

**Bowerman v Brightview Landscaping**

2019 NY Slip Op 34625(U)

December 26, 2019

Supreme Court, Putnam County

Docket Number: Index No. 500036/2019

Judge: James T. Rooney

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This opinion is uncorrected and not selected for official publication.

*To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF PUTNAM

-----X  
WILLIAM BOWERMAN,

Plaintiff,

-against-

**DECISION AND ORDER**

Index No.: 500036/2019

Motion Seq.: 1

BRIGHTVIEW LANDSCAPING, ABM INDUSTRY GROUPS, LLC; ABM INDUSTRY GROUPS, D/B/A ABM HEALTHCARE PARKING SYSTEMS OF AMERICA, INC. (F/K/A HEALTHCARE PARKING SYSTEMS OF AMERICA, INC.); ABM HEALTHCARE SUPPORT SYSTEMS AND HEALTHCARE PARKING SYSTEMS OF AMERICA, INC.

Defendants,

-----X  
ROONEY, J.

Defendants ABM INDUSTRY GROUPS, LLC; ABM INDUSTRY GROUPS, D/B/A ABM HEALTHCARE PARKING SYSTEMS OF AMERICA, INC. (F/K/A HEALTHCARE PARKING SYSTEMS OF AMERICA, INC.); ABM HEALTHCARE SUPPORT SYSTEMS AND HEALTHCARE PARKING SYSTEMS OF AMERICA, INC. BONEFISH GRILL, LLC (hereinafter "ABM Defendants") make an application pursuant to N.Y. CIV. PRAC. L& R ("CPLR") § 3212 seeking summary judgment as against WILLIAM BOWERMAN ("BOWERMAN" or "Plaintiff") and dismissal of the Complaint in its entirety, along with the dismissal of any cross claims asserted by Defendant BRIGHTVIEW LANDSCAPING ("BRIGHTVIEW") in their Answer. For all the reasons set forth herein, ABM Defendants' motion for summary judgment is denied.

In connection with this application, the Court has read the following papers:

Notice of Motion/Affirmation in Support/  
Exhibits A-C

**PAPERS NUMBERED**

1-6

Affirmation in Opposition	7-14
Reply Affirmation	15-21

**Relevant Facts and Background**

By way of background, this action was commenced by Plaintiff by the filing of a Summons and Complaint dated January 9, 2019. ABM Defendants joined issue on or about March 5, 2019 by filing and serving an Answer. ABM Defendants’ Answer includes a cross claim as against Defendant Brightview for contribution and/or indemnification. Defendant Brightview joined issue on or about March 18, 2019 by filing and serving an Answer. In their Answer, Defendant Brightview also asserted a cross claim as against the ABM Defendants. Before the Court is ABM Defendants’ motion for summary judgment seeking dismissal of the Complaint in its entirety, as well as dismissal of BRIGHTVIEW’S cross claim.

As per the Complaint, on or about January 14, 2016, Plaintiff slipped and fell by reason of an alleged dangerous condition, to wit, snow and/or ice, in a parking lot designated as Parking Lot #15 which was owned and/or operated and/or managed by ABM Defendants and BRIGHTVIEW. As a result of the alleged negligence of the Defendants, Plaintiff suffered severe and serious personal injuries. In their Answer, ABM Defendants assert that they did not perform any snow removal activities in the subject location. BRIGHTVIEW has asserted a cross claim against ABM Defendants wherein it alleges that if the Plaintiff did sustain injuries as alleged in his Complaint, then said injuries were sustained by reason of ABM Defendants’ negligence, breach of warranty and/or breach of contract.

ABM Defendants contend in the instant motion for summary judgment that they are not liable in negligence for Plaintiff’s injuries as a matter of law. ABM Defendants submit the Affidavit of Eric Swanson, Senior Manager of Finance-FP & A for ABM Healthcare, sworn to on August 13, 2019 (hereinafter “Swanson Affidavit”) in support of the instant motion<sup>1</sup>. As per the Swanson Affidavit, ABM manages “specified parking lots and garages” at Westchester Medical Center. The Court assumes that the parking lot where Plaintiff alleges that he fell is

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<sup>1</sup> It is pointed out that the Affidavit itself indicates that it is submitted in support of ABM Defendants’ “CPLR 3211(a)(7)” motion, however the Court assumes this is a typographical error, and that it is in fact submitted in support of the instant CPLR 3212 motion.

located on the Westchester Medical Center campus. It is set forth in the Swanson Affidavit that ABM has not performed snow removal at any parking lot or roadway at Westchester Medical Center, and thus “could not have” controlled, maintained or repaired the premises as alleged in the Complaint.

Additionally, ABM Defendants submit the Affidavit of Elissa Chessari, Vice President of Operations of the Westchester County Medical Center, sworn to on July 31, 2019 (hereinafter “Chessari Affidavit”). According to the Chessari Affidavit, on the date of the alleged incident, there was a Management Services Agreement between the Westchester County Health Care Corporation (“WCHCC”) and the Ampco System Parking d/b/a Healthcare Parking Systems of America (“Healthcare Parking”), and that pursuant to said Agreement, Healthcare Parking “manages and operates specified parking garages, surface lots and parking related equipment” in the lots specified in the Agreement. The Chessari Affidavit also indicates that ABM Parking is not responsible for snow and ice removal of the “subject roadways.” The Agreement referenced in the Chessari Affidavit is not actually attached to the motion papers despite being referenced therein, so the Court has not had the benefit of reviewing it.

Plaintiff opposes the instant summary judgment motion and contends that there are triable issues of fact that preclude the Court from granting the motion. Specifically, at this stage in the litigation before the completion of discovery, Plaintiff points out that there are material facts still at issue, such as who owned the premises where Plaintiff fell, who was responsible for the snow and ice removal at that location, and the specific relevant terms of the Agreement in question. Plaintiff points out that since the Agreement between ABM Parking and Healthcare has not been produced yet, the relationship between those two entities has not been established. Additionally, Plaintiff notes that there is pending third party litigation between Brightview and the ABM Defendants on the issues of contribution and indemnification.

### Legal Analysis

In deciding a motion for summary judgment, the Court’s role is solely to determine whether triable issues of fact exist, not to decide those issues. *F. Garofalo Electric Co. v. New York Univ.*, 300 A.D.2d 186, 754 N.Y.S.2d 227 (1<sup>st</sup> Dep’t 2002). This is because the remedy of summary judgment is a drastic one and it should only be granted when it is clear that no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923

(1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez, supra*. The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dep’t 1986); *Gitlin v. Chirkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 (2d Dep’t 2012). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even “arugable”, the motion *must* be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982); *Andre, supra*.

In order to prove a *prima facie* case of negligence, a plaintiff must establish the existence of a duty, the breach of that duty, and that said breach was the proximate cause of his or her injuries. *See generally, Pulka v. Edelman*, 40 N.Y.2d 781, 390 N.Y.S.2d 393 (1976). The imposition of liability for a dangerous condition, i.e. snow and ice, ““must be predicated upon occupancy, ownership, control, or special use of the premises’” *LaGuarina v. Metropolitan Transit Authority, et al.*, 109 A.D.3d 793, 795, 971 N.Y.S.2d 173, 175 (2d Dep’t 2013) (internal citation omitted). The existence of one or more of these elements is sufficient to give rise to a duty of care. *See, Johnson v. Pixley Develop. Corp.*, 169 A.D.3d 1516, 1518, 93 N.Y.S.3d 780 (4<sup>th</sup> Dep’t 2019). Conversely, where none of these elements are present, a party cannot be held liable for the dangerous condition on the property. *Id.*

It is well known that generally, a property owner or landlord has a duty to maintain the premises in a reasonably safe condition. *Kellman v. 25 Tiemann Assoc.*, 87 N.Y.2d 871, 638 N.Y.S.2d 937 (1995). To the extent that the property owner contracts out certain property management duties to an independent contractor, said owner is generally not liable for the independent contractor’s negligent acts. *Pesante v. Vertical Indus. Dev. Corp.*, 142 A.D.3d 656, 657, 36 N.Y.S.3d 716 (2d Dep’t 2016). However, there are many exceptions to this general rule, and an owner or possessor of property may still be held liable for the negligence of an

independent contractor if such negligence violated the owner's nondelegable duty of maintaining the property in a reasonably safe condition. *Id.*

In the Complaint, Plaintiff alleges that on January 14, 2016, he slipped and fell on ice and/or snow on the premises designated as Parking Lot #15, located at 100 Woods Avenue in Valhalla, New York. As previously indicated, it appears from the motion papers that this parking lot is on the Westchester Medical Center campus. The Complaint alleges that at the time of Plaintiff's fall, said premises was under the control, operation and/or management of *both* Defendant BRIGHTVIEW and ABM Defendants, and thus alleges that the negligence of both of these entities was the proximate cause of his injuries.

As previously set forth, summary judgment is a drastic remedy which should not be granted if there is any doubt whatsoever as to the existence of triable issues of fact. *Phillips, supra; Andre, supra.*

It is therefore the decision of this Court that triable issues of fact exist with respect to the control and/or operation and/or management of the premises where Plaintiff alleges that he fell. The documents submitted in support of the ABM Defendants' motion do not establish a *prima facie* showing of entitlement to judgment as a matter of law, inasmuch as they are insufficient to show ABM Defendants were not in control of the premises at the time of the incident such that they owed Plaintiff no duty of care. *Healy v. ARP Cable, Inc.*, 259 A.D.2d 380-81, 687 N.Y.S.2d 101 (1<sup>st</sup> Dep't 1999). Where the affidavits submitted in support of a motion recite matters that are exclusively within a defendant's knowledge, said affidavits should not, without more, form the basis for an award of summary judgment before the other side has had an opportunity to conduct discovery. *Reohr v. Golub Corp.*, 242 A.D.2d 850, 661 N.Y.S.2d 889 (3d Dep't 1997).

The Swanson Affidavit indicates that ABM Defendants manage specified parking lots and garages at Westchester Medical Center, "*namely* collecting fees." The Swanson Affidavit does not indicate whether this includes Parking Lot #15, which is where Plaintiff alleges that he fell, nor does it set forth the scope of ABM Defendants' management duties with respect to the parking lots and garages at the Westchester Medical Center. The Swanson Affidavit further indicates that ABM Defendants have not performed any snow removal services at any parking lots or roadways at Westchester Medical Center, and thus draws the conclusion that ABM Defendants "*could not have*" controlled, maintained or repaired the premises set forth in the

Complaint. The Swanson Affidavit references the Chessari Affidavit as evidence that ABM Defendants do not have snow removal duties in the area where Plaintiff alleges that he fell.

However, the Chessari Affidavit does not contain as an exhibit the Agreement that purportedly indicates that ABM Defendants have subcontracted out the responsibility of snow and ice removal (or any maintenance function, for that matter) to any other entity.<sup>2</sup> The Chessari Affidavit also sets forth that Medical Center's agreement with Healthcare Parking manages and operates specific parking garages, surface lots, and parking related equipment on the campus of the Medical Center and that ABM Defendants are not responsible for the snow or ice removal of the "subject roadways." However, the Chessari Affidavit does not indicate which specific parking garages, surface lots, and parking related equipment Healthcare Parking controls. The Agreement referenced in the Chessari Affidavit is not attached, and according to the Plaintiff, has not been turned over during the course of discovery. The Court is unable to ascertain from these Affidavits ABM Defendants' exact relationship with respect to the premises where Plaintiff fell, and whether or not ABM Defendants have in fact contracted out the duty of snow and ice removal of Parking Lot #15 to another entity.

The Court agrees with Plaintiff that it would be premature at this juncture, based on the foregoing Affidavits, to grant summary judgment. The Affidavits in and of themselves, and with no other support, simply do not establish that ABM Defendants did not have "occupancy, ownership, control, or special use of the premises" such that they did not owe a duty of care to the Plaintiff. Further discovery is needed before a motion for summary judgment may be entertained.

After a full review of the record, based on the foregoing, this Court denied ABM Defendants' motion for summary judgment without prejudice.

Accordingly, it is hereby

**ORDERED**, ABM Defendants' Motion for Summary Judgment is DENIED without prejudice; and it is further

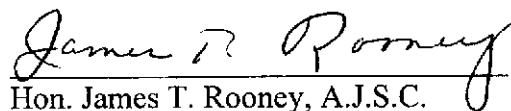
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<sup>2</sup> Interestingly, the Chessari Affidavit does not actually specify the lot where Plaintiff alleges that he fell. The affiant indicates that she was "informed that plaintiff William Bowerman alleges that he slipped and fell on snow/ice in the parking lot of [sic] on 1/14/16." Absent from this statement is any indication that the affiant actually knew the specific location at issue.

**ORDERED**, that all parties are directed to appear before the Court on ***Monday, January 13, 2020, at 10:30 a.m.*** for further proceedings in connection with this matter.

This shall constitute the Decision and Order of this Court.

Dated: Carmel, New York  
December 26, 2019

  
Hon. James T. Rooney, A.J.S.C.

To: McGiff, Halverson & Dooley, LLP  
*Attorneys for ABM Defendants*  
96 South Ocean Avenue  
Patchogue, New York 11772

Anthony LoBiondo, Esq.  
LoBiondo Law Offices  
*Attorney for Plaintiff*  
275 North Street  
Newburgh, New York 12550

Chesney, Nicholas & Brower, LLP  
*Attorney for Defendant Brightview Landscaping*  
485 Underhill Blvd., Suite 308  
Syosset, New York 11791