English v Wainco Goshen 1031 L.L.C.
2022 NY Slip Op 30336(U)
July 23, 2020
Supreme Court, Orange County
Docket Number: Index No. EF009426-2018
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
SUSAN ENGLISH,
Plaintiff,

-against-

WAINCO GOSHEN 1031 L.L.C. and KIMIECK LANDSCAPING INC.,
Defendants.
---X

DECISION AND ORDER

INDEX NO.: EF009426-2018
Motion Date: 6/26/2020
Sequence No.: 1

SCIORTINO, J.

The following papers numbered 1 to 20 were read on this motion by defendant Kimieck Landscaping Inc., pursuant to CPLR 3212, for an order granting summary judgment dismissing all claims asserted against it.

PAPERS	NUMBERED
Notice of Motion/Affirmation in Support of Motion (McNamara)/Exhibits A-L	1-14
Plaintiff's Affirmation in Opposition (Cole-Hatchard)	15
Co-Defendant Wainco's Affirmation in Opposition (Hastie)/Exhibit A/ Memorandum of Law in Opposition	16-18
Affirmation in Reply to Plaintiff's Opposition (McNamara)	19
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Background and Procedural History

This is an action for personal injuries arising out of a slip and fall on ice alleged to have accumulated on exterior stairs of a residential building located at Village Place, 308 Canter

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Court, Goshen, New York on March 16, 2017. At the time of the incident, plaintiff rented an apartment at Village Place, owned by defendant Wainco Goshen 1031 LLC ("Wainco"). Defendant Wainco and Defendant Kimieck Landscaping, Inc. ("Kimieck") are parties to a "Snow Plow & Landscaping Contract" executed in November 2016. Pursuant to the terms of the contract, Kimieck was to provide snow removal services after a snow event with accumulation of one inch or more. Kimieck was also responsible for the application of salt, calcium chloride and/or application of comparable ice and snow melt products to the pavement and/or sidewalk, walkway and stairway area(s). The contract provides that:

> Contractor shall be obligated to use its best judgment as to the timing and amount of salting, calcium chloride and/or application of comparable ice and snow melt product to be used based upon weather conditions then existing. It is further understood and agreed that Wainco shall have the right, but not the obligation under this Contract to require Contractor to apply salt and/or comparable ice and snow melt products to the Property within a reasonable amount of time of Wainco's request.

Plaintiff commenced this action by the electronic filing of a Summons and a Verified Complaint on September 11, 2018. Issue was joined by defendant Kimieck on October 12, 2018 and by defendant Wainco on November 21, 2018. Each defendant asserted cross-claims against the other. Plaintiff was deposed on May 28, 2019. The majority owner and president of Wainco, Stuart Wainberg, was deposed on June 14, 2019; and the manager of Kimieck's snow removal and landscaping work, Chris Wheeler, was deposed on the same day.

A Note of Issue was filed on September 25, 2019; and this motion was timely filed on November 25, 2019. As a result of multiple consented-to adjournments and the COVID-19 health emergency, the motion was ultimately returnable on June 25, 2020.

Depositions

Plaintiff (Exhibit H)

A significant snow event occurred on March 14, 2017, closing schools. There was no weather event or precipitation on March 15, 2017 or March 16, 2017, the day of plaintiff's fall. Plaintiff recalled seeing Kimieck's work truck at the premises on March 14, 2017, plowing and removing snow.

On March 16, 2017, at approximately 3:00 p.m., plaintiff exited her apartment onto the outside stairway facing West Main Street to wait for her children to get off the school bus. Plaintiff stepped out of the door onto the landing. When she took her second step, moving in one fluid motion, she started to slip. She attempted to grab hold of the handrail, but it was covered in ice. Plaintiff "flew up into the air" and "crashed" down at the bottom of the stairs. Plaintiff hit her head, losing consciousness for approximately 15 seconds. She was able to stand up and go back inside to call for her boyfriend; he went to pick up the children from the bus.

Plaintiff observed a patch of ice on the stairs which was approximately ½ inch thick and a foot and half in length. She described the ice as clear; she could see through it. She also observed residual salt or ice melt on the stairs.

Plaintiff observed ice only on the side of the stairs where she fell, and she believed that the ice came from the gutter. Plaintiff's boyfriend took pictures of the condition of the stairway within 15 minutes of plaintiff's fall, prior to plaintiff going to the emergency room.

Wainco (Exhibit I)

Stuart Wainberg, the majority owner of Wainco Goshen 1031 LLC, purchased the company in approximately 2014. Defendant Kimieck has served the real property for landscaping and snow removal since Wainberg's purchase of the property. Wainberg, prior to

plaintiff's fall, had not had any conversations with anyone from Kimieck regarding issues or concerns with snow and ice removal. Wainberg testified that Kimieck had no responsibility for the gutters on the property. They were responsible for the salting of stairs and walkways.

At the time of plaintiff's fall, an individual named Jeff Boris was Wainco's property manager. The property manager was responsible to make periodic examinations of the property.

Kimieck (Exhibit J)

Chris Wheeler is the Director of Maintenance for Kimieck. He testified that Kimieck serviced the property when there was between one and two inches of snow fall. It was Kimieck's responsibility to clear snow and ice and apply salt after snow was cleared. Kimieck did not have any responsibility for clearing gutters, checking gutter overflow or inspecting for ice-damming.

Wheeler testified that Kimieck did not have a contractual obligation to visit the property every few days and inspect it and did not make scheduled visits between snow events. However, Kimieck would make unscheduled visits and drive through the property every few days. **"If [they] notice[d] something out of place [they] would treat it."** (Exhibit J, page 24, lines 24-25) He further testified that he expected the property manager to contact him if an area of the property needed to be treated with salt due to thaw and refreeze.

Motion for Summary Judgment

Kimieck moves for summary judgment on several grounds. First, it owed no duty of care to the plaintiff. Second, it lacked notice of the alleged dangerous condition. Finally, none of the exceptions under *Espinal v. Melville Snow Const, LLP* (98 NY2d 136 (2002) are applicable to this case: the defendant did not launch a force or instrument of harm; the plaintiff did not detrimentally rely upon the defendant's continued service under the snow removal

contract; and the snow removal contract did not displace Wainco's duty to maintain the premises in a safe condition. As all of the *Espinal* elements are resolved in its favor, Kimieck contends that Wainco's cross-claims against it should also be dismissed.

Plaintiff opposes the motion arguing that Kimieck failed to establish its *prima facie* entitlement to judgment that it did not have constructive notice of the alleged dangerous condition. Plaintiff further argues that issues of fact remain as to whether Kimieck owed a duty of care to plaintiff because the snow removal contract displaced Wainco's duty with respect to snow removal and salt application.

Defendant Wainco also opposes the motion. It argues that Kimieck failed to establish its *prima facie* entitlement to judgment that it did not launch a force or instrument of harm by creating or exacerbating the alleged dangerous condition. Kimieck submitted no proof of its snow and ice removal efforts prior to plaintiff's fall.

Wainco further argues that issues of fact exist as to whether plaintiff detrimentally relied upon Kimieck's continued performance of its services under the contract. Issues of fact exist as to whether the snow removal contract was comprehensive and exclusive as to displace Wainco's duty to maintain the premises. Lastly, Wainco argues that Kimieck failed to establish its *prima facie* entitlement to judgment on Wainco's cross-claims for contribution and common law and contractual indemnification.

In reply to plaintiff's opposition, Kimieck argues that constructive notice is irrelevant to the analysis as it did not owe a duty to the plaintiff in the first instance and none of the *Espinal* exceptions apply. It further argues that Wainco maintained a sufficient degree of control over Kimieck's work so as to find that the snow removal contract was not comprehensive and exclusive.

In reply to Wainco's opposition, Kimieck argues that the cases cited by co-defendant are inapplicable to the facts of this case; and that Wainco failed to present an issue of fact with respect to the three *Espinal* exceptions. Kimieck does not address Wainco's arguments with respect to dismissal of the cross-claims.

Discussion

"A party moving for summary judgment must make *a prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact" (*Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dept 2011], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Generally, a contractual obligation standing alone will not give rise to tort liability in favor of a third party (*see Espinal,* 98 NY2d 136). However, the Court of Appeals has identified three situations wherein the party who enters into a contract to render services may be held liable in tort to a third party: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his 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 the other party's duty to maintain the premises safely" (*id.* at 140 [internal quotation marks and citations omitted]).

Here, Kimieck made a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidence that the plaintiff was not a party to its snow removal contract with Wainco and, therefore, it owed her no duty of care (*see Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 956 [2d Dept 2016]). Although it did so, since the pleadings did not allege facts that would establish the applicability of any of the *Espinal* exceptions above, Kimieck was not

required to affirmatively demonstrate that these exceptions did not apply in order to establish its *prima facie* entitlement to judgment as a matter of law (*see Cayetano v Port Auth. of New York & New Jersey*, 165 AD3d 1223, 1224 [2d Dept 2018]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]). The burden then shifted to plaintiff and the property owner to raise a triable issue of fact, including as to whether the *Espinal* exceptions are applicable (*id.*). They have failed to do so.

"Uniformly, a launch of a force or instrument of harm has been interpreted as requiring that the contractor create or exacerbate the dangerous condition" (*Santos v Deanco Services, Inc.*, 142 AD3d 137, 141 [2d Dept 2016]). Plaintiff does not assert the applicability of this exception and Wainco failed to raise a triable issue of fact that Kimieck's snow removal services caused or exacerbated the alleged dangerous condition. The record shows that Kimieck cleared the stairway of snow and applied salt or its equivalent to the stairway prior to plaintiff's fall. As such, it cannot be said that Kimieck created a dangerous condition by doing so, thereby launching a force or instrument of harm (*see Foster v Herbert Slepoy Corp.*, 76 AD3d at 215).

Next, plaintiff does not claim that she detrimentally relied upon Kimieck's performance of its snow removal and salting obligations under the contract; as such, this exception is not applicable here (*see Pavlovich v Wade Assoc., Inc.*, 274 AD3d 382, 383 [2d Dept 2000]).

Lastly, plaintiff and Wainco have failed to establish a triable 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 (*see Foster v Herbert Slepoy Corp.*, 76 AD3d at 215; *Linarello v Colin Serv. Sys.*, 31 AD3d 396 [2d Dept 2006]).

Kimieck was required to provide snow removal services when the snow accumulation was more than one (1) inch. Under the terms of the contract, Kimieck was also obligated to apply salt or its equivalent in addition to its snow removal duties, and to use its best judgment as to the timing and amount of salt to applied. However, Wainco maintained the right to request the application of additional salt. Wheeler testified he would expect the property manager to contact Kimieck if additional salt was required do to thaw and refreeze; and that Kimieck had no obligation to return to the premises in between snow events. This testimony was not contradicted by Wainberg. Here, Kimieck did not displace Wainco's general duty, as an owner, to keep the premises in a safe condition. This exception does not apply (see *Espinal v Melville Snow Contrs.,* 98 NY2d at 141; *Linarello v Colin Serv. Sys.*, 31 AD3d at 397; *Foster v Herbert Slepoy Corp.*, 76 AD3d at 214-215).

With respect to the cross-claims for contribution and common law and contractual contribution, the Court finds that Kimieck failed to establish its *prima facie* entitlement to judgment. The Court's finding that Kimieck did not owe a duty to the plaintiff does not necessarily resolve the remaining cross-claims (*see generally*, *Bryan v CLK-HP 225 Rabro, LLC* 136 AD3d at 956-957; *Foster v Herbert Slepoy Corp.*, 76 AD3d at 216).

Conclusion

Based upon the foregoing, it is hereby

ORDERED that the portion of Defendant Kimieck Landscaping Inc.'s motion seeking summary judgment dismissing the plaintiff's complaint is granted; and it is further

ORDERED that the portion of Defendant Kimieck Landscaping Inc.'s motion seeking summary judgment dismissing the cross-claims asserted against it is denied; and it is further

ORDERED that the parties appear for the virtual conference on September 8, 2020 at 1:30 p.m.

Any matters not specifically addressed have been considered and denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: July 23, 2020
Goshen, New York

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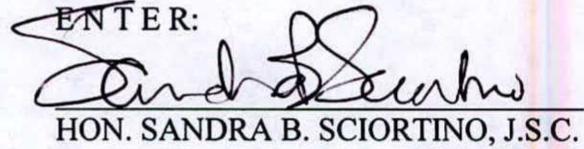

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*