SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **HON. F. DANA WINSLOW,**

Justice

JUDITH POWELL

TRIAL/IAS, PART 9
NASSAU COUNTY

Plaintiff,

-against-

CVS JERUSALEM NORTH BELLMORE, LLC. and BELLMORE HOLDING CO., INC.

MOTION DATE: 10/29/07

Defendants.

MOTION SEQ. NO.: 001
INDEX NO.: 15434/05

CVS JERUSALEM NORTH BELLMORE, LLC. and BELLMORE HOLDING CO., INC.,

Third-Party Plaintiffs,

-against-

SNOW MANAGEMENT GROUP and EXECUTIVE CLEANING CONTRACTORS, INC.,

Third-Party Defendants.

The following papers having been read on the motion (numbered 1-2):

Notice of Motion.....1
Affirmation in Opposition.....2

Separate motions by third-party defendants, Executive Cleaning Contractors, Inc. ("Executive") and Snow Management Group ("Snow Management"), pursuant to CPLR 3212, for an Order, granting each summary judgment and dismissing the third-party complaint of the defendant/third-party plaintiffs, CVS Jerusalem North Bellmore, LLC. and Bellmore Holding Co., Inc. (referred to herein as "CVS/Bellmore"); and,

Cross motion by defendant/third-party plaintiff, CVS/Bellmore, pursuant to CPLR 3212, for an Order, granting them summary judgment on their claims for common law and contractual indemnification as against the third-party defendants, Snow Management and Executive, as well as on their claim for damages for breach of contract for Snow Management and Executive's alleged failure to obtain general liability insurance naming CVS and Bellmore as additional insureds; the motions are determined as follows:

This action arises from an incident which, according to the plaintiff's deposition testimony, occurred on January 29, 2004 at approximately 6:00 p.m. at the CVS store located in North Bellmore, New York. It is noted at the outset that, in her Complaint, plaintiff alleged that the accident occurred on February 3, 2004 (*Complaint*, ¶15). Her Verified Bill of Particulars stated that the accident occurred on February 2, 2004 (*Bill of Particulars*, ¶1). When questioned at her deposition about these discrepancies, plaintiff stated that she "wasn't sure" when the accident occurred (*Powell Tr.*, pp. 21, 145) but that "[a]fter [she] saw the [CVS] accident report, [she] believe[s] it was January 29th" (*Powell Tr.*, p. 21). For the purposes of her examination before trial, January 29, 2004, was used as the date of loss.

This case involves a defective condition on the property; namely, broken and loose cement in the pavement at the parking lot and more specifically, in the area where the handicap ramp meets the asphalt parking lot (*Powell Tr.*, pp. 25, 33). This is not a snow and ice case.

Plaintiff, an attorney representing herself in this action, claims that while she was pushing a shopping cart down the handicap ramp in the parking lot at the CVS store, the front wheels of the cart got lodged on a portion of the handicap ramp where it meets the asphalt parking lot, causing the cart to suddenly stop, and

resulting in injuries to her (*Bill of Particulars*, ¶9). She alleged in her Verified Bill of Particulars that the accident occurred at the handicap ramp that leads from the pedestrian walkway to the parking lot (*Id*, ¶2).

In bringing this lawsuit against defendants CVS and Bellmore, plaintiff attributes the cause of her accident on the improper paving of the parking lot such that she claims that the parking lot was raised approximately 2 inches from the handicap ramp (*Powell Tr.*, p. 55).

Defendants, CVS and Bellmore, in turn, bring a third party action against the third party defendants, Snow Management Group and Executive Cleaning Contractors on the theory that the plaintiff's accident allegedly occurred when she tripped due to a hole cut out in the parking lot which they allege was caused by the snow plow and/or snow maintenance work negligently performed by third-party defendants, Snow and Executive (*Third Party Complaint*, ¶16). The third-party complaint sets forth claims of contribution and indemnification pursuant to the common law and contract and for breach of contract for failing to provide CVS with liability insurance.

