

**Robinson v Executive Assoc. N. I, L.L.C.**

2020 NY Slip Op 34643(U)

December 7, 2020

Supreme Court, Rockland County

Docket Number: Index No. 031183/2017

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND  
HON. ROBERT M. BERLINER, J.S.C.

To commence the 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.

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PENA-EMILIA ROBINSON and MALCOLM  
ROBINSON,

Plaintiffs,

**\*\*CORRECTED\*\***  
DECISION AND ORDER

-against-

EXECUTIVE ASSOCIATES NORTH I, L.L.C.,  
EXECUTIVE ASSOCIATES NORTH II, L.L.C.,  
EXECUTIVE ASSOCIATES NORTH III, L.L.C.,  
EXECUTIVE ASSOCIATES NORTH IV, L.L.C.,  
EXECUTIVE ASSOCIATES IX, L.L.C.,  
EMPIRE EXECUTIVE INN, L.L.C., EMPIRE  
EXECUTIVE INN MANAGEMENT  
COMPANY, L.L.C., and ASCAPE LANDSCAPE  
& CONSTRUCTION CORP.,

Index No.: 031183/2017

Motion Sequence # 5

Defendants.

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The following papers, numbered 1 to 6, were read on the motion for summary judgment by  
Defendant Ascape Landscape & Construction Corp. (“Defendant Ascape”), pursuant to CPLR §  
3212:

Notice of Motion/Affirmation in Support/Exhibits(A-V)/Memorandum of Law .....	1-3
Affirmation in Opposition(Cambareri)/Exhibits(1-4).....	4
Affirmation in Partial Opposition(Long).....	5
Reply Affirmation.....	6

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

In this action, Plaintiff Pena-Emilia Robinson seeks damages she allegedly sustained  
from a slip and fall accident on January 12, 2015. Ms. Robinson alleges that she slipped and fell  
on an icy exterior portion of a common sidewalk/walkway located at “2 Executive Boulevard,

Suffern, NY 10901” (the “Premises”). Ms. Robinson seeks damages for negligence and her husband, Mr. Robinson, seeks damages for loss of consortium against the property owner and snow removal contractor of the Premises. Defendant Executive Associates North II (“Defendant North II”), the owner of the Premises, had a contract with Defendant Ascape Landscaping & Construction Corp (“Ascape”) to provide snow removal services on the Premises (“Snow Removal Contract”). In response to the Complaint, Defendants North II and IV filed an Answer with a crossclaim against all co-defendants for common law indemnification and contribution. Likewise, Defendant Ascape filed its Answer with a crossclaim for common law indemnification and contribution against Defendants North II and IV.

Now, before the Court is Defendant Ascape’s motion for summary judgment seeking to dismiss Plaintiffs’ Complaint and for all the crossclaims against it. Ascape alleges that it owed no duty to Ms. Robinson because (1) its Snow Removal Contract does not create tort liability and none of the *Espinal* exceptions apply to hold Ascape liable for her injuries, and (2) the storm in progress doctrine applies to the circumstances of Ms. Robinson’s fall. First, the Court addresses Defendant Ascape’s motion for summary judgment on Plaintiff’s complaint.

#### I. Standard for Summary Judgment

“As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]. “Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact.” *Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]. Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011]. Further, a motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” *Scott v Long Island Power Auth.*, 294 AD2d 348 [2d Dept

2002]. “Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact.” *Kahan v Spira*, 88 AD3d 964, 966 [2d Dept 2011].

#### A. Whether to Grant Ascape Summary Judgment on Plaintiffs’ Complaint

The Court of Appeals has held that “a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party (see *Eaves Brooks*, 76 N.Y.2d at 226).” *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002].

“Nonetheless, the Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her 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 another party's duty to maintain the premises safely (see *Espinal v Melville Snow Contrs.*, 98 NY2d at 140; *Baker v Buckpitt*, 99 AD3d 1097, 1098, 952 NYS2d 666 [2012]). As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those *Espinal* exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars (see *Mathey v Metropolitan Transp. Auth.*, 95 AD3d 842, 844, 943 NYS2d 578 [2012]; *Foster v Herbert Slepyo Corp.*, 76 AD3d 210, 214, 905 NYS2d 226 [2010]).”

