

<b>Berger v East Coast Indus. Servs., Inc.</b>
2019 NY Slip Op 34268(U)
January 7, 2019
Supreme Court, Orange County
Docket Number: Index No. EF001020-2016
Judge: Elaine Slobod
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

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ALLAN BERGER,

Plaintiff,

-against-

EAST COAST INDUSTRIAL SERVICES, INC.,  
MCKINLEY INC., EAST COAST SERVICES II,  
INC., LB-UBS 2007-C6-THOMPSON STATION  
LLC, LNR PARTNERS, LLC and POLEY PAVING  
CORPORATION,

Defendants.

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P R E S E N T: HON. ELAINE SLOBOD, JSC

DECISION AND ORDER

INDEX NO. EF001020-2016

Upon review of the documents e-filed in connection with the motions for summary judgment in this slip and fall case made by (1) Poley Paving Corporation ("Poley"); (2) McKinley Inc. ("McKinley"), LB-UBS 2007-C6-Thompson Station LLC ("LB"), and LNR Partners, LLC (LNR); and (3) East Coast Industrial Services, Inc. ("East Coast Industrial") and East Coast Services II, Inc. ("East Coast II"), it is ORDERED as follows:

Poley's motion to dismiss the plaintiff's complaint is granted. Poley's motion to dismiss the co-defendants' cross-claims and its motion for summary judgment against East Coast II are denied.

The motion by McKinley, LB, and LNR to dismiss the complaint is granted with respect to LNR, but denied with respect to McKinley and LB. The motion by McKinley and LB to dismiss the cross-claims asserted against them is granted. The motion by

McKinley and LB for summary judgment on their cross-claims against East Coast Industrial, East Coast II, and Poley is denied.

The motion by East Coast Industrial and East Coast II to dismiss the complaint is granted as to East Coast II, but denied as to East Coast Industrial.

The plaintiff in this action slipped and fell in the parking lot of the Monticello Shop-Rite on March 1, 2015, at approximately 11:00 a.m. He attributed his fall to a "cloudy white" sheet of ice approximately two feet wide and the length of the shopping cart corral, and about an inch to an inch-and-a-half thick. He said that there was no snow on top of the ice.

LB is the owner of the property. LNR is the manager for the sole member of LB. McKinley is the property manager for LB. McKinley had a contract with East Coast Industrial for sweeping, trash removal and daily inspections of the property, and a separate contract with East Coast II for snow removal. East Coast II subcontracted its snow removal duties to Poley.

East Coast II's contract with McKinley did not give rise to a duty on the part of East Coast II toward the plaintiff. Given the limitations of the contract, particularly the provision which called for East Coast II to plow when snow accumulation reached two inches, the contract did not displace McKinley's duty as property manager to maintain the premises in a safe condition.

See *Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 901-02 (2d Dept 2011). The same principles support Poley's motion to dismiss the complaint.

LNR has established that it had no duty toward the public separate from LB's non-delegable duty as owner and McKinley's duty as property manager. As for LB and McKinley, there is an issue of fact regarding notice because East Coast Industrial, which had a contract to perform daily inspections, was on the property in the early morning hours on the date of the accident. Assuming for the purposes of this motion that the ice patch was there to be observed by East Coast Industrial, constructive notice could be imputed to LB and McKinley.

There are also issues of fact regarding the contention by LB and McKinley that there was a storm in progress. The plaintiff testified that it was not snowing at the time of his accident and that it was the preexisting patch of ice, and not snow, that caused his fall.

As for the cross-claims asserted by McKinley and LB against East Coast Industrial, East Coast II, and Poley, the contractual indemnification provision comes into play if those parties have been negligent, and negligence on the part of those parties has not been established. The same issues regarding negligence exist with respect to East Coast II's motion for summary judgment against Poley.

This matter is hereby scheduled for a further status conference on FEBRUARY 5, 2019, at 9:15 a.m., at the Orange County Courthouse, 285 Main Street, Goshen, New York.

This decision constitutes the order of the Court.

E N T E R

Dated: January 7, 2019  
Goshen, New York

Elaine Slobod  
HON. ELAINE SLOBOD, JSC

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