

**Gambino v 77 Ave D Supermarket Corp.**

2020 NY Slip Op 33125(U)

September 24, 2020

Supreme Court, New York County

Docket Number: 150631/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 150631/2016

JOSE GAMBINO,

MOTION SEQ. NO. 003

Plaintiff,

- v -

77 AVE D SUPERMARKET CORP., C&C APARTMENT
MANAGEMENT LLC., AVENUE D OWNERS LLC., RITE
AID OF NEW YORK, INC. and MADISON SB, LLC.,

DECISION AND ORDER

Defendants.

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RITE AID OF NEW YORK, INC.,

Third-Party
Index No. 565726/2019

Third-Party Plaintiff,

-against-

VOLKS SERVICE CORP.,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91,
92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 104, 105, 106, 107, 108, 109, 110, 111, 113

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action, third-party defendant Volks Services Corp. ("Volks") moves,
pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint filed by
defendant/third-party plaintiff Rite Aid of New York, Inc. ("Rite Aid") (Docs. 87-100, 113).
Plaintiff Jose Gambino ("plaintiff") and Rite Aid oppose the motion (Docs. 104-110). After a
review of the parties' contentions, as well as the relevant statutes and case law, the motion is
decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

The underlying facts of this case are set forth in detail in the decision and order of this Court entered June 9, 2020 ("the 6/9/2020 order"), which granted defendant Madison SB, LLC's motion for summary judgment dismissing all claims and cross claims asserted against it (Doc. 80). However, a brief summary of the facts, as well as any additional relevant facts, are set forth below.

In January 2016, plaintiff commenced this action by filing a summons and complaint as against several defendants, including Rite Aid, for injuries he allegedly sustained on February 5, 2015 when he slipped and fell on ice "on the northeast side of East 6<sup>th</sup> Street, approximately 17 flagstones west of Avenue D and 2 flagstones south of the fence located in front of 79 Avenue and 77 Avenue D" in Manhattan (Doc. 89 ¶ 7). At the time of plaintiff's injuries, Rite Aid operated a pharmacy at 87-89 Avenue D ("the Rite Aid store") and plaintiff allegedly fell in front of an empty lot through which one may access the Rite Aid store from the rear (Docs. 100, 110 ¶ 3).

In October 2014, Rite Aid executed a contract with Springwise Facility Management, Inc. ("Springwise") entitled "Snow Removal (Seasonal) Master Service Agreement" for the removal of snow and/or ice at several Rite Aid locations ("the Rite Aid-Springwise contract"), including the Rite Aid store (Doc. 107). In November 2014, Springwise, as administrator of Rite Aid, entered into a subcontract with Volks to perform snow and/or ice removal services at the Rite Aid store ("the subcontract") (Doc. 99, Exhibit 1).

In August 2019, Rite Aid filed an amended third-party complaint as against Volks, asserting claims based on common law indemnification and/or contribution (first cause of action); contractual indemnification (second cause of action); and breach of contract (third and fourth causes of action) (Doc. 92). Rite Aid claimed that, pursuant to the subcontract, Volks was obligated to remove snow and ice from the front (Avenue D) and rear (East 6<sup>th</sup> Street) entrance of

the Rite Aid store (Doc. 92 ¶ 8-9). Rite Aid further alleged that "[p]laintiff slipped and fell on the sidewalk behind the building within the area [where Volks] was contractually obligated to perform snow and ice removal services" (Doc. 92 ¶ 9). Volks filed an answer, asserting affirmative defenses, a counterclaim against Rite Aid, and cross claims against defendants (Doc. 93).

Volks now moves, pursuant to CPLR 3212, to dismiss all claims asserted against it on the ground that it was only contracted to perform snow and/or ice removal services in front of the Rite Aid store, on Avenue D, and was therefore not responsible for plaintiff's injuries, which occurred on the sidewalk on East 6<sup>th</sup> Street (Doc. 88 ¶ 6). Volks argues that, since Rite Aid's causes of actions are improperly premised on the assumption that it had a contractual obligation to remove snow and/or ice from East 6<sup>th</sup> Street, the third-party complaint must be dismissed (Doc. 88 ¶ 23). In support of its motion, Volks submits, *inter alia*, the affidavit of its principal, Jon Annunziata ("Annunziata"), who signed the subcontract on its behalf (Doc. 99 ¶ 2). Annunziata asserts that, pursuant to the subcontract, Volks was only required to remove snow and/or ice from the front of the Rite Aid store (Docs. 99 ¶ 5). Annexed to his affidavit are the subcontract as well as photographs depicting both the front and back of the Rite Aid store (Doc. 99, Exhibits 1-3).

In opposition to the motion, Rite Aid maintains that genuine issues of material fact exist that preclude the granting of summary judgment (Doc. 106). Specifically, Rite Aid argues that there is no language in the subcontract limiting Volks' scope of work to the front of the Rite Aid store; that several provisions in the subcontract support its contention that Volks was also responsible for clearing ice and snow from the rear of the Rite Aid store; and that the Rite Aid-Springwise contract corroborates its position that both sides of the premises were subject to the subcontract (Doc. 106 ¶ 15-37). Rite Aid submits, *inter alia*, the Rite Aid-Springwise contract, which has several exhibits, including a spreadsheet with additional information about the specific

locations where snow and/or ice removal was to be performed (Docs. 106 ¶ 8-9; 107-108). Rite Aid notes that the Rite Aid-Springwise contract, in a section entitled "Notes Field," indicates that there are two sidewalks adjoining the Rite Aid store (Docs. 106 ¶ 10-12; 108). Alternatively, Rite Aid argues that Volks' motion should be denied as premature because only limited discovery has taken place and neither the defendants nor Volks have been deposed (Doc. 106 ¶ 38-39).<sup>1</sup>

In a reply affirmation, Volks argues, *inter alia*, that the Rite Aid-Springwise contract has no bearing on its entitlement to summary judgment because the claims in the third-party complaint are based solely on the subcontract (Doc. 113 ¶ 5). Volks also maintains that Rite Aid has failed to identify any provision in the subcontract indicating "that the sidewalk on East 6<sup>th</sup> Street in front of the vacant lot was part of the contracted Avenue D Rite Aid store" (Doc. 113 ¶ 8). Annunziata's affidavit, asserts Volks, establishes that it was responsible only for the front of the Rite Aid store (Doc. 113 ¶ 9). Volks further argues that plaintiff and Rite Aid only set forth speculative and conclusory statements regarding its contractual obligations which are refuted by the subcontract (Doc. 113 ¶ 10).

#### LEGAL CONCLUSIONS:

It is well-settled that "summary judgment is a drastic remedy, 'which should only be granted where there is no doubt as to the existence of a triable issue of fact'" (*Advanced Aerofoil Tech., AG v MissionPoint Capital Partners LLC*, 170 AD3d 460, 461 [1st Dept 2019], quoting *Ellenberg Morgan Corp. v Hard Rock Café Assoc.*, 116 AD2d 266, 269-270 [1st Dept 1986]; see CPLR 3212). "To prevail on a motion for summary judgment, the movant must make a prima

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<sup>1</sup> Plaintiff also opposes the motion (Doc. 104). However, Volks argues, *inter alia*, that plaintiff does not have standing to oppose its motion because he has asserted no claims against Volks (Doc. 113 ¶ 3).

facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact" (*Mallory v. City of N.Y.*, 2020 NYLJ LEXIS 1368, \*3 [Sup Ct, NY County 2020]; see *Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). Moreover, it is well-established that "[t]his burden is a heavy one," requiring that the "facts . . . be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

This Court finds that Volks has failed to establish, *prima facie*, that the subcontract limited its snow and ice removal obligations solely to the Avenue D entrance to the Rite Aid store. Although Exhibit A of the subcontract, entitled "Locations," lists the Rite Aid store's address as "87-89 Avenue D," there is no language in the subcontract limiting Volks' services to Avenue D or excluding the East 6<sup>th</sup> sidewalk from the scope of work to be performed. Moreover, Exhibit B of the subcontract, entitled "Scope of Work," reflects that Volks was responsible for "[p]lowing or clearing of parking lots, service areas, ingress/egress, store sidewalks and public walkways" (Doc. 109). It further provided that "[a]n adjacent tenanted or vacant site means a site that is directly attached to the active Rite Aid or on the same property as Rite Aid" and that "[t]hese sites should also be maintained in accordance with the above scope of work when included on Exhibit A" (Doc. 109).

Viewing the proof in the light most favorable to the non-moving party, this Court finds that, when read as a whole, the subcontract is ambiguous regarding the scope of the work Volks was to perform at the Rite Aid store, thus warranting denial of the motion (see *Arnell Constr. Corp. v NY City Sch. Constr. Auth.*, 144 AD3d 714, 717 [2d Dept 2016]; *US Oncology, Inc. v Wilmington*

*Trust FSB*, 102 AD3d 401, 402 [1st Dept 2013]; *Yanuck v Simon Paston & Sons Agency*, 209 AD2d 207, 208 [1st Dept 1994]; *NAR 57,LLC v Gotham Towne House Owners Corp.*, 2019 NY Slip Op 32008[U], 2019 NY Misc LEXIS 3817, \*14-15 [Sup Ct, NY County 2019]).

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED** that defendant Volks Services Corp.'s motion, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint is denied; and it is further

**ORDERED** that, within 20 days after this order is uploaded to NYSCEF, counsel for defendant/third-party plaintiff Rite Aid of New York, Inc. shall serve a copy of this order, with notice of entry, upon all parties; and it is further

ORDERED that the parties are to participate in a discovery conference by telephone on December 7, 2020 at 4:30 p.m. (the parties are to provide a dial-in number and access code for the call or are to have all parties on the line and then patch in the Court at 646-386-3895); and it is further

ORDERED that, in lieu of the telephone conference, the parties may confer and enter into a discovery stipulation and then email it to the Court at [ipeguero@nycourts.gov](mailto:ipeguero@nycourts.gov) to be so-ordered by Justice Freed on or before December 7, 2020; and it is further

ORDERED that this constitutes the decision and order of this Court.

9/24/2020  
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: