-parties, Robert Vassalo, Joseph Galati, Chris Graffeo, Michael Pietroforte, and Brian Bartley, all employees of Bell Atlantic at the time of plaintiff's fall. Each concur that the rear parking lot at Bell Atlantic's Lincoln Avenue facility was filled with parked Bell Atlantic and employee vehicles on a twenty-four hour basis, which interfered with the ability of a snow plow to remove all snow from the premises. Although non-party David Walsh, a manager for Bell Atlantic, testified to the effect that a plan was implemented to address the parking, the corporate procedure was not effective. He also stated that he could not recall discussions with Laro's managers regarding snow removal. Indeed, the testimony of Joseph Galati, the union shop steward, revealed that complaints were also made to Bell Atlantic management concerning the snow removal service. The court declines to entertain plaintiff's sur-reply.

The threshold question in any negligence action is whether the defendant owed plaintiff a duty of care. Ordinarily a breach of a contractual obligation will not be sufficient in and of itself to impose a duty owed to third parties which would result in tort liability (***Church v Callahan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]). Only three sets of circumstances create exceptions to this general rule. First, tort liability may ensue if the promissory to the contract, through his affirmative actions, creates or exacerbates a dangerous condition. Second, if a plaintiff reasonably relies upon defendant's continuing performance of a contractual obligation to his detriment, tort liability might be imposed. Third, liability could be imposed if a comprehensive maintenance contract is such that the contacting party entirely assumes the duty

of another to maintain the premises safely (***Church v Callahan Indus.***, *supra*; ***Espinal v Melville Snow Contr, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]).

Similarly, a defendant may be liable for the negligent manner in which it performs a function if it is found to have voluntarily assumed such a duty. However, to prevail under such a theory, "plaintiff must show reliance on defendant's course of conduct, such that defendant's conduct placed him or her in a more vulnerable position than he or she would otherwise have been in had the defendant done nothing" (***Falu v 233 Assoc.***, 258 AD2d 342, 343, 685 NYS2d 230 [1999]).

Specifically with respect to defendants Laro and Debeneditto, courts have repeatedly held that contracts for snow removal such as the one at issue in this case do not create a duty to third persons when the limited snow removal obligation does not amount to a comprehensive and exclusive property maintenance obligation which totally displaced a property owner's duty to maintain the premises (***Espinal v Melville Snow Contrs, Inc.***, *supra*; ***Eidlisz v Vill. of Kiryas Joel***, 302 AD2d 558, 755 NYS2d 422 [2003]). Both Laro and Debeneditto have demonstrated that their respective agreements did not amount to exclusive maintenance obligations inasmuch as Bell Atlantic retained final approval by its Property Managers and other corporate managers over any plans and maintenance activities by Laro or snow clearing by Debeneditto which was performed by Parkview. Furthermore, there is no evidence presented that the affirmative acts of either defendant created or exacerbated a dangerous condition. The uncontradicted evidence is that the area was not plowed on the day of or day before plaintiff's accident. Therefore, it cannot be said that either defendant created or exacerbated the condition which allegedly caused plaintiff's injuries. In addition, Debeneditto, who contracted to perform all of Laro's obligations contained in the contract with Bell Atlantic, did not displace Bell Atlantic's general duty of care, as an owner, to keep the premises in a safe condition (*see*, ***Linarello v Colin Service Systems, Inc.***, 31 AD3d 396, 817 NYS2d 660 [2006]).

Accordingly, the motions by Debeneditto and Parkview and cross motion by Laro for summary judgment dismissing the complaint are granted. The cross motion by Parkview to dismiss the third-party action is denied as academic inasmuch as the main action is dismissed.

Dated: FEB 13 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**