

Smith v City of New York
2018 NY Slip Op 34411(U)
November 28, 2018
Supreme Court, Queens County
Docket Number: Index No. 705492/14
Judge: Allan B. Weiss
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DECISION AND ORDER OF THE HONORABLE ALLAN B. WEISS, DATED NOVEMBER 28, 2018, APPEALED FROM, WITH NOTICE OF ENTRY [8 - 22]

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IAS Part 2
Justice

FILED
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COUNTY CLERK
QUEENS COUNTY

JERI SMITH,
Plaintiff,

Index No.: 705492/14

Motion Date: 7/11/18

-against-

Motion Seq. Nos: 5, 6, 7 & 8

THE CITY OF NEW YORK, MALCOLM PIRNIE,
INC., WDF INC., and JOHN P. PICONE, INC.,

Defendants.

The following papers numbered EF182 to EF569 read on this (1) motion by Malcolm Pirnie, Inc. ("MP), for summary judgment in its favor pursuant to CPLR 3212; (2) motion by WDF, Inc. ("WDF"), for summary judgment in its favor pursuant to CPLR 3212; (3) motion by the City for summary judgment in its favor pursuant to CPLR 3212; and (4) motion by Picone/McCullagh JV, i/s/h/a John P. Picone, Inc. (herein "Picone"), for summary judgment in its favor pursuant to CPLR 3212.

Papers
Numbered

Notices of Motions - Affidavits - Exhibits.. EF182-198, 267-300, 306-331, 350-376
Answering Affidavits - Exhibits EF377-504, 537-542, 550-559
Reply Affidavits EF560-EF569

Upon the foregoing papers it is ordered that the motions are combined herein for disposition, and determined as follows:

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained on February 6, 2014, when she slipped and fell on black ice at the Tallman Island Water Pollution Control Plant ("Tallman" or "Tallman plant"), located at 127-01 Powells Cove Boulevard, College Point, New York. The Tallman plant, a large facility comprised of a network of buildings and roads, collected and treated city wastewater before releasing it back into the environment. The plant is owned and controlled by the City of New York and the Department of Environmental Protection ("DEP"), (collectively, "the City"). At the

time of the alleged incident, the Tallman plant was undergoing renovation and construction of its facilities. During the project, the Tallman plant remained open and was operated by the DEP. Plaintiff was a safety inspector for Pro-Safety, a consulting company hired by WDF, one of several prime contractors hired by the City to participate in the renovation of the plant facilities. Plaintiff was charged with the duty to visit the plant and inspect WDF employees and WDF subcontractors as they performed work to ensure that they were following safety rules and protocol.

Plaintiff testified at a 50-h hearing and upon examination before trial, as follows: Shortly before 8 AM, on February 6, 2014, plaintiff reported to the Tallman plant to conduct a routine safety inspection. Plaintiff briefly checked in at the Construction Manager's trailer to find out where WDF was working at the plant. Plaintiff learned that one of WDF's subcontractors, VPH Mechanical, was working in the interior tunnel of a building identified as the "East Gallery". This building is located in another part of the Tallman facility. Plaintiff left the trailer and drove her car along a common roadway called "Center Road" to the building. Center Road is an open partially-paved common street that ran through the Tallman plant premises. It had snowed shortly before February 6, 2014, and the roadway had been recently plowed by the City. Plaintiff parked her car on Center Road, on the open roadway across from the building. At one point, plaintiff walked to the building, went inside and downstairs to the basement tunnel to conduct her safety check of WDF's subcontractor. After completing her inspection, plaintiff exited the building to go back to her car and briefly said hello to several colleagues from the GM that were standing on the sidewalk conversing near the building. While greeting each other, Peter Banas, one of the engineers, who was walking in the open roadway, slipped on a patch of black ice. Banas did not fall, however. After the group jokingly warned each other of the spot, plaintiff walked onto the open roadway and crossed Center Road to go back to her car. As plaintiff crossed the open thoroughfare, she slipped and fell on the same patch of black ice in the open roadway.

Shanon Chen was deposed on behalf of the City, and testified as follows: He was employed by the Bureau of Environmental Design and Construction. He was account manager involved in overseeing construction activity of the sewer treatment plant at the Tallman plant. His oversight of construction activities on a daily basis involved reading reports, approving payments, reviewing budgets, reviewing scheduled and sharing meetings. Construction activity pertained to the sewer treatment plant at the Tallman plant. Four prime contractors were present on the project along with a construction manager. Contractors were responsible for their individual means and methods of construction. The employees of the individual contractors had their work directed by the contractor's project manager, their super and foreman. Chen indicated that site safety representatives for the individual primes were responsible to make sure that the prime contractor's employees were working in a safe

manner and, if they encountered a hazardous condition such as snow and ice, they would bring it to the attention of the resident engineer (MP).

Richard Pascucci appeared for examination before trial on behalf of Malcolm Pirnie, and testified as follows: Pascucci was a civil engineer who was employed by Arcadis (which had purchased MP). At the Tallman facility, Pascucci was a resident engineer. At Tallman, there were four types of construction: general construction, electrical, plumbing and HVAC. On February 6, 2014, Pascucci's duties included monitoring the construction for compliance with plans and specifications. Pascucci had received no reports of slippery spots on Center Road prior to February 6, 2014. The general contractor was Picone; the electrical contractor was Haldor, and the plumber and HVAC was WDF. On the date of the subject accident, the HVAC contractor was working at the RAS blower building, sludge storage and mixed flow pump station. Pascucci further testified that Picone was responsible for clearing snow and ice only from areas in which construction was underway.

Iris Martin further testified on behalf of MP, as follows: She was the environmental health and safety officer for Arcadis at the Tallman plant. As such, she was responsible for site environmental health and safety and would perform inspections of set-ups and locations of work. She would also perform various inspections throughout the day. Martin first became aware of plaintiff's accident during a phone call between 7:00 a.m. and 8:00 a.m. She walked over to the site and did not observe any snow or ice on Center Road. In fact, Martin testified, she walked through the same area where plaintiff fell and did not slip or observe any ice on the roadway. However, after the accident, she did inform the resident engineer to inform Picone to spread some rock salt. Martin indicated that the week of the accident was a "crazy week" in terms of the weather, with various freezes and thaws. Lastly, Martin testified that, prior to the accident, she had not received any complaints about the failure to properly remove snow and ice.

Peter Banas also testified on behalf of MP, upon examination before trial, as follows: He was employed by Arcadis and was working at Tallman as an environmental health and safety officer. On the date of the accident, he was provided with a printed list by Martin, of the contractors that required hot work permits. He arrived at Center Road before the accident and did not observe any snow or ice on the roadway. He had a brief conversation with plaintiff and a colleague, Al Gonzalez. He spoke with then for a couple of minutes. Prior to the conversation, however, he had stepped ten feet off a curb on Center Road and slipped in the road. Plaintiff and Gonzalez both acknowledged the slip and told him to look out. Banas did not fall. He looked at the ground and noticed that there was "black ice blended in really well with the asphalt." Less than a minute after speaking with plaintiff and Gonzalez, he heard Gonzalez yell that plaintiff had fallen in the same spot where Banas had slipped. Banas further testified that when he slipped, he observed an area of four square feet

of black ice and that there was no snow or visible ice anywhere in the area. Lastly, Banas testified that he made no complaints regarding snow or ice at the Tallman plant.

Liam McLaughlan testified on behalf of WDF, as follows: He is the vice-president of estimating at WDF, which does heating, plumbing and general construction work. Pro-Safety provided safety personnel for WDF. Although McLaughlan was not the project manager at the time of the accident, he acknowledged that cleaning of their work area was the responsibility of WDF pursuant to the contract with the City. WDF did not deal directly with the City, but instead they dealt with the construction manager (MP). WDF's contractor, VPH was working in the RAS building on the date of the subject accident. In addition, subcontractor Tristan of WDF, was working in the mixed flow building. WDF subcontractors VPH Tristan and Pro-Safety were on-site on February 6, 2014. McLaughlan further testified that anytime WDF was performing work on-site, they were required to have a site-safety representative.

Joe Schested testified on behalf of Picone, upon examination before trial, as follows: In February, 2014, he was employed as a project manager for Picone. He was at the Tallman plant on a daily basis, and was present on-site on February 6, 2014. His overall duties and responsibilities included managing the job, scheduling costs, recording general management of the contract. As of February 6, 2014, areas of work being performed by Picone were performed in the pump and blower building, digesters and mixed flow building. Picone presented a copy of a contract indicating that prior to the subject accident, responsibility for that area of the road had been assumed by the City. Picone further submitted evidence indicating that it was not responsible for snow and ice removal on Center Road as no work was being performed at that location.

After the accident, an investigation was conducted by the City and MP. It was determined that the root cause of the accident was that the roadway had been recently plowed by city workers (Bureau of Waste Water Treatment), but had not been properly salted/sanded.

Generally

In the first instance, with regard to all defendants, plaintiff's Labor Law § 240 (1), claim is dismissed. This section of the labor law is directed at elevation-related hazards only, and recovery under the statute is unavailable where the injury results from other types of hazards (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Charles v City of New York*, 227 AD2d 429, 430 [2d Dept 1996]; see also, *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487 [1995]; *Rodriguez v Tietz Ctr. for Nursing Care*, 84 NY2d 841 [1994]). Here, it is uncontroverted that plaintiff's accident was not the result of an elevation-related hazard, but rather, resulted from a slip and fall on black ice. Therefore, under the circumstances, the plaintiff's Labor Law § 240 claim is dismissed.

The branches of the motions by defendants which are to dismiss plaintiff labor law 241[6] claim based upon a violation of 23-1.7[d], are also granted. “Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers . . . [i]n order to recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards” (*Aragona v State*, 74 AD3d 1260, 1261 [2d Dept 2010], as amended (Nov. 22, 2010), citing *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005 [2d Dept 2009] [internal quotation marks omitted]). Here plaintiff relies upon 12 NYCRR 23-1.7 (d), in order to establish a violation of labor law 241[6]. This section provides that “a floor, passageway ... scaffold [ing], platform or other elevated working surface” shall be kept clear of “[i]ce, snow, water, grease” or other slippery conditions (*see Rizzuto v Wenger Contr. Co.*, 91 NY2d 343 [1998]). It is clear, however, that plaintiff did not fall on a “passageway” within the meaning of 12 NYCRR 23-1.7(d) (*see Constantino v Kreisler Borg Florman Gen. Const. Co., Inc.*, 272 AD2d 361, 362 [2d Dept 2000]; *Maynard v DeCurtis*, 252 AD2d 908 [3d Dept 1998]; *Bauer v Niagara Mohawk Power Corp.*, 249 AD2d 948 [4th Dept 1998]; *Gavigan v Bunkoff Gen. Contrs.*, 247 AD2d 750 [3d Dept 1998]; *Hill v Corning Inc.*, 237 AD2d 881 [4th Dept 1987]) Specifically, plaintiff’s accident occurred in an open area of a construction site, a location to which that regulation does not apply (*see Enriquez v B & D Dev., Inc.*, 63 AD3d 780, 781 [2d Dept 2009]; *Hertel v Hueber-Breuer Constr. Co., Inc.*, 48 AD3d 1259, 1260 [4th Dept 2008]; *Porazzo v City of New York*, 39 AD3d 731 [2d Dept 2007]; *Roberts v Worth Constr., Inc.*, 21 AD3d 1074, 1077 [2d Dept 2005]; *Morra v White*, 276 AD2d 536, 537 [2d Dept 2000]; *Rose v A. Servidone, Inc.*, 268 AD2d 516, 517-518 [2d Dept 2000]). Since plaintiff did not fall on a “passageway” within the meaning of 12 NYCRR 23-1.7(d), the branches of the motions seeking to dismiss plaintiff’s claim based upon a violation of 12 NYCRR 23-1.7[d], are granted.

Plaintiff cites no other regulatory provisions which are applicable to the instant facts. Allegations of a violation of Industrial Code regulations that are “inapplicable to the facts of the case ... are inadequate to support a cause of action” under section 241(6) (*McCole v City of New York*, 221 AD2d 605, 606 [2d Dept 1995]). In the absence of an applicable regulatory provision, there is no basis for liability under Labor Law § 241 (6) (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505).

Motion by MP

Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It applies to owners, contractors, or their agents (*see Russin v Picciano & Son*, 54 NY2d 311 [1981]), who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it

(see *Lombardi v Stout*, 80 NY2d 290, 294–295 [1992]; *Yong Ju Kim v Herbert Const. Co., Inc.*, 275 AD2d 709, 712 [2d Dept 2000]; *Jehle v Adams Hotel Assoc.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great Neck Assoc.*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]). Where, as here, the injured plaintiff's accident arose out of an allegedly dangerous condition at the work site, liability for a violation of Labor Law § 200 and common-law negligence will be imposed if the construction manager created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time (see *McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1093 [2d Dept 2012]; *White v Village of Port Chester*, 92 AD3d 872, 876 [2d Dept 2012]). Here, summary judgment is awarded to MP as the evidence indisputably shows that the black ice had only momentarily been observed before the occurrence of the plaintiff's accident. The record indicates that another coworker had, only moments before, slipped but not fallen on the same area but had not reported the incident to anyone. Significantly, plaintiff stated that she did not notice any ice in the area where she fell prior to his fall, and that she safely traversed this very area three times only minutes before the accident occurred. In view of this testimony, as well as the other facts and circumstances of this case, the plaintiff's contention that MP had notice of the “black ice” is insufficient to raise a triable issue of fact (see *Robinson v Trade Link Am.*, 39 AD3d 616, 617 [2d Dept 2007]; *Makaron v Luna Park Hous., Corp.*, 25 AD3d 770 [2d Dept 2006]; *Stoddard v G.E. Plastics Corp.*, 11 AD3d 862 [2d Dept 2006]; *Carminati v Roman Catholic Diocese of Rockville Ctr.*, 6 AD3d 481 [2d Dept 2004]; *Carricato v Jefferson Val. Mall Ltd. Partnership*, 299 AD2d 444 [2d Dept 2002]).

There was no proof to support the plaintiffs' claim that MP had constructive notice of the ice patch. Plaintiff's deposition established that the ice patch was not visible and apparent even to her as she stepped down on it (see *Carricato v Jefferson Val. Mall Ltd. Partnership*, 299 AD2d 444, 444-45 [2d Dept 2002]; see generally *Tsivitis v Sivan Assoc.*, *supra*; *Gam v Pomona Professional Condominium*, 291 AD2d 372 [2d Dept 2002]). The defendant's general awareness that water can turn to ice is legally insufficient to constitute constructive notice of the particular condition that caused the plaintiff to fall (see *Gordon v American Museum of Natural History*, *supra* at 838; *Smith v Funnel Equities*, 282 AD2d 445, 446 [2d Dept 2001]).

Moreover even assuming, *arguendo*, that it was MP's duty to remove the snow/ice from Center Road and that it had momentary notice of the ice after Banas slipped, the evidence indicates that MP's employees did not have a reasonable time to remedy that condition before plaintiff's accident occurred (see *Byrd v Walmart, Inc.*, 128 AD3d 629, 630 [2d Dept 2015]; *Rallo v Man-Dell Food Stores, Inc.*, 117 AD3d 705, 706 [2d Dept 2014]; *Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 534 [2d Dept 2001]).