*Glover v John Tyler Enters., Inc.*, 123 AD3d 882 [2d Dept 2014]. A contracting defendant establishes his prima facie entitlement to summary judgment by negating the applicability of the *Espinal* exceptions that plaintiff expressly plead in her complaint or expressly set forth within her bill of particulars. See *Turner v Birchwood on the Green Owners Corp.*, 171 AD3d 1119 [2d Dept 2019]; *Sperling v Wyckoff Hgts. Hosp.*, 129 AD3d 826 [2d Dept 2015].

In reviewing Ms. Robinson’s Verified Complaint, Amended Verified Complaint, Verified Bill of Particulars and Supplemental Bill of Particulars, the Court finds that Plaintiffs did not expressly plead or set forth any of the *Espinal* exceptions. Therefore, Defendant Ascape, in establishing its prima facie entitlement to judgment as a matter of law, was not required to affirmatively demonstrate that these exceptions apply. See *Knox v Sodexo Am., LLC*, 93 AD3d 642 [2d Dept 2012]. Ascape met its prima facie burden by submitting the Snow Removal

Contract as evidence that Ms. Robinson was not a party therein. The burden then shifted to Plaintiffs to raise a triable issue of material fact that one or more of the *Espinal* exceptions apply.

In their opposition, Plaintiffs contend that the only relevant *Espinal* exception is where the contracting party has entirely displaced the other party's duty to maintain the premises safely. As such, Plaintiffs, as well as Defendant North II, allege that the Snow Removal Contract entirely displaced Defendant North II's duty to maintain the Premises to Defendant Ascape. They rely on the depositions of Defendant North II's property manager and Ascape's co-owner. The property manager testified that Ascape was the exclusive snow removal contractor and that Ascape's employees were responsible for maintaining the sidewalks free of snow and ice. Ascape's co-owner also testified that Ascape arrived automatically to remove snow and ice on the Premises, as well as any residual snow and ice. However, as contended by Ascape, the Snow Removal Contract did not entirely displace Defendant North II's duty to maintain the premises safely because the Contract provided that Ascape began its services as soon as the snow accumulation reached one inch.

“Where the express terms of the contract provide that a contractor is obligated to plow only when snow accumulation exceeds a certain level, the Court of Appeals has held that such ‘contractual undertaking is not the type of comprehensive and exclusive’ property maintenance obligation’ that would entirely displace a landlord's or property manager's duty to ‘maintain the premises safely’.”

*Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 901-02 [2d Dept 2011][internal citations omitted]. Moreover, Defendant North II alleges that Ascape monitors the Premises before and after winter weather events and that Ascape is generally on the property during the entire weather event. Although Ascape may have “retained some independent authority” the Court cannot conclude that the Snow Removal Contract entirely displaced Defendant North II's duty to maintain the Premises. See *Hutchings v Garrison Lifestyle Pierce Hill, LLC*, 157 AD3d 1034, 1036 [3d Dept 2018].

Additionally, Defendant North II alleges that there is a question of fact as to the applicability of the first *Espinal* exception, Ascape's failure to exercise reasonable care in performance with its duties because Ascape indeed pre-salted the Premises prior to Ms. Robinson's fall. However, this *Espinal* exception requires that Ascape failed to exercise reasonable care by *launching a force or instrument of harm or by creating or exacerbating the*

snow and ice, thereby leaving the premises in a more dangerous condition than when it found them. *See Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 [2d Dept 2010]. Merely pre-salting the Premises or leaving some residual snow and ice neither launches a force or instrument of harm nor exacerbates the snow and ice. *See Id.* Based upon the foregoing, Plaintiffs and Defendant North II failed to raise a triable issue of fact. Accordingly, the portion of Ascape's motion seeking summary judgment on Plaintiffs' complaint is granted. Next, the Court addresses whether to grant Defendant Ascape summary judgment dismissing Defendant North II's crossclaims against it.

#### B. Whether to Grant Ascape Summary Judgment on North II's Crossclaims

Defendant Ascape also seeks summary judgment dismissing all the crossclaims against it, which include common law indemnification, contractual indemnification, and contribution.<sup>1</sup>

Summary judgment dismissing a crossclaim for contribution is appropriate where a landscaping contractor establishes "that it did not owe a duty of reasonable care to the [property owner] independent of its contractual obligations or that a duty was owed to the injured plaintiff, a breach of which contributed to his injuries." *Hites v Toys "R" Us, Inc.*, 33 AD3d 759 [2d Dept 2006]. Whereas "an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties[.]" *Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1030 [2d Dept 2009][internal citations omitted]. "If, in fact, an injury can be attributed solely to negligent performance or nonperformance of an act solely within the province of the contractor, then the contractor may be held liable for indemnification to an owner." *Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2d Dept 2008][internal citations omitted]. As for contractual indemnification, "[a] contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement." *Johnston v MGM Emerald Enters., Inc.*, 69 AD3d 674, 677 [2d Dept 2010]. "The right to contractual indemnification depends upon the

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<sup>1</sup> Defendant Ascape alleges that no crossclaim for contractual indemnification is alleged against it, even though it makes arguments to dismiss a crossclaim for contractual indemnification. However, a review of Executive Associates II's Answer reveals that Executive Associates II indeed alleged indemnification claims, both common law and contractual.

specific language of the contract. The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.” *Roldan v New York Univ.*, 81 AD3d 625, 628 [2d Dept 2011].

Here, Defendant Ascape established its prima facie burden for summary judgment dismissing Executive North II’s crossclaim for contribution. Specifically, Ascape established that it owed no duty of reasonable care to Ms. Robinson, as discussed above, and no duty of reasonable care independent of its contractual obligations to Defendant North II. In opposition, Defendant North II failed to raise a triable issue of material fact.

As for Executive North II’s crossclaim for common law indemnification, Defendant Ascape failed to establish its entitlement to judgment as a matter of law. Defendant Ascape can be held liable for common law indemnification to Defendant North II “even in the absence of a duty running to [Ms. Robinson].” *Mitchell v. Fiorini Landscape, Inc.*, 284 AD2d 313, 314 [2d Dept 2001]. Ascape’s employees pre-salted and salted the Premises prior to and on the day of Ms. Robinson’s fall, as evidenced by its co-owner’s deposition testimony and records. Meanwhile, Ms. Robinson maintains that her fall was caused by an allegedly dangerous and slippery condition caused by precipitation that accumulated on top of pre-existing snow/ice. Therefore, triable issues of fact exist as to whether the Ms. Robinson’s injuries were attributable to the negligent performance or nonperformance of an act that was solely within the province of Defendant Ascape, such as its obligations pursuant to the terms of the Snow Removal Contract. See *Abramowitz v Home Depot USA, Inc.*, 79 AD3d 675, 677 [2d Dept 2010]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 216 [2d Dept 2010]; *Wheaton v East End Commons Assoc., LLC*, 50 AD3d 675, 678 [2d Dept 2008].

Lastly, Ascape alleges that because the subject accident occurred as a result of an ongoing winter storm, and not as a result of any work done by Ascape or for any acts or omissions on part of Ascape, the hold harmless provision in the Snow Removal Contract is not triggered. However, in this Court’s Decision and Order dated October 21, 2020 on Executive Associates II’s motion for summary judgment (NYSCEF Document No. 121), the Court found that “there is a triable issue of material fact as to whether prior ice/snow, as opposed to solely the alleged [ongoing] precipitation itself, caused Ms. Robinson’s fall.” In that, the Court rejected Executive Associates II’s argument for summary judgment on Plaintiffs’ complaint based on the

storm in progress doctrine, the same argument that Ascape sets forth herein. Consequently, Ascape failed to eliminate all triable issues of fact as to whether it breached its duties of removing snow on the Premises pursuant to the Snow Removal Contract. *Baratta v Home Depot USA, Inc.*, 303 AD2d 434 [2d Dept 2003].

Based upon the foregoing, it is

ORDERED that Plaintiffs' Complaint is dismissed as against Defendant Ascape Landscape & Construction Corp; and it is further

ORDERED that Defendant Executive Associates North II, LLC's crossclaim for contribution is dismissed as against Defendant Ascape Landscape & Construction Corp; and it is further

ORDERED that the portion of Defendant Ascape Landscape & Construction Corp's motion for summary judgment dismissing the crossclaims for common law indemnification and contractual indemnification against it is denied.

The parties are hereby reminded of the **virtual settlement conference on January 5, 2021 at 10:30 am.**

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York  
December 7, 2020

E N T E R

  
HON. ROBERT M. BERLINER, J.S.C.

To:  
Counsel of record via NYSCEF