

Guiles v Vassar Bros. Hosp.
2021 NY Slip Op 34338(U)
December 22, 2021
Supreme Court, Orange County
Docket Number: Index No. EF010530-2017
Judge: Sandra B. Sciortino
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To commence the statutory time
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 ORANGE

-----X
LILAS GUILLES and KENNETH GUILLES,

Plaintiffs,

DECISION AND ORDER

-against-

INDEX NO.: EF010530-2017

Motion Date: 11/19/2021

Sequence No.: 3

**VASSAR BROTHERS HOSPITAL and VASSAR
BROTHERS HOSPITAL FOUNDATION,**

Defendants.

-----X
**VASSAR BROTHERS HOSPITAL and VASSAR
BROTHERS HOSPITAL FOUNDATION,**

Third-Party Plaintiffs,

-against-

**E&B PARKING SERVICES, INC. and RED
CEDAR ARBORISTS & LANDSCAPERS, INC.,**

-----X
Third-Party Defendants.

SCIORTINO, J.

The following documents were read on the motion by third-party defendant Red Cedar
Arborists & Landscapers, Inc. (hereinafter "Red Cedar") brought pursuant to CPLR 3212,
seeking summary judgment dismissing the Third-Party Complaint:

PAPERS

NYSCEF #

Notice of Motion/Affirmation in Support (Falvey)/Exhibits A - M

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Affirmation in Opposition (Gold)/ Response to Statement of Material Facts
Reply Affirmation (Falvey)

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Background and Procedural History

This is an action for personal injuries allegedly sustained by plaintiff Liliias Guiles on January 16, 2015. Plaintiff Lilas Guiles claims she slipped and fell on ice, outside the emergency room entrance at Vassar Brothers Hospital, as she was getting out of the passenger's side of a vehicle driven by her husband, plaintiff Kenneth Guiles.

This action was commenced by the filing of a Summons and Verified Complaint on December 12, 2017. On December 9, 2019, Vassar Brothers Hospital and Vassar Brothers Hospital Foundation (hereinafter "Vassar Brothers") commenced a third-party action against Red Cedar Arborists & Landscapers, Inc. (hereinafter "Red Cedar"), the snow removal contractor. Examinations before trial have been held. Note of Issue was filed on August 3, 2021.

Motion for Summary Judgment

By Notice of Motion filed on August 24, 2021, Red Cedar seeks summary judgment and dismissal of the third-party complaint. The third party defendant points to *Espinal v. Melville Snow Contrs.*, 98 NY2d 136 (2002). In *Espinal*, the Court of Appeals discussed three exceptions to the general rule that a snow removal contractor cannot be held liable for personal injuries sustained by third parties. These exceptions are (1) where the contracting party, in failing to exercise reasonable care in the performance of contractual duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continuing performance of the contractor's duty; or (3) where the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely. Red Cedar argues that none apply.

Red Cedar also argues that applicable case law provides that a snow removal contractor's burden on a motion for summary judgment motion depends on the allegations contained in the pleadings. Here, the third party defendant is not required to affirmatively demonstrate that none

of the exceptions outlined in *Espinal* apply as none of the allegations in Vassar Brothers' Third Party Complaint make allegations as to any of the *Espinal* exceptions.

Red Cedar argues the parties' deposition testimony show there are no issues of fact. Plaintiffs deposition testimony establishes that the accident area looked clear before the accident, and plaintiff Kenneth Guiles, who was driving the vehicle, only saw "black ice" in the accident area after his wife fell. Jason Zrodowski, Red Cedar's Project manager, testified that Red Cedar performed snow and ice removal services for Vassar Brothers during the winter of 2014-2015, including the area where plaintiff's accident allegedly occurred. Red Cedar performed pre-salting services before a snowfall was expected, and performed "endless" ice watch after its snow and ice removal services. Red Cedar was never informed that its snow and ice removal services were unacceptable, or that its services caused the accident area to become more dangerous. Red Cedar argues it did not create the ice and did not have actual or constructive knowledge of the ice prior to the accident.

The contract was not a comprehensive maintenance obligation that displaced the duty of Vassar Brothers to safely maintain its property. There is no evidence or testimony establishing that plaintiff relied upon Red Cedar to perform its obligations under the contract, or that Red Cedar launched a force or instrument of harm that caused plaintiff Liliias Guiles' accident. Therefore, Vassar Brothers will be unable to raise an issue of fact with respect to whether any of the *Espinal* exceptions apply.

Red Cedar further argues that plaintiffs were not parties to the contract between Red Cedar and Health Quest (which owns Vassar Brothers).

Opposition

In opposition, Vassar Brothers argue that, based on the plaintiffs' testimonies, the accident was the direct result of Red Cedar's failure to address the icy condition near the

Emergency Room entrance. The Snow Removal Agreement required Red Cedar to perform ice checks for icy patches daily both prior to and after dusk, and that the emergency room area in question was a priority area with zero tolerance. Red Cedar's project manager, Mr. Zrodowski, testified that Red Cedar alone had the responsibility to salt the area if an icy condition was found. After a storm, the site would be inspected for any refreeze "endless[ly]." Zrodowski also testified that the reports for the date in question, which would demonstrate whether or not Red Cedar took any actions to comply with its obligations, were destroyed in a fire in August of 2017. These reports included a brief narrative of the storm.

Due to the destruction of Red Cedar's records, Red Cedar cannot produce any evidence to demonstrate that it lacked notice of the icy condition. Third-party defendant's failure to submit evidence that its snow removal protocols and/or its inspection procedures have been followed on the date of the accident raises a question of fact as to whether it had notice of an alleged icy condition.

Vassar Brothers argues there are questions of fact as to whether plaintiffs detrimentally relied on Red Cedar's continued performance of snow and ice removal duties, as it is implicit that any patient who needs to go to the hospital ER justifiably assumes and relies upon a safe area. Based on the snow removal agreement and the testimony of the parties, there are questions of fact as to whether Red Cedar entirely displaced Vassar Brothers' duty to keep the area safe.

Finally, Vassar argues, based on the indemnification provision of the Snow Removal Agreement, there is an issue of fact as to whether Red Cedar breached its contractual duty to Vassar Brothers.

Reply

In reply, Red Cedar argues that Zrodowski testified that Red Cedar performed pre-salting services before a snowfall was expected and performed "endless... ice watch" after they

performed its snow and ice removal services. Red Cedar was never informed prior to the accident that its services were unacceptable.

Stephen Fajfer, on behalf of Vassar Brothers, testified that he was satisfied with the snow and ice removal work performed by Red Cedar, and plaintiffs testified that they did not see any ice or snow in the accident area before plaintiff Lilius Guiles' fall.

Red Cedar reiterates its argument that, based on the generalized allegations in Vassar Brothers' Third Party Complaint, Vassar Brothers have failed to meet their burden on the instant motion.

Discussion

It is well established that "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 Hosp.*, 68 NY2d 320, 324 [1986]; see also *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 NY3d 470, 475-476 [2013]; CPLR 3212 [b]).

Generally, "a limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties" (*Baratta v. Home Depot USA*, 303 AD2d 434, 434 [2003]). In *Espinal*, the Court of Appeals has recognized three exceptions to the general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of contractual duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continuing performance of the contractor's duty; or (3) where the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely (*Espinal v. Melville Snow Constr.*, 98 NY2d 136 [2002]).

A defendant contractor's *prima facie* showing on a motion for summary judgment requires only that the defendant "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” (*Glover v John Tyler Enters., Inc.*, 123 AD3d 882, 882 [2014]; *Barone v Nickerson*, 140 AD3d 1100, 1101 [2016]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]).

Here, neither party has appended a Third Party Plaintiff Bill of Particulars to the instant motion; it is unknown if one was demanded and/or served. This Court has only been provided with the Third-Party Complaint. The Third-Party Complaint alleges:

“14. If plaintiffs were caused damages and/or injuries as alleged in the Verified Complaint, it was due to the negligence, recklessness, and carelessness of... RED CEDAR, their employees, agents, and/or servants in connection with creating an unreasonable dangerous condition, in their failure to properly maintain the vicinity of the emergency department where valet parking was offered and/or remove snow and ice from the vicinity of the emergency department where valet parking was offered, and/or their failure to warn of said dangerous condition known or that should have been known to... RED CEDAR...

...25. RED CEDAR failed to comply with specific requirements of said Snow Removal Program Agreement.

26. If the plaintiff did in fact sustain injuries as alleged in the Verified Complaint, which is denied, then such injuries were the sole result of RED CEDAR's breach of said Snow Removal Program Agreement.

28. ...VASSAR BROTHERS HOSPITAL and VASSAR BROTHERS HOSPITAL FOUNDATION is entitled to contribution and contractual indemnification and judgment over and against Red Cedar...”

Here, Vassar Brothers, in its opposition, does not dispute that the pleadings do not sufficiently allege facts which would establish any of the *Espinal* exceptions. Since the Third-Party Plaintiff did not allege facts in the pleadings which would establish the possible applicability of any of the *Espinal* exceptions, Red Cedar is not required to affirmatively demonstrate these exceptions do not apply (*Rudloff v. Woodland Pond Condominium Assoc.*, 109 AD3d 810, 811 [2d Dept 2013]).

Further, in showing the absence of *Espinal* exceptions and by demonstrating that plaintiff was not a party to its snow removal contract with Vassar Brothers, and, therefore, owed no duty of care, Red Cedar has made a *prima facie* showing of entitlement to judgment as a matter of law

(*Rudloff*, 109 AD3d 810). The burden shifted to plaintiff to come forward with evidence sufficient to raise a triable issue of fact as to the applicability of one or more of the three *Espinal* exceptions (*Foster*, 76 AD3d 210, 214).

In opposition to Red Cedar's *prima facie* showing, Vassar Brothers failed to raise a triable issue of fact as to whether Red Cedar launched a force or instrument of harm (*Espinal*, 98 NY2d 136). Even if Red Cedar breached its contract through the failure to apply salt, the record is devoid of any evidence regarding the cause, creation, or exacerbation of the icy condition (*Santos*, 142 AD3d 137). Vassar Brothers has offered nothing more than speculation that the failure to perform such duty created or exacerbated the condition that existed when the plaintiff fell.

Vassar Brothers also failed to raise an issue of fact as to whether the subject snow removal contract was a comprehensive and exclusive agreement which entirely displaced the owner's duty to maintain the premises in a safe condition (*Espinal*, 98 NY2d at 141). Pursuant to the Snow Removal Agreement, Red Cedar would perform snow and ice removal services "before the accumulation of any winter precipitation and continue throughout the Winter Weather Event" in high priority areas, and after 2 inches of accumulation in Zero Tolerance Business Hours area (Exhibit R). Here, Richard Sleight, on behalf of Vassar Brothers, testified that he supervised the snow removal work done by Red Cedar (Exhibit N at 18). He also testified that Vassar Brothers had snow removal equipment, including shovels and snow blowers, and performed snow removal, sanding and salting (22-23, 26). Jason Zrodowski, on behalf of Red Cedar, testified as to the snow removal practices generally, and testified that ice watch was performed "endless[ly]" (Exhibit Q at 23). In his affidavit, Zrodowski avers that all work was inspected and approved (Exhibit S).

Finally, Vassar Brothers has failed to raise an issue of fact as to whether plaintiffs' detrimentally relied on Red Cedar's performance of the snow removal agreement. Despite third-party plaintiffs' contention, there is no evidence that plaintiffs detrimentally relied on Red Cedar's performance of snow and ice removal under the agreement, as there was no testimony that plaintiffs knew of an agreement or who performed snow removal services (*Foster*, 76 AD3d at 215).

With respect to third-party plaintiffs' contribution and contractual indemnification claim, as discussed above, Red Cedar has established that it did not owe a duty of reasonable care to plaintiff independent of its contractual obligations to Vassar Brothers (*Turner v. Birchwood on the Green Owners Corp.*, 171 AD3d 1119 [2d Dept 2019]). In opposition, plaintiffs, having failed to raise an issue of fact as to whether Red Cedar launched a force or instrument of harm, have failed to raise an issue of fact as to whether Red Cedar breached its contract by failing to perform its contractual services (*id.*; compare, *Baratta v. Home Depot USA*, 303 AD2d 434 [2d Dept 2003]).

Accordingly, third-party defendant's motion for summary judgment is granted.

Conclusion

On the basis of the foregoing, it is hereby

ORDERED that third-party defendant's motion for summary judgment is granted, and the third-party complaint is dismissed.

All matters not addressed herein are denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 22, 2021
Goshen, New York

ENTER:


HON. SANDRA B. SCIORTINO, J.S.C.