In opposition to these prima facie showings, plaintiff failed to raise a triable issue of fact. Accordingly, the branch of the motion which is to dismiss plaintiff's labor law 200 and common law negligence claims against MP, is granted.

For reasons noted above, the branch of MP's motion for summary judgment dismissing the labor law 241[6] claims is also granted.

Since the record does not demonstrate that, as a matter of law, plaintiff's accident was caused by the negligence of MP or that MP had the authority to direct, supervise, or control the plaintiff's work, summary judgment is awarded to MP dismissing the City's cross claims for common-law and contractual indemnification (see *Linkowski v City of New York*, 33 AD3d 971, 975 [2d Dept 2006]; *Kader v City of N.Y. Hous. Preserv. & Dev.*, 16 AD3d 461 [2d Dept 2005]; cf. *Mohammed v Islip Food Corp.*, 24 AD3d 634, 636-637 [2d Dept 2005]). Moreover, there is no evidence that MP breached the insurance procurement provision of their contract with the City. Accordingly, summary judgment is awarded to MP dismissing the City's cross claims for common-law and contractual indemnification.

Motion by WDF

The branch of the motion which is to dismiss plaintiff's labor law 200 claim[s] against WDF, is granted. Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]; *Ortega v Puccia*, 57 AD3d 54, 60-61 [2d Dept 2008]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d at 61; see *Chowdhury v Rodriguez*, 57 AD3d at 128). Where, as here, a plaintiff's injuries arise not from the manner in which the work was being performed, but rather from an allegedly dangerous condition on the property, a contractor will be liable under a theory of common-law negligence, as codified by Labor Law § 200, only when the contractor created the complained-of condition, or when the contractor failed to remedy a dangerous or defective condition of which it had actual or constructive notice (see *Martinez v City of New York*, 73 AD3d 993, 997 [2d Dept 2010]; *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543 [2d Dept 2010]; *LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 972 [2d Dept 2009]; *Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938, 940 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d at 130; *Kerins v Vassar Coll.*, 15 AD3d 623, 625-626 [2d Dept 2005]). The record indicates that plaintiff fell in an open roadway where WDF was not working. WDF was working in an interior basement of a building known as the East Gallery of the plant. Center Road, where plaintiff slipped and fell, was an open and common thoroughfare utilized by all plant personnel. WDF had no contractual duty or obligation to maintain or clear Center Road

of snow and ice. Thus, the undisputed evidence indicates that WDF had neither control nor jurisdiction over Center Road where the subject accident occurred, and further indicates that WDF did not create the black ice condition, and had no actual or constructive notice of the same.

Accordingly, the motion by WDF for summary judgment in its favor, dismissing all claims and cross claims against it, is granted.

Motion by the City

The branch of the motion which is to dismiss plaintiff's common-law negligence and Labor Law § 200 causes of action insofar as asserted against the City, is denied. There are issues of fact as to whether the City created or had actual or constructive notice of the allegedly dangerous black ice condition which caused the plaintiff's accident (*see Bradley v Morgan Stanley & Co.*, 21 AD3d 866, 868–869 [2d Dept 2005]). The record indicates that the City had recently plowed the area and thus an issue of fact is raised as to whether the City created the condition and or had actual or constructive notice of the same.

The City argues that the failure of plaintiff to establish prior written notice exempts it from liability. Generally where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect, or an exception to the written notice requirement applies (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Miller v Vil. of E. Hampton*, 98 AD3d 1007, 1008 [2d Dept 2012]; *Braver v Village of Cedarhurst*, 94 AD3d 933 [2d Dept 2012]; *Pennamen v Town of Babylon*, 86 AD3d 599 [2d Dept 2011]). Recognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it (*see Amabile v City of Buffalo*, 93 NY2d at 474; *see also Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Braver v Village of Cedarhurst*, 94 AD3d at 933). When one of these recognized exceptions applies, the written notice requirement is obviated (*see Groninger v Village of Mamaroneck*, 17 NY3d 125, 127 [2011]).

In the instant matter, the City established that it did not receive prior written notice of the alleged dangerous condition. Nonetheless, it failed to meet its burden of demonstrating its prima facie entitlement to judgment as a matter of law. “[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings” (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]; *see Braver v Village of Cedarhurst*, 94 AD3d at 933). Here, the plaintiff alleged in her notice of claim, complaint, and bill of particulars that the defendant affirmatively created the dangerous condition which caused the accident through negligent

snow removal (*see Braver v Village of Cedarhurst, supra*). Under these circumstances, the City is required to eliminate all triable issues of fact as to whether it affirmatively created the alleged dangerous condition through negligent snow removal to sustain its prima facie burden (*see id.*; *Miller v Vil. of E. Hampton*, 98 AD3d 1007, 1008-09 [2d Dept 2012]; *cf. Rubistello v Bartolini Landscaping, Inc.*, 87 AD3d 1003 [2d Dept 2011]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]). Since the City failed to do so, the motion for summary judgment is denied without regard to the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Hill v Fence Man, Inc.*, 78 AD3d 1002, 1004-1005 [2d Dept 2010]).

Furthermore, following the Court in *San Marco v Vil./Town of Mount Kisco*, 16 NY3d 111, 117 [2010], this court notes that "prior written notice statutes were never intended to and ought not exempt a municipality from liability as a matter of law where a municipality's negligence in the maintenance of a municipally owned [roadway] triggers the foreseeable development of black ice as soon as the temperature shifts."

The branches of the motion by the City which are for summary judgment in its favor on its cross claims for common-law and contractual indemnification as against PM, is denied. The City failed to establish that, as a matter of law, the plaintiff's accident was caused by the negligence of PM (*Linkowski v City of New York*, 33 AD3d 971, 975 [2d Dept 2006]; *cf. Mohammed v Islip Food Corp.*, 24 AD3d 634, 636-637 [2d Dept 2005]; *see Kader v City of N.Y. Hous. Preserv. & Dev.*, 16 AD3d 461 [2d Dept 2005]). Moreover, the City failed to demonstrate that PM breached the insurance procurement provision of their contract.

Motion by Picone

The branch of the motion by Picone which is for summary judgment in its favor on plaintiff's claims under the common law or labor law 200, is granted. A property owner or contractor may be liable for injuries occasioned as a result of alleged dangerous or defective conditions of the premises where the work is performed, under the common law for failing to provide a safe place to work, and under Labor Law § 200, which is merely a codification of the common-law rule (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; , 80 NY2d 290, 294 [1992]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51 [2d Dept 2011]; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 147 [2d Dept 2010]; *Shaw v RPA Assoc., LLC*, 75 AD3d 634 [2d Dept 2010]). As the proponent of the motion for summary judgment, Picone has the burden of establishing, prima facie, that it neither created the icy condition nor had actual or constructive notice of the condition (*see Shea v Massapequa Union Free Sch. Dist.*, 117 AD3d 817 [2d Dept 2014]; *Smith v Hariri Realty Assoc., Inc.*, 109 AD3d 897 [2d Dept 2013]; *Silva-Carpanzano v Schechter*, 105 AD3d 1030, 1031 [2d Dept 2013]; *Spinoccia v Fairfield Bellmore Ave., LLC*, 95 AD3d 993 [2d Dept 2012]). To provide 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 defendant's employees to discover and remedy it” (*Kulchinsky v Consumers Warehouse Ctr., Inc.*, 134 AD3d 1068, 1069-70 [2d Dept 2015], citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; see *Altro v Wal-Mart Stores*, 282 AD2d 487, 488 [2d Dept 2001]). Here, Picone established its prima facie entitlement to judgment as a matter of law by demonstrating that it neither created nor had actual or constructive notice of the icy condition alleged to have caused the plaintiff's fall. In support of its motion for summary judgment, Picone submitted the transcript of the deposition testimony of the plaintiff, who testified that she walked within 20 feet of the accident site three times before her fall and did not see the ice prior to her fall. The black ice was also not visible or apparent to MP safety officers Banas and Martin. Banas did not see the black ice before he slipped on it less than a minute before plaintiff slipped on it. Banas testified that the “black ice blended really well with the asphalt.” Martin, MP's lead safety officer, trained in investigating a cause of an accident, arrived to the area within minutes of the subject accident and did not observe ice in the roadway. Picone also submitted evidence indicating that the City had recently plowed the area.

