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SHORT FORM ORDER

INDEX No. 09-16737
CAL No. 13-01004OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 10-2-13 (#002)
MOTION DATE 2-21-14 (#003)
ADJ. DATE 4-18-14
Mot. Seq. # 002 - MD
003 - XMD

----------X

STEPHANIE BRYAN,

Plaintiff,

- against -

CLK-HP 225 RABRO, LLC and THE BRICKMAN GROUP LTD. LLC,

Defendants.

----------X

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Upon the following papers numbered 1 to 67 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 28 ; Notice of Cross Motion and supporting papers 29 - 39 ; Answering Affidavits and supporting papers 40 - 60 ; Replying Affidavits and supporting papers 61 - 67 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant The Brickman Group Ltd. LLC for an order, pursuant to CPLR 3212, granting summary judgment in its favor dismissing plaintiff's complaint and all cross claims against it is denied; and, it is further

ORDERED that the cross motion by defendant CLK-HP 225 Rabro, LLC for an order granting judgment in its favor on its cross claim against defendant The Brickman Group Ltd. LLC for contractual and common law indemnification is denied.

RST

This action arises out of a personal injury claim against defendants CLK-HP 225 Rabro, LLC ("defendant CLK") and The Brickman Group Ltd. LLC ("defendant Brickman") by plaintiff Stephanie Bryan, who allegedly sustained injuries on December 6, 2007 at approximately 9:25 a.m. when she slipped and fell on black ice in the parking lot of a building owned by defendant CLK. In her verified complaint, plaintiff maintains that defendants were negligent in the ownership, operation, management, maintenance and control of the parking lot in that they caused, permitted, and allowed a dangerous condition to exist in and around the area where she fell. Plaintiff contends that defendants had knowledge of the unsafe and dangerous condition in that it had existed for so long a period of time that they should have known of its existence in time to have made the area safe before plaintiff's slip and fall.

Defendant Brickman now moves for summary judgment dismissing the complaint on the grounds that it did not owe a duty of care to plaintiff; and, that it neither created nor had notice of the dangerous condition. Additionally, in seeking summary judgment dismissing the cross claims asserted against it, defendant Brickman alleges that although the contract between it and defendant CLK required it to automatically perform snow or ice removal or maintenance when it had snowed one or more inches, in practice, defendant CLK did not want them to undertake such work unless it had snowed two or more inches or it had affirmatively called defendant Brickman to do same, and in this case defendant CLK did not call and ask them to perform snow or ice removal services. Finally, defendant Brickman claims that after December 2, 2007 and before plaintiff's accident no snowfall greater than one inch had occurred on any day, thus it was not required to perform snow or ice removal duties pursuant to the contract it had with defendant CLK. In support of its motion defendant Brickman submits, *inter alia*, copies of the summons, verified complaint and answers, transcripts of the deposition testimony of plaintiff, defendant CLK by Willy Fannings and John Burke, defendant Brickman by Peter Riccio and Robert Brush, and non-party witnesses Frances Hansen, Bree Bruno, and Moises Perez-Lopez, the October 5, 2007 snow plow proposal from defendant Brickman to defendant CLK, the October 16, 2007 snow removal contract between defendants, and an affidavit from Mark L. Kramer, a forensic meteorologist with certified U.S. Department of Commerce meteorological records for December 2007. Plaintiff opposes the motion, claiming that defendant Brickman was obligated to spread salt on the asphalt roadway, driveway, and parking areas pursuant to its contract with defendant CLK to prevent icing conditions, without notification from defendant CLK, and that defendant Brickman was liable to plaintiff since it had "entirely displaced [defendant CLK's] duty to maintain the premises safely." Defendant CLK opposes the motion, claiming that defendant Brickman had an affirmative obligation to spread salt on the asphalt roadway, driveway, and parking areas at the conclusion of its snow clearing to prevent icing conditions.

Defendant CLK cross-moves seeking a judgment in its favor for contractual and common law indemnification from defendant Brickman. It alleges that the contract between defendants required defendant Brickman to remove snow and apply sand or salt at the onset of snow fall and that its terms requires it to indemnify defendant CLK for, among other things, damages, losses, and injuries arising from its work under the contract.

The October 16, 2007 contract between defendants CLK and Brickman specifically provides in pertinent part that

> The Contractor [defendant Brickman] shall perform the following services in a competent manner.
> A. Clearance of snow from all unobstructed blacktop roadway surfaces, dumpster areas and parking stalls, commencing at the outset of snowfall. . .
>
> D. Remain at the site to repeat clearing of snow from asphalt surfaces until all surfaces are clear and safe. . .
>
> F. Return to the site twenty-four hours after the snowfall to clear snow from previously obstructed areas. . .
>
> I. Supply and apply rock salt/sand mix, to asphalt roadway, driveway, and parking area surfaces at the conclusion of snow clearing to prevent icing conditions. . .
>
> THIRD: contractor agrees that it: A. Will not require notification by the managing agent, or the Association to commence work required under this Agreement, and is responsible for commencing its work at the onset of snowfall on roads and repeating its efforts continuously. . .
>
> FOURTH: Contractor agrees that the services required hereunder are essential to the safety and well being of the property, and that time is of the essence to assure adequate fire, police and ambulance access at all times, regardless of weather conditions. . .
>
> 7.2 Hold Harmless/Indemnification Agreement: To the fullest extent permitted by law, the contractor/vendor shall indemnify, hold harmless and defend the owner, director & officers, employees, subsidiaries and affiliates from and against all claims, damages, demands, losses, expenses, cause of action, suits or other liabilities (including all costs and reasonable attorney's fees), arising out of or resulting from the performance of contractor's/vendors (*sic*) work under the contract, provided any such claim . . . [was] caused in whole or in part by any negligent act or omission of the contractor/vendor.

The contract does not reference the October 5, 2007 proposal from defendant Brickman to defendant CLK which stated in pertinent part that:

> We propose to plow and shovel snow from roads, parking areas, and concrete walkways as per your direction. Brickman will respond for snow services when contacted by the client directly. Brickman will respond

> within two (2) hours of request. Brickman will plow snow to the level and extent specifically directed by Client.
>
> 1. This contract represents a snow plowing contract and shall be perceived exclusively as such. No interpretation should be made by any party, that this contract represents a parking lot maintenance or monitoring contract. Brickman will not be held responsible for damages occurring from melting snow piles, drifts, snow or ice on, around, or occurring from vehicles not moved at the time of plowing, or after plowing is complete.

The plaintiff testified that it was cold, overcast, and cloudy with no precipitation at the time of her fall in the parking lot on the north side of the building where she worked. She indicated that it had snowed about an inch the previous day but that she did not think that there was snow on the roadways as she drove to work on the morning of her accident. Plaintiff stated that she was wearing rubber soled shoes, that she walked between vehicles parked in the lot straight toward the building, and slipped and fell as she reached the driveway area of the north parking lot. She averred that while on the ground, she observed the whole parking lot was covered in a sheet of ice and that she did not see any salt or sand, and in fact, fell again as she pushed herself up. Plaintiff claimed that the entire parking lot was covered with ice as she walked across it and that she reported the condition to the supervisor in the law firm where she worked and to "Willy" at the front desk of the building.

The defendants agree, through the deposition testimony, that defendant Brickman was not called by defendant CLK to perform any work in the parking lot or at the building that morning. CLK, by Willy Fannings, testified that there was a maintenance person who would inspect the parking lot and notify defendant Brickman and request snow removal after reporting the condition to John Burke of CLK. Because Mr. Fannings parks in the south parking lot, he did not observe the condition of the north parking lot on the date of plaintiff's fall. Mr. Fannings also indicated that although CLK personnel sometimes put salt down or shovel the walkways in front of the building, they did not do that in the parking lot areas. John Burke, the vice president of property management for defendant CLK averred that it was his understanding "that even if there [was] a trace amount of snow they [Brickman] [had] an obligation to go down there" and that it was not his custom and practice to call Brickman in the event they wanted snow removed and less than 2 inches had fallen. He stated that Brickman was responsible for snow removal or ice salting for zero to two inches or more of snow as per the contract between the defendants.

Peter Riccio, the operations manager for defendant Brickman at the time of plaintiff's accident, testified that "for [the site where plaintiff fell] it would be two inches or more [before] we would go there. So we would have to have been contacted before that–before we would go [plow, shovel, or salt]." He stated that it was "pretty much automatic at two inches or more but we would call first. If it was less than two inches, we [would] have to be called first [by defendant CLK] before we [would] go there. . .[he knew] from doing that property that we –that is one of the ones that we just don't go to. . . we have to –we usually call first . . . if it is under two inches we only [went] if we were contacted." Mr. Riccio indicated that they did plow there on December 2, 2007 and "left the property after the site was

clean and wet, all walks clean and clear" which meant that all the ice was melted down to the pavement, that there was no ice left. During his testimony, Robert S. Brush, the branch manager for defendant Brickam, indicated that "as far as he was concerned" the proposal was part of the contract, that the proposal and the contract make up the entire agreement. Based upon his understanding, he claimed that if it snowed two inches or less defendant Brickman was not authorized to remove snow automatically and that if a black ice situation existed they would address it with authorization from a customer. He stated that "CLK HP was very cost conscious–any snow event less than two inches [he] would need authorization to be on site–whether that came in a phone call or e-mail."

