Neville v O'Shea Props.
2019 NY Slip Op 32785(U)
September 20, 2019
Supreme Court, Suffolk County
Docket Number: 13-18761
Judge: David T. Reilly

SHORT FORM ORDER

INDEX No. 13-18761
CAL. No. 18-02251OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 5-8-19
ADJ. DATE 6-6-19
Mot. Seq. # 001 - MG

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JOHN NEVILLE and ELIZABETH NEVILLE,

Plaintiffs,

- against -

O'SHEA PROPERTIES, KASTE DESIGN & LANDSCAPING, INC., and "XYZ MAINTENANCE COMPANY", the name being fictitious but intended to be the company that maintains the premises known as 1395-19 Lakeland Avenue, Bohemia, New York,

Defendants.

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JOHN J. JULIANO, P.C.
Attorney for Plaintiffs
39 Doyle Court
East Northport, New York 11731

MAZZARA & SMALL, P.C.
Attorney for Defendants/Third-Party Plaintiffs
O'Shea Properties and Kaste Design & Landscaping, Inc.
1698 Roosevelt Avenue
Bohemia, New York 11716

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GERALD M. O'SHEA d/b/a O'SHEA PROPERTIES,

Third-Party Plaintiff,

- against -

NICHOLAS MANCUSO,

Third-Party Defendant.

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GAMBESKI & FRUM
Attorney for Third-Party Defendant Mancuso
565 Taxer Road, Suite 220
Elmsford, New York 10523

Upon the following papers numbered 1 to 23 read on this motion for summary judgment: Notice of Motion and supporting papers 1-13; Answering Affidavits and supporting papers 14-18; 19-20; Replying Affidavits and supporting papers 21-23; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by third-party defendant Nicholas Mancuso for summary judgment dismissing the third-party complaint and cross-claim against him is granted, and this action is severed as against him.

Plaintiff commenced this action against defendants to recover damages for injuries he allegedly sustained from a slip-and-fall accident that occurred on February 11, 2013, in a parking lot of a building where plaintiff leases industrial space, located at 1395 Lakeland Avenue, Bohemia, New York. Plaintiff's wife, Elizabeth Neville, sues derivatively for loss of services. The complaint alleges that defendants, O'Shea Properties, Kaste Design & Landscaping, Inc., and XYZ Maintenance Company, were negligent in failing to remove snow and ice from "the pavement in front of the entrance," causing plaintiff to slip and fall. Defendant O'Shea subsequently filed a third-party complaint against Nicholas Mancuso alleging that he breached the lease agreement entered into between O'Shea and Mancuso by failing to "keep all sidewalks free from snow and ice," causing plaintiff to slip and fall. Third-party plaintiffs allege further that "on or prior to January 7, 2013 . . . Mancuso negligently left the water and a hose running, and negligently caused water to flow onto the parking lot and walkways at 1395 Lakeland Avenue." The crux of the third-party complaint is that plaintiff's injuries were sustained on January 7, 2013 and caused by Mancuso, who created a black ice condition by running water from his unit into the parking lot. It alleges, alternatively, that Mancuso was negligent in failing to inspect the sidewalk, failing to remove snow and ice from the sidewalk, failing to apply salt and sand to it, and failing to barricade the sidewalk.

Nicholas Mancuso now moves for summary judgment dismissing the third-party complaint and cross claims against him on the grounds that he did not create the icy condition, and that he was not a cause of plaintiff's injuries. In support of the motion, third-party defendant submits copies of the pleadings, the bill of particulars, the transcripts of the parties' deposition testimony, copies of photographs of the subject premises, a copy of a lease agreement between himself and O'Shea, and copies of telephone messages.

Plaintiff testified that he owns a furniture refurbishing business, and that he entered into a lease agreement with O'Shea Properties in 2001 to lease office and warehouse space at the subject premises, namely, unit number 19. He testified that his unit is approximately 1,200 square feet and he described it and viewed photographs of the premises which he testified accurately depict the subject premises. The photographs are submitted and indicate that the building is one-story and has several attached units that each have a glass entrance door and a garage door. There is a small concrete walkway in front of his glass entrance door and the entrance door for unit number 21. He testified that unit number 21 is to the left of his unit when looking from the outside, and that its garage is to the left of the entrance doors.

Plaintiff testified that on the date of the subject incident, February 11, 2013, he arrived at the subject premises at approximately 9:15 a.m., and that he parked his vehicle in front of unit number 23, as the entire parking lot was covered with snow and ice from a snowstorm that occurred on February 7, 2013. He testified that he observed a white pick-up truck pushing snow from another tenant's truck that was surrounded by snow. He testified that the roadways, walkways, and parking spots were covered with snow and ice accumulations that were over two feet deep, and that the snow was hard and frozen. He testified that he did not observe any salt or sand in the parking lot, and that in the 18 years that he has been a tenant he has never observed salt or sand used at that location as they were considered "extra." He testified that he

is responsible for shoveling the walkway in front of his entrance door and that O'Shea is responsible for removing snow from the entire parking lot and roadway.

Plaintiff testified that he exited his vehicle with a shovel and walked over the snow which he described as "hard, crumbly, ice snow," and that its depth varied in depth between 8 to 20 inches. He testified that the snow was hard, and that when he walked over it his feet did not sink into it. He testified that he shoveled the area directly in front of his door so that he could open it, and that he turned the lights and heat on inside the office, and then went back outside to help another tenant shovel his walkway. He testified that he walked over the concrete walkway and into the parking lot, turned right, and took approximately five steps before slipping and falling onto his back. He testified that another tenant assisted him, and that he walked back to his shop and sat down and called his wife. Plaintiff testified that at approximately 10:14 a.m., he called O'Shea's office and spoke to Deidre to advise that the premises were not plowed or were plowed in a "horrendous manner." He testified that he observed a Bobcat in the parking lot in the afternoon which could not remove the snow, and that he later observed a "big yellow bulldozer."

At his deposition, plaintiff also testified to an incident that occurred on Sunday, January 6, 2013, wherein he observed the tenant in unit 21, Mancuso, and two other persons running a hose from the garage that extended straight to the parking spots where they appeared to be doing "something with a radiator." He testified that the ground was wet, but it was not icy, and that on the following day when he arrived at the premises, he slipped and fell on black ice. He testified that he contacted O'Shea's office on that occasion as well and complained to Deidre, and that he presented to the emergency department at Stony Brook University Hospital on January 8, 2013.

Deidre Acierno testified that she works as an office manager at O'Shea Properties in their main office, located at 4155 Veterans Memorial Highway, Ronkonkoma, New York, and has been employed by O'Shea for over 17 years. She testified that at the time of the incident, the name of the company was Gerald O'Shea doing business as O'Shea Properties, and that in January 2014, it became a limited liability company under the name G.M. O'Shea Properties. She testified that her responsibilities include bookkeeping, accounting, payroll, human resources, and "whatever basically needs to be done." Acierno testified that Katie O'Shea, the Director of O'Shea, is her supervisor, and that there are two other employees who work in the office and three maintenance employees who work in the field. She testified that O'Shea owns 35 properties, and that it owned the subject property when she started working at O'Shea. She testified that the company manages its own properties, and that Joanne Meadows is the property manager and works at the main office.

Acierno testified that O'Shea is responsible for removing snow from the parking lot, and that the tenants are responsible for removing it in the area by their entrance door. She testified that O'Shea has an agreement with Kaste Design & Landscaping, Inc. to remove snow from the parking lot, and that they needed O'Shea's approval to apply salt and sand to the area. She testified that there was a snowstorm on February 8 and 9, 2013 and that 28 inches of snow accumulated, but that she is unaware if Kaste performed any snow removal services at the subject premises on those dates or on February 10, 2013.

Acierno testified that O'Shea does not have a written or formal procedure for handling complaints from tenants, and that she does not know if its employees inspect the premises after snow removal procedures have been performed. She was shown several phone messages dated February 11, 2013, and they each state the time of day that they were created. She testified that at 8:08 a.m., a voicemail was left by a tenant complaining that the middle of the building had a wall of snow, and the building was inaccessible. She testified that a message from 10:40 a.m. indicates that the area was not plowed; a message with the time of 9:00 a.m. indicates that she contacted Steve Kaste who was to bring a payloader to the property. She testified that she believes he came to the subject premises with a payloader, but that she has no personal knowledge of that.

Nicholas Mancuso testified that he began leasing unit number 21 at the subject premises in January 2013, for personal use, and that he intended to store his vehicles in it. He testified that he conducted some work in the space and brought a couple of vehicles in the spring of 2013, and that he did not store any vehicles in the space during the months of January and February of 2013. He testified that he did not operate a hose from his unit, and he does not recall working on his vehicle in January and February 2013. He testified that he is responsible for shoveling snow from the concrete walkway in front of his entrance door, and that he typically shovels the area in front of unit 19 as well.

Steve Kaste testified that he is the owner of Kaste Design & Landscaping, Inc., and that it has seven employees, including himself. He testified that his company performs snow removal services and testified as to the equipment that it owns, which includes two pick-up trucks with plows, two dump trucks with plows and sanders, a bucket loader, and 10 snow blowers. He testified that each year he submits a proposal to O'Shea for such services, and that it is typically signed by Katie O'Shea. He testified that he performs the services for 11 properties owned by O'Shea, including the subject premises, and that he retains subcontractors to assist as well. He testified that there was a major snowstorm on the weekend prior to the incident, and that he went to the subject property to clear a small path so that vehicles could enter on Monday morning. He testified that he did not spread any salt or sand on the ground, and did not perform any pre-storm preparation procedures. Kaste testified that he also went to the premises on Monday morning with a pick-up truck and plow, and testified that sometime during the day Joanne Meadows contacted him and requested that he return to the premises. He testified that he does not own a payloader, so he hired a payload operator who came to the premises.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka***

v Edelman, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Knight v 177 W. 26 Realty, LLC***, 173 AD3d 846, 103 NYS3d 503 [2d Dept 2019]; ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]).

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Mercedes v City of New York***, 107 AD3d 767, 968 NYS2d 519 [2d Dept 2013]; ***Dylan v CEJ Props., LLC***, 148 AD3d 1115, 50 NYS3d 483 [2d Dept 2017]; ***Ryan v Taconic Realty Assoc.***, 122 AD3d 708, 997 NYS2d 143 [2d Dept 2014]).

Here, Mancuso established his prima facie entitlement to summary judgment by demonstrating that he did not create the alleged condition that caused plaintiff to slip and fall. All parties testified that there was a major snowstorm prior to the morning of the incident, and that it created over two feet of snow and ice. The photographs of the subject premises taken by plaintiff with his cell phone camera on the date of the incident demonstrate that all areas of the premises were covered with snow and some vehicles were even buried. Mancuso also established that he did not have a duty to remove snow from the parking lot and roadway through the testimony of the parties and a copy of the lease agreement. Paragraph seven of the agreement between Mancuso and O'Shea merely required Mancuso to keep the walkway at his entrance door free from snow and ice. It is undisputed that plaintiff slipped in the roadway, or parking lot area, not on the concrete walkway at the entrance door.

Having established his prima facie entitlement to summary judgment, the burden shifts to the parties opposing the motion to proffer proof in admissible form sufficient to raise a triable issue of fact. In opposition, third-party plaintiff argues that Mancuso's motion should be denied, as he failed to annex a complete set of the pleadings by omitting a copy of the cross claim that he seeks to dismiss. However, the court shall disregard such omission, as the cross claim has been provided to the Court by Mancuso in his reply, and there is no proof that a substantial right has been impaired nor has prejudice been shown (*see* CPLR 2001; ***Montalvo v Episcopal Health Servs., Inc.***, 172 AD3d 1357, 102 NYS3d 74 [2d Dept 2019]; ***Sensible Choice Contr., LLC v Rodgers***, 164 AD3d 705, 83 NYS3d 298 [2d Dept 2018]; ***Long Island Pine Barrens Socy., Inc. v County of Suffolk***, 122 AD3d 688, 996 NYS2d 162 [2d Dept 2014]).

Third-party plaintiff also submits an affirmation of counsel who argues that Mancuso caused plaintiff's injuries by running water from his hose into the roadway and parking lot which subsequently froze and caused plaintiff to slip and fall on January 7, 2013. Counsel argues further that Mancuso breached the lease agreement between him and O'Shea by using the premises improperly to perform mechanical and auto body repairs, which are prohibited under the lease.

In an attempt to prove that plaintiff was injured from the January 7 incident, hospital records from Stony Brook University Hospital are submitted. Setting aside the issue of the hospital records' admissibility

(*see* CPLR 4518 [c]), and the well-settled principle that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]), neither counsel's argument nor the hospital records are of any consequence to the issue of Mancuso's liability for the incident that occurred on February 11, 2013, which is the basis for plaintiffs' action against defendants. Consequently, counsel's submissions are insufficient to raise a triable issue of fact.

However, counsel's affirmation is of relevance, as it clarifies the conflated basis for the third-party action against Mancuso. Third-party practice is allowed after defendant serves an answer to the complaint. Defendant "may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant." Here, plaintiff's claim relates to injuries that allegedly occurred on February 11, 2013 caused by snow and ice accumulations. Plaintiff alleges that defendants were negligent in failing to maintain the premises in a safe condition by failing to remove snow and ice from the roadway and parking lot, among other things. Third-party plaintiff's claim against Mancuso concerns injuries that allegedly occurred to plaintiff on January 7, 2013 by his alleged improper use of a hose that created a black ice condition in the parking lot, allegedly causing plaintiff to slip and fall.

A "third-party claim must be sufficiently related to the main action to at least raise the question of whether the third-party defendant may be liable to defendant-third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff" (***Qosina Corp. v C & N Packaging, Inc.***, 96 AD3d 1032, 1034, 948 NYS2d 308 [2d Dept 2012]). While impleader is permissible even if the impleaded party owes no duty to the primary plaintiff, the liability sought to be imposed upon a third-party defendant must arise from the liability asserted against the third-party plaintiff in the main action (***Loch Sheldrake Beach & Tennis Inc. v Akulich***, 141 AD3d 809, 36 NYS3d 525 [3d Dept 2016]; ***Sunbelt Rentals, Inc. v Tempest Windows, Inc.***, 94 AD3d 1088, 943 NYS2d 197 [2d Dept 2012]; ***BBIG Realty Corp. v Ginsberg***, 111 AD2d 91, 489 NYS2d 224 [1st Dept 1985]).

Here, the liability asserted against defendants arose from an incident that allegedly occurred on February 11, 2013, while Mancuso's liability is based upon an unrelated incident that allegedly occurred on January 7, 2013. In their opposition papers, plaintiffs confirm that their only claim against the defendants arises from the incident that occurred on February 11, 2013 caused by the unsafe snow and ice conditions in the parking lot of the subject premises.

Third-party plaintiff's arguments are in actuality an attempt to escape liability on proximate cause grounds and shift liability to Mancuso, ostensibly arguing that he was the sole proximate cause of plaintiff's injuries stemming from the January incident. However, there are two proximate cause issues in a negligence action (*see* ***McDonald v We're Assoc. Co.***, 290 AD2d 422, 736 NYS2d 82 [2d Dept 2002]; ***Farinaro v State***, 132 AD2d 642, 518 NYS2d 16 [2d Dept 1987]). To impose liability, defendant must first be found to be a proximate cause of the accident, and then it must be shown that the accident caused the injuries that plaintiff complains of (*see* ***Canonico v Beechmont Bus Serv., Inc.***, 15 AD3d 327, 790 NYS2d 36 [2d Dept 2005]; ***Narducci v McRae***, 298 AD2d 443, 748 NYS2d 764 [2d Dept 2002]; ***Bocci v Turkowitz***, 255 AD2d 476, 680 NYS2d 637 [2d Dept 1998]).

While there may be more than one proximate cause of an injury, "[a] defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury" (***Turturro v City of New York***, 28 NY3d 469, 483, 45 NYS3d 873 [2016]). Here, the injuries that plaintiffs complain of are alleged to have been caused by defendants' negligence in failing to remove snow and ice from the subject premises on February 11, 2013. The third-party complaint against Mancuso is unrelated to the claims contained in plaintiffs' complaint and, therefore, impleader is improper and impermissible, thus requiring its dismissal on procedural grounds (*see* ***Langan v Cabela***, 289 AD2d 377, 734 NYS3d 876 [2d Dept 2001]).

In any event, third-party defendant established that he was not involved in the "events which produced the injury" on February 11, 2013 and, therefore, that his actions were not a proximate cause of that injury. Third-party plaintiff has failed to submit sufficient evidence to raise a triable issue of fact to defeat Mancuso's motion. Accordingly, the motion by third-party defendant Mancuso for summary judgment dismissing the third-party complaint which, notably, contains a cause of action for contractual indemnification and contribution, and for an Order awarding him summary judgment dismissing the cross claim by Kaste Design for indemnification and contribution, is granted.

Dated: Sept 20, 2019
Riverhead, NY

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**