

**Casiglia v Huntington Square-M. Smith, L.L.C.**

2014 NY Slip Op 32444(U)

September 9, 2014

Sup Ct, Suffolk County

Docket Number: 12-3740

Judge: Peter H. Mayer

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UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that this motion (001) by defendants Huntington Square-M. Smith, LLC and Inland Continental Property Management and this motion (002) by defendant Middle Island Maintenance Corp. for summary judgment are consolidated for the purposes of this determination; and it is further

**ORDERED** that this motion (001) by defendants Huntington Square-M. Smith, LLC and Inland Continental Property Management for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint and all cross claims as against them and to obtain contractual and common-law indemnification and attorneys' fees by co-defendant Middle Island Maintenance Corp. is denied; and it is further

**ORDERED** that this motion (002) by defendant Middle Island Maintenance Corp. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims as against it is determined herein.

This is an action to recover damages for injuries allegedly sustained by plaintiff on January 3, 2011 at approximately 8:40 a.m. when he slipped on ice while walking in a shopping center parking lot located at 3126 Jericho Turnpike, East Northport, New York. At the time of said incident, the subject premises was owned by defendant Huntington Square-M. Smith, LLC (Huntington Square) and managed by defendant Inland Continental Property Management (Inland). Defendant Middle Island Maintenance Corp. (Middle Island) provided snow removal services for said premises pursuant to a service agreement.

Plaintiff alleges that defendants were negligent in, among other things, causing or allowing the parking lot to become and remain in a dangerous and defective, slick, slippery and icy condition, failing to provide plaintiff with a safe path on which to walk, and failing to adequately and properly keep the lot clean and clear. In addition, plaintiff alleges that defendants had actual and constructive notice of the alleged condition. In their answer, defendants Huntington Square and Inland assert cross claims against defendant Middle Island for contribution, common law and contractual indemnification, and for breach of contract for failure to procure liability insurance naming them as additional defendants. Defendant Middle Island asserts a cross claim against its co-defendants for contribution and indemnification.

Defendants Huntington Square and Inland seek (001) summary judgment dismissing the complaint on the grounds that they did not create nor did they have notice of the alleged dangerous and defective condition and that there is no evidence that their snow removal arrangements increased the natural hazards created by the prior snowfall. They assert that plaintiff was unable to describe the alleged condition in any sufficient detail. In the event that they are unable to obtain said relief, they seek summary judgment on their cross claims against Middle Island for common law and contractual indemnification. Their submissions in support of the motion include the pleadings, plaintiff's bill of particulars, the deposition transcripts of plaintiff, Joan Nemchock on behalf of defendant Inland, and Phil Weber on behalf of defendant Middle Island, the service agreement between Inland on behalf of the owner Huntington Square and the contractor Middle Island, a service invoice for December 2010 from Middle Island to Inland, and property snow logs of Inland completed by Middle Island.

Defendant Middle Island requests (002) summary judgment dismissing the complaint on the grounds that it owes no duty to plaintiff, none of the exceptions to *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120 (2002) apply, and that its conduct was not a substantial factor in causing plaintiff's injury. Defendant Middle Island also seeks summary judgment dismissing all cross claims on the ground that plaintiff's accident was not a result of the negligent performance of its contractual duties. Its submissions include the pleadings, plaintiff's bill of particulars, the deposition transcripts of plaintiff, Phil Weber on behalf of Middle Island, and Joan Nemchock on behalf of defendant Inland, and the service agreement.

In opposition to defendants' motions, plaintiff maintains that a major snowstorm occurred in the subject area between December 26 and 27, 2010 followed by extended melting and freezing cycles during the end of December and first two days of January, and that there was intermittent rainfall during the day on January 2, 2011 until approximately 9 p.m. followed by freezing temperatures in the early morning of January 3, 2011. Plaintiff contends that defendant Middle Island's snow removal efforts caused or exacerbated the icy condition because the snow that they piled on the sidewalk and grass area melted and created runoff in the parking lot which they failed to monitor or address when it turned to ice, and that defendants Huntington Square and Inland negligently instructed defendant Middle Island to push the snow to the perimeter of the property. His other arguments include failure by defendants to state when the area where plaintiff fell was last inspected prior to his fall to establish lack of notice, and that issues of fact remain as to whether the subject icy condition was remedied by salt or sand. In support of his opposition, plaintiff submits photographs of the area of the accident and certified local climatological data from NOAA, National Climatic Data Center for December 2010 and January 2011.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [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 has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Plaintiff testified at his deposition that on the morning of his accident, the weather was clear, there was no precipitation, and that it had last snowed, a heavy snow storm, approximately seven to nine days prior to that date. In addition, he testified that after crossing Jericho Turnpike and the public sidewalk and taking seven or eight steps at the far end of the subject parking lot, which he felt was icy as he walked, he slipped on ice and fell. Plaintiff also testified that after his fall, he observed that the ice that he had slipped on was approximately 15 feet by 15 feet. He did not see any sand or salt or ice melt on the blacktop. He noted that

there was snow, less than six inches, along the edges of the parking lot near the grass, and that it appeared that snow had been moved from the blacktop toward the grass. Plaintiff had never been to said parking lot prior to his fall and had never made any complaints nor was he aware of anyone having made any complaints concerning its condition prior to his fall.

Joan Nemchock testified at her deposition that she is property manager for defendant Inland, that her job duties included reviewing snow removal contracts and visiting the property usually in the third month of each quarter of the year, and that the subject property had two tenants, Stop & Shop and Best Buy. Ms. Nemchock's deposition testimony reveals that her job duties also involved managing snow and ice removal with respect to the subject parking lot, that the contractor Middle Island was responsible for snow removal and ice control, and that she identified the subject service agreement. In addition, her testimony reveals that if there was a snow or ice condition on the parking lot, the tenant would contact her and then she would contact Middle Island. Ms. Nemchock also testified that she received no prior complaints regarding snow or ice conditions on the subject property. According to Ms. Nemchock, Middle Island was required to complete snow control sheets (snow logs) each time they came onto the subject property indicating the time they arrived on the property, weather conditions, the time they left and what they did at the property.

Phil Weber testified at his deposition that he is president of Middle Island, that he contracted with Inland to provide snow and ice removal services at the subject property, and explained that after one inch of snow fell he and his employees would go to the subject property and automatically plow the lot, plowing away from the buildings towards Jericho Turnpike, salt or sand if ice existed, and clear and spread calcium chloride on the sidewalks. In addition, Mr. Weber testified that he and his employees acted immediately based on personal observation of weather and property conditions whenever there was precipitation and that he communicated with Ms. Nemchock of Inland if he needed further direction when there was a larger snowfall as to where to place the snow. According to Mr. Weber, his company always applied sand and salt or just salt after it plowed the parking lot. He also explained that if there was icing after a rain or freezing rain his company would automatically sand or salt, or if there was runoff from piles of snow after a large snow storm then his company would salt the areas where the water ran to catch basins. He did not have any independent recollection of the contents of the submitted snow logs. With respect to the snow log for January 2, 2011 to January 3, 2011 indicating freezing rain and "sanding freezing rain and ice patches," Mr. Weber explained that it involved spot sanding of patches of ice and the roadway directly in front of the stores. He further testified that he did not recall receiving any complaints concerning any snow or ice conditions in the subject parking lot from December 2010 to the beginning of 2011.

The "Snow Removal Guidelines" in the service agreement include the following:

- 1 The Contractor will provide their own employees, equipment, and supplies necessary to complete the services described hereunder which include all parking areas, sidewalks adjacent to buildings, and public sidewalks.
  
- 3 The Contractor will begin plowing at the Property as soon as the snow reaches a height of 1 inch, regardless of the time of day or night or the day of the week.

5 The Contractor shall supply and mechanically spread deicing rock salt at Contractor's own discretion. The Contractor shall spread calcium chloride on concrete walkways.

6 The Contractor agrees that for snowfalls of 1"-6" snowfall all snow shall be plowed away from the building and pushed to the furthest end of the parking lot. No snow shall be piled up and stacked around light posts, or onto islands or landscaping.

7 The Contractor agrees that for snowfalls of 6" and over all snow shall be plowed away from the building only if absolutely necessary. The Contractor will be permitted to windrow snow to each island or light post, upon request; windrows will be removed at no additional cost. The Contractor will relocate snow that has accumulated during the Term, if such accumulation begins to impair access to the Property entrance, interior roadways or designated parking stalls.

Paragraph 10.01 entitled "Indemnification" in the service agreement provides that:

To the fullest extent permitted by law, Contractor agrees to indemnify, protect, defend, save, and hold harmless the Releasees [includes owner and managing agent] from and against any and all claims, actions, liabilities, damages, losses, costs and expenses, including attorney's fees, arising out of or resulting from, directly or indirectly, the performance of Services at the Property by Contractor or Contractor's subcontractors, agents or employees. In addition, Contractor agrees to indemnify, protect, defend, save, and hold harmless the Releasees from and against any and all claims, actions, liabilities, damages, losses, costs and expenses arising out of or resulting from Contractor's failure to purchase all insurance coverage required in this Agreement.

“ ‘A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice thereof’ ” (*Gushin v Whispering Hills Condominium 1*, 96 AD3d 721, 721, 946 NYS2d 202 [2d Dept 2012], quoting *Robinson v Trade Link Am.*, 39 AD3d 616, 616–617, 833 NYS2d 243 [2d Dept 2007]; see *Moore v Great Atlantic & Pacific Tea Co., Inc.*, 117 AD3d 695, 985 NYS2d 605 [2d Dept 2014]). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; *id.*). A general awareness of the presence of snow or ice is legally insufficient to constitute notice of the particular condition which caused the plaintiff's fall (see *Kaplan v DePetro*, 51 AD3d 730, 858 NYS2d 304 [2d Dept 2008]).

Here, defendants Huntington Square and Inland failed to demonstrate their prima facie entitlement to judgment as a matter of law dismissing plaintiff's complaint as against them inasmuch as they failed to present any evidence showing that they lacked actual or constructive notice of the icy condition in the area where the injured plaintiff allegedly fell (see *Joe v Upper Room Ministries, Inc.*, 88 AD3d 963, 931 NYS2d 658 [2d Dept 2011]; *Lattimore v First Mineola Co.*, 60 AD3d 639, 874 NYS2d 253 [2d Dept 2009]). Ms. Nemchok's deposition testimony fails to indicate when she or any of the owner's representatives last inspected the subject

parking lot prior to the incident, or what the parking lot looked like when it was last inspected prior to plaintiff's accident (*see Baines v G & D Ventures, Inc.*, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]; *compare Werny v Roberts Plywood Co.*, 40 AD3d 977, 836 NYS2d 297 [2d Dept 2007]). Inasmuch as defendants Huntington Square and Inland failed to meet their initial burden as the parties moving for summary judgment, the Court need not review the sufficiency of plaintiff's opposition papers (*see Baines v G & D Ventures, Inc.*, 64 AD3d at 529). Therefore, their request for summary judgment dismissing plaintiff's complaint as against them is denied.

As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties (*see Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 810, 971 NYS2d 170 [2d Dept 2013]; *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 1103, 915 NYS2d 103 [2d Dept 2010]; *Wheaton v East End Commons Assoc., LLC*, 50 AD3d 675, 677, 854 NYS2d 528 [2d Dept 2008]). However, in *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140, 746 NYS2d 120 (2002), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*id.*; *see Diaz v Port Auth. of N.Y. & N.J.*, \_\_\_ AD3d \_\_\_, 2014 NY Slip Op 05830 [2d Dept 2014]).

Defendant Middle Island made a prima facie showing of its entitlement to judgment as a matter of law dismissing plaintiff's complaint as against it by offering evidence that plaintiff was not a party to its snow removal agreement, and that it, thus, owed him no duty of care (*see Knox v Sodexo Am., LLC*, 93 AD3d 642, 939 NYS2d 557 [2d Dept 2012]). Inasmuch as plaintiff did not allege facts in his complaint or bill of particulars that would establish the possible applicability of any of the *Espinal* exceptions, defendant Middle Island was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law (*see Rudloff v Woodland Pond Condominium Assn., supra*; *Knox v Sodexo Am., LLC, supra*).

Once defendant Middle Island made its prima facie showing, the burden shifted to plaintiff to come forward with proof sufficient to raise a triable issue of fact as to the applicability of one or more of the three *Espinal* exceptions (*see Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]).

In opposition to defendant Middle Island's prima facie showing, plaintiff failed to raise a triable issue of fact as to whether Middle Island launched a force or instrument of harm, whether plaintiff detrimentally relied on the continued performance of Middle Island's duties, or whether Middle Island entirely displaced Huntington Square's duty to maintain the premises safely (*see Ayala v Johnson Controls, Inc.*, \_\_\_ AD3d \_\_\_, 990 NYS2d 893 [2d Dept 2014]). Specifically, plaintiff offered only speculation and conjecture to support his contention that defendant Middle Island launched a force or instrument of harm by creating or exacerbating the ice patch that allegedly caused his fall (*see Javid v Sclafmore Constr.*, 117 AD3d 907, 985 NYS2d 893 [2d Dept 2014]). By merely plowing the snow in accordance with the service agreement and piling it onto the grass at the perimeter of the parking lot and leaving some residual snow or ice on the plowed area, defendant Middle Island cannot be said to have created a dangerous condition and thereby launched a

force or instrument of harm (see *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361, 850 NYS2d 359 [2007]; *Espinal v Melville Snow Contrs.*, 98 NY2d at 142, 746 NYS2d 120; see also *Henriquez v Inserra Supermarkets, Inc.*, *supra*). In addition, 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 *Foster v Herbert Slepoy Corp.*, *supra*). Moreover, plaintiff cannot claim detrimental reliance on defendant Middle Island's proper performance of its contractual duties as there is no evidence that he had any knowledge of who performed snow-plowing services or of any snow removal agreement (see *id.*). Furthermore, plaintiff failed to establish a triable issue of fact as to whether the subject service agreement was a comprehensive and exclusive agreement that entirely displaced the owner's duty to maintain the premises in a safe condition (see *Espinal v Melville Snow Contrs.*, 98 NY2d at 141, 746 NYS2d 120; *Foster v Herbert Slepoy Corp.*, *supra*). The terms of the agreement limited defendant Middle Island's snow plowing obligation to snow accumulations of one inch or more. Where the express terms of the contract provide that a contractor is obligated to plow only when snow accumulation exceeds a certain level, the Court of Appeals has held that such "contractual undertaking is not the type of 'comprehensive and exclusive' property maintenance obligation" that would entirely displace a landlord's or property manager's duty to "maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d at 141; *Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d at 901-902). Based on the foregoing, the request by defendant Middle Island for summary judgment in its favor dismissing plaintiff's complaint as against it is granted.

That branch of Middle Island's motion for summary judgment dismissing the cross claim for contribution asserted against it is granted inasmuch as there was no evidence that Middle Island either owed a duty of reasonable care to plaintiff or a duty of reasonable care independent of its contractual obligations to the owner Huntington Square (see *Abramowitz v Home Depot USA, Inc.*, 79 AD3d 675, 912 NYS2d 639 [2d Dept 2010]; *Wheaton v East End Commons Assocs., LLC*, 50 AD3d 675, 854 NYS2d 528 [2d Dept 2008]).

The principle of common-law, or implied, indemnification allows a party who has been compelled to pay for another's wrong to recover from the wrongdoer the damages the party paid to the injured party (see *Arrendal v Trizechahn Corp.*, 98 AD3d 699, 950 NYS2d 185, 186 [2d Dept 2012]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808, 888 NYS2d 81 [2d Dept 2009]). "If, in fact, an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of a contractor engaged by a landowner, the contractor may be held liable to the landowner for common-law indemnification" (see *id.*). That branch of Middle Island's motion for summary judgment dismissing the cross claim for common-law indemnification is denied as there remain questions of fact as to whether the accident resulted from negligence or nonperformance of an act solely within Middle Island's province (see *Abramowitz v Home Depot USA, Inc.*, *supra*; *Wheaton v East End Commons Assocs., LLC*, 50 AD3d 675, 854 NYS2d 528 [2d Dept 2008]; *Richter v Hunter's Run Homeowners Assn.*, 14 AD3d 601, 787 NYS2d 903 [2d Dept 2005]; *Baratta v Home Depot USA, Inc.*, 303 AD2d 434, 756 NYS2d 605 [2d Dept 2003]). Moreover, defendant Middle Island failed to sustain its burden on the issue of contractual indemnification inasmuch as a question of fact exists with respect to whether it breached the contract by failing to perform one or more of the services under the service agreement (see *Aberman v Retail Property Trust*, 92 AD3d 703, 938 NYS2d 347 [2d Dept 2012]; *Baratta v Home Depot USA, Inc.*, *supra*). Triable issues of fact exist including whether defendant Middle Island failed to salt or sand the subject perimeter area of the parking lot, whether it was required under its service agreement to do so inasmuch as the agreement left the application of deicing rock salt to the "Contractor's own discretion," and, if so, whether its failure to do so was the sole cause of the injured plaintiff's accident (see *Byrnes v St. Luke's Cornwall Hosp.*, 87 AD3d 519, 927 NYS2d 800 [2d Dept 2011]).

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Furthermore, defendant Middle Island failed to submit sufficient evidence to demonstrate that it complied with its contractual obligation to procure liability insurance inuring to the benefit of Huntington Square and Inland such that its request for summary judgment dismissing the cross claims predicated upon its failure to procure insurance is denied (*see Weitz v Anzek Constr. Corp.*, 65 AD3d 678, 885 NYS2d 314 [2d Dept 2009]).

Defendants Huntington Square and Inland are not entitled to summary judgment on their cross claim for common-law indemnification against Middle Island because they failed to satisfy their prima facie burden of establishing that they were not negligent (*see Robles v Bruhns*, 99 AD3d 980, 953 NYS2d 143 [2d Dept 2012]). In addition, defendants Huntington Square and Inland are not entitled to summary judgment on their cross claim for contractual indemnification against Middle Island as there remain triable issues of fact concerning the negligence of both in connection with their monitoring of the snow removal process and the designation of the placement of the snow (*see Mathey v Metropolitan Transp. Auth.*, 95 AD3d 842, 943 NYS2d 578 [2d Dept 2012]). Therefore, their request for attorneys' fees are denied at this juncture.

Accordingly, the motion by defendants Huntington Square and Inland for summary judgment dismissing the complaint or, in the alternative, summary judgment on their cross claims against defendant Middle Island for common law and contractual indemnification is denied. The motion by defendant Middle Island for summary judgment dismissing the complaint and all cross claims as against it is granted solely to the extent that plaintiff's complaint and the cross claim for contribution are dismissed as against it.

Dated: September 9, 2014

  
PETER H. MAYER, J.S.C.