

**Fernandez-Perez v J.P. Morgan Chase & Co.**

2009 NY Slip Op 30921(U)

April 15, 2009

Supreme Court, New York County

Docket Number: 107289/06

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT: \_\_\_\_\_ J.S.C. \_\_\_\_\_

PART 11

Index Number : 107289/2006

**FERNANDEZ-PEREZ, MADELINE M.**

vs.

**JP MORGAN CHASE &**

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *and cross-motion* are determined in accordance with the *annexed decision and order.*

**FILED**

APR 22 2009

COUNTY CLERKS OFFICE  
NEW YORK

Dated: April 15, 2009

*[Signature]*  
HON. JOAN A. MADDEN <sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
MADELINE M. FERNANDEZ-PEREZ a/k/a/  
MARIA PEREZ,

Plaintiff,

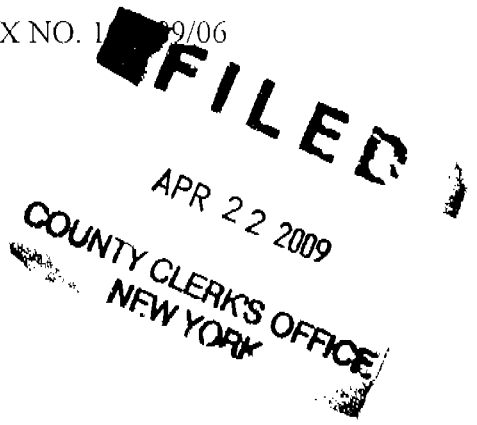
-against-

J.P. MORGAN CHASE & CO.,

Defendant.

-----X  
JOAN A. MADDEN, J.:

INDEX NO. 1 99/06



In this action for damages for personal injuries, defendant/third-party plaintiff J.P. Morgan Chase & Co. ("Chase"), moves for an order pursuant to CPLR 3212 granting summary judgment against third-party defendant McGuire's Service Corp. ("McGuire's") on its third-party claims for contribution, and common law and contractual indemnification. Third-party defendant McGuire's opposes the motion and cross-moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint. Plaintiff takes no position with respect to the motion or cross-motion.

The underlying complaint in this action alleges that plaintiff Madeline M. Fernandez-Perez a/k/a Maria Perez ("Ms. Perez") was injured on December 15, 2003, when she slipped and fell on snow and ice in the parking lot of the Chase Bank located at 314 South Broadway, Yonkers, New York. The complaint asserts one cause of action for negligence against Chase alleging, *inter alia*, that Chase was negligent in the "ownership, operation, management, maintenance and/or control of the aforesaid premises and more particularly the entryways, access ways, walkways, driveways and other common areas thereat, in causing, allowing and/or

permitting said premises to become and/or remain for a sufficiently long period of time in a dangerous, defective, hazardous, faulty and careless condition.” Chase asserts third-party claims against the snow removal company, McGuire’s, for contribution, contractual and common law indemnification, and breach of contract.

In support of its motion for summary judgment, Chase submits an attorney’s affirmation, and documents including the pleadings, a “Service Agreement for Parking Lot Snow Removal Services” between Chase and McGuire’s, and a portion of the deposition testimony of McGuire’s president, Tina McGuire. Chase asserts that based on its contract with McGuire’s for snow removal services which was in effect on the day of the accident, McGuire’s had exclusive control over snow removal operations at the parking lot where plaintiff alleges she fell. Chase also points to Tina McGuire’s testimony that in December 2003, as part of her duties, she monitored the weather through different websites and she alone made the decision to send out snow removal crews, without having to contact anyone at Chase. Relying on that evidence, Chase argues that had no supervisory role over the plowing work performed by McGuire’s, and for that reason, Chase contends it is entitled to common law indemnification and contribution, or alternatively, contractual indemnification pursuant to paragraph 4 of its service agreement with McGuire’s.

McGuire’s opposes the Chase motion, and cross-moves for summary judgment dismissing the third-party complaint. McGuire’s submits an attorney’s affirmation, the pleadings, plaintiff’s verified bill of particulars, plaintiff’s deposition testimony, and the deposition testimony of Tina McGuire for McGuire’s and Paul Deri for Chase. McGuire’s admits that it is a “snow removal contractor,” but asserts that “there is no evidence in the record identifying the contract that was in effect at the time of the accident, nor is there any testimony

with regard to the indemnity provision being in effect at the time of the accident.” McGuire’s also asserts that the record establishes that plaintiff’s claim does not arise out of McGuire’s negligent performance or non-performance, as the undisputed evidence shows that McGuire’s provided services to the Chase location sometime after 3:00 p.m. on December 14, 2003, the day before plaintiff’s alleged accident, and that McGuire’s returned to the location at approximately 6:00 a.m. on December 15, 2003, the day of the accident, to spread salt and sand.

The proponent of a motion for summary judgment “must 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. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 (2005); Ayotte v. Gervasio, 81 NY2d 1062 (1993). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, supra at 324.

At the outset, the court concludes that Chase has sufficiently demonstrated that at the time of plaintiff’s accident, it had a written snow removal services contract with McGuire’s which contained an indemnification provision covering plaintiff’s personal injury claim. Annexed to Chase’s motion papers is a copy of a contract between Chase and McGuire’s, entitled “Service Agreement for Parking Lot Snow Removal Services.” Chase explains that it obtained this contract directly from McGuire’s, through discovery, in response to the court’s compliance conference order directing McGuire’s to provide Chase with a copy of agreement for

snow removal services in effect on the date of the accident. Paragraph 14.4 of the contract is entitled “Indemnity Agreement,” and states as follows:

The Contractor [McGuire’s] agrees to indemnify and hold Chase, its agents, servants, and employees, harmless from any and all claims (including loss of use), expenses (including reasonable attorney’s fees), damages, suits, costs and judgments sustained by Chase or others due to any negligent act, error, omission, or willful misconduct of the Contractor and/or its subconsultants.

While McGuire’s objects to Chase’s reliance on the above-quoted contract, it submits no affidavit or any other evidentiary proof showing or even suggesting that the contract annexed to Chase’s motion papers is not the agreement in effect on the date of the accident. Notably, McGuire’s does not deny that it actually provided that contract to Chase in response to court-ordered discovery directing the production of the contract in effect on the date of the accident.<sup>1</sup> Under these circumstances, McGuire’s objections to the contract are without merit.

Notwithstanding the foregoing conclusion, Chase’s indemnification and contribution claims cannot be resolved summarily, as Chase fails to make a prima facie showing that it is free from negligence. See Prenderville v. International Services Systems, Inc., 10 AD3d 334 (1<sup>st</sup> Dept 2004). Chase’s motion papers include no evidentiary proof affirmatively establishing the absence of negligence on its part. Chase relies solely on its contract with McGuire’s and the excerpt from Tina McGuire’s deposition testimony. The contract merely shows what services McGuire’s was obligated to perform in connection with the removal of snow from the Chase parking lot. The excerpt from Tina McGuire’s deposition testimony merely establishes the general manner in which McGuire’s performs a contract for snow removal services. Neither the

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<sup>1</sup>This court’s January 10, 2008 discovery order expressly directed “third-party defendant McGuire’s Service Corp. to produce a copy of the snow and ice removal contract in effect on the date of the accident for the subject parking lot area, within 2 weeks.”

contract nor the testimony is sufficient to eliminate any material issue of fact as to the absence of Chase's negligence in connection with the condition of the parking lot at the time of plaintiff's accident. Chase submits no deposition testimony or affidavit from an individual with personal knowledge as to whether a Chase employee ever monitored or inspected the parking lot after a snow storm, or whether a Chase employee inspected the parking lot after plaintiff reported the accident to a bank employee immediately thereafter. Even though Chase produced a witness for deposition, no portion of that witness's testimony is annexed to Chase's motion papers. Thus, as Chase fails to make an affirmative prima facie showing as to its freedom from negligence, it is not entitled to summary judgment on its third-party claims.

McGuire's likewise fails to make a prima facie showing that it is entitled to summary judgment dismissing the third-party claims. As determined above, McGuire's objections as to the existence of a contract and a contract indemnification provision are without merit. McGuire's assertion that "there is no admissible evidence in the record that it failed to perform the required services, or that those services were, in any way, insufficient," does not satisfy its burden to make an affirmative showing by evidentiary proof that it performed the snow removal services at the Chase parking lot with reasonable care and, thus, was not negligent. Moreover, the conclusory assertion in its attorney's affirmation that McGuire's performed the work "in an professional manner" is not supported by any evidentiary proof. In seeking summary judgment, McGuire's relies solely on the parties' deposition testimony, which is insufficient to establish McGuire's lack of negligence, as a matter of law. Even though Tina McGuire testified that her log book indicated that the Chase parking lot was plowed the day before the accident, and was salted and sanded at 6:00 a.m. on the day of the accident, she did not testify that she had personal

knowledge about the actual condition of the parking lot on the day before or the day of plaintiff's accident, after those services were performed. The Chase witness also had no personal knowledge of the actual condition of the parking lot at the time of the accident, as he testified that in December 2003, he was not the project manager responsible for that location. Plaintiff, on the other hand, testified that it snowed the day before her accident, and that she slipped and fell on snow and ice in the Chase parking lot at approximately 10:30 a.m. Plaintiff also testified that the parking lot "seemed to be cleared," but there was still snow on the ground and there was no salt. Even assuming that McGuire's made a prima facie showing, plaintiff's testimony is sufficient to raise an issue of fact as to its negligence.

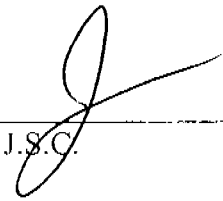
Accordingly, it is hereby

ORDERED that the motion and cross-motion are denied; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on April 30, 2009 at 2:30 p.m. in Part 11, Room 351, 60 Centre Street..

DATED: April 15 2009

ENTER:

  
 \_\_\_\_\_  
 J.S.C.

**FILED**  
 APR 22 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK