

**Triolo v Cablevision Corp.**

2009 NY Slip Op 32816(U)

November 13, 2009

Supreme Court, Nassau County

Docket Number: 011174/07

Judge: Daniel Martin

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SHORT FORM ORDER  
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN  
Acting Supreme Court Justice

TRIAL/IAS PART 30  
NASSAU COUNTY

ELIZABETH TRIOLO and JOSEPH TRIOLO,  
Plaintiffs,

Sequence No: 1  
Index No.: 011174/07

-against-

CABLEVISION CORPORATION,  
Defendant.

CSC HOLDINGS, INC. s/h/a CABLEVISION  
CORPORATION,  
Third-Party Plaintiff,

-against-

GREENS-KEEPER OF NASSAU, INC.,  
Third-Party Defendant.

**The following papers have been read on this motion:**

	Papers Numbered
Third-Party Defendant's Notice of Motion	1
Plaintiffs' Affirmation in Opposition	2
Defendant/Third-Party Plaintiff's Reply Affirmation in Partial Support	3
Third-Party Defendant's Reply Affirmation	4

In a personal injury action, the third party defendant, Green-Keeper of Nassau, Inc. (hereinafter referred to as Greens-Keeper) moved for an order granting it summary judgment. The motion is opposed by the plaintiff, and by the defendant and third party defendant in so far as the motion seeks dismissal of the third party complaint.

The underlying action stems from an incident occurring on February 11, 2005 when the plaintiff slipped and fell in a parking lot due to the alleged negligent snow removal and ice treatment on premises owned and controlled by the defendant. The plaintiff alleged that she fell as she left the parking lot area and approached steps leading to the building on the premises. The plaintiff was caused to fall by "clumpy" rock salt on the steps which the plaintiff failed to observe. The defendant denies any liability for the incident in question, and via its third party action alleges that the movant was solely responsible for the removal and treatment of snow and ice on the defendant's premises.

In support of its motion, the movant argues that the plaintiff's deposition demonstrated that the plaintiff was solely responsible for the incident in question. In support of that contention, the movant directs the court's attention to the fact that at the deposition of the plaintiff indicated that she did not look at the step before placing her foot down and had no idea what caused her to fall until after the incident when a stranger directed her attention to the "clumpy" substance. However, the plaintiff concedes that this stranger did not witness the accident. The movant also offered the deposition, of an employee, of the defendant, Mario Licata, who described how the premises are maintained. Mr Licata indicated that there is daily inspection and when needed maintenance of the premises by defendant's employees. He is aware of records kept by the defendant with respect to maintenance and he notes that there is no indication of any complaints being made of a dangerous condition on the premises for thirty days prior to the incident in question. Lastly, the deposition of Donald Schaumloffel, a principal in the movant admitted that he utilized an ice melting agent which is flake-like in nature which is spread by hand on the steps to prevent ice formation. Mr Schaumloffel testified that material utilized did not have clumping tendencies and that he has never known it to clump. More significantly, Mr Schaumloffel indicated that the movant's records indicated that the last time Greens-Keeper worked at the site was on February 4, 2005- one week prior to the accident, and that there were no requests to take corrective action subsequent to that date.

Based on the foregoing, the movant makes several arguments in support of its request for summary judgment. First, the movant argues that the facts demonstrate that the plaintiff does not have a viable action since there is no possibility of actual or constructive notice being afforded to Greens-Keeper. Second, the movant claims that the plaintiff is solely responsible for the accident, or alternatively, plaintiff is incapable of proving how the accident occurred. Third, the movant argues that nothing the movant did created the condition in question.

The plaintiff's opposition consists of an attorneys affirmation which argues that the movant's proof was insufficient as, it merely established potential gaps in the plaintiff's proof. The plaintiff also points out that the plaintiff was capable of identifying what caused her to slip and fall; to wit:, "thick clumps of rock salt". The plaintiff's proof does not identify the source of the rock salt.

The defendant submits proof which alleges that pursuant to its 2003 agreement with Greens-Keeper, the movant must defend and indemnify the defendant for all actions brought out of the movant's performance of its snow removal obligations. Noting that snow removal work was performed one week prior to the accident, the defendant asserts, the incident arises out of the

movant's snow removal operations. The defendant alleges that the insurer obtained by movant has indicated that it will neither defend or indemnify the defendant, and the defendant alleges that such posture, in effect, is a breach of its indemnity agreement with Greens-Keeper since the defendant (contrary to the agreement of the parties) must now defend the action and be directly responsible if it is found liable. The defendant requests that the third party action be severed from the main action.