Picone also did not have actual notice of the black ice. Plaintiff testified that she did not make prior complaints to Picone (or anyone else) about snow or ice at the Tallman plant. Banas testified that after he slipped on the ice, he did not notify Picone of it or direct Picone to clear it. Moreover, Schested, Picone's project manager, Chen, the City's accountability manager, Zaman, Tallman's plant chief, Martin and Banas all had not received any prior complaints about the condition.

Finally, Picone established, prima facie, that it did not create the subject black ice condition. The City admits that it snow plowed sections of its roads at the Tallman plant where construction work was not ongoing. Notably, under Article 16 of the contract between the City and Picone, the City was permitted to take over any part of Picone's work upon written notification to Picone. On October 4, 2012, over a year prior to plaintiff's accident, the City accepted and took over the work on Corridor A, also known as Center Road, and the RAS Building, including snow and ice removal. Schested, Picone's project manager at the site since 2006, testified that after the City took over the RAS Building and Center Road, Picone was no longer in control of the area and no longer removed snow and ice from that area. Moreover, the City admitted that it was responsible for removing snow and ice from Center Road because there was no ongoing construction work on that section of the road. The plaintiff and Martin testified that on the morning of the alleged accident, Picone was not working in the area of the subject accident, and did not have any equipment there. Significantly, the accident report created by MP, states that the City plowed Center Road before the subject accident.

Accordingly, the branch of the motion by Picone which is to dismiss plaintiff's labor law 200 and common law negligence claims insofar as asserted against Picone, is granted.

Plaintiff's reliance on the doctrine of *res ipsa loquitur* to establish liability by the Picone, is misplaced. To rely on that doctrine, a plaintiff must show that "(1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the instrumentality that caused the injury is within the defendants' exclusive control; and (3) the injury is not the result of any voluntary action by the plaintiff" (*Giantomaso v T. Weiss Realty Corp.*, 142 AD3d 950, 951-52 [2d Dept 2016]; *McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 827 [2016]; *see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]; *States v Lourdes Hosp.*, 100 NY2d 208, 211-212 [2003]; *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495 [1997]; *Bunting v Haynes*, 104 AD3d 715, 716 [2d Dept 2013]; *Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 721 [2d Dept 2011]). Under the facts of this case, however, the second element is not established inasmuch as Picone was not in exclusive control of Center Road.

Moreover, plaintiff's evidence failed to satisfy the third element of the *res ipsa loquitur* doctrine, namely, that the accident and any resulting injuries was not the result of any voluntary action or contribution on the part of plaintiff (*Giantomaso v T. Weiss Realty Corp.*, 142 AD3d 950, 952 [2d Dept 2016]; *see Roldan v New York Univ.*, 81 AD3d 625, 628-629 [2d Dept 2011]; *Petro v New York Life Ins. Co.*, 277 AD2d 213, 214 [2d Dept 2000]; *Braithwaite v Equitable Life Assur. Socy. of U.S.*, 232 AD2d 352, 354 [2d Dept 1996]). The record indicates that plaintiff's colleague, Banas, had slipped moments before in the same area and that plaintiff was warned about the area prior to her fall.

The branch of the motion by Picone which is to dismiss the City's claims for breach of contract for failure to procure insurance, is granted based upon evidence that Picone fulfilled this contractual obligation by procuring the required insurance (see *Martinez v Tishman Const. Corp.*, 227 AD2d 298, 299 [1st Dept 1996]; *New York Univ. v Royal Ins. Co.*, 200 AD2d 527 [1st Dept 1994]). Under the contract, Picone was required to purchase commercial general liability insurance in Picone's name with the City as an additional insured to cover the indemnity provisions under the contract. The record indicate that Picone fulfilled this obligation as it procured and maintained the required insurance.

Since Picone is entitled to summary judgment dismissing the complaint insofar as asserted against it on the ground that it was not negligent as a matter of law, it is entitled to summary judgment dismissing the cross claim for contribution asserted against it (see *Loughlin v City of New York*, 74 AD3d 757, 758-59 [2d Dept 2010]; *Perez-Roman v Fundex Capital Corp.*, 289 AD2d 464, 464-465 [2d Dept 2001]).

Picone submitted evidence showing, among other things, that it had no duty to remove snow from the location where plaintiff fell, thus establishing its prima facie entitlement to judgment as a matter of law dismissing the third-party cause of action for common-law indemnification (see *Mikelatos v Theofilaktidis*, 105 AD3d 822, 825 [2d Dept 2013]; *Guerra v St. Catherine of Sienna*, 79 AD3d 808, 809 [2d Dept 2010]; *Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2d Dept 2008]). Therefore, the branches of the motion by Picone which seek to dismiss the common-law indemnity claims of the City, MP and WDF, are granted.

The branch of the motion by Picone to dismiss the City's contractual indemnification cross claim, is also granted. Picone demonstrated its prima facie entitlement to judgment as a matter of law by establishing that the plaintiff's accident was not "caused by the negligent acts or omissions of [Picone]," such that the indemnification clause was not triggered (*Mikelatos v Theofilaktidis*, 105 AD3d 822, 824 [2d Dept 2013]; see *Perales v First Columbia 1200 NSR, LLC*, 88 AD3d 1213, 1214 [3d Dept 2011]; *Kogan v North St. Community, LLC*, 81 AD3d 429, 430 [1st Dept 2011]; see generally *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]). The right to contractual indemnification depends upon the specific language of the contract (*Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255-56 [2d Dept 2010]; see *Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2d Dept 2009]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2d Dept 2008]). In the absence of a legal duty to indemnify, a contractual indemnification provision "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; see *Baginski v Queen Grand Realty, LLC*, 68 AD3d 905, 907 [2d Dept 2009]). Here, the contract between the City and Picone (defined therein as "Contractor"), states that Picone is required to indemnify the City but only for claims arising out of Picone's operations or its failure to comply with contract terms or the Law. The black ice condition at issue did not arise out of Picone's snow removal operations because it did not remove snow and ice from that part of Center Road. Instead, it performed snow and ice removal at the direction of MP (the construction manager) 600 feet away from where its excavation work was ongoing. Also, once again, the accident report prepared following plaintiff's fall indicates that the City had snow plowed that section of Center Road shortly before the subject accident.

The contract also requires Picone to indemnify the City for failing to comply with "the Law." The contract defines "the Law" as a statute of the State of New York, local law of the City of New York, or the common law. There is also no evidence that Picone violated any statute or ordinances, or common law such that it would be required to indemnify the City for failing to comply with "the Law". In opposition, the City did not raise a triable issue of fact.

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The branch of the motion by Picone which is to dismiss the contribution claims is granted as Picone is not liable to plaintiff.

Accordingly, the motion by Picone for summary judgment in its favor dismissing all claims and cross claims against it, is granted.

Conclusion


The motion by MP for summary judgment in its favor is granted.

The motion by WDF for summary judgment in its favor is granted.

The motion by the City for summary judgment in its favor is denied.

The motion by Picone for summary judgment in its favor is granted.

Dated: November 28 2018



J.S.C.

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