

Sala v Ferrandino & Son, Inc.
2020 NY Slip Op 32129(U)
March 2, 2020
Supreme Court, Nassau County
Docket Number: 600674-17
Judge: Jerome C. Murphy
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

DOMINIC SALA,

Plaintiff,

- against -

**FERRANDINO & SON, INC., CREATIVE
LANDSCAPING BY COW BAY, INC.,
and COW BAY CONTRACTING, INC.,**

Defendants.

TRIAL/IAS PART 10

Index No.: 600674-17

Motion Date: 12/19/19

Sequence No.: 004

ME

DECISION AND ORDER

XXX

The following papers were read on these motions:

Motion Seq. 004	
Notice of Motion., Affidavit in Support and Exhibits	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

PRELIMINARY STATEMENT

In motion sequence 004, defendant, Creative Landscaping By Cow Bay, Inc., and Cow Bay Contracting, Inc., brings this application for an Order pursuant to CPLR §3212, granting summary judgment to the defendant, Creative Landscaping By Cow Bay Contracting, Inc. on the grounds that no triable issue of fact exist and/or dismissing Plaintiff's complaint pursuant to CPLR §3212 and any and all cross-claims against Defendant, Creative Landscaping By Cow Bay, Inc. and granting such other and further relief as this Court may deem just and proper. Opposition and reply papers have been received with respect to this application.

BACKGROUND

Plaintiff was an employee at TD Bank, 500 Old Country Road, Plainview, New York when, on March 9, 2015, at approximately 7:00 A.M., as he was walking in the parking lot adjacent to the building, from his car, he claims to have slipped on ice, suffering personal injuries. TD Bank had a contract for snow removal with Creative Landscaping by Cow Bay, Inc. The Service Contract (Exh. "E" to Motion) provides for a Commencement Date at 12:01 a.m. on October 15, 2012, and a Termination Date at 11:59 p.m. on April 15, 2015.

Mark D'Alonzo testified on behalf of defendant Landscaping by Cow Bay, Inc. that the contract terminated on March 8, 2015, the day before the accident involving plaintiff. Jamie Banion testified on behalf of Ferrandino & Son that their contract for snow removal at the TD Bank premises began on March 9, 2015, the day of the accident. Neither Mr. D'Alonzo nor Mr. Banion had knowledge of whether any snow removal was performed by their respective companies on March 9, 2015.

The issue presented is who, if anyone, plowed snow at the TD Bank before the incident of March 9, 2015, and does that company have any obligation to plaintiff for the manner in which they performed their services.

DISCUSSION

Creative Landscaping by Cow Bay, Inc. moves for summary judgment pursuant to CPLR § 3212 dismissing the Complaint of plaintiff, and all cross-claims. Movant argues that they were not responsible for the snow removal at the premises, and, in any event, did not owe a duty to plaintiff even if they had performed the snow removal.

The motion to dismiss the Complaint of plaintiff is granted, as a snow removal contractor owes no duty of care to a person who falls on snow or ice. A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136 [2002]). In *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 (1928), Chief Judge Cardozo stated that imposing liability under such circumstances would render contracting parties liable in tort to "an indefinite number or potential beneficiaries (*id.* at 168).

Moch involved a contract to supply water to the City of Rensselaer, including for fire hydrants at the appropriate pressure. Because of failure of defendant to supply adequate water

pressure, plaintiff's warehouse was destroyed by fire. While the contract was valid and enforceable between the City and defendant, it was not intended to make defendant answerable to anyone who might be harmed as a result of defendant's alleged breach. Because plaintiff was not a third-party beneficiary, it could not sue for breach of contract. Nor could plaintiff succeed in tort, because liability would be unduly, and indefinitely extended by such an enlargement of the zone of duty, but that tort liability to a third party may arise where "the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good" (*id.*).

In *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 NY2d 220 (1990) the Court reiterated the position that a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party. A commercial tenant brought action to recover for property damage sustained when a sprinkler system malfunctioned, and flooded the premises. In refusing to extend liability to encompass defendant companies who were under contract with the property owner to inspect and maintain the sprinkler system, ruling, for policy reasons, that the building owners were in a better position to insure against the loss.

But the Court noted that inaction may give rise to tort liability where no duty to act would otherwise exist if, for example, performance of contractual obligations has induced detrimental reliance on continued performance and inaction would result not "merely in withholding a benefit, but positively or actively in working an injury", quoting *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167.

In *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579 (1994) the Court considered whether a maintenance company under contract to provide preventive maintenance services to a hospital, assumed a duty of care to plaintiff, a nurse who was injured when a wall-mounted fan fell on her as she was attending to a patient. The contract between the parties was "comprehensive and exclusive" (*id.* at 588), and required the maintenance company to inspect, repair and maintain the facilities, and to train and supervise all support service personnel. The company's obligation was so broad that it entirely displaced the hospital in carrying out its maintenance duties, and became "the sole privatized provider for a safe and clean hospital premises" (*id.* at 589). Because the company's contractual obligation was comprehensive, the Court determined that this was another instance in

which a contracting provider owed a duty to “non-contracting individuals reasonably within the zone and contemplation of the intended safety services”, including plaintiff.

As stated in *Espinal*, *supra* at 140, there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care, and potentially be liable in tort, to third persons: (1) in failing to exercise reasonable care in the performance of his duties, “launches a force or instrument of harm” (*Moch*, 247 N.Y. at 168; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties (*Eaves Brooks*, 76 N.Y.2d at 226); and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely (*Palka*, 83 N.Y.2d at 589).

Plaintiff has not raised a triable issue of fact that the snow plow company failed to exercise reasonable care in the performance of its duties, thereby launching a force or instrument of harm; that plaintiff or third-party plaintiff detrimentally relied on continued performance of the company’s duties; or that they have displaced the landlord’s duty to maintain the premises safely. (See, *Somekh v. Valley Natl. Bank*, 151 A.D.3d 783, 786 [2d Dept. 2017]; *Rudloff v. Woodland Pond Condominium Assn.*, 109 A.D.3d 810, 811-812 92d Dept. 2013; and *Reisert v. Mayne Construction of Long Island, Inc.*, 165 A.D.3d 854 [2d Dept. 2018]). As stated in *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d *supra* at 142, relying on the language of *Moch*, 247 N.Y. at 168, in order for plaintiff to rely upon a claim that defendant launched a force or instrument of harm, must show that the snow removal contractor “creates or exacerbates a harmful condition, may be said to launched a force or instrument of harm.”

As stated in *Rudloff*, *supra*,

By merely plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area, Lemp cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm. Moreover, a claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them . . .

Defendant Creative Landscaping by Cow Bay, Inc. has established its prima facie entitlement to dismissal of the Complaint on the ground that they owed no independent duty to plaintiff, and plaintiff has failed to overcome the prima facie showing with evidence that any of the three

exceptions in *Espinal* imposed a duty upon the contractor by launching a force or instrument of harm, that plaintiff had come to rely upon the continued performance of the company's contractual duties, or that the company had fully replaced the landlord's duty to maintain the premises in a safe condition. Defendant Creative Landscaping by Cow Bay, Inc.'s motion to dismiss the Complaint and any and all Cross- claims against it is granted.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York

March 2, 2020

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

MAR 09 2020

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**