

Hasan v 123 Plaza LLC
2022 NY Slip Op 33446(U)
September 29, 2022
Supreme Court, Kings County
Docket Number: Index No. 3028/2016
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 3028/2016
Seq. 013, 014, 015, 016

Part 91

DECISION/ORDER

ABED HASAN,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiffs,

against

Papers Numbered

Notice of Motion and Affidavits Annexed	<u>1-4</u>
Order to Show Cause and Affidavits Annexed. . . .	<u> </u>
Answering Affidavits	<u>5-12</u>
Replying Affidavits	<u>13-17</u>
Exhibits	<u>Var.</u>
Other	<u> </u>

123 PLAZA LLC,

Defendants,

123 PLAZA LLC,

Third-Party Plaintiffs,

against

CITY & COUNTY PAVING CORP., DISH NETWORK SERVICE, LLC, and ABC CORP. said name being fictitious, The true name of "ABC Corp" being unknown to third-party plaintiff, said third-party defendan intended to be a security company,

Third-Party Defendants,

DISH NETWORK SERVICE L.L.C.,

Second Third-Party Plaintiffs,

against

MATRIX CLEANING SERVICES LLC AND US SECURITY ASSOCIATES,

Second Third-Party Defendants.

Upon the foregoing papers, second third-party defendant US Security Associates ("USSA")'s motion for summary judgment dismissing all third-party claims and cross-claims against it (Seq. 013), second third-party defendant Matrix Cleaning Services LLC ("Matrix")'s

motion for summary judgment dismissing Dish's third-party complaint against it (Seq. 014), third-party defendant City & County Paving ("C&C")'s motion for summary judgment dismissing the complaint against it and amending the caption to remove C&C (Seq. 015), and third-party defendant/second third-party plaintiff Dish Network Service LLC ("Dish")'s motion for summary judgment dismissing the complaint and all claims and cross-claims against it (Seq. 016) is determined as follows:

Introduction

This action arises from an alleged slip and fall on snow and ice on January 29, 2016. The plaintiff was then an employee of the third-party defendant Dish Network ("Dish") (Hasan EBT at 16). Defendant 123 Plaza was the owner of the property. Third-party defendant Dish was the commercial tenant of the premises. Third-party defendant City & County Paving was contracted by 123 Plaza to remove snow from the premises (Snow Removal Agreement). Second third-party defendant Matrix Cleaning was retained by Dish to provide janitorial services. Finally, second third-party defendant USSA was hired by Dish to provide security at the premises.

Factual Background

Mr. Hasan testified that the building where he worked was surrounded by a parking lot (Hasan EBT at 23). The parking lot abuts a set of steps and a ramp, both of which lead to the main entrance of the building (*id.* at 34, 35). The plaintiff testified that on the day of his accident he remembered neither snowy or rainy conditions nor any accumulated snow on the ground (*id.* at 43–44). The plaintiff also did not recall salt or sand on the ground during his walk from the bus stop to work (Hasan EBT at 43–44).

Michael Bavaro, the president of C&C, testified that the standard practice during snowfall was as follows: If a storm resulted in snow accumulation over two inches, C&C would

automatically provide snow removal to its clients (Bavaro EBT at 26). This ordinarily consisted of a white pickup truck with a plow pushing snow to the corners of the parking lot “where no one drives or parks” at night (Vladimir Gudín, an employee at Dish, EBT at 13–14). If there was less than two inches of snowfall, a client would have to contact C&C to perform services (Bavaro EBT at 26). Mr. Bavaro testified that removal crews would consider where piles of snow were placed in order “to try to minimize the melting and refreeze, if possible” (*id.* at 28). However, Mr. Gudín testified that there was often a small pile of snow by the ramp (Gudín EBT at 15).

Mr. Gudín never observed the driver of the snowplow putting down salt or sand, and C&C would not provide hand shoveling services—“only . . . machine, mechanical work, and . . . salt” (Gudín EBT at 16; Bravaro EBT at 24). However, Mr. Gudín did occasionally observe the security guard throwing salt on the stairs and ramp (Gudín EBT at 16).

Jonathan Porter, the regional facility manager for Dish, testified that he was responsible for “contracting with third-party providers” to manage snow and ice at the facility (Porter EBT at 11). These agreements were ordinarily informal, “handshake” agreements—terms were agreed upon by actual conduct and compensation was negotiated through purchase orders submitted to the contractors (*id.* at 11–13). The cleaning service contracts were determined locally by individual facility managers; in the instant case, the local facility manager was Floyd Vesprey (*id.* at 15–16). If there were conditions in the parking lot that needed to be addressed, the USSA employees would reach out to Mr. Vesprey (Vejai Jorawar, representative of USSA, EBT at 24). Mr. Vesprey kept a snow blower on the premises, and Mr. Jorawar testified that he saw Mr. Vesprey use that snow blower in the parking lot on at least two occasions (*id.* at 25–26).

It appears from the record that Mr. Vesprey was not deposed. However, Matrix submits an affidavit from Mr. Vesprey which lays out the terms of Dish’s service agreement with Matrix.

In that affidavit, Mr. Vesprey explicitly states that clearing ice and snow were not part of Matrix's contractual responsibilities (Vesprey Aff. at ¶ 7). Additionally, none of the duties that Mr. Vesprey lists include exterior cleaning of any kind (*id.* at ¶¶ 4–6).

On January 24, 2016, there was a snowstorm that resulted in snowfall well over two inches (Bavaro EBT at 49 [approximating 27 inches of snow]). As that amount of snow triggered its contractual obligation, C&C responded by plowing the parking lot at the subject premises on that day (*id.*). C&C employees pushed the snow “to the perimeter, wherever [they could],” as the entire premises is paved and there is “no extra space there” to pile snow (*id.* at 50). Two days later, on January 27, Mr. Vesprey called C&C and requested additional snow removal services (*id.* at 51). The C&C employees used a “backhoe . . . to scoop up and move some snow to clear open some parking . . . and . . . [stack] the snow” (*id.*).

On the day of the plaintiff's accident the weather was “warm [and] sunny” (Gudin EBT at 18). The pile of snow by the wall of the building was melting, and the run-off water was flowing into the parking lot (*id.* at 38). At the end of the day, around 7:00pm, the water that had run-off of the snow pile had frozen in the parking lot (*id.*). Mr. Gudin testified that, as he was taking a smoke break before leaving the premises for the day, he witnessed Mr. Hasan slip and fall beside the ramp (*id.* at 37). Mr. Gudin also photographed the scene of the accident and authenticated those photographs at his deposition.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required

(*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). 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, launch[es] a force or instrument of harm [or creates or exacerbates a hazardous condition]; (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” (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Thayer v Community Services for the Mentally Retarded, Inc.*, 184 AD3d 889, 891 [2d Dept 2020]).

USSA’s Motion for Summary Judgment (Seq. 013)

USSA seeks dismissal of Dish’s third-party claims against it. USSA argues that it was not contractually obligated to maintain the condition of the parking lot, and specifically had no contractual duty to remove snow and ice. The USSA contract with Dish does not include a requirement to remove snow and ice. Additionally, the contract states that the “client [Dish] shall assume complete responsibility for any and all liability arising there from” (Security Contract at 2).

Despite the testimony of several witnesses that the USSA security officers may have salted the steps and ramp, there is no evidence that USSA employees salted or otherwise treated the parking lot. Additionally, there is no contention that the plaintiff’s accident was caused by run-off from the stairs and ramp. Notably, there is no argument in opposition to USSA’s contentions. Accordingly, USSA’s motion is granted and the third-party complaint against them is dismissed.

Matrix's Motion for Summary Judgment (Seq. 014)

Matrix was retained by Dish, pursuant to a written proposal, to perform janitorial services at the premises (Matrix Proposed Agreement at 1). I previously denied Matrix's post-answer motion to dismiss, in which it argued that it had no contract to remove snow and ice. I also granted Dish's motion to amend its third-party complaint to include an allegation that the agreement wherein Matrix incurred a duty to remove snow and ice was made verbally. Matrix argues that Dish has not produced any agreement, check, or other evidence that an agreement existed between them regarding removal of snow and ice, and that the third-party complaint against it should therefore be dismissed.

William Sylvester, the senior facility associate at Dish, testified that there were Matrix employees who cleaned the parking lot (Sylvester EBT at 38). Mr. Sylvester further testified that he was informed of Mr. Hasan's accident by Edgar Mansanet, an employee of Matrix (*id.* at 16). Mr. Sylvester's affidavit claims that "Dish delegated all responsibility for clearing snow and ice from the outside of the entrance to the building to ... Matrix" (Sylvester Aff. at ¶ 4). Additionally, Mr. Sylvester affirmed that Mr. Mansanet approached him and "confirmed to me that he was outside the building, clearing the parking lot from snow and ice, right before plaintiff's accident, and that he saw plaintiff's accident occur" (Sylvester Aff. at ¶ 10). Although Damon Cleveland, then-owner of Matrix, testified that he would be "very surprised" if Mr. Mansanet had cleaned up snow and ice, he did not know for sure whether Mr. Mansanet ever actually engaged in this activity (Cleveland EBT at 36-37).

Pursuant to *Espinal*, a triable question of fact remains as to whether Matrix created the dangerous condition that caused Mr. Hasan's accident. Mr. Sylvester's testimony about personally observing Mr. Mansanet, a Matrix employee, undertaking snow and ice removal in

the parking lot is sufficient evidence to create a triable issue as to whether Matrix caused or exacerbated the frozen run-off condition by negligently piling the snow against the ramp.

Matrix also seeks summary judgment on its counterclaims for prima facie tort and abuse of process, as well as sanctions for a frivolous suit. However, the “institution of a civil action by summons and complaint is not legally considered process capable of being abused” (*Curiano v Suozzi* (63 NY2d 113, 116 [1984])). Furthermore, “prima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides remedy”—not to violate the public policy goal of open access to the courts without fear of “retaliatory lawsuits” (*id.* at 118). Matrix has therefore failed to make out its prima facie case on both its claim of both abuse of process and of prima facie tort.

Accordingly, Matrix’s motion for summary judgment on all claims and for sanctions is denied.

C&C’s Motion for Summary Judgment (Seq. 015)

“As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties” (*Reisert v Mayne Constr. of Long Is., Inc.*, 165 AD3d 854, 855 [2d Dept 2018]). However, the *Espinal* exceptions continue to apply (*id.*). Piling snow in an area where frozen run-off could endanger pedestrians is grounds for liability of a snow removal contractor (*Gushin v Whispering Hills Condominium*, 96 AD3d 721, 722 [2d Dept 2012]).

It is undisputed that C&C performed work at the site of the accident on January 27, 2016, which was two days prior to Mr. Hasan’s fall. C&C contends that the work performed at the site on January 27 was merely restacking from the larger plowing job performed on January 24, and that Mr. Bavaro testified that C&C would not have stacked snow near the ramp (Bavaro EBT at

58). However, the photographs of the site clearly show snow piled near the ramp. It is undisputed C&C employees were at the site moving snow two days before the plaintiff's accident. Mr. Bavaro also testified that he was not personally at the site on January 27, and that his testimony was based on what his operating manager had told him happened (*id.* at 56). Mr. Bavaro's testimony about where the snow was placed on January 27 is, therefore, hearsay.

While "passive" omissions may not give rise to liability, it is not clear that C&C's actions were passive. In *Gushin*, the court found that a question of fact existed as to the liability of a snow removal contractor where the run-off from snow that was piled in a landscape circle may have frozen on the roadway and caused the plaintiff's accident (*Gushin v Whispering Hills Condominium I*, 96 AD3d 721, 722 [2d Dept 2012]). Ultimately, whether C&C's was negligent in its snow-removal undertaking is a question of fact for a jury—accordingly, C&C's motion for summary judgment is denied.

C&C also argues that the snow contract requires Dish, the customer, to "hold harmless City & County Paving Corp. to the fullest extent permitted by law" (Snow Removal Contract). However, a party cannot seek indemnification for its own negligence (*see Giangarra v Pav-Lak Contracting, Inc.*, 55 AD3d 869 [2d Dept 2008]). Since there is a question of fact as to C&C's negligence here, its motion for summary judgment on the issue of indemnification is also denied.

Dish's Motion for Summary Judgment (Seq. 016)

Dish seeks summary judgment on the grounds that it did not have an obligation to maintain the parking lot, and therefore should not be liable to 123 Plaza for the condition. As noted above, there is testimony that Mr. Vesprey kept a snow blower at the site and had previously used it to move snow in the parking lot (Jorawar EBT at 25–26). Dish's argument about its contractual obligations is moot if its employees created a duty by undertaking snow

removal in the parking lot and creating the dangerous condition. There is a question of fact as to whether Dish’s employees operated a snow blower in the parking lot, thereby creating or exacerbating the frozen run-off that ultimately caused Mr. Hasan’s fall. Dish cannot, therefore, be awarded summary judgment on the issue of indemnification.

Dish also argues that the plaintiff’s complaint should be dismissed in its entirety as no party had notice of the black ice that had formed. While “black ice is a transient condition that is difficult to see or recognize as ice . . . these unique issues do not change the burden of proof which a property owner must meet in order to establish prima facie entitlement to summary judgment” (*Steffens v Sachem Central School District*, 190 AD3d 1003, 1003 [2d Dept 2021]). Here, there are questions of fact as to whether any party created the defective condition. Additionally, there are questions about constructive notice, as there is testimony from multiple parties acknowledging that run-off refreeze after snow removal was an anticipated condition.

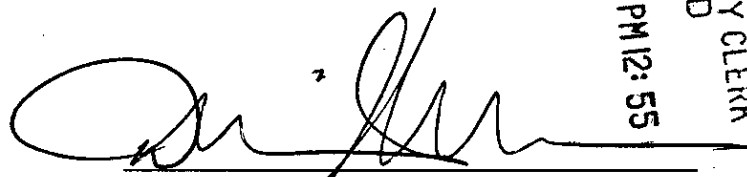
Based on the foregoing analysis, Dish’s motion for summary judgment is denied.

Conclusion

USSA’s motion for summary judgment (Seq. 013) is granted. Matrix’s motion for summary judgment (Seq. 014) is denied. C&C’s motion for summary judgment (Seq. 015) is denied due to triable questions of fact. Dish’s motion for summary judgment (Seq. 016) is denied due to triable questions of fact.

This constitutes the decision and order of the court.

September 29, 2022
DATE


DEVIN P. COHEN
Justice of the Supreme Court

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