Pursuant to a two year contractual agreement dated September 18, 2002 between CVS Realty Co and Snow Management Group, CVS engaged Snow Management for the purposes of rendering snow management services to CVS in connection with CVS stores, including the store that is the subject of this litigation (*Snow Management Motion*, Ex. M [CVS-Snow Management Agreement], ¶2). This contract was in effect on the date of the plaintiff's alleged accident.

Paragraph 13 of the CVS-Snow Management Agreement states as follows:

> 13. **Indemnification**: [Snow Management] agrees to indemnify, hold harmless and defend CVS, and any employee or agent thereof (each

> of the foregoing being hereinafter referred to individually as the "Indemnified Party") against all liability (including reasonable attorneys' fees and costs) to third parties (other than liability solely the fault of the Indemnified Party) arising from the acts or omissions of [Snow Management] its agents or contractors in the performance of its obligations hereunder. [Snow Management]'s duty to defend CVS under this Section shall apply to any complaint or claim which makes allegations that place the alleged breach of duty, whether tortious or contractual, potentially within the scope of the duties, responsibilities and obligations undertaken by [Snow Management] pursuant to this Agreement regardless of whether allegations are also made against CVS for its alleged independent breach of duty of whatever nature. [Snow Management] further agrees to indemnify, hold harmless and defend CVS, and any employee or agent thereof against all claims of intellectual property infringement arising from the Service or Deliverables. [Snow Management]'s obligation to indemnify shall survive the expiration or termination of this Agreement by either party for any reason. [Snow Management] shall conduct the defense in any such third party action arising as described herein with counsel reasonable [sic] acceptable to CVS and CVS shall cooperate with such defense.

Pursuant to paragraph 14 of the CVS-Snow Management Agreement, Snow Management was also required to provide liability insurance for CVS. The provision stated, in pertinent part, as follows:

14. **Insurance**: For and during the term of this Agreement and for as long as [Snow Management] is performing Services hereunder, [Snow Management] shall secure and maintain at its own expense insurance of the type and in the amounts set forth below.

A. Commercial General Liability Insurance in an amount of not less $1,000,000 per occurrence, subject to a $2,000,000 aggregate covering, without limitation, bodily injury (including death), personal injury, defamation, property damage including, and without limitation, all contractual liability for such injury or damage assumed by [Snow Management] under this Agreement or CVS and/or its subsidiaries under any applicable lease. This policy shall include products/complete operations coverage.

* * *

CVS Corporation, its directors, officers, employees, agents, subsidiaries and affiliates shall be named as additional insured on the general liability and automobile liability policies.* * *

Third-party defendant Snow Management hired third-party defendant Executive Cleaning Contractors, Inc. to perform snow and ice removal services for CVS. On October 15, 2003, CVS, by its agent, Snow Management Group, entered into a written agreement with third party defendant, Executive (*CVS Cross*

Motion, Ex. H [CVS-Executive Agreement]). Pursuant to this agreement, Snow Management was designated as CVS's agent with respect to all aspects of the agreement (*Id*, ¶2).

Pursuant to the CVS-Executive Agreement, Executive agreed to perform snow removal from, *inter alia*, the handicap parking areas, snow plow the parking lot, driveways and aprons to the facility and apply approved ice control and traction materials as needed. Executive also assumed the responsibility to perform inspections on a regular basis as well as the responsibility for any damage to CVS's pavement.

The CVS-Executive Agreement further provided that extra attention must be given to all handicap sidewalk ramp access areas and designated handicap parking spaces during business hours (*CVS-Executive Agreement,* p. 31). As a result, Executive workers would use shovels and snow blowers on the handicap ramp (*Id.*, p. 32).

Executive's president, Frank Schembre, testified at his deposition that Executive's equipment *could* cause some damage to a blacktop under certain circumstances (*Id.*, pp. 25-26). He admitted that Executive performed snow plowing removal at the subject CVS store on January 18, 19, 20, 27 and 28, 2004, prior to the alleged incident (*Id.*, p. 53). On January 28, 2004, Executive performed work at the store on two occasions, the first at 4:00 a.m. and the second at 8:00 a.m. (*Id*).

