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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN Justice PART 7

Maria GREEN-CAMERON et ano

- v -

WILLRYE HOLDINGS, LLC et al.

INDEX NO. 111336/06

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-O	1-2
Answering Affidavits — Exhibits A-M; A-K	3-7
Replying Affidavits Reply to Cross Motion	8 9

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached memorandum Opinion.

FILED

NOV 18 2008

COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN J.S.C.

Dated: 11/12/08

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 7

- X

MARIA GREEN-CAMERON and ROBERTO CAMERON,

INDEX NO. 111336/06

Plaintiffs,

-against-

DECISION AND ORDER

WILLRYE HOLDINGS, LLC, SIVAN RYE, LLC and WILLETT MAINTENANCE, LLC,

Defendants.

- X

HON. MICHAEL STALLMAN, J.:

Defendants Willrye Holdings, LLC and Sivan Rye, LLC move for an order pursuant to CPLR 3212 granting them summary judgment on their cross-claims against the co-defendant, Willett Maintenance, LLC ("Willett") for contractual and common-law indemnification, including reimbursement of costs and reasonable attorneys' fees.

Defendant Willett cross-moves for an order pursuant to CPLR 3212 granting it summary judgment or, in the alternative, denying the motion by Willrye Holdings and Sivan Rye (it appears from Willett's supporting papers that it seeks summary judgment against plaintiff only).

This is an action for damages based on personal injuries allegedly sustained by Maria Green-Cameron ("plaintiff") on March 2, 2006 when she slipped and fell on what she describes as "a nice little oval shape of ice" (see plaintiff's EBT, plaintiff's exhibit, J, p 21) in the parking lot of 411 Theodore Fremd Avenue in Rye, New York (the "premises"). The premises is owned by Willrye Holdings, LLC and managed by Sivan Rye, LLC (collectively "owners"). Willett is a maintenance contractor retained by owners to perform snow and ice removal services at the premises including the parking lot.

Owners now seek summary judgment on their cross-claims against Willett for common law and contractual indemnification and breach of contract[1] contending that their "comprehensive and exclusive" maintenance contract with Willett is so broad that it entirely displaces their obligations with respect to snow and ice removal at the premises, and that Willett breached the maintenance contract by failing to procure insurance naming owners as additional insureds. Owners also contend that they are entitled to reimbursement from Willett for their costs and disbursements including reasonable attorneys' fees pursuant to the indemnification provision in the maintenance contract.

In support of its cross-motion for summary judgment dismissing the complaint and in opposition to owners' motion, Willett argues, *inter alia*, that it cannot be found liable to plaintiff or owners because there is no evidence that it had actual or constructive notice of an icy condition where plaintiff fell or that it created that condition.

The Court will address Willett's cross-motion first. To establish a *prima facie* case of negligence, plaintiff must demonstrate that a duty was owed to her by defendants, breach of that duty and resulting injury (see Gaeta v. City of New York, 213 AD2d 509, 510 [2d Dept 1995]). "In slip and fall cases involving snow and ice, a property owner or possessor is not liable unless he or she created the defect, or had actual or constructive notice of its existence" (Voss v. D&C Parking, 299 AD2d 346 [2d Dept 2002] citing Simmons v. Metropolitan Life Insurance Company, 84 NY2d 972 [1984]); see also Gaeta v. City of New York, *supra*, at 510 [to prove breach of duty in a slip and fall case plaintiff must show that defendants created the condition which caused the accident or that they had actual or constructive notice of the condition]). Discovery on the issue of liability has been

[1] The breach of contract claim is not mentioned in owners' notice of motion, which does, however, request "other and further relief."

completed.

The Court finds that Willett's cross-motion should be denied. The proponent of a motion for summary judgment must establish his defense or cause of action sufficiently to warrant a court's directing judgment in his favor as a matter of law (see Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Willett has succeeded in establishing its defense to the extent that there is no evidence in the papers before the court that Willett had actual notice of the ice patch which allegedly caused plaintiff to slip and fall or that Willett created the ice patch. Plaintiff now has the burden of submitting evidentiary proof in admissible form to show that an issue exists with respect to constructive notice[2] (*id.*). A co-worker, who witnessed plaintiff's accident, has submitted an affidavit in which she states that there was no precipitation at the time plaintiff fell and that the area where plaintiff fell was covered by a patch of black ice. Plaintiff's co-worker stated further that there was no salt or sand in the area (see Sanchez affidavit attached to plaintiff's attorney's affirmation in opposition). This is sufficient to satisfy plaintiff's burden. The issue of whether Willett had constructive notice of the ice patch shall await trial for resolution.

The Court finds that owners' motion for summary judgment on its cross-claims against Willett should be granted. It is clear from the maintenance contract (owners' exhibit I) that Willett was responsible for keeping the premises and the parking lot "operational and safe at all times 24 hours a day" and that its responsibilities included "addressing conditions of snow, ice, sleet, slush and all other related winter time conditions" (see exhibit A to owners' exhibit I).

Counsel for plaintiff agrees, stating that "[i]t is the plaintiff's firm position that [Willett] had

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[2] Constructive notice can be found where a defect or dangerous condition is visible and apparent and existed for a sufficient length of time prior to the accident for the defendant to discover and remedy it (see Gordon v. American Museum of Natural History, 67 NY2d 836, 837 [1986]).

undertaken the owner's obligation to maintain the parking lot in a safe and proper condition" (see Wolff June 30, 2008 affirmation in opposition, p 10). The indemnification provision in the maintenance contract provides in pertinent part as follows:

> Contractor [Willett] shall indemnify, defend, and hold harmless the indemnified parties [owners] from and against all causes of action, claims, including but not limited to causes of action and claims for negligence, strict liability and gross negligence, damages, liens, demands, costs, expenses, and liabilities, including reasonable attorneys' fees and court costs ... . These obligations ... shall not apply if the claim results solely from the negligence of an indemnified party.

(see owners' exhibit I, ¶ 8). Although plaintiff initially named owners as the sole defendants (owners commenced a third-party action against Willett which was thereafter consolidated with the main action), she does not now claim that owners were negligent. It is clear from the indemnification provision that owners are entitled to be reimbursed for all costs and expenses, including reasonable attorneys' fees, incurred with respect to this action. The maintenance contract further provides that Willett shall, at its own expense, procure commercial general liability insurance naming owners as additional insureds (*id.*, ¶ 7). Willett does not deny that it failed to procure such insurance.

Accordingly, it is hereby

ORDERED that owners' motion for an order granting summary judgment on their cross-claims against Willett for contractual and common law indemnification, including reimbursement of costs and reasonable attorneys' fees is granted as to liability, and it is further

ORDERED that Willett's cross-motion for an order granting summary judgment dismissing the complaint is denied, and it is further

ORDERED that the calculation of damages owed by Willett to owners, including costs, expenses, reasonable attorneys' fees and damages resulting from Willett's failure to procure insurance naming owners as additional insureds shall be referred to a Special Referee to hear and

determine upon the conclusion of the trial of this action.

This constitutes the decision and order of the Court.

DATED: **November 12, 2008**
New York, New York

E N T E R:

J.S.C.

FILED
NOV 18 2008
COUNTY CLERK'S OFFICE
NEW YORK