On a motion for summary judgment pursuant to CPLR 3212, the proponent 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." Sheppard-Mobley v. King, 10 A.D.3d 70, 74 (2d Dept. 2004), *aff'd. as mod.*, 4 N.Y.3d 627 (2005), *citing Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v. King, *supra*, at p.74; Alvarez v. Prospect Hosp., *supra*; Winegrad v. New York Univ. Med. Ctr., *supra*. In this instance the movant has met its burden by establishing that 1) that it neither caused or created the alleged negligent condition by proof that it performed its services one week prior to the accident, that it used materials that were flake-like and incapable of clumping, and that when its employees left the site one week prior to the accident there was no indicia of a dangerous condition, and 2) that it received no actual or constructive notice of any deficiencies in the services that were rendered in its snow removal services. The court notes, that unlike many snow removal cases, the accident is not alleged to be caused by negligent movement or placement of the snow which subsequently melts and freezes causing an ice condition, but rather the allegation is that the de-icing services created a dangerous condition in and of itself. The argument advanced by the plaintiff that the movant is merely seeking summary judgment by demonstrating gaps in the plaintiff's proof thus, mischaracterizes the nature of the movant's proof. The court concludes the movant has sufficiently shown an absence of negligence on its part.

The burden now shifts to the parties opposing summary judgment to prove that potential bona fide issues of fact exist. The plaintiff's counsel argues that the movant has not negated the possibility of constructive notice as to the landlord. The court notes that although said argument has great weight as to a potential tortfeasor who had continual access and responsibility for the maintenance of the premises such as a lessee or property owner, such argument is not germane to a service provider who has no contractual obligation for continual inspection and maintenance of the premises. The plaintiff's opposition is deficient in that it fails to contest the initial facts established by the movant, to wit; that it neither created the condition asserted by the defendant nor had any responsibility for insuring that such condition did not continue to exist. Thus, to the extent that movant seeks to remove any claim of direct responsibility owed by it to the plaintiff, the court notes that it has established that it was free of negligence and owed no duty to the plaintiff. See Mitchell v Fiorini Landscape 284 AD2d 313, 726 NYS2d 567. Therefore that branch of the movant's motion seeking dismissal of any direct or cross claims against it must be granted.

The remaining branch of the motion seeks dismissal of the third party actions which is in the nature of indemnification. The indemnification claim can only be derived from the contract for

snow removal services or common law indemnification. The pertinent part of the contract provides:


“Contractor shall indemnify , defend and hold Cablevision harmless from and against any and all claims, loses, fines and damages arising, in any way whatsoever, **out of the Contractor’s performance of its obligations hereunder.**” (emphasis added).

Several cases with a somewhat similar factual pattern have been decided and the courts have consistently ruled that direct claims or cross claims by plaintiffs against a contractor of such services cannot be maintained, but that where issues of fact exists as to whether the contractor’s negligence contributed to the injuries in question, indemnification actions by the property owner against its contractor cannot be summarily disposed. See e.g. Hites v Toy’s R Us Inc. 35 AD3d 759, 822 NYS2d 624, Prenderville v International Service Systems inc. 10 AD3d 334, 781 NYS2d 110, Boskey v Gazza properties, Inc. 248 AD2d 344, 669 NYS2d 624.

In each of the afore cited cases the contractor did not sufficiently prove an absence of an issue of fact as to its negligence. In this case the movant contractor has established, without contradiction, that it was free of negligence. The proof submitted by the defendant consists solely of an attorneys affidavit and offers no facts to contradict the proof submitted by the movant. The fact that the contractor applied a de-icing material one week prior to the accident does not raise an issue of fact where, as here, the contractor has indicated that the material used was not capable of forming the clumps which plaintiff claims caused her to fall.

Lastly, the court notes that the movant claims, without contradiction, that it satisfied its obligation to obtain insurance coverage, notwithstanding the proof submitted by the defendant indicating otherwise. Said issue has been rendered moot by the courts determination as to the other branches of the relief requested by the movant. The obligation of the third party defendant to obtain insurance was undertaken so that the defendant would incur no obligation to defend or pay for loses sustained through any activity of the third party defendant- a circumstance not present herein. Accordingly the motion is in all respects granted

So ordered.

  
HON. DANIEL MARTIN  
A.J.S.C.

Dated: November 13, 2009

**ENTERED**  
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NASSAU COUNTY  
COUNTY CLERK'S OFFICE