Iturrino v RBR & Melville Snow Contrs.
2016 NY Slip Op 30335(U)
February 29, 2016
Supreme Court, Suffolk County
Docket Number: 10-39643
Judge: Arthur G. Pitts
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[* 1]

SHORT FORM ORDER

INDEX No. 10-39643

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-5-15 (005)
MOTION DATE 8-13-15 (006)
MOTION DATE 9-17-15 (007)
ADJ. DATE 9-17-15
Mot. Seq. # 005- MG
006- MG; CASEDISP
007- MG; CASEDISP

STEPHEN ITURRINO,

Plaintiff,

- against -

RBR & MELVILLE SNOW CONTRACTORS and WAL-MART REAL ESTATE BUSINESS TRUST,

Defendants.

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Upon the following papers numbered 1 to 30 read on these motions for summary judgment ; Notices of Motions/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 17 - 24 ; Replying Affidavits and supporting papers 25 - 30 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion sequences #005, #006 and #007 are combined herein for disposition; and it is

ORDERED that motion #005 by defendant RBR Snow Contractors s/h/a RBR & Melville Snow Contractors for summary judgment in its favor is granted and the complaint and all cross claims asserted against it are hereby severed and dismissed; and it is further

ORDERED that motion #006 by third-party defendant F.M. Landscaping, Inc. for summary judgment is granted and the third-party complaint is dismissed; and it is further

ORDERED that motion #007 by defendant The Brickman Group, Ltd for summary judgment is granted and the complaint and all cross claims asserted against it are hereby severed and dismissed.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained when he slipped and fell on ice on the sidewalk at approximately 8:00 pm on December 21, 2008 during the course of his employment at the Walmart store on Nesconset Highway in East Setauket, New York (the "Store" or the "Premises"). Insofar as pertinent to the motions herein, in his complaint, as amplified by his bill of particulars, plaintiff alleges that defendant The Brickman Group, Ltd ("Brickman"), the company contracted by the Store to perform snow removal services, and defendant RBR Snow Contractors s/h/a RBR & Melville Snow Contractors ("RBR"), the company subcontracted by Brickman to remove the snow were negligent in allowing snow and ice to exist on the walkway creating a dangerous condition for pedestrians.

RBR and Brickman have each interposed an answer with affirmative defenses and/or cross claims against the other seeking indemnification and contribution. RBR thereafter commenced, and issue has been joined in a third-party action seeking indemnification and/or contribution from the independent subcontractor it hired to actually perform the work, F.M. Landscaping, Inc. ("FM"). RBR and Brickman now each move for summary judgment dismissing the complaint and all cross-claims asserted against them, and FM moves for summary judgment dismissing the third-party complaint. In support of their respective motions, the parties rely on, *inter alia*, the deposition testimony of plaintiff, Ray Nobile on behalf of Brickman, Lara Beekman on behalf of RBR, Frank Milazzo on behalf of FM, and Joe Sceppa on behalf of, and the owner of non-party Cromwell & Tisch Building Construction ("Cromwell").

Plaintiff testified that he was employed as a customer service manager at the Store. He recalled that it had snowed the day before his accident and that it rained when he first arrived to work at about 2:00 pm on December 21, 2008. Plaintiff testified that he was instructed by his supervisor to collect shopping carts from outside. As he traversed the walkway adjacent to the Store towards the first cart he saw, he slipped and fell. According to plaintiff, there were solid sheets and patches of ice along the walkway where his accident occurred.

Brickman entered into a contract with the Store for snow removal services. According to the deposition testimony of Nobile, a vice president and general manager of Brickman, upon entering into the agreement with the Store, Brickman had already identified RBR as the subcontractor which would provide the services. The subcontract between Brickman and RBR provides for RBR to perform the snow removal services Brickman had agreed to provide at the Store. Nobile testified that the general scope of the Brickman contract was to provide road, parking lot and loading dock plowing at the request of the Store; sidewalks and pedestrian entrances, exits and stairs were explicitly excluded from the scope of work. The Brickman contract also explicitly provides for the Store and not Brickman, to determine when and to the extent the snow removal services were to be performed as a result of accumulations of snow and/or ice, and that the Store would notify Brickman in advance as to the extent of such services.

Nobile further testified that the application of salt or sand also was determined by the Store. If such request was made, it would be by the Store to Brickman by email or telephone, and reflected in an invoice. The directions from the Store to Brickman would be passed from Brickman to RBR to perform the work. Nobile testified that sand and salt were not requested for the date of the subject accident or the preceding day.

Beekman, an employee of RBR, testified that RBR had an agreement with Brickman. Upon reading the agreement during her deposition, Beekman explained that after being contacted by Brickman, RBR was to respond to the Premises when there was a snow accumulation between 2 to 5.9 inches. Beekman testified that RBR had a subcontract with FM to perform the actual work, and that FM was only responsible for plowing. Beekman further testified that if snow removal from the sidewalks was requested by Brickman, another subcontractor was hired; she identified Cromwell as the subcontractor hired for the subject snow event. Beekman further testified that based on the invoices RBR had in its files for the Brickman contract, FM was at the Premises snow plowing on the 19th and 20th of December 2008, and the next day, December 21st, Cromwell was at the Premises shoveling the sidewalks from 5:00 pm to 9:30 pm. Beekman testified that when the plaintiff's accident occurred at approximately 8:00 pm, snow removal from the sidewalks was still in progress.

Sceppa's testimony was consistent with that of Beekman's, i.e., Cromwell was contacted to, and removed snow from the sidewalks of the Premises on December 21, 2008 from 5:00 pm to 9:30 pm. Sceppa also testified that he would only go to a site to remove snow upon receiving a phone call from RBR.

Frank Milazzo, the principal of FM, testified his company was subcontracted by RBR to only plow the Premises. He testified that based on his records, a major snowfall in excess of ten inches had occurred, and that snow plowing of the parking lot of the Premises began at 3:00 pm on December 19 and was completed at 4:00 am on December 20, 2008, whereupon FM left. Milazzo testified that after the plowing was completed, a contractor was hired to spread sand in the parking lot. Milazzo further testified that on December 22, 2008, a contractor hired by FM returned to the Premises to move the snow. He denies that FM removed any snow from the walkways of the Premises.

"A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties" (***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, exceptions have been recognized and tort liability in favor of a non-contracting third-party may arise where the snow removal contractor has launched a force or instrument of harm in failing to exercise reasonable care in the performance of its duties, or where there has been detrimental reliance by the injured non-contracting third-party on the contractor's continued performance of its snow removal duties, or where the snow removal contractor has entirely displaced the property owner's duty to maintain the premises in a reasonably safe condition (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*).

Based on the above testimony and proffered contract, Brickman has established its prima facie entitlement to judgment as a matter of law merely by coming forward with proof that the plaintiff was not a party to its contract with the Store. Therefore, Brickman cannot be held liable for plaintiff's injuries (*see* ***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011] [a contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third- party]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]; ***Wheaton v East End Commons Assoc., LLC***, *supra*). Furthermore, the terms of the Brickman contract limited the extent of any snow removal obligations to a determination by the Store as to what services would be performed. Such contractual undertaking is not the type of comprehensive and exclusive obligation that would entirely displace a property owner's duty to maintain the premises in a safe condition (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Henriquez v Inserra Supermarkets, Inc.***, *supra*; ***Roach v AVR Realty Co., LLC***, 41 AD3d 821, 839 NYS2d 173 [2d Dept 2007]); *see also* ***Bickelman v Herrill Bowling Corp.***, 49 AD3d 578, 853 NYS2d 383 [2d Dept 2008]).

RBR is also entitled to summary judgment dismissing the complaint for the same reasons, as it also did not owe a direct duty of care to the plaintiff as its agreement was with Brickman (*see* ***Roach v AVR Realty Co., LLC***, *supra*; *see also* ***Cardozo v Mayflower Center, Inc.***, 16 AD3d 536, 792 NYS2d 166 [2d Dept 2005]). Thus, the burden shifts to the plaintiff to submit evidentiary proof in admissible form to raise a triable issue of material fact as to whether any of the exceptions apply so as to hold Brickman or RBR liable in tort (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; *see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Plaintiff has failed to do so.

In opposition, plaintiff does not address the detrimental reliance exception and has not presented any evidence that Brickman, vis-a-vis its subcontract with RBR, or RBR by removing the snow in accordance with the agreement, "launched a force or instrument of harm which created or exacerbated the allegedly hazardous condition" (***Wheaton v East End Commons Assoc., LLC***, *supra* at 677; *see* ***Foster v Herbert Slepoy Corp.***, *supra*; ***Bickelman v Herrill Bowling Corp.***, *supra*). Although the Brickman contract and RBR subcontract do not include clearing snow from the walkways of the Premises, it is not disputed that RBR dispatched a contractor, Cromwell, to the Premises to perform such work. Plaintiff maintains that Brickman and RBR should be held vicariously liable for the conduct of Cromwell, "as it cannot be said as a matter of law that Cromwell was not negligent in doing the work...."

It is argued that as Cromwell dispatched at least one person to remove snow from the walkways two and one-half hours prior to plaintiff's accident, a jury could conclude that the laborer was negligent in failing to make the walkway where plaintiff's accident occurred near the entrance/exit of the Store safe and free of ice. Plaintiff, however, has failed to present any evidence that Cromwell was negligent in clearing the snow from the walkway or that its snow clearing efforts launched a force or instrument of harm which exacerbated the icy conditions on the walkway. Indeed, Cromwell was still in the process of removing snow from the walkways when the plaintiff's accident occurred. Moreover, unavailing is the argument by plaintiff that salt or sand had not been applied as Nobile testified that the Store had not requested it for the date of the subject accident.

FM is also entitled to summary judgment dismissing the third-party complaint. The agreement between RBR and FM states that FM shall indemnify and hold harmless RBR from and against all claims arising out of or resulting from the performance of the work. As it is not disputed that FM was dispatched by RBR to plow the Premises, and did not shovel the sidewalks, FM cannot be held liable for the plaintiff's injuries. Such finding necessarily defeats the third-party action for indemnification asserted by RBR against FM (*see* ***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]). Similarly, the branches of the motions by Brickman and RBR for summary judgment on the cross claims for indemnification and contribution are academic, in light of dismissal of the complaint as against them (*see* ***Stone v Williams***, *supra*; ***Cardozo v Mayflower Center, Inc.***, *supra*).

Accordingly, the motions by RBR, Brickman and FM for summary judgment are granted.

Dated: February 29, 2016

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION