

**Clark v CLPF-Broadway Knolls, L.P.**

2020 NY Slip Op 34745(U)

November 9, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 621336/2016

Judge: George Nolan

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SHORT FORM ORDER

INDEX No. 621336/2016  
CAL. No. 202000066OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 55 - SUFFOLK COUNTY

**PRESENT:**

Hon. GEORGE M. NOLAN  
Justice of the Supreme Court

MOTION DATE 7/1/20 (002)  
MOTION DATE 7/23/20 (003)  
ADJ. DATE 9/17/20  
Mot. Seq. # 002 MD  
              # 003 MD

-----X  
FELICIA CLARK,

Plaintiff,

- against -

CLPF-BROADWAY KNOLLS, L.P.,  
BRIGHTVIEW LANDSCAPES, LLC,  
INDIVIDUALLY and as d/b/a BRIGHTVIEW  
and BRICKMAN FACILITY SOLUTIONS,

Defendants.  
-----X

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by Brightview dated June 6, 2020; Notice of Cross Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers by plaintiff dated August 11, 2020 ; Replying Affidavits and supporting papers by Brightview dated September 16, 2020; Notice of Motion/ Order to Show Cause and supporting papers by CLPF-Broadway dated June 26, 2020; Notice of Cross Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers by plaintiff dated August 11, 2020 and by Brightview dated September 10, 2020 ; Replying Affidavits and supporting papers by CLPF dated September 15, 2020 ;Other \_\_\_; it is

**ORDERED** that the motion of defendant Brightview Landscapes, LLC and the motion of defendant CLPF-Broadway Knolls, L.P. for summary judgment are consolidated for the purposes of this determination; and it is

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**ORDERED** that the motion of defendant Brightview Landscapes, LLC pursuant to CPLR 3212 for summary judgment is denied; and it is further

**ORDERED** that the motion of defendant CLPF-Broadway Knolls, L.P. pursuant to CLPR 3212 for summary judgment is denied.

The plaintiff commenced this action to recover damages for injuries that she allegedly sustained as a result of slip and fall accident, which occurred in a parking lot owned by defendant CLPF-Broadway Knolls, L. P. (“CLPF”) on January 24, 2016 at approximately 4:30 p.m. Defendant Brightview Landscapes, LLC (“Brightview”) was hired by CLPF to clear snow from the premises and the plaintiff claims that she fell on compacted snow and ice. The plaintiff alleges, among other things, that the defendants failed to maintain the property in a safe condition, that their efforts to clear snow from the parking lot were inadequate and made the condition worse than before they started to clear it, and that they failed to warn of the dangerous condition on the premises.

Brightview now moves for summary judgment dismissing the complaint and the cross claims against it on the grounds that it is protected by the “storm in progress” doctrine and that it owed no duty to the plaintiff. CLPF moves for summary judgment, arguing that it did not have notice of the condition and that it is protected by the storm in progress doctrine. The plaintiff opposes both motions.

In her sworn testimony, the plaintiff stated that on the day of the accident, she visited a friend who lived in the apartment complex owned by CLPF. She typically parked in a parking lot on the property whenever she visited and attempted to find a parking space on her arrival. When she arrived on the premises, the plaintiff observed some snow on the ground and snow removal activity taking place around the property, including in the parking lot. There were several men shoveling and there was machinery being used to plow snow. The plaintiff recalled that some of the parking area was cleared of snow and, because there were no available parking spaces, one of the workers showed her where she could park. The worker directed her to an area near her friend’s building. The plaintiff testified that the accident occurred when she was stepping out of her vehicle. According to the plaintiff, she placed her left foot on the ground, and when she placed her right foot down, her foot slipped and she fell. She testified that she observed “rigid wide tire tracks” that was packed with snow on top of ice where she fell.

Karen Molano testified that she was the property manager at the CLPF apartment complex at the time of the accident. She testified that CLPF contracted with Brightview to provide snow removal services, and that the contract was in effect on January 24, 2016, when the plaintiff’s accident happened. She recalled that Brightview agreed to provide services anytime snowfall was more than two inches. Brightview decided on the kind of equipment it used to remove snow, decided when and where to place salt, and used their own employees to do the work. Molano recalled that there was a snow storm on January 23, 2016, and that Brightview prepared the grounds for the snowfall. Brightview also provided snow removal services throughout the storm.

Douglas Reedy testified on behalf of Brightview. He testified that the contract with CLPF included snow removal around that property, and placement of salt as needed. Snowfall started in the

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area on January 22 at approximately 10:00 p.m. and continued through January 24, tapering off at approximately 6:00 a.m. The total snowfall was approximately 23.4 inches. Brightview maintained snow logs documenting its actions while executing its duties under the contract, and the snow log concerning CLPF's property indicated that snow removal activity started at the property on January 23 and continued through January 25. Salt was applied at various times before and after the snowfall, and snow removal was ongoing at the time of the plaintiff's accident on January 24 between 4:00 p.m. and 5:00 p.m. According to Reedy, Brightview employees used shovels and snow plows to remove the snow.

George Wright, a professional meteorologist, averred that snow fell heavily on January 23, that there was blizzard conditions in the area, and that a state of emergency was in effect throughout the day. Heavy snowfall continued through the overnight hours of January 24 and the temperature ranged from 26 to 32 degrees. The snowfall tapered between 4:00 a.m. and 4:15 a.m. on January 24; however, blowing and drifting snow continued throughout the afternoon. Between 21 and 23 inches of snow fell in the area. Although there was no precipitation on the afternoon of January 24, winds averaged 15 to 20 miles per hour with gusts of 25 to 30 miles per hour, which created blowing and drifting snow. At the time of the accident, winds were at 5 to 10 miles per hour, there was no precipitation, and it was approximately 32 degrees.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, evidence must be viewed in the light most favorable to the nonmoving party (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]).

Here, Brightview contends that it did not owe a duty to the plaintiff inasmuch as it was merely contracted to provide snow removal services and the plaintiff was not a party to the agreement. Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Perkins v Crothall Healthcare, Inc.*, 148 AD3d 1189, 51 NYS3d 118 [2d Dept 2017]; *Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]). However, the Court of Appeals has recognized several exceptions to this general principal whereby a party who enters into a contract may have assumed a duty of care to non-contracting third persons when (1) the contracting party fails to exercise reasonable care while performing his or her duties and launches a force or instrument of harm, (2) a plaintiff

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detrimentally relied on the continued performance of the contracting party's duties, or (3) the contracting party entirely displaced another's duty to maintain the premises safely (*Espinal v Melville Snow Contrs., supra*; *Yvars v Marble Hgts. of Westchester, Inc.*, 158 AD3d 850, 73 NYS3d 246 [2d Dept 2018]; *Koslosky v Ross-Malmut*, 149 AD3d 925, 52 NYS3d 400 [2d Dept 2017]; *Santos v Deanco Servs., Inc.*, 142 AD3d 137, 35 NYS3d 686 [2d Dept 2016]; *see also Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 611 NYS2d 817 [1994]; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 557 NYS2d 286 [1990]; *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160 [1928]).

Although Brightview demonstrated that the plaintiff was not a party to the agreement that it had with CLPF, it failed to establish that it exercised reasonable care in performing its duties under the contract. The record establishes that there was a blizzard in the area some hours prior to the plaintiff's accident, and that Brightview had started the process of cleaning snow from the parking lot before the storm ended. The cleaning process was ongoing when the plaintiff drove into the parking lot. The plaintiff testified that there were workers shoveling and equipment was being used to clear snow. The plaintiff also testified that what caused her to fall was snow-covered ice that was compacted by large tire tracks—tracks that were larger than those of normal cars, and Brightview has acknowledged that it was using heavy machinery to perform its work. Taking the plaintiff's version of events as true, this court cannot conclude as a matter of law that Brightview's efforts to clear the snow did not launch a force or instrument of harm that caused the plaintiff's injury.