The expert of defendant Brickman, Mark L. Kramer, indicates that no precipitation fell on December 6, 2007 and that after the December 2, 2007 snowfall, less than 1.0 inch of snow fell on any one day from December 3, 2007 through December 6, 2007 at the place where plaintiff fell. More particularly however, plaintiff's expert, Brett E. Zweiback, and the climatological data submitted indicates that on December 5, 2007, the day prior to plaintiff's fall, it snowed at approximately 12:20 p.m. and ended at approximately 3:35 p.m. with another period of light snowfall between approximately 4:45 p.m. and ending at approximately 7:53 p.m. with light flurries thereafter ending completely by 10:48 p.m. There was a trace of snow depth (*i.e.* 0.4 inches of snow or less) on December 5, 2007 at 7 p.m. and at 7 a.m. on December 6, 2007. Temperatures during the night before the accident were below freezing and at the time plaintiff fell, 9:25 a.m., it was between 24 and 26 degrees Fahrenheit. Mr. Zweiback opined that the black ice that existed when plaintiff fell was the result of the December 5, 2007 precipitation which "froze and formed a sheet of transparent or 'black ice'" as it had not been removed or treated with salt or sand.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Fundamental to recovery in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). To establish a prima facie case of liability in a slip and fall accident involving snow and ice, a plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*see* ***Zabbia v Westwood, LLC***, 795 NYS2d 319 [2005]; ***Tsivitis v Sivan***

Associates, LLC, 292 AD2d 594, 741 NYS2d 545 [2002]). To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]). On a motion for summary judgment to dismiss the complaint, the defendant bears the burden of proving the absence of notice as a matter of law (*see* ***Baines v G & D Ventures, Inc.***, *supra*). Furthermore, a plaintiff seeking to hold a snow removal contractor liable must show that by virtue of a defendant's snow removal contract, defendant displaced the duty of the landowner to safely maintain the premises (***Espinal v Melville Snow Contractors, Inc.***, 283 AD2d 546, 724 NYS2d 893 [2001]) and assumed a duty to plaintiff to exercise reasonable care to prevent all foreseeable harm to the plaintiff such that the plaintiff detrimentally relied on the defendant's performance of the defendant's duties under the snow removal contract (*see* ***Palka v Servicemaster Management Services***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Pavlovich v Wade Associates, Inc.***, 274 AD2d 383, 710 NYS2d 615 [2000]), or that the defendant's actions "advanced to such a point as to have launched a force or instrument of harm" (***Pavlovich v Wade Associates, Inc.***, *supra*).

Here, the contract between defendants CLK and Brickman does not specify at which point an obligation with respect to sanding or salting of ice occurs. Although it indicates that the clearance of snow will commence "at the outset of the snowfall", no mention is made of an ice condition in and of itself. The proposal clearly states that defendant Brickman will not be obligated to "maintain or monitor" the parking lot, however, the contract indicates that the services required of defendant Brickman are "essential to the safety and well being of the property" and that defendant Brickman "will not require notification" from defendant CLK to commence work. Thus, the contract is ambiguous and the terms outlining when defendant Brickman was to perform ice salting or sanding is vague. As it is a question of law whether or not a contract is ambiguous (***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (*see* ***Chimart Assoc. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]). If a contract is ambiguous, and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (***Amusement Bus. Underwriters v American Intl. Group***, 66 NY2d 878, 880, 498 NYS2d 760 [1985]). Here, where the testimony of each of the defendants contradicts the other as to the custom and practice of snow clearance/ice treatment (*i.e.* after two inches of snow, upon the occurrence of the event, after a request, without a request), defendant Brickman failed to meet its burden in its application for summary judgment dismissing the cross claims, as there are issues of fact as to its contractual obligation. Similarly, there are questions of fact as to whether defendant Brickman was obligated to maintain the premises in a safe condition, free from black ice, by virtue of the snow removal contract's language requiring it to "commence work at the onset of snowfalls" or if it did not displace the duties of defendant CLK as was indicated in the language of the proposal which specifically stated that it was a "snow plow" contract and did not amount to a parking lot maintenance or monitoring contract.

Questions of fact exist as to the obligations of each of the moving defendants pursuant to the contract (*i.e.* defendant Brickman "will not require notification . . . to commence work . . . and is required to commence work at the onset of snowfall" or defendant Brickman "will respond for snow

services when contacted by [defendant CLK] directly"). Similarly questions of fact exist as to the facts of the matter (*i.e.* defendant CLK by its vice president John Burke claims that defendant Brickman had an obligation to treat the parking lot for a trace amount of snow and that he did not customarily call defendant Brickman to remove snow when snowfalls were less than two inches, while defendant Brickman by its operations manager, Peter Riccio, and its branch manager, Robert S. Brush, indicated that they did not go to the premises to treat it for snow and ice where it snowed less than two inches, unless they were contacted first by defendant CLK). Thus, the motion by defendant Brickman for an order granting it summary judgment and dismissing the complaint and cross claims is denied and the request for an order granting judgment to defendant CLK for contractual and common law indemnification is denied.

Dated: 7-31-14

Hon. Denise F. Molia
A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION