Almonte v Citibank NMTC Corp.
2018 NY Slip Op 30095(U)
January 18, 2018
Supreme Court, New York County
Docket Number: 160230/2014
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DANIEL ALMONTE,

Plaintiff,

-against-

CITIBANK NMTC CORPORATION, CITIGROUP TECHNOLOGY, INC., 2481 ACP OWNER, LLC, LOUIS LEFKOWITZ REALTY, INC. AND ABM JANITORIAL SERVICES-NORTHEAST, INC.,

Defendants.

Index No.: 160230/2014

DECISION/ORDER

Motion Sequence 006

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Cross-Motion and Affidavits/ Affirmations/Memos of Law annexed	1-2
Opposition Affidavits/Affirmations and Memo of Law annexed	3-6
Reply Affidavits/Affirmations/Memos of Law annexed	7-8

ERIKA M. EDWARDS, J.S.C.:

Plaintiff Daniel Almonte ("Plaintiff") brought this action against Defendants Citibank NMTC Corporation, Citigroup Technology, Inc. (collectively "Citibank"), 2481 ACP Owner, LLC's ("owner"), Louis Lefkowitz Realty, Inc.'s ("managing agent") and ABM Janitorial Services-Northeast, Inc. ("ABM") to recover damages for injuries sustained when he slipped and fell on snow and ice while walking to a mailbox on the sidewalk abutting Citibank. The accident occurred on February 12, 2014, at 2481 Adam Clayton Powell Boulevard in New York, New York. Plaintiff alleges in substance that Defendants were negligent in their maintenance and snow and ice removal from the sidewalk. Plaintiff testified in substance that it had snowed approximately two or three days before his accident and there was approximately two or three inches of snow along the curb near the corner where he slipped and fell. At the time of Plaintiff's accident, the owner was out-of-possession, Citibank was the commercial tenant pursuant to an assigned lease and ABM had a contract with Citibank to shovel the sidewalk and entrances.

The court previously dismissed Plaintiff's complaint and all cross-claims against the owner and managing agent, granted summary judgment in owner's favor as to its cross-claims against Citibank and granted summary judgment in managing agent's favor as to its cross-claims for contribution and common-law indemnification as against Citibank.

ABM now moves for summary judgment dismissal of Plaintiff's complaint and any cross-claims against it. Citibank cross-moves for summary judgment in its favor as to its cross-claims against ABM and opposes ABM's motion to dismiss ABM's cross-claim for contractual indemnification against Citibank. The owner, managing agent and Plaintiff oppose ABM's motion. ABM opposes Citibank's motion. For the reasons set forth herein, the court denies ABM's motion for summary judgment in its favor for dismissal of Plaintiff's complaint and all cross-claims against it and denies Citibank's cross-motion for summary judgment in its favor as to its cross-claims for contribution and indemnification against ABM.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). Facts supported by admissible evidence must be viewed in the light most favorable to the non-movant.

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). Normally, a contractor does not owe a duty of care to a non-contracting third-party such as Plaintiff, however there are three exceptions when the contractor assumes a duty of care and can be held potentially liable in tort where 1) the contracting party, in failing to exercise reasonable care in performance of its duties, "launches a force or instrument of harm"; 2) Plaintiff detrimentally relies on the continued performance of the contracting party's duties; and 3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [internal quotations and citations omitted]).

A party's right to indemnification may arise from a contract or may be implied based upon common-law principles of what is fair and proper between the parties (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). A party is entitled to full contractual

indemnification when "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citations omitted]). Generally, a defendant "whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006] [internal quotation marks and citations omitted]). It is premised on "vicarious liability without actual fault," which requires that "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*id.* at 367 [internal quotation marks and citations omitted]). The shifting of loss under common-law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common-law indemnification "unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*id.* at 377-378).

Parties to an agreement are free to tailor their contract to meet their particular needs and to include or exclude provisions as they see fit (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). Absent some indicia of fraud or other circumstances warranting equitable intervention, the court has a duty to enforce the terms of the agreement (*id.* [internal citations omitted]). When the relevant terms of an agreement are clear and unambiguous, the intentions of the parties are apparent and the court is prohibited from altering the terms of the contract (*see Osprey Partners, LLC v Bank of N.Y. Mellon Corp.*, 115 AD3d 561, 561-562 [1st Dept 2014]). However, when the meaning of a contract provision is reasonably susceptible to more than one interpretation, courts can look to the surrounding facts and circumstances extrinsic to the agreement to determine the intent of the parties (*67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 248 [1975]).

As an initial matter, the court accepts the motion and cross-motion as timely filed and will consider them on their merits. In applying these legal principles to the facts of this case and considering the facts in the light most favorable to the non-movants, the court determines that both ABM and Citibank failed to demonstrate a prima facie case of entitlement to summary judgment in their favor as a matter of law and even if they had met their burdens, then several material questions of fact remain to preclude summary judgment in favor of either Defendant. These disputed factual issues include, but are not necessarily limited to, whether the parties intended for the contract between ABM and Citibank to require ABM to clear the entire sidewalk abutting Citibank (including the area where Plaintiff fell) or simply a 2 to 3 foot walking path on a portion of the sidewalk; whether ABM reasonably performed its obligations under the contract regarding the manner in which it shoveled the sidewalk and whether it applied a sufficient amount of calcium chloride under the circumstances; whether ABM negligently removed the snow and ice from the sidewalk; whether ABM owed a duty of care to Plaintiff as an exception to *Espinal* because it "launched a force or instrument of harm" in its snow and ice removal activities; and whether it caused, contributed to, or exacerbated a dangerous and hazardous condition which caused Plaintiff's accident.

Therefore, there are questions of fact remaining as to the interpretation of the parties' contract regarding ABM's duties, whether ABM was negligent in its snow and ice removal and whether it owed and breached a duty of care to Plaintiff. Additionally, since the issue of ABM's negligence requires a trial, neither ABM, nor Citibank is entitled to summary judgment on their contribution or indemnification claims. Thus, the court denies ABM's motion to dismiss

Plaintiff's complaint and all cross-claims against it and denies Citibank's cross-motion for summary judgment in its favor as to its cross-claims against ABM.

As such, it is hereby

ORDERED that the court denies Defendant ABM Janitorial Services-Northeast, Inc.'s motion for summary judgment and Defendants Citibank NMTC Corporation's and Citigroup Technology, Inc.'s cross-motion for summary judgment without costs.

Date: January 18, 2018

HON. ERIKA M. EDWARDS