

Sassone v 22 Main St. LLC
2022 NY Slip Op 35259(U)
June 21, 2022
Supreme Court, Rockland County
Docket Number: Index No. 033173/2019
Judge: Robert M. Berliner
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

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.

-----X
THOMAS SASSONE,

Plaintiff,

-against-

22 MAIN STREET LLC and MAPLESHADE
LANDSCAPING,

Defendants.
-----X

DECISION AND ORDER

Index No.: 033173/2019

Motion Sequence # 2

The following papers, filed on NYSCEF, were read on Defendant Mapleshade Landscaping's motion for summary judgment dismissing the Complaint pursuant to CPLR § 3212:

Notice of Motion/Affirmation in Support/Exhibits(A-K)/Statement of Material Facts	NYSCEF Doc. Nos. 27-40
Affirmation in Opposition/Stoyack Affidavit/Response to Statement of Material Facts	43-45
Reply Affirmation	52

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

This negligence action arises out of Plaintiff's alleged damages he sustained when he slipped and fell on black ice on the driveway of 22 South Main Street, New City, New York ("the Premises"). On March 7, 2019, Plaintiff arrived at the Premises and walked from his car to the office around 8:00 – 8:30 am. He did not observe any black ice at the accident area. Around 8:00 pm later that day, Plaintiff left his office and walked to his car. Plaintiff slipped and fell on his way to his car in the driveway. After falling, he noticed a patch of black ice, which he allegedly slipped on. Plaintiff alleges that the black ice formed due to snow which melted refroze. Defendant 22 Main Street LLC is the property owner of the Premises. Defendant 22 Main Street LLC contracted with Defendant Mapleshade to provide snow removal services on the Premises ("Snow Removal

Agreement”). Defendant 22 Main Street LLC’s Answer asserts crossclaims sounding in contribution and common law indemnification against Defendant Mapleshade.

Now before the Court is Defendant Mapleshade’s motion for summary judgment dismissing the Complaint and Defendant 22 Main Street LLC’s crossclaims. In support, Defendant Mapleshade argues that it did not owe a duty to Plaintiff because its Snow Removal Agreement does not create tort liability and none of the *Espinal* exceptions apply to hold it liable for Plaintiff’s damages. Defendant Mapleshade argues that Plaintiff’s Complaint and Bill of Particulars failed to allege any of the *Espinal* exceptions, which could create a duty of Defendant Mapleshade Landscaping to Plaintiff. As such, according to Defendant Mapleshade, it is not required to affirmatively demonstrate that any of the *Espinal* exceptions do not apply.

In opposition, Plaintiff argues that he did allege the *Espinal* exception that Defendant 22 Main Street LLC entirely displaced its duties to maintain the premises to Defendant Mapleshade by way of the Snow Removal Contract. Therefore, according to Plaintiff, Defendant Mapleshade must negate the applicability of that *Espinal* exception. Plaintiff further argues that there is a triable issue of fact as to whether Defendant Mapleshade assumed the duties of Defendant 22 Main Street LLC pursuant to the deposition testimonies of Defendant 22 Main Street LLC’s Daniel Pildes, who works for Defendant 22 Main Street LLC in a management capacity, and Defendant Mapleshade’s principal Matthew Fierman.

“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.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]. “Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact.” *Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]. Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011]. First,

the Court determines whether to grant Defendant Mapleshade summary judgment dismissing the Complaint.

I. Whether to Grant Defendant Mapleshade Summary Judgment Dismissing the Complaint

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, Defendant Mapleshade established that Plaintiff was not a party to the Snow Removal Agreement and that he did not expressly plead any of the *Espinal* exceptions in his Complaint or Bill of Particulars. Plaintiff argues that he expressly plead the *Espinal* factor (that Defendant Mapleshade assumed Defendant 22 Main Street LLC's duty to maintain the premises safely) based upon the language: “Plaintiff also claims that the defendants have a duty to perform reasonable inspections of (ice check, [sic] should they be contractually obligated to do so.” Bill of Particulars ¶ 3. However, the Court does not agree that this language *expressly* pleads that

Defendant Mapleshade entirely displaced the duty to maintain the Premises safely. Accordingly, Defendant Mapleshade established its prima facie burden entitlement to summary judgment.

In opposition, Plaintiff argues that based upon the testimonies of Pildes and Fierman, Defendant Mapleshade completely assumed the duty of snow removal from the driveway and parking lot areas. However, Plaintiff's theory of the defective condition that caused his fall is the defects in the drainage system and pavement that permitted precipitation to pool and freeze on the driveway. As Defendant Mapleshade contends, the Snow Removal Agreement does not include services for inspecting the pavement or drainage system or making any repairs thereto. Regardless of whether the Defendant Mapleshade had an exclusive duty as to snow removal on the Premises, the services contracted for under the Snow Removal Agreement do not concern the alleged recurrent condition of defects in the drainage system or pavement. Therefore, the Snow Removal Agreement was not so comprehensive and exclusive so as to entirely displace Defendant 22 Main Street LLC's duty to Defendant Mapleshade to maintain the premises safely. *Compare Corrales v Reckson Assoc. Realty Corp.*, 55 AD3d 469 [1st Dept 2008] with *Sampaiolopes v. Lopes*, 172 AD3d 1128 [2d Dept 2019]. Next, the Court determines whether to grant the portion of Defendant Mapleshade's motion seeking summary judgment dismissing the crossclaims against it.

II. Whether to Grant Defendant Mapleshade Summary Judgment Dismissing Defendant 22 Main Street's Crossclaims

Summary judgment dismissing a crossclaim for contribution is appropriate where a landscaping contractor establishes "that it did not owe a duty of reasonable care to the [property owner] independent of its contractual obligations or that a duty was owed to the injured plaintiff, a breach of which contributed to his injuries." *Hites v Toys "R" Us, Inc.*, 33 AD3d 759 [2d Dept 2006]. Whereas "an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties[.]" *Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1030 [2d Dept 2009][internal citations omitted]. "If, in fact, an injury can be attributed solely to negligent performance or nonperformance of an act solely within the province of the contractor, then the

contractor may be held liable for indemnification to an owner.” *Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2d Dept 2008][internal citations omitted].

Here, Defendant Mapleshade established its prima facie burden for summary judgment dismissing Defendant 22 Main Street LLC’s crossclaims. Specifically, Defendant Mapleshade established that it did not owe a duty of reasonable care to Defendant 22 Main Street LLC independent of its contractual obligations and that it did not owe a duty to Plaintiff as the injured party and that a breach of this duty contributed to the alleged injuries. *See Roach v AVR Realty Co., LLC*, 41 AD3d 821, 825 [2d Dept 2007]. As for the crossclaim for common law indemnification, Defendant Mapleshade established that Plaintiff’s injuries cannot be attributed solely to the negligent performance or nonperformance of its duties solely within its province because Plaintiff proffered proof that the cause of his fall was due to the defects in drainage and pavement on the Premises, of which were not within Defendant Mapleshade’s responsibilities as the snow removal contractor for the Premises. *Cf. Wheaton v East End Commons Assoc*, 50 AD3d 675 [2d Dept 2008]. In opposition, Defendant 22 Main Street LLC failed to make any arguments opposing Defendant Mapleshade’s motion. Therefore, its crossclaims should be dismissed.

All arguments raised and materials submitted on this matter have been considered by the Court, notwithstanding the absence of specific reference thereto. All requests for relief not explicitly granted herein are denied, in the Court’s discretion.

Based upon the foregoing, it is

ORDERED that Defendant Mapleshade Landscaping’s motion for summary judgment dismissing the Complaint and the crossclaims as against it is granted and the same is hereby dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
June 21, 2022

ENTER



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

To:

Counsel of record via NYSCEF