SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. DAVID P. SULLIVAN,
Supreme Court Justice.

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LONNIE GOLDMAN,

Plaintiff,

Index No. 606067/2018
Motion Seq. Nos. 002, 003
Motion Submitted: 07/02/2021

-against-

KABRO ASSOCIATES, LLC, GREAT NECK PLAZA, L.P. and GREEN EARTH, INC.,

Defendants.

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KABRO ASSOCIATES, LLC and GREAT NECK PLAZA, L.P.,

Third-Party Plaintiffs,

-against-

GREEN EARTH, INC.,

Third-Party Defendants.

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The following papers read on these motions:

Defendants Kabro and Great Neck move this Court for an order, pursuant to CPLR §3212, seeking summary judgment on their cross-claim against Defendant Green Earth for contractual indemnification. Defendant Green Earth has cross-moved for summary judgment as well, seeking dismissal of Plaintiff's claim and any cross-claims asserted against it. The motion has been opposed by Defendant Green Earth, whereas Defendants Kabro and Great Neck and Plaintiff have opposed the cross-motion, and the Court has received timely reply. Based upon the following, the motion is hereby granted, over opposition, and the cross-motion is hereby denied as stated hereafter.

The underlying incident giving rise to the instant action involves a slip-and-fall incident on snow and ice. It is undisputed that on or about November 16, 2016, Defendant Kabro, the owner of five (5) separate strip malls throughout the northern half of Nassau County, New York, contracted with Defendant Green Earth to provide snow removal services at the subject property. The agreement recited the price for the service at each location, including the large strip mall managed by Defendant Great Neck where the subject incident occurred. It is also undisputed that there was an indemnification clause contained in the agreement that reads as follows:

> "Each party shall indemnify and hold the other harmless from any and all claims, damages, losses, and expenses, including but not limited to reasonable attorney's fees, for personal injuries sustained by third parties as a result of any act or omission of such party in the performance of the services defined in this agreement."

On March 14, 2017, a snow event took place which left several inches of snow at the property owned by Defendant Kabro and managed by Defendant Great Neck. Defendant Green Earth performed its service as contracted for by plowing and shoveling wherever possible in the parking lot and sidewalk area of the subject premises during the snow event. The following morning, Plaintiff, a local resident nearby the subject premises, attempted to go to two separate

banks within the strip mall; unfortunately, he slipped and fell in the parking lot just off the sidewalk area, resulting in significant injury to his left arm.

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. Alvarez v. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). To make a prima facie showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie showing has been made, 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. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

To establish a claim for common law indemnification, a third-party plaintiff is required to prove not only that it was not negligent, but also that the proposed indemnitor was responsible for the negligence that contributed to the accident, or in the absence of any such negligence, had the authority to direct, supervise, and control the work giving rise to the injury. Bellefleur v. Newark Beth Israel Medical Center, 66 AD3d 807, 888 NYS2d 81 (2nd Dept., 2009). A party's right to contractual indemnification depends upon the specific language of the relevant contract. Castillo v. Port Authority of New York & New Jersey, 159 AD3d 792, 72 NYS3d 582 (2018). 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 circumstances. Morris v. Home Depot USA, 152 AD3d 669, 59 NYS3d 92 (2nd Dept., 2017).

To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that a duty was owed to the plaintiff as an injured party and that a breach of that duty

contributed to the alleged injuries. Eisman v. Village of East Hills, 149 AD3d 806, 52 NYS3d 115 (2nd Dept., 2017). The critical requirement is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought. Id at 808-809, 118.

It is well-established that in order to impose liability upon a defendant in a slip-and-fall action, evidence must show that the defendant either created the condition which caused the accident or had actual or constructive notice of the condition. Cusack v. Peter Luger, Inc., 77 AD3d 785, 909 NYS2d 532 (2nd Dept., 2010). As a general rule, a limited contractual obligation to provide snow removal does not render the contractor liable in tort for the personal injuries of third parties. Turner v. Birchwood on the Green Owners Corp., 171 AD3d 1119, 98 NYS3d 323 (2nd Dept., 2019). However, such a contract for removal of snow and ice does not give rise to a duty on the part of the snow removal contractor or subcontractor to exercise reasonable care to prevent foreseeable harm to plaintiff unless in failing to exercise reasonable care in the performance of its duties, the snow removal contractor launched a force or instrument of harm, the plaintiff detrimentally relied upon the continued performance of the snow removal contractor's duties, or the snow removal contract has entirely displaced the property owner's duty to maintain the premises safely. Roach v. AVR Realty Co., 41 AD3d 821, 839 NYS2d 173 (2nd Dept., 2007). Essentially, the contract must be an exclusive and comprehensive agreement which entirely displaces the property owner's duty to maintain the premises safely. Foster v. Herbert Slepoy Corp., 76 AD3d 210, 905 NYS2d 226 (2nd Dept., 2010).

In the instant case, the facts before this Court require review of both motions simultaneously, since a conclusion in favor of Defendant Kabro and Great Neck necessitates a finding of liability against Defendant Green Earth. In support of the motion, Defendants Kabro

have not only submitted a copy of the service contract between the parties but has also included the deposition transcript of Plaintiff and Defendant Green Earth's owner and president, amongst other things. The testimony placed before the Court appears uncontroverted that Defendant Green Earth had its workers actively performing snow removal services at the subject property until approximately 6:00pm on March 14, 2017, the same time it has also been asserted that the storm ceased. However, there is not any details in the testimony provided of certain areas, such as the immediate area where Plaintiff slipped and fell, in which Defendant Green Earth was unable to remove snow due to too many parked cars in the area. Likewise, while Plaintiff's testimony indicates that there were cars in the parking lot at the time of his accident, he did not provide sufficient testimony that would allow this Court to find that Defendant Green Earth was unable to perform its duties. The operative clause effecting such a scenario contained in the contract reads as follows:

> "Individual parking spaces…will only be plowed if parked vehicles do not obstruct the spaces. There must be at least six (6) contiguous open spaces in order for safe plowing to occur. Subsequent plowing visit will be made to clear vacant parking spaces after the storm has ended."

Although Defendant Green Earth's owner was able to testify as to its general practices of returning the next day after business hours end and the parking lot is expected to be empty or near empty to finish its snow removal job, he was unable to speak to what occurred during this specific snow event. It should be noted that his testimony indicates that salting and other post-snow removal treatment of the pavement did not occur until the following morning, beginning at or around the time of Plaintiff's slip and fall; additionally, there is not any indication that Defendant Green Earth returned to the premises that evening to clear areas that were unable to

be cleared the previous day. Thus, in the absence of any testimony addressing the number of cars in the area where Plaintiff fell, nor any other testimony that it had adequately cleared the area the evening before, summary judgment cannot be awarded to Defendant Green Earth and its cross-motion is hereby denied.

Turning next to the motion by Defendants Kabro and Great Neck, this Court finds that the language of the contract certainly requires Defendant Green Earth to indemnify Defendants Kabro and Great Neck for any liability that may be found against them. The terms of the contract clearly apply to the facts of this case and given the remaining terms and course of dealing between Defendants Kabro and Great Neck and Defendant Green Earth, Defendant Green Earth entirely displaced Defendants Kabro and Great Neck with regard to snow and ice removal at the subject property; in so doing, the snow and ice left behind following the storm ceased was the responsibility of Defendant Green Earth to remedy and remove. Therefore, the motion by Defendants Kabro and Great Neck is hereby granted in full, over opposition. *See* Sarisohn v. Plaza Realty Services, Inc., 109 AD3d 654, 971 NYS2d 115 (2nd Dept., 2013).

Coinciding with foregoing, the granting of the motion by Defendant Kabro and Great Neck requires not only a denial of the cross-motion by Green Earth, but also a finding of summary judgment in favor of Plaintiff upon a search of the record. Indeed, this Court has searched the record, pursuant to CPLR §3212(b), and finds that awarding summary judgment on the issue of liability on Plaintiff's complaint is also appropriate at this time. *See* Edgerton v. City of New York, 160 AD3d 809, 74 NYS3d 617 (2nd Dept., 2018). The issue of liability has certainly been put forth before the Court, by the very nature of Defendant Green Earth's motion, and it has submitted a response to Plaintiff's opposition. Accordingly, summary judgment on the issue of liability on Plaintiff's complaint is also granted as and against Defendant Green

Earth; moreover, given the finding of indemnification in favor of Defendants Kabro and Great Neck, the matter shall proceed to trial on the issue of damages only.

Defendants Kabro and Great Neck shall serve a copy of the within order with notice of entry upon Defendant Green Earth and Plaintiff within thirty (30) days from the date of this order. Thereafter parties shall appear in the DCM Pretrial Part of Supreme Court, Nassau County, on January 27, 2022.

This hereby constitutes the Decision and Order of this Court.

Dated: September 10, 2021
Mineola, New York

ENTER

David P. Sullivan
HON. DAVID P. SULLIVAN, J. S. C.