Wolchock v Glorious Sun Blue Hill Plaza, LLC.
2020 NY Slip Op 34811(U)
August 21, 2020
Supreme Court, Rockland County
Docket Number: Index No. 033361/2018
Judge: Robert M. Berliner
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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.

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

----------x
AMY WOLCHOCK

Plaintiff,

-against-

GLORIOUS SUN BLUE HILL PLAZA, LLC., CBRE, INC., and GRASSKEEPERS LANDSCAPING, INC.,

Defendants.
----------x

GLORIOUS SUN BLUE HILL PLAZA, LLC. And CBRE, INC.,

Third-Party Plaintiffs,

-against-

GRASSKEEPERS LANDSCAPING, INC.,

Third-Party Defendant.
----------x

DECISION AND ORDER

Index No.: 033361/2018

Motion Sequence # 2

The following papers, numbered 1 to 5, were read on the motion for summary judgment by Defendant/Third-Party Defendant Grasskeepers Landscaping, Inc.:

Notice of Motion/Affirmation in Support/Affidavit(Turco)Exhibits(A-L) 1-3
Affirmation in Opposition.....4
Reply Affirmation.....5

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

This action arises out of a slip and fall accident, where Plaintiff Amy Wolchock ("Wolchock") allegedly sustained damages after slipping and falling in a parking lot located at 1

Blue Hill Plaza in Pearl River, New York ("the Premises"), on May 21, 2018. While walking from her car in Parking Lot A to the building of the Premises, part of her shoe and foot went into a depression or pothole causing her foot to twist and fall. Wolchock traversed the Premises for 16 years prior to the accident as her office is located there. At the time of the accident, the Premises was owned by Glorious Sun Blue Hill Plaza, LLC ("Glorious") and managed by CBRE, Inc. ("CBRE"). On June 13, 2018, Wolchock filed a complaint against Glorious and CBRE for a cause of action sounding in negligence. On April 22, 2019, Glorious and CBRE filed a third-party complaint for indemnification against Grasskeepers Landscaping, Inc. ("Grasskeepers"). They had contracted with Grasskeepers to provide various services of snow removal, landscaping, and patching up driveways and parking lots on the Premises ("Service Agreement"). On August 2, 2019, Wolchock filed an amended complaint including Grasskeepers as a co-defendant.

Now, before the Court is Grasskeepers's motion for summary judgment pursuant to CPLR § 3212. It seeks summary judgment as to Wolchock's complaint and summary judgment as to the third-party cause of action for contractual indemnification. First, the Court addresses whether to grant Grasskeepers summary judgment on Wolchock's complaint.

I. Summary Judgment as to Wolchock's Complaint

Grasskeepers contend that it is entitled to judgment as a matter of law as to Wolchock's cause of action for negligence because: (1) it owed no duty to Wolchock; (2) the alleged defect was trivial; and (3) it had no notice of the alleged defect. The Court will address whether it owed a duty to Wolchock.

"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. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted].

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 Slepoy 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].

Here, Grasskeepers submitted the Service Agreement as evidence that Wolchock is not a party therein. Within her amended verified complaint, verified bill of particulars, and supplemental verified bill of particulars, Wolchock alleged only two of the *Espinal* exceptions: (1) Grasskeepers created or launched an instrument of harm and (2) Wolchock detrimentally relied on Grasskeepers's continued performance of its contracting duties. Therefore, Grasskeepers must establish that those two exceptions do not apply in order to meet its prima facie burden. First, Grasskeepers established that it did not launch a force or instrument of harm in failing to exercise reasonable care in the performance of its duties by relying on the testimony of Kui and Turco, who were not aware of any asphalt repair made by Grasskeepers prior to Wolchock's fall at the accident site. *See Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 [2d Dept 2010][" a claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them"].

Second, Grasskeepers established that Wolchock did not detrimentally rely on the continuing performance of Grasskeepers's obligations because she testified that she never heard of Grasskeepers prior to this action. *Id.* [finding that plaintiff failed to proffer evidence that she detrimentally relied on the contractor's performance of its contractual duties to remove snow on the premises "since the plaintiff herself testified that she had no idea who performed snowplowing services, and there was no evidence that she had any knowledge of any agreement whereby snow removal services were conducted at the premises"]. Consequently, Grasskeepers established its prima facie burden that it is entitled to summary judgment. Plaintiff failed to provide evidentiary proof to raise a triable issue of fact. Therefore, the Court grants Grasskeepers's motion for summary judgment as to Wolchock's claim for contractual indemnification.

Because this issue is dispositive as to summary judgment of Wolchock's complaint, the Court need not discuss whether the alleged defect was trivial and whether Grasskeepers had any notice as to the alleged defect.

II. Summary Judgment as to Glorious's and CBRE's Third-Party Cause of action

Furthermore, Grasskeepers seeks summary judgment dismissing the third-party claim for contractual indemnification. In support, it relies on, *inter alia*, the Service Agreement, the EBT of CBRE's real estate manager Elliot Kui, and EBT of Grasskeepers's owner Larry Turco. Grasskeepers contends that there is no proof of its negligence in failing to identify the alleged defect in Parking Lot A prior to the accident, and that it had no duty to inspect or notify the Premises for any potholes pursuant to the Service Agreement.

"The right to contractual indemnification depends upon the specific language of the contract. The promise to indemnify should not be found unless it can be clearly implied from the language and the purpose of the entire agreement and the surrounding circumstances." *George v. Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009][internal citations omitted].

Here, the Service Agreement states:

> "To the fullest extent permitted by law, Contractor shall defend . . . indemnify, pay, save, and hold harmless the Owner Indemnified Parties from and against any liabilities, damages, costs, expenses, suits, losses, claims, actions, fines and penalties . . . of third

> parties that any of the Owner Indemnified Parties may suffer, sustain or incur to the extent arising out of or in connection with:
> 1. Contractor's work or presence on the Property, *including but not limited to any negligent acts*, errors or omissions, intentional misconduct or fraud of Contractor, its employees, subcontractors or agents or others, whether active or passive, actual or alleged, whether in the provision of the Work, failure to provide any or all of the Work or otherwise;
> 2. any breach by Contractor of this Contract . . ."

Affirmation in Support, Exhibit H, Service Agreement § 13(a)(1)-(2) (emphasis added). Contrary to Grasskeepers's contention, Glorious and CBRE do not need to establish Grasskeepers's fault in order to prevail on their claim for contractual indemnification because the plain and unambiguous terms of the Service Agreement do not limit Grasskeepers's obligation to indemnify to only negligent acts of its work on the Premises. *Diudone v City of New York*, 87 AD3d 608, 609 [2d Dept 2011][internal citations omitted].

Furthermore, Grasskeepers alleges that, under the Service Agreement, it was not obligated to conduct any regular inspections of the parking lots to identify deteriorating pavement, thereby making the indemnification provision inapplicable to these circumstances. It alleges that its responsibilities with respect to potholes included only to "[r]epair and fill all potholes with cold patch in the roadways and the parking lots" for both winter maintenance and Spring clean-up in April. Affirmation in Support, Exhibit H, Service Agreement at Exhibit D. Turco also testified that Grasskeepers did not regularly inspect the parking lots for needed repairs; rather, a practice was established where CBRE would inform Grasskeepers of needed repairs and Turco would perform an annual walkthrough CBRE's general manager, Joanne Morano, in April for any needed repairs, including potholes. Meanwhile, Kui testified that Grasskeepers inspected the parking lots for potholes and notified CBRE of the needed repairs during the winter months, in addition to the annual walkthrough. Also, it is not established how long prior to Wolchock's fall that the alleged defect existed. In light of the foregoing, the Court finds that there are genuine issues of material fact as to whether Wolchock's claims against Glorious and CBRE arise out of or are in connection with Grasskepers's scope of work pursuant to the Service Contract, thereby requiring Grasskeepers to indemnify Glorious and CBRE for her claims. Therefore, the Court denies Grasskeepers's motion for summary judgment dismissing the third-party contractual indemnification claim.

Based upon the foregoing, it is

ORDERED that Plaintiff Wolchock's amended verified complaint is dismissed as against Defendant Grasskeepers Landscaping, Inc.

The parties are hereby advised of a pre-trial conference on **September 9, 2020 at 10:30 am.**[1]

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
August 21, 2020

ENTER

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

To:

Counsel of record via NYSCEF

[1] The conference will occur virtually via Skype for Business. Plaintiff's counsel is directed to file a court notice via NYSCEF confirming the availability and providing the contact information of all counsel of record.