

Taghipour v Brookside Mgt. Corp.
2019 NY Slip Op 33936(U)
June 21, 2019
Supreme Court, Dutchess County
Docket Number: 2017-51535
Judge: Hal B. Greenwald
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SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. HAL B. GREENWALD

Justice.

SUPREME COURT: DUTCHESS COUNTY

CYRUS TAGHIPOUR,

Plaintiff,

-against-

DECISION AND ORDER
ON TWO MOTIONS
Index No. 2017-51535

BROOKSIDE MANAGEMENT CORP. and
AMCO HOME IMPROVEMENTS LLC,

Defendants.

_____x

The following papers were read and considered on two separate motions filed by the defendants seeking certain relief including dismissal of the complaint, on different grounds, dismissal of or enforcement of cross claims and common law indemnity.

NYSCEF Nos 1,3,5,8, 24-38, 39-42, 43-55, 56-62, 63, 64, 65-72, 73-77

BACKGROUND FACTS AND RELEVANT PROCEDURAL HISTORY

Plaintiff seeks to recover for “slip and fall” injuries he sustained at the parking lot at 8 Colonial Drive Wappingers Falls, New York on December 19, 2016. Plaintiff CYRUS TAGHIPOUR commenced the within action by the filing of a Summons and Verified Complaint on June 28, 2017. Defendant AMCO HOME IMPROVEMENTS, INC. (AMCO) filed its Verified Answer and Cross Claim on August 17, 2017. Defendant BROOKSIDE MANAGEMENT CORP. (BROOKSIDE) filed its Verified Answer and Cross Claims on September 6, 2017. AMCO answered BROOKSIDE’s Cross Claims on September 19, 2017.

Counsel for AMCO filed its instant Motion for Summary Judgment on November 30, 2018 initially returnable December 28, 2018. (MOTION#1). AMCO seeks an Order granting it Summary Judgment and dismissing the underlying complaint and all Cross Claims against AMCO by Defendant BROOKSIDE. In response BROOKSIDE by its counsel filed an Affirmation in Opposition on December 12, 2018 and a Reply was filed by AMCO on December 19, 2018. BROOKSIDE thereafter filed its Motion for Summary Judgment on December 20, 2018. (MOTION#2) BROOKSIDE seeks an Order dismissing the underlying Complaint as well as Summary Judgment granting BROOKSIDE its Cross Claim against AMCO for common law indemnity. Plaintiff CYRUS TAGHIPOUR (TAGHIPOUR) filed an Affirmation Opposition to Motion #1 on December 21, 2018. AMCO filed its Affirmation in Opposition to Motion #2 on January 7, 2019. TAGHIPOUR filed its Affirmation in Opposition to Motion #2 on January 8, 2019.

Although certain issues concerning each Motion are related, the within Decision and Order will deal with the two above motions in the order they were filed.

AMCO'S MOTION FOR SUMMARY JUDGMENT

AMCO is the snow removal contractor for Defendant BROOKSIDE at the time of Plaintiff's alleged "slip & fall" incident. It is AMCO's position that Summary Judgment should be granted, and the action dismissed by reason that there was no privity between it and the Plaintiff and thus this action is barred. Further, AMCO proffers there are no triable issues of facts that can support a negligence determination against AMCO.

AMCO bases its Motion on the Deposition Before Trial testimonies of Plaintiff CYRUS TAGHIPOUR, a witness Yakov Basch who is employed by Defendant BROOKSIDE as a manager, the superintendent at BROOKSIDE Esad Muratovic, and the owner of AMCO, Almir Muratovic. The argument put forth by AMCO, is there cannot be a finding of negligence (against AMCO) unless there is a breach of a duty of care (between AMCO and TAGHIPOUR).

"A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties" (Wheaton v East End Commons Assoc., LLC, 50 AD3d 675, 677 [2008]). "Generally, a contractual obligation standing alone will not give rise to tort liability in favor of a third party" (Schwint v Bank St. Commons, LLC, 74 AD3d 1312, 1313 [2010]; see Espinal v Melville Snow Contrs, 98 NY2d 136, 138 [2002]). "However, the Court of Appeals has identified three situations wherein the party who enters into a contract to render services may be held liable in tort to a third party: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launch[es] 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" (Schwint v Bank St. Commons, LLC, 74 AD3d at 1313 [internal quotation marks omitted]; see Espinal v Melville Snow Contrs., 98 NY2d at 140).

Accordingly, this Court must determine if there are triable issues of fact that call into dispute the three (3) aforesaid Espinal factors. Conflicting issues concerning AMCO's responsibilities in performing its snow removal tasks are at issue. Almir Muratovic (hereinafter referred to as "Almir") testified on behalf of defendant AMCO. He previously provided snow removal work when he was the superintendent of the subject property between 2007-2013 (EBT page 14, lines 8-15). The snow removal work that AMCO provided was based upon a document variously characterized as an invoice, a contract and an agreement. The monthly cost agreed upon during snow removal season was \$2000. The document states as a "Description: Snow Removal": *Snow plow all driveways as needed including parking spots and salt the property as needed.* Almir testifies that he removed snow from the parking lots and parking spaces, but not specifically the space between cars. He did indicate that he "would spread salt in between any parked vehicles using a truck mounted salt spreader." (EBT page 67, lines 16-23). Further he indicated that he would use the shovels in his truck "...if the snow plow became stuck or to help someone dig out. (EBT page 64, lines 8-17). However, he also stated in response to questions whether he got out of

the truck to clear up parking spaces that: "...I did that most of the time as a favor to tenants to **help them clean around their cars to get out.** (Emphasis added) (EBT page 64, lines 15-17).

The property manager for BROOKSIDE, Yakov Basch testified that AMCO was responsible for removing all the snow and ice in the parking lot and apply salt. At the conclusion of his testimony, Mr Basch states he has "No expectations" as to how AMCO gets the job done only: "**Q. You just want the snow removed? A. That's all.**"

It thus appears there are triable issues of fact as to whether AMCO's action (or inaction) in snow removal, was a failure to use reasonable care, such as to "launch", or to put in motion or initiate, the condition that had causation to the Plaintiff's fall, and resultant injuries. Accordingly, there is an issue of fact as to whether point #1 in *Espinal*, may have been satisfied to the extent that AMCO may be held liable to plaintiff. Accordingly, AMCO cannot be granted summary judgment dismissing the instant action as against them.

Additionally, there are issues of fact whether TAGHIPOUR detrimentally relied upon the services of AMCO to properly remove snow and ice from the parking lots, parking spots and driveways.

Plaintiff TAGHIPOUR testified at EBT page 43, lines 12-16 as follows:

"Q. So my question to you, is, was the area in the middle, was that cleared of snow and ice?

A. In the middle cleared. But behind the cars and between, no."

Further TAGHIPOUR stated that there was no salt in and around the parking lot. (EBT page 44, line 7-9)."

As a consequence of the prior testimony of TAGHIPOUR, Almir Muratovic from AMCO and Yakov Basch, here are triable issues of fact that concern Espinal point #2 and whether BROOKSIDE or AMCO is responsible, once they had actual or constructive notice of the snow. Accordingly, Summary Judgement cannot be granted to AMCO, so long as there are issues of fact to be determined at trial.

Lastly, Espinal point#3, there certainly are issues of fact as to whether the activities of AMCO, pursuant to its invoice, contract or agreement could reconsidered to have "...displaced the other party's (BROOKSIDE) duty to maintain the premises safely."

The testimony by BROOKSIDE by Basch indicates that AMCO was responsible for snow and ice removal at the subject property. Basch states that AMCO is to "**do the snow whenever it snows.**" (See EBT page 10 line 7).

When asked about the invoice, agreement or contract Basch indicated that AMCO had certain responsibilities concerning snow removal

Additionally, Basch testified that there was no specific depth of snow for AMCO to remove snow (EBT page 13, lines 3-7); that AMCO did not have to report to BROOKSIDE (EBT page 13 lines 8-14) and that Basch ‘completely relied on him’ [Muratovic/AMCO] (EBT page 13, line 20).

