

Sanders v Sangwan & Sangwan, LLC

2009 NY Slip Op 31873(U)

August 20, 2009

Supreme Court, Suffolk County

Docket Number: 08345/2008

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 08345/2008

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:**Hon. Paul J. Baisley, Jr.**

 ELENA SANDERS,

Plaintiff(s),

-against-

SANGWAN & SANGWAN, LLC,

Defendant(s).

 SANGWAN & SANGWAN, LLC,

Third-Party Plaintiff,

-against-

CS MAEDER SNOW PLOW,

Third-Party Defendant.

ORIG. RETURN DATE: September 24,2008**FINAL RETURN DATE:** October 8, 2008**MTN. SEQ. #:** 001-MG**PLTF'S ATTORNEY:**
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Upon the following papers numbered 1 to 38 read on this motion to dismiss: Notice of Motion and supporting papers 1 - 17; Affidavit in Opposition and supporting papers 18 - 26; Reply Affirmation 27 - 38; it is,

ORDERED that this motion (001) by the third-party defendant for dismissal of the third party complaint in its entirety pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted; and it is further

ORDERED that, pursuant to 22 NYCRR 202.8(f), the parties in the main action are directed to appear for a preliminary conference on September 4, 2009 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

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This action arises out of a slip and fall on snow and ice in which, in the main action, the injured plaintiff is suing the owner of the property where the alleged accident occurred. The property owner then brought a third-party action against the business it contracted with to provide snow and ice removal services. In this motion, the third-party defendant, CS Maeder Snow Plow (hereinafter Maeder), seeks dismissal of the third-party complaint in its entirety upon the grounds of documentary evidence (CPLR 3211[a][1]) and failure to state a cause of action (CPLR 3211[a][7]).

The underlying third-party complaint contains four causes of action, each seeking indemnification and contribution in the event the defendant/third-party plaintiff is found liable. The causes of action are based upon (1) negligence; (2) failure to obtain general liability insurance as required by the underlying contract; (3) failure to defend and indemnify as required by the underlying contract; and, (4) failure to perform snow removal services as required pursuant to the underlying contract.

The third-party defendant Maeder contends that the underlying contract requires dismissal because it only provided for snow removal services when a snow fall in excess of 2" was forecast. In such a case, Maeder was obligated to remove snow from certain areas within certain time frames. As to the walkways, they were to be "shoveled clear and salt/sand will be used when temperature is forecasted to drop below freezing."

Maeder contends that the underlying contract and the submitted certified weather reports attached to the affidavit of a meteorologist/expert provide the documentary basis for dismissing the third-party complaint. Maeder argues that the underlying contract contains no provision requiring Maeder to carry general liability insurance (second cause of action); no provision requiring Maeder to indemnify and contribute to the third-party plaintiff in the event it was found liable for injuries related to snow removal (third cause of action); and, no provision requiring Maeder to supply a defense to the third-party plaintiff in the event it was sued for injuries related to snow removal services (fourth cause of action).

In addition, Maeder relies on the weather documents and the meteorologist's affidavit to show that there was no forecast for snow in excess of 2" for the day in question (Dec. 17, 2007); that the last day on which snow removal services were performed was three days before (Dec. 14, 2007); that there were no forecasts for snow in excess of 2" for the intervening days; that the total accumulation of snow in the intervening days was less than 2"; and, that the temperatures during those intervening days included periods above freezing as well as below. All of this, according to Maeder, proves that the condition precedent for providing snow removal services never occurred with regard to the day in question. Accordingly, Maeder contends that there is no basis for claiming that Maeder was negligent in failing to remove snow that day or for claiming that the snow removal services provided three days before were done negligently.

In addition and in any event, Maeder argues as a matter of law that it owed no duty to the plaintiff in the underlying action because the plaintiff was not a party to the contract between Maeder and the third-party plaintiff property owner.

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In order to prevail on a motion to dismiss on the basis of documentary evidence (CPLR 3211[a][1]), the admissible documents must conclusively resolve factual issues raised in the pleadings in favor of the moving party (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573 [2005]; *New York Schools Ins. Reciprocal v Gagliotti Assocs.*, 305 AD2d 563, 759 NYS2d 372 [2d Dept 2003]). Here, insofar as the underlying contract is concerned, the underlying contract does, indeed, conclusively establish that Maeder was under no obligation to carry general liability insurance and was under no obligation to defend and indemnify. In opposition to this limited part of Maeder's application, the third-party plaintiff offers no meaningful opposition. Accordingly, the pertinent causes of action (second and third) are dismissed.

