SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MARVIN FOSKEY,

Plaintiff,

- against -

GENTING NEW YORK, LLC d/b/a RESORTS WORLD CASINO, NEW YORK RACING ASSOCIATION, INC. and ELITE PARKING AREA MAINTENANCE, INC.

Defendants.

Index No.: 701507/2014

Motion Date: 10/2/17

Motion No.: 55

Motion Seq.: 6

- x

GENTING NEW YORK, LLC d/b/a RESORTS WORLD CASINO and NEW YORK RACING ASSOCIATION, INC.

Third-Party Plaintiffs,

- against -

ELITE PARKING AREA MAINTENANCE, INC.,

Third-Party Defendant.

- x

The following electronically filed documents read on this motion by defendant/third-party defendant, ELITE PARKING AREA MAINTENANCE, INC., for an order granting defendant/third-party defendant, ELITE PARKING AREA MAINTENANCE, INC., summary judgment, dismissing plaintiff's complaint, the third-party complaint, and all cross-claims against defendant/third-party defendant, ELITE PARKING AREA MAINTENANCE, INC.:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 102
Genting's Affirmation in Opposition-Exhibits	EF 103 - 107
Affirmation in Reply	EF 108
Plaintiff's Affirmation in Opposition-Exhibits	EF 109 - 112
Affirmation in Reply	EF 113

This is an action for damages for personal injuries allegedly sustained by plaintiff on November 23, 2013 when he tripped over a piece of metal located in a grassy area on the grounds of Resorts World Casino located at 110-00 Rockaway Boulevard in Queens County, New York. Genting New York, LLC d/b/a Resorts World Casino is the operator of the facility located at the premises. Prior to the incident, Genting New York, LLC d/b/a Resorts World Casino entered into an agreement with Elite Parking Area Maintenance, Inc. to perform certain landscaping services at the premises.

Plaintiff commenced this action on March 5, 2014 by filing a summons and complaint. Defendants Genting New York LLC d/b/a Resorts World Casino and New York Racing Association, Inc. (collectively hereinafter Genting) joined issue by service of a verified answer dated April 10, 2014. Genting then commenced a third-party action against Elite Parking Area Maintenance, Inc. (Elite) on April 13, 2015. Elite served an answer to the third-party complaint on July 23, 2015. By Short Form Order entered on July 29, 2015, Elite was added as a party defendant to the main action. Genting served an answer to the amended complaint on August 4, 2015. Elite served an answer to the amended complaint on August 12, 2015. Plaintiff filed the Note of Issue on May 9, 2017. Elite now timely moves for summary judgment on the grounds that it was not in privity with plaintiff, did not create or exacerbate the condition which allegedly caused plaintiff's incident, and was not actively negligent. Elite further contends that plaintiff's claim does not arise out of Elite's performance of landscaping work under the Genting and Elite contract.

Plaintiff appeared for an examination before trial on November 20, 2014 and December 2, 2015. He testified that the incident occurred on November 23, 2013 between 11:00 a.m. and 12:00 p.m. Prior to the accident, he was heading to the casino to meet his friend. He had never visited the casino before. The weather was sunny, nice, and warm. After parking his vehicle, he walked through a grass area. He walked for approximately 90 seconds before the incident occurred. He described the area he was walking in at the time of the incident as a clean area of grass. As he was walking, his right foot hit something causing him to trip and lose his balance. After regaining his balance, he looked and observed that he had tripped on a metal object. He described the metal object as a pole or something made of metal sticking out of the ground. The metal object appeared to be a metal pole that someone had cut and left. There was about four inches of the pole left in the ground, and it was covered with grass.

Nicholas D'Amato, on behalf of Genting, appeared for an examination before trial on April 17, 2015. He testified that he is employed by D'Amato Builders and Advisors. In his position, he acts as the full time on-site owner's representative for Genting. Genting's facilities department was responsible for maintaining the signs on the premises, including cutting down and replacing signs.

Christopher Jones, on behalf of Genting, appeared for an examination before trial on September 7, 2016. He testified that he is employed by Genting. At the time of plaintiff's incident, he was a slot manager. His responsibilities included being the executive on duty for any type of issues that occurred inside or outside the casino, including the parking lot. Regarding the parking lot, he would make general observations and if there was anything out of place he would report it. Every manager or executive on duty was responsible for walks around the premises. Genting's security also inspected the property. These walks, which he performed twice per shift, consisted of checking the property to ensure everything was in working order, including checking for debris. His checks included the grassy islands about the premises. Elite was trained for the upkeep of the grass on the property. There was nothing specific in the contract between Genting and Elite which placed a responsibility on Elite to report tripping hazards to Genting. He had a general expectation that if Elite saw something they would say something. No one had ever communicated such responsibility to Elite. After being shown photographs, he testified that it looked like a metal post was cut. He walked in the area of the incident during his walks of the property, but never saw that metal object.

Ray Miazga appeared for an examination before trial on behalf of Elite on October 5, 2016. He is employed as a sales manager and general supervisor. In his roles, he manages two other salesmen and supervises three crews. The contract between Genting and Elite detailed the scope of work as "cutting of the lawns, trimming, fertilization, aeration" throughout the casino premises. The landscape season runs from March to approximately the middle of November. During the season, Elite performed work at the subject premises every Thursday. Upon arriving at the site, Elite's crew would cut the grass, edge the lawn areas, and then do a final blowing and removal of the clippings. Pursuant to his understanding of the contract, Elite was also responsible for applying fungicide and inspecting the grassy areas for weeds. Elite had a duty to inspect and pick up debris in the grassy areas at the casino. From time to time Elite would pick up and throw out glass bottles, beer cans, and soda cans found on the grassy area. Elite was not responsible for inspecting for

tripping hazards. He did not consider the subject cut off sign post to be debris within the meaning of the contract. Genting's facility department would commonly replace signs or sign posts located on the grassy areas of the subject property. He observed Genting's facilities department doing sign work as often as bi-weekly. He did not consider it to be unusual to see cut off sign posts at the facility. Elite never performed, nor was Elite ever requested to perform, any repairs to the signs or light posts in the grass areas of the premises. After being shown photographs of the alleged condition, he testified that the condition appeared to be a cut off sign post. He had never seen that condition when he was at the subject premises, and he did not know how it came to be there.

Based on the above testimony and landscaping contract between Genting and Elite, Elite claims that it has established its prima facie entitlement to summary judgment as Elite did not owe a duty of care to plaintiff and did not create, cause or exacerbate the defective or hazardous condition. Regarding the contractual indemnity claims, Elite contends that there is nothing within the scope of work to suggest that Elite was responsible for performing work with respect to signs or sign posts at the premises or to suggest that Elite was tasked with some responsibility to inspect for and to report to Genting any tripping hazards unrelated to landscaping work.

In opposition, Genting contends that the motion must fail as issues of fact remain regarding Elite's indemnity obligations to Genting, Genting's claims for contribution, and Elite's negligence in failing to inspect the grassy areas. Genting contends that Genting failed to demonstrate, prima facie, that the claims are not "arising out of or in any way connected with" the landscaping contract. Genting argues that since plaintiff's claims involve the grassy areas which Elite contracted to maintain, plaintiff's claims are in fact connected with the landscaping contract. Genting also points to the contract, which provides that Elite had a duty to "pick up and remove all leaves and debris in bedded landscaped areas". As the contract separates leaves and debris, Genting contends that Elite's duty extended further than leaf removal. Moreover, based on Mr. Miazga's testimony that from time to time Elite had picked up and thrown out bottles and cans found on the grassy area, the term debris would include the metal piece. Lastly, Genting contends that Elite failed to name Genting as an additional injured on the policy of insurance to cover any potential loss.

