SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES EDWARD D'AUGUSTE** **PART** **IAS MOTION 55EFM**

Justice

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ROBERT MEEHAN,

Plaintiff,

- against -

THE FEIL ORGANIZATION, INC., JEFFREY MANAGEMENT CORP., ONYX EQUITIES LLC., 990 STEWART OWNER, LLC, ONYX MANAGEMENT GROUP, LLC,

Defendant.

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INDEX NO. 154511/2016

MOTION DATE 12/04/2019

MOTION SEQ. NO. 003

DECISION ON MOTION

ONYX EQUITIES LLC,

Third-Party Plaintiff,

Third-Party
Index No. 595023/2017

- against -

INNOVATIVE DESIGNS & MAINTENANCE, LLC,

Third-party Defendant.

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INNOVATIVE DESIGNS & MAINTENANCE, LLC,

Second Third-Party Plaintiff,

- against -

SUMMIT MAINTENANCE CORP.,

Second Third-party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is granted in part.

Background

Plaintiff Robert Meehan alleges that around 7:00 a.m., on February 16, 2016, he slipped and fell on ice in the parking lot of 990 Stewart Ave., Garden City, New York 11530 (the "premises"). Defendant/third-party plaintiff Onyx Equities, LLC ("Onyx") owned the parking lot at all relevant times. Onyx entered into a contract with Innovative Designs & Maintenance, LLC ("Innovative") for snow and ice removal. Innovative then sub-contracted their responsibility for snow and ice removal to defendant/second third-party defendant Summit Maintenance Corp. ("Summit"). In its answer to the summons and complaint, Onyx asserted cross-claims against Innovative for negligence, breach of contract, common law and contractual indemnification, and insurance coverage.

Innovative now moves, pursuant to CPLR 3212, for (i) summary judgment dismissing the complaint and all cross-claims arising therefrom, and (ii) summary judgment against defendant Summit on its cross-claim for contractual indemnification.

Discussion

Innovative first moves for summary judgment dismissing plaintiff's claims as against it. Here, Innovative is entitled to summary judgment and dismissal of plaintiff's claims because it did not owe plaintiff a duty of care. It is well settled law that "a finding of negligence must be based on the breach of a duty, [therefore,] a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138 (2002). The Court of Appeals has held that there are three specific circumstances wherein a party may "be potentially liable in tort" to third parties by virtue of having entered into a contract to render services:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his 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 the other party's duty to maintain the premises safely.

Id. at 140 (alterations, internal quotation marks, and citations omitted). The Court of Appeals has further stated that "[t]hese principles are firmly rooted in our case law, and have been generally recognized by other authorities. *Id.* (citing Restatement [Second] of Torts § 324A).

There has been no evidence presented by plaintiff that Innovative has launched an instrument of harm, that plaintiff has detrimentally relied on any of Innovative's representations to him, or that Innovative entirely displaced Onyx's duty to maintain the premises safely. First, plaintiff has failed to state with any particularity how Innovative potentially created a dangerous condition. In fact, plaintiff's affidavit in opposition explicitly states that he does not take a position on the facts alleged in the instant motion. NYSCEF Doc. No. 111, ¶ 3. Second, the contract between Onyx and Innovative specified that Innovative was only responsible for snow and ice removal, and that any "[r]efreezing of runoff and melting snow" or other property maintenance was the responsibility of the property owner, Onyx. NYSCEF Doc. No. 94, at 1. Additionally, the contract between Onyx and Innovative states that Innovative "cannot be held liable for any accidents . . . it is the property owner[']s responsibility to notify us." *Id.* at 2. For these reasons, this Court finds that Innovative did not owe a duty to plaintiff. Accordingly, the first branch of Innovative's motion seeking summary judgment dismissing the complaint as against it is granted.

Innovative next moves for summary judgment dismissing all cross-claims as against it. Onyx has brought cross-claims against Innovative for negligence, breach of contract, common law and contractual indemnification, and insurance coverage. It is well settled that "a claim arising out of an alleged breach of contract . . . may not be converted into a tort action absent the

violation of a legal duty independent of that created in the contract." *Givoldi, Inc. v. United Parcel Serv.*, 286 A.D.2d 220, 221 (1st Dep't 2001). Onyx is alleging that Innovative did not supervise, inspect, or control the work of Summit, even though it was their contractual responsibility. NYSCEF Doc. No. 113. The duty arises, if at all, under contract. Further, without the underlying common law claim for negligence, there can be no common law claim for indemnity. Thus, this branch of Innovative's motion is granted to the extent of dismissing the negligence and common law indemnity claims.

The remainder of the second branch of the motion is denied. The evidence before this Court on the instant motion shows that Innovative contracted to provide snow and ice removal for Onyx at the premises. NYSCEF Doc. No. 94. Innovative then subcontracted this responsibility to Summit. NYSCEF Doc. Nos. 95; 104, Ex. 1. In the subcontract agreement between Innovative and Summit, Onyx was made both an additional insured and certificate holder under the contract, making them a third-party beneficiary. These facts, together with the lack of evidence submitted by Innovative, make it improper to grant summary judgment in Innovative's favor on the remainder of Onyx's cross-claims.

Lastly, Innovative moved for summary judgment on its cross-claim for contractual indemnification against Summit. Innovative argues that they are entitled to contractual indemnification pursuant to the plain language of the subcontract agreement. However, the plain language in Exhibit B to the subcontract agreement states the following:

> Summit Maintenance Corp. is not responsible for claims resulting from the melting or refreezing of snow, ice, or rain. Property Manager and Owner will hold Summit Maintenance Corp. harmless and indemnify Summit Maintenance Corp. for any such claims, unless and to the extent that such claims are due to negligence or willful misconduct of Summit Maintenance Corp., its employees, or subcontractors.

NYSCEF Doc. No. 104, Ex. 1, at Ex. B thereto. Thus, the plain language of the above clause indicates that Summit cannot be held liable unless it is shown to be negligent. It is true that another part of the subcontract agreement indemnifies Innovative to the "fullest extent permitted by law." *Id.*, ¶ 2. However, the plain language of Exhibit B states that Innovative will not be indemnified unless there is negligence on the part of Summit. Even, assuming *arguendo*, that these clauses are inconsistent, there would be questions of fact regarding the parties' intent. More importantly, Innovative has not provided any evidence to show that Summit was negligent in this instance. Thus, various questions of fact remain as to the cause of the alleged accident and who was responsible for the alleged dangerous condition. Accordingly, the third branch of Innovative's motion seeking summary judgment dismissing Summit's cross-claim for contractual indemnification is denied.

To the extent that discovery issues are still outstanding, the parties are directed to contact the Court via email at ddmckenn@nycourts.gov and jszellan@nycourts.gov to schedule a conference.

Accordingly, the motion is granted in part and denied in part. This constitutes the decision and order of this Court.

5/15/2020
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[x]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[x]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**