NEW YORK SUPREME COURT - COUNTY OF BRONX

**PART 15**

| | |
|---|---|
| Case Disposed | ❑ |
| Settle Order | ❑ |
| Schedule Appearance | ❑ |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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**YVETTE THEUS**

Index №. **308415/2010**

-against-

Hon..**MARY ANN BRIGANTTI-HUGHES,**

**CVS ALBANY LLC., et als.**

----------X

The following papers numbered 1 to _9___ Read on this motion, **SUMMARY JUDGMENT**
Noticed on June 13 and 20, 2013 and duly submitted on the Motion Calendar of **October 15, 2013**

| | PAPERS NUMBERED | |
|---|---|---|
| Notice of Motion- Exhibits and Affidavits Annexed | 1,2 | 3,4 |
| Answering Affidavit and Exhibits | 5,6 | 7,8 |
| Replying Affidavit and Exhibits | 9 | |
| _____ Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memoranda of Law | | |

Respectfully Referred to: _____

Dated: _____

Upon the foregoing papers, third-party defendant Executive Snow Control ("Executive") moves for summary judgment, dismissing the complaint of the third-party plaintiff Campanelli Landscaping, Inc. ("Campanelli") and all cross-claims, pursuant to CPLR 3212. The motion is opposed by the plaintiff Yvette Theus ("Plaintiff") and CVS Albany, LLC., CVS Caremark Corporation ("CVS"), and E&N Refrigeration Corp. ("E&N").

Defendant Campanelli also moves for summary judgment, dismissing Plaintiff's complaint and all cross-claims, pursuant to CPLR 3212. The motion is opposed by Plaintiff and CVS. In the interest of judicial economy, these motions are consolidated and disposed of in the following Decision and Order.

## I. Background

On February 13, 2010, Plaintiff allegedly slipped and fell on the sidewalk in front of 282 East 149th St., Bronx, New York. The property was owned by CVS, who contracted with Campanelli to provide snow

and ice removal services. Campanelli, in turn, contracted with Executive to actually perform the snow and ice removal on the premises.

Plaintiff testified that she drove to the subject CVS on the date of the accident and parked her car in the street in front. Plaintiff recalled that it had snowed prior to her accident, but did not remember exactly when it had last snowed. There was snow on the sidewalks, and snow pushed up along the sidewalk curbs. After leaving the car, Plaintiff walked towards the front doors of the CVS store. As she was walking, Plaintiff testified that she "just went up in the air and went down on the left side of my body." While lying on the ground, Plaintiff observed a "mountain of ice or show or something, melting of ice" and believed it looked like black ice. A non-party witness testified that he saw a "mountain" of slush and ice prior to the accident and did not see any salt or sand on the ground. He also did not see any water dripping onto the sidewalk, and testified that the ice was a "couple of inches" thick. There also appeared to be snow on top of the ice.

By agreement dated October 1, 2005, CVS contracted with Campanelli to provide snow and ice removal services. The agreement specified that Campanelli was responsible for "removal of snow from handicap parking areas, snowplowing of parking lots, driveways, and aprons to the facility, and the application of approve ice control and traction materials as needed." The contract also required Campanelli to supply ice control products twenty-four hours a day, seven days a week during the winter months, and it was Campanelli's duty to "check the site (continuously if necessary) to determine if ice management services were required." The agreement also explicitly stated "[u]nder no circumstances does the 'notice to proceed' relieve [Campanelli] of its responsibility to have monitored the CVS location for the need of services." The contract also stated that "generally, no sidewalk snow clearing (immediately adjacent to the building) is necessary under this Agreement except when specifically requested by CVS Headquarters..." and snow placed purposely or inadvertently on the sidewalk must be cleared within 60 minutes of being notified of such a condition. Section 10 of the agreement states that Campanelli agreed to indemnify and hold harmless and defend CVS against all liability arising from the acts or omissions of Campanelli or its agents/contractors.

At deposition, Joseph Campanelli testified that his company subcontracted ice and snow removal services at the accident location to Executive. Mr. Campanelli confirmed invoices for "snow removal and ice control" at the location reflect such services performed on February 10 and February 11, 2010, when a winter storm occurred. He further testified that "lot one" on the invoice referred to the CVS parking lot and the municipal sidewalk where this accident occurred. There was a snowfall of 13.5 inches on February 10, 2010. Executive made five services calls to the CVS on that date, in light of the severe weather. The next day, the service tickets indicate that the sidewalks were shoveled and plowed once, and calcium salt was applied. Executive's president, Frank Schembre, testified that he believed the snow in question had dropped off the CVS canopy and onto the sidewalk some time after his company performed its final service

on February 11, 2010, and the accident on February 13, 2010. Mr. Schembre did admit that he did not inspect the area after February 11th and had no documents or photographs indicating that the sidewalk was clear when Executive had finished for the day. He also confirmed that he was not present at the CVS on the date that Executive performed its snow and ice removal services. Mr. Schembre testified that Executive was only responsible for removing snow after the storm, and was not required to further monitor the condition of the sidewalk or return to the location.

The CVS store manager, Babal Jamal, testified that he did not recall the incident in question. He further testified that CVS employees generally do not call for snow removal services – the company will usually arrive at the site on its own. After reviewing Executive invoices for services, he confirmed that he inspected Executive's work on February 10, 2010, and stated that it was satisfactory. As for the work performed on February 11, 2010, he noted that the work ticket was improperly signed by a cashier instead of a CVS managerial employee. Cashiers were not permitted to leave their registers and inspect the work performed by Executive. He did testify that Executive was not responsible for returning to an accident location or continuously monitoring the sidewalk for snow/ice. That responsibility rested exclusively with CVS.

## II. Standard of Review

"[T]he proponent of a summary judgment motion 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. (*Muniz v. Bacchus*, 282 A.D.2d 387 [1st Dept. 2001]). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. (*Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 [2nd Dept. 1964]; *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 [3rd Dept. 1988]).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. (*Knepka v. Tallman*, 278 A.D.2d 811 [4th Dept. 2000]).

If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]; *Bronx County Public Adm'r v. New York City Housing Authority*, 182 A.D.2d 517 [1st Dept. 1992]).

III. Applicable Law and Analysis

*Campanelli's Motion for Summary Judgment*

Campanelli's motion for summary judgment must be denied as untimely, since it was served more than 120 days after the Note of Issue and Certificate of Readiness was filed on February 14, 2013. The Notice of Motion and accompanying papers were not served until June 21, 2013. CPLR 3212(a) requires that a motion for summary judgment be made no later than 120 days of the note of issue being filed, "except with leave of court on good cause shown." (*Brill v. City of New York*, 2 N.Y.3d 725 [2004]). The First Department has emphasized that the 120-day deadline is "clear and strict" and "may not be approached causally..." (*Perini Corp. v. City of New York*, 16 A.D.3d 37 [1st Dept. 2005]). "[I]n the wake of recent Court of Appeals decisions, parties may no longer rely on the merits of their cases to extricate themselves from failing to show good cause for a delay in moving for summary judgment pursuant to CPLR 3212(a)." *(Id.)*. Here, Defendant's moving papers do not offer any good cause to warrant the untimely motion. Accordingly, the motion is denied.

*Executive's Motion for Summary Judgment*

Executive argues that it is entitled to summary judgment as there is no triable issue of fact as to whether Executive adequately performed their snow and ice removal services. Executive completed its work two days before the accident, and CVS managers confirmed that it was performed in a satisfactory manner. Executive later received no complaints about the work, and had no duty to continuously inspect the property after their work was completed.

To demonstrate entitlement to judgment as a matter of law in these circumstances, Executive was required to demonstrate that their snow removal efforts did not create or exacerbate a dangerous condition (*Prenderville v. International Services Systems, Inc.*, 10 A.D.3d 334 [1st Dept. 2004]). Executive has failed to satisfy its initial burden in this respect. In support of the motion, Executive relies on the fact that "CVS managers verified that the work was completed in a satisfactory manner" as evinced by signed work tickets. The work ticket of February 11, 2010, however, is signed by a "manager" named "Xiomare Pagan." Mr. Jamal testified at deposition that Ms. Pagan was a cashier who was not allowed to leave the register to inspect the work. He believed, therefore, that an individual from Executive likely just entered the store to obtain a signature after completing the services without a proper inspection. Executive does not provide any testimony from Ms. Pagan regarding the condition of the sidewalk. At his deposition, Mr. Campanelli testified that no representatives from Campanelli would go to CVS stores and inspect Executive's snow removal work after it was performed. Mr. Schembre testified that he was not present at the CVS and did not inspect the area after his company performed snow and ice removal services on February 11, 2010.

Plaintiff as well as a non-party witnessed described the accident location as a "mountain" of snow and ice, that they observed no salt or sand, and the ice was a "couple of inches thick." In light of the foregoing, Executive failed to eliminate all triable issues of fact as whether their snow removal operations created or increased a dangerous snow-related hazard (*Prenderville, supra.*; *Garcia v. Mack-Cali Realty Corp.*, 52 A.D.3d 420 [1st Dept. 2008]). Although Executive contends that CVS and Plaintiff had no standing to oppose the motion, a court is free to consider all submitted evidence to determine a motion's proper disposition (*see Way v. Grantling*, 186 Misc.2d 110 [Sup. Ct., Mad. Cty., 2000]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Campanelli's motion for summary judgment is denied, and it is further,

ORDERED, that Executive's motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: 1/6, 2014

Hon. Mary Ann Brigantti-Hughes, J.S.C.