To the contrary BROOKSIDE’s superintendent Esad Muratovic stated (EBT page 21, lines 5-20) that he understood that AMCO would do snow removal, “...every four inches. Additionally, he relayed what efforts would be made by AMCO to remove snow and ice in the parking spots (EBT page 27, line 21 to page 31, line 10).

BROOKSIDE did not have a formal policy concerning tenants’ removal of their cars during or before snow falls. Almir as superintendent for BROOKSIDE wanted such a policy (EBT page 31, line 19 to page 32, line 13). There are issues of fact as to why such a policy was never implemented (EBT page 32, lines 10-23).

AMCO by Almir Muratovic at his EBT also discussed AMCO’s snow removal responsibilities. He stated he would “automatically come [to remove snow], (EBT page 20, line 5). It is unclear how much snow fell in relation to the timing of the accident. If AMCO removed the snow, did it refreeze and when it did refreeze are also factual issues that must be determined.

For all the above reasons, AMCO’s Motion for Summary Judgment is denied.

THE BROOKSIDE MOTION FOR SUMMARY JUDGMENT

Defendant BROOKSIDE is the property manager of the subject property where Plaintiff had a “slip & fall” incident and injured himself. BROOKSIDE sought summary judgment and a dismissal of the Complaint and all cross claims by Co-Defendant AMCO. BROOKSIDE further seeks a finding against Co-Defendant AMCO on its cross claim for common law indemnity. It is alleged by BROOKSIDE that there are no issues of fact that AMCO is the responsible party, that BROOKSIDE does not owe a duty of care to the plaintiff and that summary judgment should be granted.

Plaintiff’s proof indicates that a snowy and icy condition from the storm that occurred on or about or before December 19, 2016, was responsible for his injuries. (*see Bernstein v. City of New York*, 69 N.Y.2d 1020, 1022, 517 N.Y.S.2d 908, 511 N.E.2d 52). Viewing the evidence in the light most favorable to plaintiff (*see Byrd v. Church of Christ Uniting*, 192 A.D.2d 967, 969, 597 N.Y.S.2d 211; *Dykstra v. Windridge Condominium One*, 175 A.D.2d 482, 483, 572 N.Y.S.2d 527), he has shown facts and conditions from which defendants’ negligence can reasonably be inferred (cf., *Bernstein v. City of New York*, supra). Additionally, in order to impose liability upon defendants under the instant circumstances, plaintiff is required to demonstrate that defendants had either actual or constructive notice of the icy condition (*see George v. Ponderosa Steak House*, 221 A.D.2d 710, 711, 632 N.Y.S.2d 893, 894). There are issues of fact whether BROOKSIDE had actual notice of the condition or constructive notice of the condition.

Plaintiff has chosen to proceed upon the theory of constructive notice. Constructive notice requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit a defendant to discover it and take corrective action (*see*

id.; Byrd v. Church of Christ Uniting, supra, at 969, 597 N.Y.S.2d 211). Here, plaintiff's proof in opposition to the motion for summary judgment, at a minimum, is enough to establish that snow and ice-covered portions of the parking lot at the time of the accident and for some time before the accident.

Assuming arguendo, that snow and ice, if left remaining on a parking lot or parking space, is considered a defective condition on property, this "defective condition" must be shown to have existed and that the owner of the property had "actual or constructive notice of its existence. Chang v Marmon Enterprises, Inc. 99 N.Y.S. 397, citing in relevant part Steed v. MVA Enters., LLC, 136 A.D.3d 793, 26 N.Y.S.3d 98.; Pampalone v. FBE Van Dam, LLC, 123 A.D.3d 988, 989, 1 N.Y.S.3d 155). A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it (*see* Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837-838, 501 N.Y.S.2d 646, 492 N.E.2d 774).

Plaintiff testified at his EBT that there were piles of snow behind and between his car. EBT page 44, lines 10-15; that BROOKSIDE never adopted any policy or gave him any instructions to move his car when there was snow. (EBT page 29, lines 2-20). He indicated there was snow and ice, and "patches all over except in the middle..." (EBT page 53, lines 12-13).

