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SHORT FORM ORDER

INDEX NO. 06-19091
CAL. NO. 09-000560-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-3-09
ADJ. DATE 6-9-09
Mot. Seq. # 006 - MG
007 - XMotD
008 - XMD

JASWINDER K. PABLA, Plaintiff, - against - G.A.C. INTERNATIONAL d/b/a DENTSPLY INTERNATIONAL, FOUR L. REALTY CO. and KINGS PARK CONTRACTING, Defendants.	STEVEN D. DOLLINGER & ASSOCIATES Attorneys for Plaintiff Five Threepence Drive Melville, New York 11747 ANDREA G. SAWYERS, ESQ. Attorneys for Defendants G.A.C. International & Four L. Realty Co. 3 Huntington Quadrangle, Suite 102S, P.O. Box 9028 Melville, New York 11747 RIVKIN RADLER, LLP Attorneys for Defendant Kings Park Contracting 926 Rexcorp Plaza Uniondale, New York 11556-0926

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Kings Park Contracting, dated January 28, 2009, and supporting papers (including Memorandum of Law dated January 28, 2009); (2) Notice of Cross Motion by the defendants G.A.C. International d/b/a Dentsply International and Four L. Realty Co., dated February 11, 2009, and supporting papers; and Notice of Cross Motion by the plaintiff, dated May 8, 2009, and supporting papers (3) Affirmation in Opposition by the defendant Kings Park Contracting, dated May 18, 2009, and supporting papers; and Affirmation in Opposition to cross motion and reply by the defendants G.A.C. International d/b/a Dentsply International, dated June 1, 2009, and supporting papers; and (4) Reply Affirmation and in further support of plaintiff's cross motion by the plaintiff, dated June 5, 2009, and supporting papers; and Reply Affirmation and in further support by defendant Kings Park Contracting, dated June 8, 2009; and supporting papers; and (5) Other (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Kings Park Contracting is granted and it is further

ORDERED that the cross motion by defendant GAC International, d/b/a Dentsply, and defendant Four L. Realty is granted as to Four L. Realty, and is otherwise denied; and it is further

ORDERED that the cross motion by plaintiff is denied.

Defendant Kings Park Contracting ("KPC") moves for an order dismissing the complaint and cross claim against it and submits, in support, copies of the pleadings; a copy of a document dated October 9, 2002 from KPC to GAC titled "Proposal"; a copy of an invoice dated January 29, 2004 from KPC to GAC; copies of local climatological data from the National Climatic Data Center for January and February 2004; and copies of various transcripts of pretrial deposition testimony. GAC and Four L. Realty cross-move for an order dismissing the complaint and submit, in support, copies of the pleadings; copies of pretrial deposition testimony; a copy of a document titled "Agreement of Lease Between Four L Realty Co. and G.A.C. International, Inc."; and an affidavit by Debra Tellekamp ("Tellekamp"), one of the general partners of Four L. Realty Co. Plaintiff cross-moves for an order dismissing GAC's affirmative defense based upon the Worker's Compensation Law and submits, in support, her affidavit, copies of her pay checks and pay stubs, a document titled "New York Department of State, Division of Corporations Entity Information"; and a news release issued on November 12, 2008 by Dentsply International Inc. GAC and Four L. Realty have submitted an affirmation in opposition and reply. KPC has submitted a reply affirmation in further support of its motion and in opposition to GAC's cross motion and reply. Plaintiff has submitted a reply affirmation in further support of her cross motion and in further opposition to GAC's motion. KPC has submitted a memorandum of law.

The facts of the underlying complaint place the various motions in context. Plaintiff, by her pretrial deposition, testified that on February 4, 2004 she was employed by GAC, a dental supply company. She stated that she worked in the warehouse part of the building which housed GAC and that, on the day of her alleged accident, upon arriving at work, she parked her car in a lot adjacent to the warehouse and traversed between 60 and 75 feet to the building entrance. She indicated that the parking lot had been cleared of snow and that she observed ". . . the sun was there, so the snow was melting and coming to the parking lot, you know, and some – same thing, like some ice was already over there melted. Snow get water then turn into ice, it was there also [sic]. So I was liking – taking my time to move because it was there." She testified that she left the building at about 6:00 p.m. and that the ambient temperature was below freezing when she walked to her car. Plaintiff testified that after traversing about ten feet in "very dim" lighting, she slipped and fell and that, although she did not initially observe ice on the surface of the parking lot, after she fell she observed "a pretty big area with the ice all around me at that time." She testified that the ice was "black, shiny." As a result of the fall, plaintiff alleges that she sustained various injuries including a fracture of her left leg.

KPC by its motion, alleges, among other things, that pursuant to an oral contract and written proposal, it performed snow removal and sanding for GAC in the event of accumulation of snow in excess of two inches, that in the event of precipitation of less than two inches only sanders would be dispatched to the premises; and that after performing snow removal services, it did not return to the premises unless requested to do so by GAC. KPC also alleges that the accident took place in an area where GAC performed its own sanding. It points to the testimony of Thomas Nevins ("Nevins"), who indicated that he was the night manager of the GAC warehouse on the evening of the accident, and who testified that the accident took place in an area where GAC performed its own sanding and that, when he arrived at work on the night of the accident, he observed no ice or snow in the parking lot. Nevins also indicated that prior to plaintiff's fall, he observed patches of ice in the area where the accident took place and dispatched his employees twice to spread rock salt over the area. KPC also notes the testimony offered by Michael

Bracciodieta ("Bracciodieta"), an operations manager for GAC. Bracciodieta testified that on occasions when sanding was necessary to ameliorate icy conditions, he was charged with making the determination as to whether to contact KPC - in those instances when the entire parking lot was icy - or to assign the task of deicing an isolated area, such as the building entrance, to GAC employees. According to Bracciodieta's testimony, the spot where plaintiff fell was within the scope of the parking lot area where GAC employees would perform sanding and salting themselves.

As an initial contention, KPC argues that it owed no duty of care to plaintiff inasmuch as its obligation to perform snow removal services for at the premises where plaintiff's accident was alleged to have occurred was limited pursuant to its agreement with GAC, which required KPC to perform snow removal and sanding services only if there was an accumulation of snow in excess of two inches. In addition, KPC argues it was not obligated, upon completion of its snow removal tasks, to return to the premises except upon a specific request by GAC to do so. KPC points to the deposition testimony of the various witnesses in further support of its position that it did not perform its services negligently nor did it create a dangerous condition at the site of the premises or in the GAC parking lot where the accident was alleged to have occurred. KPC notes that the accident took place six days after it last performed snow removal at the site. KPC also argues that the action against it must be dismissed because plaintiff cannot establish that it caused the dangerous condition which resulted in plaintiff's injuries nor can she show that KPC had notice of the allegedly icy condition of the parking lot. Because KPC had no ongoing duty to monitor the condition of the parking lot, it contends that plaintiff cannot prove that it had actual or constructive notice of its condition. Finally, KPC argues that GAC's cross claim against it must be dismissed because it has demonstrated, as a matter of law, that it properly performed its obligation to remove snow from the premises and, therefore, any claim by GAC for contribution is without basis. It argues that since it did not agree to indemnify GAC, GAC cannot seek common law indemnity against it. Further, KPC claims that since it did not agree to indemnify GAC in connection with snow removal services, GAC's claim for contractual indemnity must fail. As to the latter, KPC points to its various submissions which, it alleges, delineates the nature of the snow removal agreement between it and GAC. It also argues that, despite GAC's claim to the contrary, it had no obligation to obtain a general liability insurance providing coverage to GAC and, therefore, GAC's cross claim in that regard must be dismissed.

GAC and Four L. Realty, by their cross motion, claim entitlement to summary dismissal of plaintiff's action against them on the ground it is barred by the Workers' Compensation Law. GAC and Four L. Realty allege that it is "undisputed" that plaintiff was employed by GAC at the time of her accident, and that, pursuant to New York State Workers' Compensation Law § 11, liability is limited exclusively to the benefits available thereunder. It is not disputed that plaintiff sought and obtained such benefits from GAC. It is also noted that plaintiff's own sworn statements confirm that GAC was her employer. GAC and Four L. Realty also argue that, in the event their motion for summary judgment is denied, then summary judgment against KPC should also be denied because "[t]he evidence submitted herein clearly shows that the snow plowing undertaken by [KPC] created a dangerous, icy condition or increased the snow-related hazard which caused plaintiff to slip and fall." Specifically, the testimony by plaintiff that she did not see any sand or salt in the area where she fell is proffered in support of the argument that KPC failed to properly sand and salt the area where plaintiff fell. In addition, Four L. Realty argues that, as a threshold matter, it is an out-of-possession landlord and, pursuant to the terms of its lease with GAC, the responsibility for snow removal was assumed by GAC as tenant. In support, Four L. Realty points to the

testimony by Bracciadieta who "confirmed" the practice by GAC of hiring KPC for snow removal. Four L. Realty also refers its lease agreement with GAC, which charges the tenant, GAC, with "keeping the exterior premises clean and free of debris, snow and ice."

