SHORT FORM ORDER

INDEX NO: 616468/18

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

RICHARD KERN,

Plaintiff,

- against-

IONA COLLEGE,

Defendant.

IONA COLLEGE,

Third-Party Plaintiff,

- against -

BILLMAR AMUSEMENTS N.Y. PARTY WORK, INC.,

Third-Party Defendant.

ORIG. RETURN DATE: 8/20/20
ADJOURNED DATE: 9/10/20
MOTION SEQ. NO.: 001 - MG

PLTF'S/PET'S ATTY:
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Upon the following papers read on this motion for summary judgment ;Notice of Motion and supporting papers by third-party defendant dated July 14, 2020 ; Notice of Cross-Motion and supporting papers ; Affirmation/affidavit in opposition and supporting papers by plaintiff dated August 19, 2020 and by third-party plaintiff dated August 27, 2020 ;Affirmation/affidavit in reply and supporting papers by third-party defendant dated August 19, 2020 and by third-party defendant dated September 8, 2020; Other ; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that Third-Party Defendant's motion seeking summary judgment is granted and the third-party complaint against it is dismissed in all respects.

The within action seeks to recover damages for personal injuries allegedly sustained by Plaintiff on August 28, 2015 while he was on the campus of Defendant Iona College. Plaintiff's complaint, which was filed on October 24, 2018 (the action was commenced on August 20, 2018 by filing of a summons with notice), alleges that Defendant either created an unsafe condition, failed to maintain the premises or failed to remedy an unsafe condition about which it knew or should have known. Plaintiff avers that he was injured when he fell into a hole in a grassy area. Plaintiff was in the process of setting up an inflatable movie screen at the time of the accident. It is asserted that his company was subcontracted by Third Party Defendant Billmar Amusements N.Y. Party Work, Inc. ("Party Work"). Iona College ("Iona") had contracted with Party Work to provide and set up an inflatable outdoor movie screen and snow cone machine to be used in the grassy area here at issue. The "Iona College Addendum" to the agreement between Iona College and Party Work provided that Party Work would indemnify and hold Iona College harmless for claims arising out of "...the negligence or willful misconduct of ARTIST [Party Work], its agents

and/or employees in the performance of the services provided under this Agreement." It further provided that Party Work was not obligated to defend, indemnify or hold Iona College harmless for claims arising out of the negligence or willful misconduct of the College.

Defendant filed a third-party summons and complaint against Party Work on March 9, 2020, alleging negligence, breach of contract and failure to procure insurance, seeking contribution, common law indemnity, contractual indemnity and a money judgment. Party Work interposed an answer with counterclaims essentially seeking contribution from Iona College. Issue has been joined with respect to Defendant and Third-Party Defendant and discovery has been conducted but is not yet complete. Party Work now seeks summary judgment dismissing Iona College's claims against it on multiple bases.

A party moving for summary judgment "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" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Stonehill Capital Mgmt., LLC v. Bank of the West.***, 28 NY3d 439, 448, 68 NE3d 683, 688 [2016](quoting ***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). Additionally, summary judgment may be denied under circumstances where facts essential to justify opposition may exist but cannot be fully stated due to the need for discovery, pursuant to CPLR §3212(f), if the discovery sought is not predicated upon speculative hope that evidence supporting a theory may be uncovered (***Greenberg v. McLaughlin***, 242 AD2d 603, 604, 662 NYS2d 100, 101 [2d Dept 1997]; ***Zarzona v. City of New York***, 208 AD2d 920, 920, 617 NYS2d 534, 535 2d Dept 1994]; ***Price v. Cty. of Suffolk***, 303 AD2d 571, 572, 756 NYS2d 758, 759 [2d Dept 2003]).

Party Work seeks summary judgment on the basis that it had no duty to maintain the area where the incident occurred and that no defense or indemnification by Party Work is warranted because there are no claims of negligence as against Party Work. It also argues that Plaintiff was a subcontractor required to maintain his own insurance and that Plaintiff was not an agent of Party Work. Party Work asserts that any comparative negligence on the part of Plaintiff should not be attributed to it; however, even if negligence were attributed to it vicariously, such comparative negligence would not have any bearing on liability as it would only be relevant in the assessment of damages. Party Work asserts that the breach of contract claim has no merit because it is based upon a failure to obtain insurance, which it actually did obtain. This argument would also apply to the "failure to procure insurance" cause of action which is asserted. Party Work also asserts that the alleged hazard, alternately described by various parties as a "hole" or a "divot," was open and obvious and that the complaint as to Defendant and Third Party Defendant should be dismissed on that basis. Plaintiff opposes only this portion of Party Work's motion, as it is the only portion of the motion that directly attacks Plaintiff's complaint.

There is insufficient evidence in the record to support a determination that the condition which allegedly caused the accident was an open and obvious condition. Where a duty exists to maintain property in a reasonably safe condition, there is no duty to protect or warn against an open and obvious condition which is not inherently dangerous (***Grosskopf v. Beechwood Org.***, 166 AD3d 860, 860–61, 88 NYS3d 561, 563 [2d Dept. 2018]***; Benson v. IT & LY Hairfashion, NA, Inc.***, 94 A.D3d 932, 932–33, 943 NYS2d 137, 138 [2d Dept. 2012]; ***Benjamin,*** *supra;* ***Robbins,*** *supra;* ***Nannariello,*** *supra;* ***Sarab,*** *supra*). Whether or not a condition is open and obvious must be considered in the context of surrounding circumstances (***Robbins,*** *supra;* ***Lazic v. Trump Vill. Section 3,*** 134 AD3d 776, 20 NYS3d 643 [2d Dept. 2015]). A condition is open and obvious when it is readily observable by the senses (***Id.***). Here, setting aside the question of duty, there is insufficient evidence in the record to establish that an open and obvious condition existed; therefore, summary judgment may not be granted on that basis. However, Party Work has made a *prima facie* case that it was not negligent.

To assert a claim of negligence, a party must state sufficient facts to establish that the adverse party owed a duty to the claimant, that he or she breached that duty and that such breach proximately caused damages (***Miglino v. Bally Total Fitness of Greater New York, Inc.***, 92 AD3d 148, 937 NYS2d 63 [2d Dept. 2011], *aff'd but criticized*, 20 NY3d 342, 985 NE2d 128 [2013]; ***Pulka v. Edelman***, 40 NY2d 781, 782–83, 358 NE2d 1019 [1976]; ***Muallem v. City of New York***, 82 AD2d 420, 423–25, 441 NYS2d 834 [2d Dept.1981], aff'd, 56 NY2d 866, 438 NE2d 1142 [1982]. The threshold issue in any negligence case is whether or not defendant owed a duty to Plaintiff. In the absence of duty, there can be no breach and no liability (***Pulka v. Edelman***, 40 NY2d 781, 782–83, 358 NE2d 1019 [1976]; ***Muallem v. City of New York***, 82 AD2d 420, 423–25, 441 NYS2d 834 [2d Dept.1981], aff'd, 56 NY2d 866, 438 NE2d 1142 [1982]; ***Miglino v. Bally Total Fitness of Greater New York, Inc.***, 92 AD3d 148, 159–60, 937 NYS2d 63, 71–72 [2d Dept. 2011], *aff'd but criticized on other grounds*, 20 NY3d 342, 985 NE2d 128 [2013]).

Here, Iona's indemnification provision which was incorporated into the agreement with Party Work, requires indemnification in the event that a claim arises from the negligence or willful conduct of Party Work, it employees or agents. There is nothing in the record to suggest that Party Work created the condition or had a duty to remedy it (or that it even knew about the condition). To the extent that Plaintiff may have been an agent of Party Work and may be found at all culpable, Party Work is correct in asserting that such culpability will have no bearing on liability and will only be considered in the context of determining damages. CPLR §1411 provides that culpable conduct on the part of Plaintiff does not preclude recovery by Plaintiff, it only proportionally reduces the amount of damages that may be recovered by Plaintiff. Even if sufficient proof to establish Plaintiff's contributory negligence had been presented, it would not act as a bar to summary judgment (***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Outar v. Sumner***, 164 AD3d 1356, 81 NYS3d 751 [2d Dept. 2018]; ***Lopez v. Dobbins***, 164 AD3d 776, 79 N.Y.S.3d 566 [2d Dept. 2018]).

In opposition to Party Work's motion, Iona College argues that Party Work was obligated to add the College as an insured on its General Liability Insurance Policy and that failure to do so was a breach of contract. Evidence has been presented that Iona was added to Party Work's general liability policy as an additional insured. Iona asserts that it has not received Plaintiff's employment records from Party Work (although there is ample evidence in the record that Plaintiff was an independent contractor), nor has it received a copy of Party Work's general liability insurance policy. Iona claims that this lack of disclosure is highly prejudicial to Iona's defense. Iona further argues that, although Plaintiff had set up the inflatable movie screen at Iona on several prior occasions without incident, that Plaintiff was incompetent and that "...the incompetent Plaintiff was injured due to his own negligence." This assertion is based upon Plaintiff's deposition testimony that in a telephone conversation following the accident, Party Work's principal, Mark Roland, blamed Plaintiff for falling in the hole. Mr. Roland was not present at the time of

the accident. Iona argues that it is entitled to have Party Work's insurer defend it and that it needs more discovery to explore the relationship between Plaintiff and Party Work. It is unclear how any such discovery will aid in Iona's defense. Iona's right to indemnification is predicated upon the negligence of Party Work. There is no evidence in the record, nor any argument that Party Work itself was negligent. Any alleged negligence on the part of Plaintiff would be considered in the context of determining Plaintiff's entitlement to damages, not liability. Iona has failed to raise a triable issue of fact and has failed to credibly establish that facts essential to its opposition may be uncovered in discovery.

Based upon the foregoing, Third Party Defendant Party Work's motion seeking summary judgment is granted. Iona College's Third Party action is dismissed in all respects.

Dated: Riverhead, New York
November 17, 2020

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ____ FINAL DISPOSITION __XX__ NON-FINAL DISPOSITION