There has been conflicting testimony that AMCO was to remove the snow from the parking lots, but if there was snow leftover between the cars, possibly the superintendent would do it or maybe AMCO would do this with the assistance of Esad (EBT page 30, lines 7-16; page 30 lines 17-31; page 33, lines 19-23; page 37, lines 5-10). Esad stated he had to report to management about the snow removal process (EBT page 49, lines 10-14). It was not AMCO's responsibility to move cars from their spaces, and BROOKSIDE never instituted a policy of requiring tenants to remove their cars during snow storms.

As stated by Almir, BROOKSIDE had prior actual and constructive notice for many years that snow, and ice accumulated between and behind cars, even after the snow plows had made a pass through the parking lot (EBT page 33, line 21 to page 34, line 6).

Plaintiff TAGHIPOUR cites several cases in its opposition to the BROOKSIDE summary judgment motion. In Olivieri v GM realty., LLC, 37 A.D.3d 569 (2nd Dept 2007) the Plaintiff's opposition was based upon constructive notice of how long the ice/snow covered condition and/or refreezing due to weather conditions, existed. The lower Court found for defendant property owner's motion and the Second Department reversed. Similarly, there are triable issues of fact as to when the ice and snow existed, and whether there had been a refreezing prior to the accident due to the weather thus summary judgment must be denied (*See also* Morris v Home Depot USA 152 A.D.3d 669 [2nd Dept 2017])

Repeatedly, it has been held that a property owner may be vicariously liable for the actions (or inactions) of a snow plow operator contracted to remove snow from the property owner's property. AMCO had certain responsibilities to remove the snow/ice, but BROOKSIDE also had its continued liability for the work to be performed. The negligent acts performed by AMCO, such as being aware that the snow and ice between cars would refreeze, and that AMCO failed to

complete its work, raise triable issues of fact did AMCO's actions create the icy/snow covered conditions between the cars, and what was BROOKSIDE's continuous responsibility.

As set forth in BROOKSIDE's Motion for Summary judgment for common-law indemnification by co-Defendant AMCO "One is entitled to implied **indemnification** where he or she has committed no wrong but is held vicariously liable for the wrongdoing of another" (*see Kozerski v. Deer Run Homeowners Assn.*, 217 A.D.2d 841; *Kearsey v. Vestal Park, LLC*, 71 A.D.3d at 1367, 897 N.Y.S.2d 542; *Westbank Contr., Inc. v. Rondout Val. Cent. School Dist.*, 46 A.D.3d 1187, 1189, 847 N.Y.S.2d 780 [2007]).

However, a continued review of the EBT testimony asserted by all parties to this lawsuit, it is apparent to this Court, there are triable issues of fact as to who committed the "wrongdoing". There are continuing issues of fact as to what actions were taken by each of the co-Defendants. Accordingly, BROOKSIDE has not established its own freedom from negligence, and AMCO cannot be held to indemnify a party where there remain issues of triable fact as to where the responsibilities lie with respect to the instant issue of negligence. Thus, BROOKSIDE's Motion seeking common-law indemnification against AMCO is denied

Additionally, as there is no "indemnification" clause in the invoice, contract or agreement between AMCO and BROOKSIDE for snow removal in existence at the time of the accident, there is no justification for the Court to impose contractual indemnification.

By reason of all the foregoing it is hereby

ORDERED, that Defendant AMCO HOME IMPROVEMENTS, LLC.'s Motion for Summary Judgment seeking to dismiss the claim by Plaintiff is hereby denied; and it is further

ORDERED, that Defendant BROOKSIDE MANAGEMENT CORP.'s Motion for Summary Judgment seeking to dismiss the claim by Plaintiff is hereby denied; and it is further

ORDERED that Defendant BROOKSIDE MANAGEMENT CORP.'s Motion for Summary Judgment seeking judgment on its cross-claim against Defendant AMCO for indemnity is hereby denied; and it is further

ORDERED that counsel for all parties shall appear for a pretrial conference **August 22, 2019 at 9:30 a.m.** before the Hon. Hal B. Greenwald, J.S.C., Dutchess County.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Dated: June 21, 2019
Poughkeepsie, New York

E N T E R



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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Greenwald's Chambers, please do not submit any copies. Submit only the original papers.