

Daly v Hopewell Hot Bagels, Inc.
2020 NY Slip Op 34661(U)
November 24, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 2019-50556
Judge: Christi J. Acker
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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 DUTCHESS**

-----X
EILEEN DALY,

Plaintiff,

-against-

HOPEWELL HOT BAGELS, INC. and J & M
DUTCHESS MANAGEMENT, INC.,

Defendants.

-----X
HOPEWELL HOT BAGELS, INC. and J & M
DUTCHESS MANAGEMENT, INC.,

Third-Party Plaintiff,

-against-

S.J.S. CONTRACTORS,

Third-Party Defendants.

-----X
ACKER, J.S.C.

DECISION AND ORDER

Index No.: 2019-50556

The following papers numbered 1-37 were considered in connection with the following motions: (1) motion of Defendants/Third-Party Plaintiffs Hopewell Hot Bagels, Inc. and J & M Dutchess Management, Inc. (hereinafter "Defendant Hot Bagels" and "Defendant J&M" individually or "Defendants" collectively) for an Order pursuant to CPLR 3212, granting summary judgment in favor of said Defendants and dismissing Plaintiff's Complaint and any cross claims against them and (2) the motion of Third-Party Defendant S.J.S. Contractors (hereinafter "Third-Party Defendant" or "SJS") for an Order pursuant to CPLR 3212, granting said Third-Party Defendant summary judgment, dismissing Plaintiff's Complaint and Third-Party Plaintiff's Complaint against it:

Defendants Hot Bagels and J&M’s Motion

Notice of Motion-Affirmation of Andrea P. Demers, Esq.-Exhibits A-M-
 Memorandum of Law in Support..... 1-16
 Affirmation in Opposition of Michelle N. Daly, Esq.-Exhibits A-E..... 17-22¹
 Reply Affirmation of Andrea P. Demers, Esq23

Third-Party Defendant’s Motion

Notice of Motion-Affirmation of Jeffrey D. Sherwin, Esq.-Exhibits A-K..... 24-35
 Affirmation in Opposition of Andrea P. Demers, Esq.....36
 Reply Affirmation of Jeffrey D. Sherwin, Esq37

This action was commenced by Plaintiff Eileen Daly (hereinafter “Plaintiff”) on or about February 21, 2019. It is alleged that on March 10, 2018, Plaintiff was injured when she slipped and fell on black ice on a stairway leading to Defendant Hot Bagels. The premises on which the accident occurred was owned by Defendant J&M. Third-party Defendant SJS had an agreement with Defendant J&M to remove snow and ice and to treat ice at the premises.

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. Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. In opposition, “the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact.” *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986].

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.*

¹ Plaintiff’s opposition was submitted in opposition to the motion of Defendant Hot Bagels and J&M and in opposition to that portion of Third-Party Defendant’s motion seeking to dismiss Plaintiff’s Complaint.

Megerlan, 121 AD2d 497 [2d Dept. 1986]; *Gitlin v. Chirkin*, 98 AD3d 561 [2d Dept. 2012].

“Issue finding, rather than issue determination, is the court’s function on a motion for summary judgment.” *Vumbico v. Estate of Wiltse*, 156 AD3d 939, 941 [2d Dept. 2017]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as to the absence of triable issues. *Castlepoint Ins. Co. v. Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept. 2016].

Discussion

On March 10, 2018, at approximately 8:30 am, Plaintiff slipped and fell on an outdoor stairway adjacent to Defendant Hot Bagels. Plaintiff parked in a lot behind the building and started to descend the stairway to the store, as she had done almost every day for the prior two years. It is alleged that there was black ice on the steps that Plaintiff did not see until after her fall. The property was owned by Defendant J&M, who had a snow removal contract with Third-Party Defendant. Plaintiff testified that it had last snowed approximately two days before and that at the time of the accident it was warm and clear.

Both Defendants and Third-Party Defendant move for summary judgment. Defendants argue that there is no proof of a dangerous condition, nor proof that Defendants created any such condition or had actual or constructive notice thereof. In support of their motion, Defendants submit, *inter alia*, the Pleadings, Plaintiff’s three (3) Bills of Particulars directed to Defendants and the deposition transcripts of the Plaintiff and John DiDio on behalf of Defendants. In opposition, Plaintiff submits the same deposition transcripts, her own affidavit, an affidavit from Brian Kiernan, a certified professional home inspector and her Bill of Particulars responsive to the demands of the Third-Party Defendant.

“A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence.” *Coelho v. S & A Neocronon, Inc.*, 178 AD3d 662, 663 [2d Dept. 2019]. “[A] defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it [internal quotation marks and citation omitted].” *Id.* In order to meet its initial burden on the issue of lack of constructive notice, Defendants must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the Plaintiff fell. *Id.*

Defendants herein have failed to establish *prima facie* that they did not have constructive notice of the alleged icy condition. Mr. DiDio testified that Defendant J&M was responsible for maintaining the sidewalk and the stairs where Plaintiff’s accident occurred. He further testified that the outside of the property was not inspected on a regular basis and that inspections were usually conducted only when someone brought an issue to his attention. Accordingly, Defendants’ motion is denied as they do not proffer any evidence as to when the area in question was last cleaned or inspected in relation to Plaintiff’s fall.² *Id.* “Since the defendants failed to meet their initial burden as the movant, the burden never shifted to the plaintiff to submit evidence sufficient to raise a triable issue of fact.” *Bisono v. Quinn*, 125 AD3d 704, 705 [2d

² Defendants rely almost exclusively upon Fourth Department cases in arguing that they are entitled to summary judgment because Plaintiff’s accident was the result of black ice. Nevertheless, the Second Department clearly requires Defendants to present some evidence of when the area was last inspected in order to establish *prima facie* entitlement to summary judgment and they have failed to do so. Although they cite a Court of Appeals case, *Simmons v. Metro. Life Ins. Co.*, 84 NY2d 972 [1994], that case does not mention black ice and was based upon a jury verdict, not a summary judgment motion.

Dept. 2015].

Third-Party Defendant has also moved for summary judgment against Plaintiff and Defendants. In addition to the exhibits submitted by Defendants in their motion, SJS provides the deposition transcript of its owner, Steven Shultis, the contract between Defendant J&M and SJS and the Winter Maintenance Plow and Material Logs for March 7 and 8, 2018. In opposition, Defendants submit an attorney affirmation.³

The Court notes that Plaintiff has not asserted a direct claim against SJS. Nevertheless, at Point I of its motion, SJS argues that it owed no duty of care to Plaintiff. Neither Defendants, nor Plaintiff, oppose these arguments and the Court finds that SJS has established that it owed no duty of care to Plaintiff. *See Arnone v. Morton's of Chicago/Great Neck, LLC*, 183 AD3d 862 [2d Dept. 2020].

Further, Third Party Defendant has established its *prima facie* entitlement to the dismissal of the Third-Party Complaint. That Complaint asserts two causes of action against SJS – the first for contractual indemnification and the second for common-law contribution and indemnification. In support of the dismissal of the claim for contractual indemnification, SJS submits its contract with Defendant J&M, which contains no provision requiring SJS to indemnify J&M or to name J&M as an additional insured on its commercial general liability policy. As Third-Party Defendants do not oppose this portion of SJS's motion, the first cause of action in the Third-Party Complaint is dismissed.

SJS also argues that it is entitled to dismissal of the second cause of action for common-

³ As noted above, Plaintiff submitted one opposition to both of the motions of Defendants and Third-Party Defendants. Notably, Plaintiff does not specifically address the arguments contained in SJS's motion other than to argue, generally, that to the extent that the motion seeks to dismiss Plaintiff's Complaint, it should be denied.

law indemnification and contribution. “The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party.” *Curreri v. Heritage Prop. Inv. Tr., Inc.*, 48 AD3d 505, 507 [2d Dept. 2008]. Here, SJS established its entitlement to judgment as a matter of law dismissing the common-law indemnification cause of action by showing that any liability of Defendants in this case would be based on Defendants’ own wrongdoing and not based on vicarious liability. *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 635 [2d Dept. 2014]. A review of Plaintiff’s affidavit and deposition testimony, as well as her counsel’s arguments in opposition to Defendants’ motion, demonstrates that Plaintiff maintains that the icy condition that caused her to fall was the result of water dripping from an overhead gutter. As Defendant J&M, and not SJS, was responsible for the maintenance of the gutters, any potential liability of Defendants to Plaintiff would be based upon the alleged wrongdoing of Defendants and not upon vicarious liability.

In opposition, Defendants argue that SJS has failed to establish that its snow removal actions did not create or exacerbate any alleged icy condition on the stairway. However, such is not the standard for the dismissal of a common-law indemnity claim. The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee. As such, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. *Id.* Here, SJS has demonstrated that the wrongdoing alleged by Plaintiff, if any, was the result of Defendants’ actions, and not those of SJS, and Defendants fail to raise a triable issue of fact in opposition. Accordingly, SJS is entitled to dismissal of Defendants’ common-law indemnity claim. *Hamed v. City of New*

York, 186 AD3d 677 [2d Dept. 2020].

SJS has also established their entitlement to judgment as a matter of law dismissing Defendants' common-law contribution cause of action by establishing, *prima facie*, that it was not responsible for the happening of the accident. *Desena, supra*, at 636. In opposition, Defendants do not specifically address common-law contribution, instead offering only speculation that the condition at issue may have been caused by SJS – however this assertion is unsupported by citation to the record or to case law. As such, Defendants fail to raise an issue of fact and SJS is also entitled to the dismissal of Defendants' claims for common-law contribution.

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Therefore, it is hereby

ORDERED that Defendants' motion for summary judgment is DENIED; and it is further

ORDERED that Third-Party Defendant's motion is GRANTED in its entirety and the Third-Party Complaint is dismissed in its entirety; and it is further

ORDERED that the remaining parties shall appear for a virtual settlement conference via Teams on **January 20, 2021 at 11:30 a.m.**

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
November 24, 2020


CHRISTI J. ACKER, J.S.C.

To: All Counsel Via ECF