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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 48**

ST. ANEL ST. VILUS,

INDEX NO.: 019985/07

Plaintiff,

MOTION DATE:3-22-10
SUBMIT DATE:4-26-10
SEQ. NUMBER - 005

-against-

FREEPORT VF LLC, HOME DEPOT U.S.A., INC., and AMBROSE SCHMITT,

MOTION DATE 4-5-10
SUBMIT DATE: 4-26-10
SEQ. NUMBER -006

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 2-22-10.....1
Memorandum of Support, dated 2-22-10.....2
Notice of Cross Motion, dated 3-25-10.....3
Affirmation in Opposition to Cross Motion, dated 4-12-10.....4
Affirmation in Opposition, dated 4-16-10.....5
Affirmation in Reply, dated 4-15-10.....6

The motion by defendant Ambrose Schmitt pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted by co-defendants is granted to the extent that the complaint and so much of the cross claim that is for common-law indemnification and contribution is dismissed, and is otherwise denied.

That branch of the cross motion by defendants Freeport VF LLC and Home Depot U.S.A., Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint against Home Depot U.S.A. is granted and the complaint is dismissed as against this defendant. That branch of the cross motion that is for judgment in favor of defendant Freeport VF LLC on its claim for common-law and contractual indemnification is denied. That branch of the cross motion that is for breach of contract for failure to procure insurance is granted. That branch of the motion that is for dismissal of Ambrose Schmitt's cross claims for common law indemnification and contribution is denied as academic, as the complaint as against him has been dismissed.

This is an action for personal injuries stemming from a slip and fall accident in front of a Home Depot U.S.A., Inc. ("Home Depot") retail store in Freeport, New York on February 15, 2007. The plaintiff contends that he slipped on ice as he exited his automobile after parking in the lot owned by defendant Freeport VF LLC ("Freeport VF"). Defendant Ambrose Schmitt is a private contractor engaged under a written agreement by a managing agent, non-party Vornado Realty Trust ("Vornado"), to clear snow and ice from the lot. He had worked on that lot the evening of February 13 into the morning of February 14, 2007. Freeport VF has cross claimed against Schmitt for contractual and common-law indemnification and contribution, and Schmitt has cross claimed against his co-defendants on these grounds as well.

Initially, the Court finds that the branch of the motion by Freeport VF and Home Depot that is for dismissal of the action against Home Depot is based on the undisputed fact that Home Depot was not the owner of the parking lot where the plaintiff fell, nor had it

assumed, by lease or otherwise, any duty to maintain it in a safe condition. Freeport VF is the owner of the lot, and had the obligation to maintain it. Home Depot's motion is unopposed, and is therefore granted. The action as against this defendant is dismissed. CPLR 3212.

The Court now turns to the motion by Schmitt for dismissal of the complaint and all cross claims pled by Freeport VF. Schmitt has presented proof in admissible form that he was a private contractor hired to perform snow and ice removal at the premises. At this juncture, it is appropriate to note that on his cross claims Schmitt alleges a contract with Home Depot and Freeport VF, which constitutes a judicial pleading admission that a contract existed between Schmitt and Freeport VF, notwithstanding the fact that on its face the contract appears to be one between Schmitt and the non-party, Vornado. *See generally, Aronitz v Pricewatershouse Coopers LLP,* 27 AD3d 393 (1st Dept. 2006). Further, Schmitt's co-defendants have demonstrated that Vornado and Freeport VF are closely related entities, in that Vornado is the general partner of the sole Freeport VF LLC member, an entity called Vornado Realty LP. Accordingly, for purposes of this motion the Court will draw no distinction between Freeport VF and Vornado, and refer to Freeport VF as the party that engaged Schmitt.

It is settled law that, in general, a snow removal contractor owes no duty to persons injured by a fall on snow and ice that occurs on the landowner's property. *See Billotti v Above Average Landscaping Serv., Inc.,* 17 AD3d 495 (2d Dept. 2005); *Nobles v Procut Lawns Landscaping & Contr., Inc.,* 7 AD3d 768 (2d Dept. 2004); *Kamphefner v Allstate Sec.,* 284 AD2d 305 (2d Dept. 2001). However, a contractor can be said to have assumed

a duty of care, and thus be potentially liable in tort, if it can be shown that 1) the contractor, in failing to exercise reasonable care in the performance of his duties, launched a force or instrument of harm, or 2) the plaintiff detrimentally relied on the continued performance of the contractor's duties, or 3) the contractor had entirely displaced the owner's duty to maintain the subject premises safely. *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 (2002)

A review of the snow removal contract reveals that it was not a comprehensive and exclusive property maintenance agreement which would serve to displace the obligations of Freeport FV to maintain the property in a safe condition. *Linarello v Colin Serv. Sys. Inc.*, 31 AD3d 396 (2d Dept. 2006). Further, there are no factual allegations of detrimental reliance by the plaintiff, which would necessitate that he had knowledge of Schmitt and his contract. *Bugiada v Iko,* 274 AD2d 368 (2d Dept. 2000).

Finally, Freeport and, by way of a "me too" affirmation, plaintiff, point to Schmitt's deposition and argue that Schmitt "launched a force of harm" by attempting to move water from a depression in the surface of the parking lot so that it would be spread around (and thus, by clear implication, made easier to drain off), but instead caused a dangerous icing condition. However, Schmitt's testimony also places the depression some two hundred feet from the main entrance to the strore; this was where the plaintiff undisputedly fell, and there is no other competent evidence that this area been the recipient of any additional water and ice caused by Schmitt's actions. The Court thus finds that this issue rests on no more than speculation, and is insufficient to stave off the motion. *See, Zabbia v Westwood, LLC,* 18 AD3d 542 (2d Dept. 2005); *Penny v Pembrook Mgt.,* (2d Dept. 2001). Accordingly, Schmitt is entitled to dismissal of the plaintiff's complaint insofar as it is asserted against him.

The Court now turns to the issue of contractual indemnification asserted by Freeport VF. The simple two-page purchase order contract presented contains a "Terms and Conditions" section. One subsection is entitled, "CONDITIONS OF PURCHASE ORDER"; the next, "INSURANCE TO BE CARRIED BY SELLER, CONTRACTOR, AND/OR SUB-CONTRACTORS" and the last, "INVOICE INSTRUCTIONS." The only reference to indemnification comes in a sentence which is under the Insurance section, and states as follows: "Contractor shall indemnify and Hold Purchaser [Vornado/Freeport VF] Harmless, such indemnity shall be issued by a recognized insurance carrier or surety company."

"Courts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an 'unmistakable intent' to indemnify." *Great N. Ins. Co. v Interior Constr. Corp.,* 7 NY3d 412, 417, *quoting Levine v Shell Oil Co.,* 28 NY2d 205, 212 (1971). The *Great N. Ins.* Court, at that same page, also cited another of its precedents: "When a party is under no legal obligation to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Hooper Assocs. v AGS Computers,* 74 NY2d 487, 491-492 (1989) [citations omitted].

Applying this law to the subject agreement, the Court does not agree with Freeport VF that it is clear that Schmitt's obligation and duty to indemnify extended beyond its obligation to purchase insurance, so that Freeport VF would have an insurance carrier standing ready to defend and indemnify it. The provision states that "such indemnity *shall be issued by* a recognized carrier or surety company." (Emphasis supplied.) This creates an issue of fact as

to whether Schmitt's sole obligation under this provision was to provide the insurance coverage, as the language arguably indicates that the indemnification was to come from the insurance carrier alone – *i.e.,* that Vornado/Freeport VF was to be named as an additional insured on a policy covering Schmitt. The intent of the parties as to whether this extends to indemnification from Schmitt without regard to insurance therefore will have to be ascertained at trial. Accordingly, so much of the branch of Freeport VF's cross motion that is for contractual indemnification is denied.

The Court notes that the cross claim is for contractual indemnification and contribution, and not for breach of contract for failure to purchase insurance. Nevertheless, Freeport VF has presented proof by way of a copy of Schmitt's insurance policy that the required insurance in favor of Freeport VF was never procured, which has not been rebutted. Under these circumstances, the Court finds it appropriate to grant judgment to Freeport VF for Schmitt's failure to obtain the insurance. A court may grant judgment on an unpleaded cause of action provided the proof supports the claim and the defendant has not been misled to his prejudice. *Torrioni v Unisel, Inc.,* 214 AD2d 314 (1st Dept. 1995) [summary judgment granted on unpleaded cause of action for failure to procure insurance]. No prejudice is asserted, nor can the Court discern any from the record.

Freeport VF therefore can look to Schmitt for damages occasioned by the loss it may suffer if it does not have its own insurance providing for a defense of the plaintiff's law suit and indemnification for any judgment he obtains or, if it does have its own coverage, the cost of the premiums it paid for such insurance, any ourt-of-pocket expenses and any increase in premiums resulting from the claim. *Inchaustegui v 666 5th Ave. Ltd. Partnership,* 96 NY2d 111 (2001); *Wong v New York Times Co.,* 297 AD2d 544, 548 (1 st Dept. 2002). Of course,

should Freeport VF prevail at trial on its interpretation of the indemnity agreement, it would be entitled to recoupment of all losses, irrespective of its own insurance.

However, the Court dismisses outright the common-law indemnification and contribution claims asserted by Freeport VF against Schmitt. With regard to contribution, no duty of care in favor of Freeport VF independent of Schmitt's contractual obligations has been shown, nor any in favor of the plaintiff. *Roach v AVR Realty Co. LLC,* 41 AD3d 821, 824 (2d Dept. 2007). Further, as noted above, there is no proof that the ice on which the plaintiff allegedly slipped was caused to exist wholly by Schmitt's act or omission, which is fatal to the claim for common-law indemnification. *Id.; see also, Corley v Country Squire Apts., Inc.,* 32 AD3d 978 (2d Dept. 2006).

That branch of the the cross motion that is to dismiss to the cross claims asserted by Ambrose Schmitt for indemnification and contribution is denied as academic, as the plaintiff's action against this defendant has been dismissed.

In sum, the plaintiff's action against Home Depot and Schmitt is dismissed, and the case will proceed against Freeport VF. Summary judgment is granted to Freeport VF on its unpleaded cross claim against Schmitt for breach of contract for failure to procure insurance, and the sole remaining cross claim against Schmitt for contractual indemnification will proceed to trial.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 14, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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