The CVS-Executive Agreement also contained an Indemnification provision, pursuant to which Executive agreed to indemnify, hold harmless and defend CVS and Snow Management "against all liability. . . to third parties (*other than liability solely th fault of the Indemnified Party*)" (*Id.*, ¶12 [Emphasis

Added]). Paragraph 12 of the CVS-Executive Agreement states as follows:

> [Executive] agrees to indemnify, hold harmless and defend CVS, [Snow Management], and any employee or agent thereof (each of the foregoing being hereinafter referred to individually as the "Indemnified Party") against all liability (including reasonable attorneys' fees and costs) to third parties (other than liability solely the fault of the indemnified party) arising from the acts or omissions of [Executive] or its agents in the performance of its obligations hereunder. [Executive]'s duty to defend CVS and [Snow Management] under this section shall apply to any complaint of claim which makes allegations that place the alleged breach of duty, whether tortious or contractual, potentially within the scope of duties, responsibilities and obligations undertaken by [Executive] pursuant to this Agreement, regardless of whether allegations are also made against CVS or [Snow Management] for its alleged independent breach of duty of whatever nature. [Executive] further agrees to indemnify, hold harmless and defend CVS, [Snow Management], and any employee or agent thereof against all claims of intellectual property infringement arising from the Service or Deliverables. [Executive's] obligation to indemnify shall survive the expiration or termination fo this agreement by either party for any reason. [Executive] shall conduct the defense in any such third party action arising as described herein with counsel reasonably acceptable to CVS and CVS shall reasonably cooperate with such defense.

Similar to the CVS-Snow Management Agreement, the CVS-Executive

Agreement also includes a provision whereby Executive, like Snow Management, agreed to provide liability insurance for CVS. Paragraph 13 of the CVS-Executive Agreement, states, in pertinent part, as follows:

> 13. Insurance: For and during the term of this Agreement and for as long as [Executive] is performing Services hereunder, [Executive] shall secure and maintain at its own expense insurance of the type and in the amounts set forth below.
>
> A) Commercial General Liability Insurance in an amount of not less than $1,000,000 per occurrence, subject to a $2,000,000 aggregate covering, without limitation, bodily injury (including death), personal injury, defamation, property damage including, and without limitation, all contractual liability for such injury or damage assumed by [Executive] under this Agreement or CVS, [Snow Management] or its subsidiaries under any applicable lease. This policy shall include products/completed operations coverage.
>
> * * *
>
> CVS, its directors, officers, employees, agents, subsidiaries, affiliates and [Snow Management] shall be named as additional insured on the general liability and automobile liability policies.* * *

At her deposition, plaintiff was shown seven photographs, marked as Exhibits A - G, of the area of the alleged accident (*Executive Motion*, Ex. F

[Photographs A-G]). She testified that the photographs were taken on two occasions - a day after the accident and a couple of days later. She stated that the flattened cardboard box depicted in photograph A was not present at the time of the accident. Plaintiff circled an area on photograph A depicting the exact location of her accident. She stated that within the circled area, there "was some broken pavement material" (*Powell Tr.*, p. 65). She testified that she "saw little pieces of pavement type of material" (*Id.*, p. 143).

The manager of the subject CVS store, Scott Crafa, testified at his deposition, that "loose cement" was seen in the spot where the ramp touched the pavement. Crafa stated that the information surrounding the accident was noted in an accident report that was prepared on January 30, 2004, the day after the accident (*Crafa Tr.*, pp. 14, 37; *Snow Management Motion*, Ex. N). The accident report was prepared by his assistant, the shift supervisor at the time of the accident, Maria Demasi. The information was taken directly from the plaintiff (*Id*). Crafa testified that the plaintiff was offered the opportunity to fill out an accident report on the day thereof but she declined (*Id.*, p. 15). He stated that the plaintiff showed him the area where she fell (*Id.*, p. 37) and that directly after the accident, Crafa personally inspected the ramp, and found "a piece of concrete that was loose" (*Id.*, p. 17). He described it as "[a]pproximately 8 to 12 inches long and about an inch deep" (*Id*). He looked down at the area where the plaintiff showed him and saw "broken concrete" (*Id.*, 50). He also described the condition as "a broken part of the apron that caused a groove where there was a hole" (*Id.*, 53).

Scott Crafa, testified at his deposition, that following the plaintiff's accident, sometime in the year 2005, he handwrote an undated memorandum to another CVS employee, Mariusz Masnyk, indicating that there was concrete

broken near the handicap ramp where it meets the parking lot. He testified that he wrote the memo sometime in the year 2005, following the subject accident, but was not sure of the date (*Crafa Tr.*, p. 13). The subject memo states, in full, as follows:

> Attention: Mariusz Masnyk
>
> From: Scott Crafa manager store 2134
> um [sic: voicemail]: 19288
>
> Mariusz, my assistant and I can only remember one incident with [sic] ramp. The woman involved did not want to fill out an accident report. Basically there was some damage caused by the snow removal crew. The plow broke part of the concrete where the ramp meets the parking lot. There was a patch put on the ramp after this. My assistant and I don't recall any other incident with the ramp. (*CVS Opp.*, Ex. J).

At his deposition, Scott Crafa stated, in pertinent part, as follows:

> Q: ***What made you believe at that time that there was some damage caused by the snow removal crew?
>
> A: Prior to that date no physical damage that I witnessed or saw there. I do inspections around my store (*Crafa Tr.*, p. 18).

Said undated handwritten memorandum by Scott Crafa forms the predicate

of the within third party action.

Upon the instant motion, third party defendants, Executive and Snow Management, each seek summary judgment dismissal of third-party plaintiff, CVS/Bellmore's complaint. Insofar as both defendants, advance the same arguments in support of their respective motions for summary judgment, this Court will address both motions simultaneously.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, 68 NY2d 320). However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id*). In this case, neither third-party defendant, Executive, nor third-party defendant, Snow Management, has satisfied its initial burden of entitlement to judgment as a matter of law.

In moving for summary judgment, defendants, Snow Management and Executive both argue that the area where the plaintiff alleges her accident occurred, i.e., the area circled by the plaintiff in photograph A, was not within their responsibility, obligation or control. Defendants submit that the circled area on photograph A was not the same area that CVS's manager, Scott Crafa had referred to in the undated memo indicating that there was some broken concrete.

Accordingly, defendants, Snow Management and Executive, argue that CVS's third party complaint predicated on the undated memo must be dismissed. Defendants' argument is unavailing.

A more complete reading of CVS's manager, Scott Crafa, confirms that he stated, in pertinent part, as follows:

Q: In Exhibit A, the part that is exposed and circled in the photograph with the ballpoint pen, is that the area which had the broken concrete in it?

A: No.

Q: In the photograph marked as Defendant's Exhibit A, have you ever observed that area circled prior to the date of this incident?

Mr. Gugerty: That general area?

Mr. Criscitelli: That exact area that is circled.

A: I have seen it, yes.

Q: Is there any elevation difference between the concrete and the asphalt at that location prior to the incident?

***

A: No, I noticed no difference in elevation.

Q: On the evening that Mrs. Powell had her incident, did you notice that there was any difference in the elevation between the end of the handicap ramp and the beginning of the pavement of the parking lot?

A: You're talking about the apron?

Q: Yes.

A: There was a broken part of the apron that caused a groove where there was a hole I guess would be the best. (*Crafa Tr.*, pp. 52-53 [Emphasis Added]).

While defendants Executive and Snow Management submit that Crafa unequivocally testified that the area which plaintiff circled is not the same area that he noted and referred to in his memo, this Court is not persuaded that the circled area, i.e., the apron, was not, in fact, defective. That is to say that both the plaintiff and the defendant, agree that the apron of the ramp and the parking lot was broken and defective.