Plaintiff also opposes the motion, adopting each and every argument set forth in Genting's opposition. Plaintiff contends that there are questions of fact regarding Elite's contractual obligations, contributory negligence, duty to inspect, and actual performance under the landscaping contract. Plaintiff further contends that Elite fails to offer any argument concerning a lack of actual or constructive notice of the dangerous condition.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

Before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to the plaintiff Kallem v Mandracchia, 111 AD3d 893 [2d Dept. 2013]; Safa v Bay Ridge Auto, 84 AD3d 1344 [2d Dept. 2011]). A party who enters into a contract to render services may be said to have assumed a duty of care and could potentially be liable to third persons: "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] 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" (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136 [2002][internal quotation marks omitted]).

Here, neither opposition opposes those portions of the motion seeking to dismiss plaintiff's complaint based on the fact that Elite did not owe plaintiff a duty and did not create or exacerbate the hazardous or defective condition. Accordingly, as Elite demonstrated, prima facie, that it did not owe a duty to plaintiff and that none of the *Espinal* exceptions apply, that branch seeking dismissal of plaintiff's complaint is granted.

Moreover, Genting does not oppose that portion of the motion seeking to dismiss Genting's common law indemnity claims. Rather the opposition only opposes those portions of the motion seeking to dismiss the contractual indemnity claim and the breach of contract for the alleged failure to procure insurance.

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to

be assumed" (see Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]). A party is entitled to full contractual indemnification provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (Margolin v New York Life Ins. Co., 32 NY2d 149, 153 [1973]).

Here, the indemnity provision states that Elite will indemnify Genting against and from any claims "arising out of or in any way connected with this Agreement", "a violation of any of the terms and conditions of this Agreement", or "any related act or failure to act by [Elite]". Thus, to create an issue of fact sufficient to deny the summary judgment motion, Genting must show that Elite had an enumerated contractual duty to inspect for and to report the subject hazard. Under the contract, Elite's scope of work includes weeding, cultivating, raking, sweeping, blowing, fertilizing, pruning, mowing, edging, aerating, planting, and maintaining the irrigation system. The scope of work does not include any work with respect to signs or sign posts. Moreover, Mr. D'Amato testified that it was Genting's facilities department that was responsible for maintaining the signs on the premises including cutting them down and replacing them. To the extent Genting claims that it was Elite's duty to inspect for debris and it is ambiguous as to whether the metal pole would be included in the definition of debris, any such ambiguity is construed against the party that drafted it, which here is Genting (see Computer Associates Inter., Inc. v Balloon Mfg. Co., Inc., 10 AD3d 699 [2d Dept. 2004]; Cowen & Co. v Anderson, 76 NY2d 318 [2d Dept. 1990]).

The plain and unambiguous terms of the contract place no responsibility on Elite to perform any work on the signs at the subject premises or to inspect for and report any tripping hazards unrelated to its landscaping work. Thus, as plaintiff's claim does not arise out of and is unrelated to the Genting and Elite landscaping contract, the contractual indemnity claim must be dismissed (see Dos Santos v Power Auth. of State of N.Y., 85 AD3d 718 [2d Dept. 2011]; DiStefano v Kmart Corp. Intl., 89 AD3d 459 [1st Dept. 2011]).

Turning to the breach of contract claim based on the ground that Elite failed to procure insurance, in support of the motion Elite submitted a copy of its insurance policy that contains a blanket additional insured endorsement. Thus, there was no breach of contract as Elite did purchase a policy of insurance consistent with its obligation.

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the summary judgment motion by defendant/third-party defendant, ELITE PARKING AREA MAINTENANCE, INC., is granted, plaintiff's complaint, the third-party complaint and all cross-claims asserted against defendant/third-party defendant, ELITE PARKING AREA MAINTENANCE, INC. are dismissed, and the Clerk of Court is authorized to enter judgment accordingly.

Dated: October 5, 2017
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C