Trinidad v Middle Is. Maintenance Corp.
2013 NY Slip Op 33191(U)
November 20, 2013
Supreme Court, Queens County
Docket Number: 8873/12
Judge: Timothy J. Dufficy

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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KATHLEEN TRINIDAD

Plaintiff, **Index No.: 8873/12**

-against- **Mot. Date: 10/8/13**

MIDDLE ISLAND MAINTENANCE CORP.,THE STOP AND SHOP SUPERMARKET COMPANY AND SOL GOLDMAN INVESTMENTS, LLC, **Mot. Cal. No. 136**

Mot, Seq. 2

Defendants.

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The following papers numbered 1 to 12 read on this motion by defendant **MIDDLE ISLAND MAINTENANCE CORP.** for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability and dismissing this action as against it, and all cross-claims asserted against it .

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-7
Affirmation in Opposition-Exhibits	8-10
Reply Affirmation	11-12

Upon the foregoing papers, it is ordered that defendant **MIDDLE ISLAND MAINTENANCE CORP.'s** ("Middle Island") motion is granted in all respects for the reasons set forth below.

The plaintiff brings this action seeking damages for personal injuries sustained in a slip-and-fall accident that occurred on January 5, 2011. Middle Island now moves for

an order pursuant to CPLR 3212 granting summary judgment on the issue of liability and dismissing this action and all cross-claims asserted against it.

It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 [2d Dept. 1994]; Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank of Albany v. McAuliffe, 97 AD2d 607 [3d Dept. 1983]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v. City of New York, supra at 562).

The plaintiff allegedly sustained personal injuries on January 5, 2011, when she slipped and fell on ice in the upper level of the enclosed garage at the co-defendant's supermarket. The area is owned by Stop & Shop Supermarket Company (“Stop & Shop”) and managed on Stop & Shop's behalf by Fameco Management Services Associates, L.P. (“Fameco”). Pursuant to a written agreement between Stop & Shop and movant Middle Island, the latter performed snow plowing, spot sanding and salting services for the parking lot areas at the supermarket, and had done so two days prior to the day of the plaintiff's accident. The owner cross-claimed against Middle Island for contribution, contractual indemnification, and common-law indemnification based in part on his alleged unspecified affirmative negligence.

In order for a snow removal contractor to establish its prima facie entitlement to summary judgment, the Court of Appeals held in Espinal v Melville Snow Contrs (98 NY2d 136, 138 [2002]) that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." However, the Court identified three exceptions to the general rule, pursuant to which "a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable

care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (id. at 140; see Church v Callanan Indus., 99 NY2d 104, 111-112 [2002]; Folkl v McCarey Landscaping, Inc., 66 AD3d 825 [2d Dept. 2009]; Crosthwaite v Acadia Realty Trust, 62 AD3d 823, 824 [2d Dept. 2009]).

Contrary to the contentions of the owner and the plaintiff, the movant Middle Island demonstrated its prima facie entitlement to judgment as a matter of law under the circumstances of this case merely by coming forward with proof that the plaintiff was not a party to his oral snow removal contract and that he therefore owed no duty of care to the plaintiff (see Wheaton v East End Commons Assoc., LLC, 50 AD3d 675, 677 [2d Dept. 2008]; Baratta v Home Depot USA, 303 AD2d 434, 434-435 [2d Dept. 2003]). Although Middle Island, in fact, did so, it was not required to negate the possible applicability of any of the three exceptions set forth in Espinal v Melville Snow Contrs. (98 NY2d at 140) and its progeny as part of his prima facie showing, since the plaintiff never alleged facts in her complaint or in her bill of particulars which would establish that any of those exceptions applied herein. Here, Middle Island made the requisite prima facie showing based on the plaintiff's allegations, and the burden shifted to the plaintiff to come forward with evidence sufficient to raise a triable issue of fact as to the applicability of one or more of the three Espinal exceptions. The plaintiff failed to sustain this burden.

In opposition to Middle Island's prima facie showing, the plaintiff and owner failed to establish a triable issue of fact as to whether the subject snow removal contract was a comprehensive and exclusive agreement which entirely displaced the owner's duty to maintain the premises in a safe condition (see Espinal v Melville Snow Contrs., 98 NY2d at 141; Linarello v Colin Serv. Sys., Inc., 31 AD3d 396, 397 [2d Dept. 2006]). In this regard, while the subject contract placed the obligation for plowing snow and ice from the parking lot area primarily on Middle Island, the deposition testimony of the supermarket manager was that he monitored the conditions of the parking lot on the second level, and spread calcium chloride on the parking lot when ice conditions formed, rather than calling Middle Island back for small, icy patches. Accordingly, Middle Island

did not completely displace the owners' duty of care to maintain the subject area in a safe condition.

Similarly, the owners and the plaintiff did not raise a triable issue of fact as to whether Middle Island failed to exercise reasonable care in the performance of his duties, and thereby launched a force or instrument of harm by creating or exacerbating the snow and ice condition (see Shaw v Bluepers Family Billiards, 94 AD3d 858 [2d Dept. 2012]; Espinal v Melville Snow Contrs., 98 NY2d at 140). Indeed, by merely plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area, Middle Island cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm (see Rudloff v Woodland Pond Condominium Assoc., 109 AD3d 810, 811 [2d Dept. 2013]; Fung v Japan Airlines Co., Ltd., 9 NY3d 351, 361 [2007]; Espinal v Melville Snow Contrs., 98 NY2d at 142). Moreover, a claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them (see e.g. Linarello v. Colin Service Systems, Inc., supra at 397 [2d Dept. 2006]). Therefore, even if Middle Island had the obligation to apply salt or sand to the parking lot area after plowing, the owners and the plaintiff have offered nothing more than speculation that the failure to perform that duty rendered the property less safe than it was before Middle Island started its work (see Church v Callanan Indus., 99 NY2d at 112; Crosthwaite v Acadia Realty Trust, 62 AD3d 823, 825 [2d Dept. 2009]).

Likewise, the plaintiff failed to demonstrate in her opposition papers any detrimental reliance upon Middle Island's proper performance of its contractual duties, since she had no idea who performed snow plowing and snow abatement services, and there was no evidence that she had any knowledge of any agreement whereby snow removal services were conducted at the premises (see e.g. Wheaton v East End Commons Assoc., LLC, 50 AD3d 675, 677 [2d Dept. 2008]; Castro v Maple Run Condominium Assn., 41 AD3d 412, 413 [2d Dept. 2007]).

Since there is no evidence that Middle Island either owed a duty of reasonable care to the plaintiff or a duty of reasonable care independent of its contractual obligations to the owners, the owners' cross claim for contribution also must be dismissed (see Foster v Herbert Slepoy Corp., 76 AD3d 210, 216 [2d Dept. 2010]; Wheaton v East End

Commons Assoc., LLC, supra at 678; Roach v AVR Realty Co., Inc., 41 AD3d 821, 824 [2d Dept. 2007]). Furthermore, since there was no evidence that Middle Island was negligent, so as to trigger the contractual indemnity provision of its contract with the owner, summary judgment dismissing the cross claim for contractual indemnification must be granted as well (see Corley v Country Squire Apts., Inc., 32 AD3d 978, 820 NYS2d 900 [2d Dept. 2006]). For the same reason that branch of Middle Island's motion for summary judgment dismissing the owner's cross claim for common-law indemnification must be granted, since there are no triable issues raised as to Middle Island's breach of its snow removal contract or whether its negligent failure to perform was the sole cause of the plaintiff's accident (see Wheaton v East End Commons Assoc., LLC, 50 AD3d supra at 678; Curreri v Heritage Prop. Inv. Trust, Inc., 48 AD3d 505, 507 [2d Dept. 2008]; Cf. Peycke v Newport Media Acquisition II, Inc., 17 AD3d 338, 339 [2d Dept. 2005]).

Accordingly, based upon the foregoing, it is

ORDERED, that Middle Island's motion is granted, and the plaintiff's complaint and all-cross-claims are dismissed as against it.

This constitutes the decision, order and judgment of the Court.

Dated: November 20, 2013

TIMOTHY J. DUFFICY, J.S.C.