Moreover, the record herein shows that directly after her accident, plaintiff

showed Scott Crafa, where exactly she fell (*Crafa Tr.*, p. 37) and that he personally inspected the location of plaintiff's accident directly after the accident and found a loose piece of concrete about 8-12 inches long and an inch deep (*Id.*, pp. 15, 17, 50). Contrary to third-party defendants' argument that the loose pavement did not exist within the circled area, the plaintiff described the broken pieces of pavement as existing in the "apron area" where the ramp meets the parking lot.

In relying upon CVS's accident report, third party defendants Executive and Snow Management further submit that on the evening of the alleged incident, CVS admitted there was no defect present at the site of the accident. Third-party defendants argue that CVS's own accident report indicates the following: "What are the conditions of the incident area? FINE." The report does not make any reference at all to any damaged concrete or pavement and thus, defendants argue, CVS's position that on the date of the accident, there was no defect present at the site of the accident is meritless.

First, it is noted that CVS, in bringing this third-party suit, does not and has at no point contended that there was *no* defect at the site of the accident; rather, the entire premise of the third party action is that there *was* damage to the premises and that said damage was the result of the third-party defendants' negligence.

Second, Scott Crafa testified at his deposition that the person who wrote the incident report, his assistant, Maria Demasi, in turn, reported to CVS corporate that "the *surrounding* area, *not the specific area*, was in 'decent' shape" (*Crafa Tr.*, p. 62 [Emphasis Added]). Thus, at the very least, there remains an issue of fact as to whether Maria Demasi was referring to the specific area of plaintiff's accident when she noted that the conditions were "fine" or whether she was

referring to the general parking lot vicinity.

Third party defendants, Snow Management and Executive's reliance on Frank Schembre's testimony that it was impossible for a snow plow to cause any damage to the subject parking lot because the blade of the snow plow did not have any downward pressure that would result in any damage to the asphalt and/or handicap ramp (*Schembre Tr.*, p. 62) is equally meritless. Frank Schembre testified at deposition that the handicap ramps would be cleaned by a plastic shovel which could not cause any damage to the area marked by the plaintiff in photograph A. However, Schembre also clearly stated that the work of its employees *could* have caused the loose cement (*Schembre Tr.*, pp. 25-26). In light of this possibility, defendants have failed to make their prima facie showing of entitlement to judgment as a matter of law.

Snow Management and Executive also argue that Scott Crafa's failure to state the basis of his assertion in his undated memo that there was broken concrete near the handicap ramp where it meets the parking lot, entitles them to judgment as a matter of law. Defendants submit that Scott Crafa has absolutely no information regarding any possible connection between the alleged broken concrete and any snow removal provider. Instead, defendants argue, he merely makes this completely unfounded and self-serving statement approximately one year after the alleged accident.

There is ample proof on the record herein that confirms that Scott Crafa personally inspected the location of the accident immediately after plaintiff's injury. Thus any contention by the defendants that Crafa's undated memorandum makes a "completely unfounded" and "baseless" assertion is simply wrong. Similarly, defendants' contention that CVS has not sufficiently tied the broken

concrete to the actions of either Snow Management or Executive is unpersuasive. A more complete reading of Crafa's testimony discloses that Crafa explicitly stated:

> At his deposition, Scott Crafa stated, in pertinent part, as follows:
>
> Q: ***What made you believe at that time that there was some damage caused by the snow removal crew?
>
> A: Prior to that date no physical damage that I witnessed or saw there. I do inspections around my store (*Crafa Tr.*, p. 18).

Moreover, Crafa also testified that upon special request, the snow removal crew had in fact serviced the CVS property on the morning of January 29, 2004 (*Crafa Tr.*, pp. 40-41).

Based on the foregoing, this Court finds that the third-party defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, this Court is compelled to deny defendants, Executive and Snow Management's respective motions, regardless of the sufficiency of defendant/third-party plaintiff, CVS/Bellmore's opposing proof (*Winegrad v. New York Univ. Med. Center*, supra at 853).

Finally, defendant/third-party plaintiff, CVS/Bellmore's cross motion, for an Order, pursuant to CPLR 3212, granting summary judgment on its contractual and common law indemnification claims, as well as on its claim for damages for

breach of contract for Snow Management and Executive's failure to obtain general liability insurance naming CVS and Bellmore as additional insureds is granted in part and denied in part.

It is noted at the outset that CVS/Bellmore's untimely cross motion, involving the same issues as in the original motion, is nevertheless deemed timely made and is properly before this Court (*Rosa v. RH Macy Company, Inc.*, 272 AD2d 87 [1st Dept. 2000]; *Siegel v. Siler*, 186 Misc.2d 481 [Sup. Ct. New York 2000). The motions brought by Snow Management and Executive as well as the cross motion by CVS/Bellmore involve the actions and responsibilities of the third-party defendants, Snow Management and Executive, pursuant to their respective contracts with CVS. The issue in all motions is whether the acts of Executive and Snow Management were the cause of the subject condition and what responsibility the third party defendants have in accordance with those acts. Accordingly, the cross-motion for summary judgment is deemed timely (*see also* CPLR 3212[a]).

Pursuant to General Obligations Law § 5-322.1, any contract purporting to indemnify a party for its own negligence is void and unenforceable (*Kinney v Lisk Co.*, 76 NY2d 215 [1990]). Consequently, a party to a contract who is a beneficiary of an indemnification provision must prove itself to be free of negligence; to any extent that the negligence of such a party contributed to the accident, it cannot be indemnified therefor (*Kennelty v Darlind Constr.*, 260 AD2d 443 [2nd Dept. 1999]; *Stein v Yonkers Contr.*, 244 AD2d 476 [2nd Dept. 1997]; *Dawson v Pavarini Constr. Co.*, 228 AD2d 466 [2nd Dept. 1996]). In the instant case, the defendant/third-party plaintiffs, CVS/Bellmore has failed to establish their freedom from fault so as to entitle it to summary judgment on its claims for

contractual indemnification (*American Ref-Fuel Co. v Resource Recycling*, 248 AD2d 420, 423 [2nd Dept. 1998]; *McGill v Polytechnic Univ.*, 235 AD2d 400 [2nd Dept. 1997] ; *Dawson v Pavarini Constr. Co.*, supra; *cf.*, *Kennelty v Darlind Constr.*, supra).

In addition, while a party may be indemnified against its own active negligence by contract provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances" (*Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774 [1987]; *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 158-159 [1977]; *Levine v Shell Oil Co.*, 28 NY2d 205, 212 [1971]), in this case, the indemnification provisions in both Agreements (CVS-Snow Management Agreement and CVS-Executive Agreement) limits the indemnitors in each contract, namely Snow Management and Executive's duty to "indemnify, hold harmless and defend" the indemnitee, CVS and/or Snow Management, against all liability, *"other than liability solely the fault of the indemnified party."* Thus contrary to CVS/Bellmore's contention, this language does not necessarily compel the third party defendants, Snow Management and Executive to indemnify or hold CVS/Bellmore harmless in this negligence action. The parties' intentions are clearly outlined in unequivocal terms.

Accordingly, defendant/third party plaintiff, CVS/Bellmore's cross motion for an Order granting summary judgment on its claims for common law and contractual indemnification is **denied**.

Insofar as the third party defendants, Executive and Snow Management fail to produce evidentiary proof in admissible form sufficient to establish the

existence of material issues of fact which require a trial of defendant/third party plaintiff, CVS/Bellmore's claims for damages for breach of contract for their failure to procure the requisite insurance, said part of CVS/Bellmore's cross motion for summary judgment is **granted.**

This constitutes the Order of the Court.

Dated: March 28, 2008 ENTER:

J.S.C.