Turning now to that part of this motion seeking a dismissal of the third-party complaint for its failure to state a cause of action, in general, in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12). In addition, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]).

However, affidavits submitted by the moving party (as contrasted to affidavits by the opposing third-party plaintiff) in support of such a motion which,

"Do no more than assert the inaccuracy of plaintiff's allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint [*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 357 NE2d 970, 389 NYS2d 314], and do not otherwise conclusively establish a defense to the asserted claims as a matter of law [*see Leon v Martinez*, 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 (1994)]" (*Tsimerman v Janoff*, 40 AD3d 242, 835 NYS2d 146, 147 [1st Dept 2007]).

Conversely, if affidavits in support of the motion to dismiss "conclusively establish a defense to the asserted claims as a matter of law, then such proof may be considered on such a motion (*id.*; *see also Lawrence v Miller*, 11 NY3d 588, 595, 873 NYS2d 517 [2008]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 315 [1976]).

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As to the remaining causes of action (alleging negligence and failure to remove snow as required by the contract; first and fourth causes of action, respectively), Maeder argues that the documentary evidence comprised of the official weather reports conclusively establish that Maeder was under no duty to provide snow removal services for the day in question and, thus, cannot be said to have negligently performed services which were not required in the first place.

In opposition, the third-party plaintiff contends that there is a question of fact, even though this is not a motion for summary judgment, as to whether the snow removal services three days previously were negligently performed and thus resulted in the slippery conditions on the day in question and also contends that the contract is ambiguous and, arguably, that the third-party defendant was obligated to at least clear the walkways on the day in question because the temperature fell below freezing.

These arguments, however, are without merit because the contract is clear on its face and unambiguously provides that no snow removal services are to be performed unless there is a forecast of snow in excess of 2" - which there was not - and the requirement for clearing the walkways and applying salt/sand to them if the temperature was "forecasted to be below freezing" was only operable in the context of appearing at the site to provide snow removal services when the forecast was for snow in excess of 2". On all other days, there was no contractual obligation on the part of Maeder to provide any snow removal services. Indeed, this was the case on the day of the alleged accident.

As a rule, a contract which provides for snow removal services, such as the one here, generally does not make the snow remover liable in tort for injuries to third persons (*see Espinal v Melville*, 98 NY2d 136, 141-142, 746 NYS2d 120 [2002]; *Georgotas v Laro Maint. Corp.*, 55 AD3d 666, 865 NYS2d 651 [2d Dept 2008]; *Baratta v Home Depot USA Inc.*, 303 AD2d 434, 434-435, 756 NYS2d 606, 607 [2 Dept 2003]). On the other hand, if it can be shown that the injured person relied on the snow remover's services to her detriment, or if the snow removal services resulted in creating an instrument of harm, the snow removal business could be liable (*id.*). Here, there is no allegation of reliance and, in any event, the submissions conclusively establish that the snow remover, Maeder, did not create the hazardous condition.

As for common law indemnification (which would be part of the first cause of action), such a claim will survive a motion to dismiss unless it is conclusively established that the alleged injuries were not attributable to the non-performance of an act solely within the province of the snow removal business (*see Wheaton v East End Commons Assoc.*, 50 AD3d 675, 854 NYS2d 528 [2d Dept 2008]; *Baratta v Home Depot USA Inc.*, 303 AD2d 434, 434-435, 756 NYS2d 606, 607 [2 Dept 2003]).

In this case, the submissions on this motion by the third-party defendant Maeder conclusively establish it that was under no duty to perform snow removal services on the day in question and that there could be no nexus between the services provided three days before and the snow and ice conditions on the day in question (*see e.g. Guggenheim v Ginzberg*, 43 NY2d 268, 275, 401 NYS2d 182, 185 [1977]; *Steve Eliot, LLC v Teplitsky*, 59 AD3d 523, 524, 873 NYS2d 672, 673 [2d Dept 2009]). Thus, even if the allegations, standing alone, could survive a motion to dismiss for failure to state a cause of action, the conclusive disproving of the essential elements in the third-party complaint warrant dismissal (*see Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]).

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Accordingly, Maeder has clearly established that it was not and could not be found negligent for services on the day in question since it was not under any obligation to perform such services and, in addition, it could not be found liable for any alleged negligence for services performed three days before since the weather conditions in that intervening period included temperatures high enough to melt snow and ice and any intervening snow was not enough to require Maeder to provide additional services under the contract.

Thus, the third-party complaint is dismissed in its entirety based upon documentary evidence (CPLR 3211[a][1]) and the failure to state a cause of action (CPLR 3211[a][7]).

This constitutes the decision and order of the court.

Dated: August 20, 2009

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.