Plaintiff, by her cross motion, contends that GAC's request for dismissal based upon New York State Workers' Compensation Law is without basis inasmuch as she was employed and payed by Dentsply GAC, which is a division of Dentsply International Inc., not by GAC. She claims that her statements in her verified bill of particulars and during her deposition to the contrary were in error and that review of her pay checks and stubs reveals that her actual employer was Dentsply GAC, which, she contends, is separate and distinct from GAC International, the lessee of the premises where the accident took place. Plaintiff also contends that she is not precluded from asserting that Dentsply GAC was a separate entity from GAC on the ground that she was provided Workers' Compensation benefits by the latter; that investigation has revealed that GAC and Dentsply GAC are separate entities and that GAC has failed to demonstrate, by the submission of competent, admissible evidence, that GAC and Dentsply GAC are separate legal entities which actually function as one company. In support of this argument, plaintiff relies on documents from the New York Department of State, Division of Corporations reflecting "Entity Information" with respect to Dentsply GAC, which is listed as a Delaware foreign corporation with a principal executive office in Philadelphia, Pennsylvania. Such evidence, she argues, demonstrates that Dentsply GAC is a separate entity from GAC. Plaintiff also points to an affidavit from one of the general partners of Four L. Realty which states, among other things, that the premises were leased to GAC, a New York corporation, and to GAC's amended answer, which "only admits that 'G.A.C. International,' *not* 'G.A.C. International d/b/a DENTSPLY INTERNATIONAL,' was the tenant on the lease." (Italics in the original.)

Plaintiff also contends, as to KPC's cross motion, that it has failed to carry its initial burden of proving that its snow removal activities did not cause or increase the danger of the icy conditions in the parking lot which caused her to slip and fall. She notes that her claim against KPC is based not upon failure to perform its contract but upon its own affirmative acts, which created a risk of injury to people walking in the parking lot. The snow removal activities by KPC, in removing the snow, plaintiffs claims, created or aggravated a hazardous, slippery snow or ice condition. Specifically, plaintiff points to her own and Nevis's testimony regarding the piles of snow which were deposited approximately fifteen to twenty feet from the site of her accident. Plaintiff also notes that the weather reports submitted by KPC for the period January through February 2004 reflect that, in addition to the snow storm of January 27/28 which resulted in clean up efforts by KPC, there were seven inches of snow/ice on the ground on February 1 and 2, six inches of snow/ice on February 3, and five inches of snow/ice on February 4. Based upon the aggregate testimony of the various witnesses plaintiff posits that it is "reasonable to infer" that after KPC plowed the snow on January 28, the piles of snow began to melt with the rising temperature during the ensuring days resulting in the formation of ice as the temperature later fell, and that she ultimately fell on the accumulated ice.

The evidence before the court in the form of meteorological records indicates that after the snow storm on January 28, no additional snow fell in the area where plaintiff's accident occurred. Additionally, the testimony of Nevins and plaintiff established that, on the night of the accident, the parking lot was cleared of snow. The indications, from the various meteorological data, that there was ground cover of snow/ice during the intervening period, as alleged by plaintiff, does not contradict the factual description of the actual accident site as articulated by the parties during their respective depositions. The evidence also

shows that during the intervening period between the clearance of snow by KPC and plaintiff's fall, efforts when undertaken by GAC employees to rid the parking lot of ice by sanding and salting.

KPC contends that it fulfilled its contractual obligation by removing the snow from the premises after the storm and that, absent communication from GAC, it had no further duty to return to the site unless additional snowfall, in excess of two inches, accumulated at the site. Plaintiff counters that KPC has failed to carry its burden of proving that its snow removal efforts did not cause or increase the danger of icy conditions which resulted in her injuries. Here, pursuant to a snow removal contract, KPC plowed the GAC parking lot. It did not return to the site thereafter because it was not instructed by anyone at GAC to do so. KPC claims that it had no contractual duty to plaintiff and that such obligation did not accrue in any event because it did not fail to exercise reasonable care in the performance of its duties, that plaintiff did not detrimentally rely on the continued performance of its duties, and that it did not entirely displace the owner's duty to maintain the premises (*see* ***Espinal v Melville Snow Contrs***. 98 NY2d 136, 140 [2002]). The evidence shows that the area plowed by KPC was cleared of snow. There is no indication that plaintiff was aware of the contract between KPC and GAC. Most significantly, there nothing in the record to show that KPC launched a force or instrument of harm thereby creating or exacerbating a hazardous condition when it conducted its plowing operation six days before plaintiff fell (*see* ***Castro v Maple Run Condominium Association,*** 41 AD3d 412 [2007]). Plaintiff's allegations to the contrary are speculative and thus insufficient to raise a triable issue of fact (*see* ***Yannotti v Four Bros. Homes at Heartland Condominium I***, 24 AD3d 659 [2005]). The application by KPC for summary dismissal of plaintiff's complaint against it, therefore, is granted. Additionally, KPC's motion to dismiss the cross claims asserted against it by GAC for contribution and indemnification and for failure to procure a general liability insurance policy is granted. As noted, KPC has demonstrated that it is free from negligence or responsibility with respect to plaintiff's injuries. There is nothing in the record to suggest that KPC agreed either to indemnify GAC or to purchase general liability insurance. In any event, the record before the court demonstrates that KPC's limited contractual undertaking with GAC was not a comprehensive and exclusive property maintenance obligation which usurped GAC's duty to maintain the property (*see* ***Pavlovich v Wade Associates, Inc***., 274 AD2d 382 [2000]).

By its cross motion Four L. Realty contends that it cannot be held liable for plaintiff's accident, because by its lease responsibility for snow removal was transferred to GAC. Plaintiff contends that this court should not consider Four L. Realty's argument that it was an out-of-possession landlord because it was raised for the first time in reply, however, the submissions by Four L. Realty, including an affidavit by Tellekamp and the entire lease agreement were provided in support of its cross motion. An out-of-possession landlord is not generally responsible for injuries which occur on its premises unless it has retained control over the property or is contractually obligated to maintain or repair the alleged dangerous condition (*see* ***Stein v Harriet Management***, 51 AD3d 1007 [2008]). Four L. Realty has established a prima facie entitlement to summary judgment by providing a copy of its lease with GAC which clearly sets forth the nature of its obligations with respect to the property and the fact that it relinquished control of the leased premises and imposed upon GAC the responsibility to "keep[ ] the exterior premises clean and from of debris, snow and ice." Plaintiff has not alleged a statutory defect nor presented evidence that the defects alleged constituted a significant structural or design flaw and thus not raised a triable issue of fact (*see* ***Yadegar v International Food Market***, 37 AD3d 595 [2007]). Thus, plaintiff's motion for summary judgment as to Four L. Realty is denied and the cross motion by Four L. Realty for judgment in its favor is granted

The remaining issue as to whether GAC International Inc. is an alter ego of employer GAC Dentsply, thus barring plaintiff's cause of action by the operative provisions of the Workers Compensation Law, cannot be determined summarily. It is true that, as a general rule, "when an employee is injured in the course of [her] employment, [her] sole remedy lies in [her] entitlement to the Workers' Compensation Law" (***Billy v Consolidated Machine Tool Corp.***, 51 NY2d 152, 156 [1980]) and, as noted by GAC, the defense of the exclusivity language contained in the Workers Compensation Law may also extend to suits brought by plaintiffs against corporations which are alter egos of, or joint venturers with, the corporation which employed the injured plaintiff (*see* ***Ortego v Noxxen Realty Corp.***, 26 AD3d 361, 362 [2006]). Plaintiff concededly identified GAC as her employer both during her deposition and in her verified bill of particulars. In addition, the documentation supplied to the State of New York Workers' Compensation Board identifies GAC as plaintiff's employer. Plaintiff counters those submissions by pointing out that one of the documents included in plaintiff's Workers' Compensation file is a letter from "Medical Evaluation Specialists" advising of a report done by an independent medical examination which identifies plaintiff's employer as Dentsply International. She also refers to the deposition testimony of Nevins and Braddiodieta who testified that they were employed by "Dentsply G.A.C. International" and notes that the lease agreement between Four L. Realty and GAC International, Inc. does not mention Dentsply GAC, which, plaintiff claims, is a division of Dentsply International, Inc.

Based upon the foregoing, GAC has not established, as a matter of law, that it is an alter ego or joint venturer of GAC Dentsply to the extent that the exclusivity provisions of the Workers' Compensation Law would bar plaintiff's suit against GAC Dentsply nor has plaintiff established that her employer was Dentsply GAC. The submissions from each are at best equivocal and thus preclude summary determination. Therefore, the applications by GAC and plaintiff for summary judgment as against each other are denied.

Dated: 9/19/09

Peter H. Mayer

PETER H. MAYER, J.S.C.