Brightview further contends that it is protected by the storm in progress rule. Generally, a defendant "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" (*Fenner v 1011 Route 109 Corp.*, 122 AD3d 669, 670, 996 NYS2d 341 [2d Dept 2014]; *Sabatino v 425 Oser Ave., LLC*, 87 AD3d 1127, 930 NYS2d 598 [2d Dept 2011]). As the proponent seeking summary judgment, defendant has the burden of establishing that it neither created the snow and ice condition nor had actual or constructive notice of it (*Fenner v 1011 Route 109 Corp.*, 122 AD3d 669, 670, 996 NYS2d 341; *Sabatino v 425 Oser Ave., LLC*, 87 AD3d 1127, 930 NYS2d 598 [2d Dept 2011]; *Smith v Christ's First Presbyterian Church of Hempstead*, 93 AD3d 839, 941 NYS2d 211 [2d Dept 2012]; *Meyers v Big Six Towers, Inc.*, 85 AD3d 877, 925 NYS2d 607 [2d Dept 2011]). This burden may be met by presenting evidence that there was a storm in progress when the slip and fall accident occurred (*see Sie v Maimonides Med. Ctr.*, 106 AD3d 900, 965 NYS2d 562 [2d Dept 2013]; *Smith v Christ's First Presbyterian Church of Hempstead*, 93 AD3d 839, 941 NYS2d 211). Under the storm in progress rule, an owner or snow-removal contractor will not be held liable for injuries sustained in a slip and fall accident which occurs during an ongoing storm, a lull in the storm, or for a reasonable time following the cessation of a storm (*see Fenner v 1011 Route 109 Corp.*, 122 AD3d 669, 670, 996 NYS2d 341; *Smilowitz v GCA Serv. Group, Inc.*, 101 AD3d 1101, 957 NYS2d 391 [2d Dept 2012]; *Smith v Christ's First Presbyterian Church of Hempstead*, 93 AD3d 839, 941 NYS2d 211 [2d Dept 2012]; *see also Ndiaye v NEP W. 119th St. LP*, 124 AD3d 427, 1 NYS3d 50 [1st Dept 2015]). It is established, however, that "even if a storm is ongoing, once a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm" (*Cotter v Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 97 AD3d 524, 947 NYS2d 608 [2d Dept 2012]; *see Talamas v Metro. Transp. Auth.*, 120 AD3d 1333, 1334, 993 NYS2d 102, 103 [2d Dept 2014]).

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Even if a storm was in progress at the time of the plaintiff's accident, as previously indicated, Brightview has failed to establish as a matter of law that it did not exacerbate the natural hazard created by the storm (*see Cotter v Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 97 AD3d 524, 947 NYS2d 608 ). The record shows that Brightview was in the process of cleaning snow from the parking area at the time of the accident. The plaintiff's testimony that she fell on snow and ice that was compacted by a vehicle with large tires creates an issue of fact to be resolved by a jury. Inasmuch as Brightview has failed to meet its burden on the branch of its motion seeking to dismiss the plaintiff's complaint, it is denied.

Next, CLPF moves for summary judgment dismissing the complaint on the ground that it did not have notice of the condition on its property. Like Brightview, CLPF contends that it is protected by the storm in progress rule.

To establish liability in a slip and fall case involving snow or ice, a plaintiff must establish that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (*see Devlin v Selimaj*, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; *Viera v Rymdzionek*, 112 AD3d 915, 977 NYS2d 390 [2d Dept 2013]; *Cruz v Rampersad*, 110 AD3d 669, 972 NYS2d 302 [2d Dept 2013]; *Morreale v Esposito*, 109 AD3d 800, 971 NYS2d 209 [2d Dept 2013]; *Denardo v Ziatyk*, 95 AD3d 929, 943 NYS2d 591 [2d Dept 2012]; *Flores v BAJ Holding Corp.*, 94 AD3d 945, 942 NYS2d 202 [2d Dept 2012]; *Medina v La Fiura Dev. Corp.*, 69 AD3d 686, 895 NYS2d 98 [2d Dept 2010]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]). To constitute constructive notice, the condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (*Gordon v American Museum of Natural History*, *supra*; *see Stewart v Sherwil Holding Corp.*, 94 AD3d 977, 942 NYS2d 174 [2d Dept 2012]; *Medina v La Fiura Dev. Corp.*, *supra*). CLPF claims it did not create the dangerous condition inasmuch as its employees did not participate in the snow cleaning process, and that it did not have actual notice of the condition because there were no complaints made about the snow. The record establishes that CLPF employees were not involved in cleaning snow on the day of the plaintiff's accident. Additionally, there was no record of complaints made about the condition of the property prior to the accident.

Nevertheless, CLPF has failed to establish as a matter of law that it did not have constructive notice of the condition in the parking lot. CLPF claims that the condition was not visible and apparent because the plaintiff did not see the compacted snow before she fell, and that the storm was in progress at the time of the accident; therefore, it did not have sufficient time to discovery and remedy the condition. CLPF's contentions are unavailing. The plaintiff testified that she did not see the condition because she fell when she was stepping out of her vehicle. Furthermore, the evidence proffered by CLPF shows that there was no precipitation for several hours prior to the plaintiff's accident. The certified weather works snow fall report merely states that snow tapered off between 3:00 a.m. and 6:00 a.m. on January 24. The report further states that "[i]n addition to the heavy snowfall, strong northeasterly winds with frequent gusts of up to 30 to 45 miles per hour resulted in significant blowing and drifting of snow. This blowing and drifting continued even after snow tapered off." There is no statement indicating that blowing or drifting snow was ongoing at the time of the accident. Accordingly, triable issues of fact remain as to the length of time the alleged condition was present and whether such condition existed for a sufficient length of time before the accident to be discovered and remedied (*see*

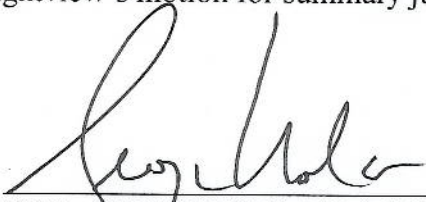
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*Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646; *see also Mavis v Rexcorp Realty, LLC, supra*). Additionally, CLPF has failed to demonstrate that Brightview’s snow removal efforts did not create the allegedly icy condition (*see Anderson v Landmark at Eastview, Inc.*, 129 AD3d 750, 10 NYS3d 605 [2d Dept 2015]).

In light of the foregoing, the branch of Brightview’s motion for summary judgment dismissing CLPF’s cross claims for indemnification against it is denied. The right to contractual indemnification “depends upon the specific language of the contract, [and] [t]he 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” (*Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999-1000, 47 NYS3d 121 [2d Dept 2017][internal citations and quotations omitted]; *see Castillo v Port Auth. of New York & New Jersey*, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]). The snow removal contract between Brightview and CLPF states that Brightview “assumes all risks and liabilities for and agrees to indemnify and hold [CLPF] . . . harmless from any and all claims with regard to loss, damage, injury, liability, and expense, including reasonable attorney’s fees and costs, arising or incurred in connection with the providing of products and/or services as specified herein.”

By the explicit terms of the agreement, Brightview is obligated to indemnify CLPF against claims arising as a result of the snow removal services that it provided. Therefore, should the finder of fact determine at trial that Brightview removed snow and ice from the parking lot in a negligent manner, Brightview would be responsible for indemnifying CLPF (*see Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 995 NYS2d 95 [2d Dept 2014]; *LaGuarina v Metro. Tr. Auth.*, 109 AD3d 793, 971 NYS2d 173 [2d Dept 2013]). Accordingly, the branch of Brightview’s motion for summary judgment dismissing CLPF’s cross claims is denied.

Dated: November 9, 2020

  
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HON. GEORGE NOLAN, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION