

Zurzolo v Brickman Facility Solutions, LLC

2019 NY Slip Op 30673(U)

March 19, 2019

Supreme Court, Suffolk County

Docket Number: 6006/2015

Judge: William G. Ford

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

CHERYL ZURZOLO,

Plaintiff,

-against-

BRICKMAN FACILITY SOLUTIONS, LLC &
JFM CONCRETE CORP.,

Defendants.

_____ X

Motions Submit Date: 05/17/18
Mot Seq 001 MG; CASE DISP
Mot Seq 002 MG; CASE DISP

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On the defendants opposed motions for summary judgment to dismiss the complaint pursuant to CPLR 3212(a) and further to dismiss their cross-claims as against each other, the following papers were considered: Notice of Motion & Affirmation in Support and supporting papers; Affirmations in Opposition and opposing papers; Notice of Motion & Affirmation in Support and supporting papers; Affirmations in Opposition and opposing papers; Reply Affirmations; and upon due deliberation and full consideration, it is

ORDERED that the motions for summary judgment dismissing plaintiff's complaint brought by defendants Brickman Facility Solutions, LLC and JFM Concrete Corporation are hereby **granted** for the reasons that follow; and it is further

ORDERED accordingly that plaintiff's complaint against defendants is **dismissed**; and it is further

ORDERED that defendant's motions to dismiss or for summary judgment on the cross-claims against each other are **denied** as moot or academic for the following reasons; and it is further

ORDERED that movant's counsel each serve a copy of this decision and order with notice of entry on counsel for plaintiff by overnight mail; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

FACTUAL BACKGROUND

On January 29, 2013 plaintiff Cheryl Zurzolo was an employee of non-party Lowe's employed at their Riverhead location in Suffolk County. She worked the morning shift and would arrive at work at approximately 5 mins to opening at 6:00 a.m. On that morning having arrived at the employee parking lot, on exiting her vehicle, she slipped on colorless ice, landing and impacting on her left-hand side. After regaining her feet, she walked into work and reported the incident to her store manager, who then prompted her to complete internal employee accident and worker's compensation reports.

As a result of the occurrence, plaintiff sued defendants Brickman and JFM for negligence in the nature of premises liability for causing, creating or contributing an alleged dangerous icy condition in the Lowe's employee parking lot. Defendants represent the general and subcontractors serving Lowe's for snow and ice removal for their Riverhead location. Pursuant to their subcontract, Brickman crossclaimed against JFM seeking contribution and indemnification.

SUMMARY OF THE PARTIES' CONTENTIONS

Presently before the Court are defendants' motions seeking entry of summary judgment dismissing the complaints for plaintiff's failure to plead and prove that defendants, snow and ice removal contractors, owed a duty to the plaintiff because she was not a party to either agreement. Arguing in the alternative, JFM then sought to dismiss Brickman's cross-claim against it for contribution and indemnification and for failure to procure liability insurance naming it as an additional co-insured.

Plaintiff opposes the motions for summary judgment arguing that *Espinal* exceptions apply, namely that despite not being able to identify at deposition the exact contractor which removed snow and ice at the Riverhead Lowe's, that plaintiff detrimentally relied on the contractors to ably and capably perform their duties and obligations under the snow/ice removal agreement. Further, plaintiff argues that despite not being a party to defendants and non-party Lowes' agreements, she was an intended or third-party beneficiary of them as a Lowe's employee, for whose benefit the snow/ice removal agreement existed to safeguard from the harm alleged here.

Lastly, plaintiff argues that defendants as the snow/ice removal contractors launched the form or instrumentality of her alleged harm. Plaintiff claims a triable question of fact exists warranting trial and necessitating denial of judgment as a matter of law, arguing backed by the affidavit of an previously undisclosed expert meteorologist, that Brickman's preparation of a snow plow stacking site plan and JFM's execution of snow and ice removal was negligent in allowing for ice formation due to a snow melt/refreeze scenario, given the location of snow piles on the periphery of the employee parking lot stalls, and drainage located on the opposite end of the parking lot.

Defendants on this point respond that plaintiff failed to plead or prove the argued *Espinal* exceptions. Further, they argue that plaintiff's expert meteorologist's opinion is not probative as he lacks competence to testify concerning pitch of the parking lot and movement of melted snow or groundwater, not being an engineer or hydrologist. Defendants also argue that neither

the primary agreement or the subcontract supplanted non-party Lowe's common law duty as tenant or owner, nor were either agreement so comprehensive as to have either contractor exercise primary custody or control of the accident situs.

STANDARD OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (*Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (*Gniewek v Consol. Edison Co.*, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see Goldstein v. Monroe County*, 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]); *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman, supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v Schefman*, 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]; *Benincasa v Garrubo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

DISCUSSION

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. However, 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, and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely (*Rudloff v Woodland Pond Condominium Ass'n*, 109 AD3d 810, 810, 971 NYS2d 170, 171 [2d Dept 2013]; citing *Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

In light of this well settled law and prevailing precedent, defendant movant makes a *prima facie* showing of entitlement to summary judgment and judgment as a matter of law dismissing plaintiff's complaint of negligence arising from premises liability by offering proof that the plaintiff was not a party to its snow removal contract, and that it, thus, owed her no duty of care (*Knox v Sodexho Am., LLC*, 93 AD3d 642, 642, 939 NYS2d 557, 558 [2d Dept 2012]).

Thus, the law within the Second Department has recognized that defendants are entitled to judgment as a matter of law dismissing plaintiff's slip and fall premises liability complaint where they show *prima facie*, that they did not owe the plaintiff a duty of care by offering proof that the plaintiff was not a party to the snow/ice removal contract, particularly where contrary to the plaintiff's contentions, the pleadings did not allege facts which would establish the applicability of any of the *Espinal* exceptions. Thus, the courts have held that defendants are not required to affirmatively demonstrate that these exceptions did not apply in order to establish their *prima facie* entitlement to judgment as a matter of law (*Bronstein v Benderson Dev. Co.*, 167 AD3d 837, 838-39, 91 NYS3d 142, 144 [2d Dept 2018]).

The motion record makes clear that defendants have met their *prima facie* burden of entitlement to judgment as a matter of law within the general rule. It is clear on inspection of both the primary agreement between Lowe's and Brickman, as well as the subcontract between Brickman and JFM, that plaintiff was a party to neither. However, the primary agreement contains verbiage that the primary contract exists for the benefit of safety of the general public and Lowes employees, of which plaintiff fits within the latter category.

Preliminarily, "[a] party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost" (*Bd. of Educ. of Northport-E. Northport Union Free School Dist. v Long Is. Power Auth.*, 130 AD3d 953, 954-55, 14 NYS3d 450, 452 [2d Dept 2015]). That said, the law also holds that "[a]n employee is not automatically a third-party beneficiary of a service contract between his or her employer and another party, [but] ... if the employer's intent was to benefit its employees, third-party beneficiary status may be inferred (*Vargas v Crown Container Co., Inc.*, 155 AD3d 989, 992, 65 NYS3d 567, 571 [2d Dept 2017]). To aid in this determination, courts are instructed that to properly determine "third-party beneficiary status it is permissible for the court to look at the surrounding circumstances as well as the agreement ... [but it is also] ... well settled that the obligation to perform to the third party beneficiary need not be expressly stated in the contract." Nor must the identity of a third-party beneficiary need not be set forth in the contract or, for that matter, even be known as of the time of its execution (*Encore Lake Grove Homeowners Ass'n, Inc. v Cashin Assoc., P.C.*, 111 AD3d 881, 882, 976 NYS2d 143, 145 [2d Dept 2013]). By the same token however, the Lowes primary snow/ice removal agreement with Brickman expressly provides that the contract should not be read to confer any independent

rights or remedies in any non-signatories or third-parties. Thus, this Court does not read into the agreement as plaintiff advocates that the primary snow/ice removal agreement procured by Lowes with Brickman existed to her benefit to the degree that Lowe's, the premises owner or tenant, expected to offload its common law duties and exposure for premises liability onto its contractor. Accordingly, this Court holds that plaintiff, despite her status as a Lowe's employee, was not an intended beneficiary of either snow/ice removal agreement.

Further, plaintiff is unsuccessful for other reasons in precluding summary judgment and entry of judgment as a matter of law dismissing her complaint. Plaintiff's argument that the mere existence of an alleged icy condition in the employee parking lot was evidence or indicia of negligence by either contractor is belied by prevailing law. The Second Department has held under analogous circumstances that "[w]here the express terms of the contract provide that a contractor is obligated to plow only when snow accumulation exceeds a certain level, ... 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" (*Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 901-02, 933 NYS2d 304, 306 [2d Dept 2011]; see e.g. *Somekh v Val. Nat. Bank*, 151 AD3d 783, 786, 57 NYS3d 487, 491 [2d Dept 2017])[affirming motion court's grant of summary judgment dismissing the complaint, where after reviewing the record, court noted that snow/ice removal contractor's agreement did not take on premises owner's responsibility, or supplant its common law duty to plaintiff to maintain the premises, where the agreement required contractor to respond to the premises only when there was an accumulation of two or more inches of snow or any accumulation of ice]).

Here, the parties' record made clear that the operative agreements contained a 2-inch precipitation trigger as testified to at deposition by representatives for both defendants, subject to continuous monitoring of prevailing weather conditions, which both defendants did by reliance on paid weather reporting services. Additionally it must be noted that our department's law plainly states that "[a] snow removal contractor cannot be held liable for personal injuries 'on the ground that the snow removal contractor's passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition' " (*Reisert v Mayne Constr. of Long Is., Inc.*, 165 AD3d 854, 856, 85 NYS3d 490, 491 [2d Dept 2018]; see also *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215, 905 NYS2d 226, 229 [2d Dept 2010])[ruling plaintiff's offer insufficient of mere proof that defendant contractor's plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area, could not be said to have created a dangerous condition and thereby launched a force or instrument of harm also recognizing that the claim of exacerbation of an existing condition requires some showing that the contractor left the premises in a more dangerous condition than plaintiff found it]).

Moreover, plaintiff's claim of detrimental reliance rings hollow where, as here, the injured plaintiff's deposition testimony establishes that she did not detrimentally rely upon any performance defendant contractor, but rather, that he relied on his own observations of the condition of the accident as it existed on the morning of the incident (*Rudloff supra*. 109 AD3d at 812, 971 NYS2d at 172 [2d Dept 2013]). Plaintiff here did testify that she was generally unaware of the precise entity responsibly for snow plowing and ice removal services on behalf of Lowes, but that she did know it was an outside contractor and not paid Lowes personnel who carried out those functions.

Under analogous circumstances, other courts have determined that plaintiff failed to raise a triable issue of fact to forestall an award of summary judgment dismissing the complaint premised on the contention the defendant contractor created or exacerbated the allegedly icy condition by failing to apply salt or sand. Even given this claim, courts have reasoned that defendant snow/ice removal contractor's mere failure to apply sand or salt at the accident scene without additional evidence from plaintiff, constituted mere speculation and conjecture that the failure to perform that duty rendered the property less safe than it was before the contractor began performance of its work. Moreover, the courts discounted plaintiff's expert affidavit as unduly speculative and thus, insufficient to raise a triable issue of fact (*Trombetta v G.P. Landscape Design, Inc.*, 160 AD3d 677, 678-79, 73 NYS3d 230, 232 [2d Dept 2018]).

Applied here, the Court notes that neither defendant objected at threshold to the consideration of plaintiff's expert meteorological affidavit. Nothing in the motion record indicated that this litigation expert was disclosed to the defendant prior to the making of the motions, or that CPLR 3101(d) disclosure was produced. This notwithstanding, the Court considered the affidavit in the rendering of this decision in view of the rule within the Second Department holding that "refusal of the Supreme Court to consider the plaintiffs' expert affidavit submitted in opposition to defendant's motion was an improvident exercise of discretion (*LeMaire v Kuncham*, 102 AD3d 659, 661, 957 NYS2d 732, 734 [2d Dept 2013]; *Rivers v. Birnbaum*, 102 A.D.3d 26, 953 N.Y.S.2d 232 [2d Dept 2012]; see also *Salcedo v Weng Qu Ju*, 106 AD3d 977, 978, 965 NYS2d 595, 597 [2d Dept 2013][a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment]; accord *Brande v City of White Plains*, 107 AD3d 926, 927, 966 NYS2d 911 [2d Dept 2013]). However, despite consideration of the expert affidavit, plaintiff's case cannot be saved. Defendants rightfully note that meteorological data did factor into the analysis, but the ultimate opinion that defendants were negligent in piling snow in the vicinity of and around the employee parking lot away from drainage caused or contributed to an alleged dangerous icy condition, considered additional factors behind prevailing temperature and weather data, on which plaintiff's professed expert was not qualified to opine, lacking an engineering degree.

Given all of the above, this Court determines that plaintiff has failed to raise a triable question of fact on any of the *Espinal* factors, and in consideration of the fact that plaintiff was not a signatory to the snow/ice removal agreements and was not specifically an intended or third-party beneficiary of either agreement, summary judgment for defendants dismissing plaintiff's complaint is proper and warranted on this record. Accordingly, this Court rules that plaintiff's complaint as against defendants is **dismissed**, and defendants' motion for judgment as a matter of law dismissing the complaint and for an award of summary judgment is hereby **granted**.

The remaining contentions of defendants concerning the cross-claims as against each other for contractual or common law contribution and indemnification need not be reached here presently, and the same are considered **denied** as moot or rendered academic by the foregoing determinations (see e.g. *Lubell v Stonegate at Ardsley Home Owners Ass'n, Inc.*, 79 AD3d 1102, 1104, 915 NYS2d 103, 105 [2d Dept 2010][standing for the proposition that where, as here, there are no triable issues of fact with respect to negligence on the part of defendant, the Supreme Court properly granted that branch of defendant's motion which was for summary

Supreme Court properly granted that branch of defendant's motion which was for summary judgment dismissing so much of the first cross claim as asserted a claim for common-law indemnification]).

The foregoing constitutes the decision and order of this Court.

Dated: March 19, 2019
Riverhead, New York



WILLIAM G. FORD, J.S.C.

 X FINAL DISPOSITION

 NON-FINAL DISPOSITION