

Keung v Westchester County
2024 NY Slip Op 35245(U)
March 25, 2024
Supreme Court, Westchester County
Docket Number: Index No. 63753/2022
Judge: Nancy Quinn Koba
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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 WESTCHESTER

-----X
MARIYA KEUNG,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 63753/2022
Mot. Seq. Nos. 1,2

WESTCHESTER COUNTY and TOWN OF PELHAM,

Defendants.

-----X
TOWN OF PELHAM,

Third-Party Plaintiff,

-against-

D. RAGNO LANDSCAPING CORP.,

Third-Party Defendant.

-----X
QUINN KOBA, J.

By notice of motion, third-party defendant, D.Ragno Landscaping Corp. ("Ragno"), seeks an order, pursuant to CPLR 3212, dismissing the complaint, the third-party complaint, and any and all cross-claims, together with such other and further relief that is just and proper (the "Ragno Motion"). Defendant/third-party plaintiff, Town of Pelham (the "Town"), partially opposes the Ragno Motion.

By notice of motion, the Town seeks an order, pursuant to CPLR 3212, dismissing the complaint and for such other and further relief as is just and proper. (the "Town Motion"). Plaintiff opposes the Town Motion. Ragno joins in so much of the Town Motion seeking dismissal of the complaint under CPLR 3212.

The following documents were considered in determining the instant motions:

PAPER

NYSCEF DOC. NO.

The Ragno Motion

Notice of Motion, 38-54
 Statement of Material Facts,
 Affirmation in Support,
 Exhibits A-N

Affirmation in Opposition (Town), 74-75
 Exhibit 1

Reply Affirmation 76

The Town Motion

Notice of Motion, 55-67
 Affirmation in Support,
 Statement of Material Facts,
 Exhibits A-H,
 Memorandum of Law,
 Affidavit of Service

Affirmation (Ragno) 69

Affirmation in Opposition (Keung) 77-87
 Statement of Material Facts,
 Exhibits A-F

Reply Affirmation, 89-90
 Exhibit I

NYSCEF Files

Based upon the foregoing, the Court determines the motions as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On or about August 18, 2022, plaintiff commenced this personal injury action by filing a summons and complaint. She seeks to recover damages for injuries she allegedly sustained, on or about February 4, 2022, when she slipped and fell on ice in the parking lot of the Town Clerk's Office, located at 20 Fifth Avenue, Pelham (the "Town Parking Lot"). Issue was joined on September 8, 2022 as to the Town when it filed its Answer. Issue was joined on September 19, 2022 as to defendant, Westchester County (the "County"), when it filed its Answer. (The primary action was discontinued as to the County pursuant to a stipulation of discontinuance filed on May 3, 2023.)

On or about April 18, 2023, the Town filed a third-party complaint against Ragno. The third-party complaint alleges causes of action sounding in common-law negligence and contribution. Issue was joined thereon when Ragno filed its Answer on June 27, 2023. On or about December 1, 2021, the Town and Ragno entered into a contract for Ragno to provide

"winter event services," including snow removal and salt treatment services (the "Winter Services Contract"). The Winter Services Contract identifies the Town properties covered thereby, including the Town Parking Lot, and covers, in relevant part, the service period from December 1, 2021 through March 20, 2022. The Winter Services Contract provides for snow removal and salt treatment services to be performed on surfaces including parking, driveway, walkway and sidewalk areas. The Winter Services Contract also provides, in relevant part, that "Snow will be plowed on an ongoing basis through duration of storm to allow for the safest possible vehicular and pedestrian travel," and a "No automatic return policy," which provides that "Following removal of snow, should any snow melt and re-freeze onto plowed surface, **the designated contact person at [] [the Town]** is to contact [] **[D. Ragno]**" (Exhibit K on the Ragno Motion).

As a preliminary matter, the Court observes plaintiff's affirmation in opposition to the Ragno Motion does not contain a certificate of compliance regarding length and word count as required by the Rules for New York State Trial Courts that went into effect on February 1, 2021 (see 22 NYCRR § 202.8-b). Although this omission will be overlooked in this instance, counsel is advised that compliance with this rule is expected for all future motions.

On another preliminary note, the Court observes the Town did not submit a counter-statement of material facts as required 22 NYCRR § 202.8-g. For purposes of the instant motion only, the Court will excuse the Town's omission in light of the Town having submitted a statement of material facts on the Town Motion. Counsel is advised that compliance with this rule is expected for all future motions.

ANALYSIS

Summary Judgment standard

"On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotations and citations omitted]).

Once a prima facie showing has been made, however, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution or tender an acceptable excuse for the failure to do so; mere expressions of hope are insufficient to raise

a genuine issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d at 505 [internal citation omitted]). "[I]n deciding a motion for summary judgment, issue-finding, rather than issue-determination, is the key to the procedure" (*id.* [internal quotation marks and citation omitted]). Summary judgment is not warranted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see *Karel v Pizzorusso*, 215 AD3d 738 [2d Dept 2023]).

A. *The Town Motion*

"A defendant moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, *prima facie*, that it neither created the snow or ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition (internal quotation marks and citation omitted). This burden may be satisfied by presenting evidence that there was a storm in progress when the injured plaintiff allegedly slipped and fell (internal quotation marks and citations omitted). Under the so-called 'storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm (internal quotation marks and citations omitted)" (*Cassino-Sharp v Whispering Hills Home Owners Assn., Inc.*, 219 AD3d 457, 458 [2d Dept 2023]).

Here, the Town failed to tender sufficient evidence establishing its *prima facie* entitlement to judgment as a matter of law dismissing the complaint. The Town's submissions in support of the Town Motion, including the transcripts from the depositions of Keung and Town Supervisor Daniel McLaughlin ("McLaughlin") and the affidavit of the Town's expert, Consulting Forensic Meteorologist Mark L. Kramer ("Kramer"), present triable issues of facts as to whether the Town is protected under the "storm in progress" rule, whether the Town created the icy condition that allegedly caused plaintiff's accident, and whether the Town had actual or constructive notice of the subject icy condition.

As is relevant here, plaintiff's 50-h hearing and deposition testimonies show that, between 6:15 p.m. and 7:15 p.m., plaintiff was walking through the Town Parking Lot when she slipped and fell to the ground. The weather conditions were "quite cold," "fairly dark," and drizzling. Plaintiff observed the icy condition that caused her accident after she fell. She did not observe any sand or salt on the Town Parking Lot's surface.

McLaughlin's deposition testimony shows that Philip DeSimone ("DeSimone") is the Town employee responsible for inspecting the Town areas, including the Town Parking Lot, determining whether additional winter weather services, such as salting, under the Winter Services Contract are needed, and, if such additional services are needed, contacting Ragno to perform the same. McLaughlin did not know whether DeSimone inspected the Town areas, including the Town Parking Lot, during the relevant period. Nor did McLaughlin know if Ragno performed winter weather services under the Winter Services Contract on the Town Parking Lot during the relevant period.

Nor did Kramer's affidavit resolve the issues as to whether there was an ongoing storm at the time of plaintiff's accident, whether the Town created the icy condition that allegedly caused plaintiff's accident, and whether the Town had actual or constructive notice of the subject icy condition. Kramer's opinions and conclusions contained in his affidavit, (the "Kramer Affidavit" [Exhibit 65]), are based upon his review, *inter alia*, of certified meteorological data for the period February 1, 2022 through the date of the accident. Based on a review of the foregoing, Kramer opined that no precipitation fell on February 1, 2022 or February 2, 2022, .53 inches of rain had fallen by the end of the day on February 3, 2022 at Westchester County Airport and continued into February 4, 2022, and no snow or ice remained on the ground in Pelham as of 7 a.m. on February 4, 2022. Kramer further opined that, on February 4, 2022, the temperature dropped throughout the day and into the night to freezing or below "to support an accumulation of glaze (black ice) due to the falling precipitation" (Kramer Affidavit [Exhibit H]). Kramer concluded, in sum and substance, that "the sheet of black ice that allegedly caused the accident formed after 3 p.m. on the date of the accident "due to rain that transitioned to light freezing rain/freezing drizzle during the afternoon which continued into the evening as air temperatures fell below freezing" (*Id.*). The Kramer Affidavit, however, did not "contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor" (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 [2008][internal quotation marks and citations omitted]). As such, Kramer's opinions and conclusions do "not constitute proof in admissible form sufficient" to demonstrate the absence of any material issues of fact (see *Arredondo v Valente*, 94 AD3d 920, 922 [2d Dept 2012]).

As the Town failed to make a *prima facie* showing, it is not necessary for the Court to assess the sufficiency of the opposition papers.

B. The Ragno Motion

Negligence standards

"The elements of a cause of action alleging negligence are (1) the existence of a duty on the defendant's part as to the plaintiff; (2) a

breach of this duty; and (3) an injury to the plaintiff as a result thereof (internal quotation marks and citations omitted). A defendant moving for summary judgment dismissing a cause of action alleging negligence may generally sustain his or her *prima facie* burden by negating a single essential element of that cause of action (internal quotation marks and citations omitted)" (*McKay v Town of Southampton*, 220 AD3d 59, 63-64 [2d Dept 2023]).

With respect to third party service providers, "a party who enters into a contract to render services does not assume a duty of care to third parties outside the contract (internal quotation marks and citations omitted)," (*Abramson v Janowski's Hamburgers, Inc.*, 216 AD3d 605,606 [2d Dept 2023], liability for a dangerous condition on real property "can also be imposed upon a party that creates a dangerous condition or defective condition (internal citations omitted)" (*Id.*; see also *Cooper v American Carpet & Restoration Servs., Inc.*, 69 AD3d 552, 554 [2d Dept 2010])).

Here, Ragno failed to tender sufficient evidence establishing its *prima facie* entitlement as a matter of law dismissing the complaint and third-party complaint. The admissible evidence submitted by Ragno did not eliminate triable issues of material facts as to whether it owed a duty to plaintiff, whether Ragno performed its contractual snow and ice removal services during the relevant period, whether there was a triggering event under the Winter Services Contract obligating Ragno to remedy the icy condition of the Town Parking Lot during the relevant times, whether the Town contacted Ragno to provide additional contractual snow or ice remediation services at the Town Parking Lot, and whether Ragno created a dangerous condition on the Town Parking Lot.

McLaughlin's deposition testimony shows the following. McLaughlin has never seen any invoices from Ragno. McLaughlin did not have personal knowledge that Ragno performed its contractual snow and ice removal services during the relevant times. McLaughlin did not know if DeSimone inspected the Town Parking Lot or contacted Ragno about performing additional contractual ice or snow remediation services on the Town Parking Lot during the relevant times. Nor does the certified meteorological data submitted by Ragno eliminate all triable issues of material facts.

Further, the affirmation of Ragno's attorney, Marc E. Stiefeld (the "Stiefeld Affirmation") lacks probative value because it is not based upon personal knowledge (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Therefore, the same does not eliminate triable issues of facts. In light of Ragno's failure to meet its *prima facie* burden, it is not necessary for the Court to assess the sufficiency of the opposition submissions.

All remaining arguments raised and evidence submitted on the instant motions have been considered by this Court, notwithstanding the absence of specific reference thereto.

Accordingly, it is hereby

ORDERED that third-party defendant, D.Ragno Landscaping Corp.'s motion is denied in all respects; and it is further

ORDERED that defendant, Town of Pelham's motion is denied in all respects; and it is further

ORDERED that the parties shall appear in Courtroom 1602 for an in-person Settlement Conference on April 29, 2024, at 9:30 a.m., and **each party shall timely file the settlement form annexed to** the Court Notice uploaded to NYSCEF on September 11, 2023 (NYSCEF Doc. No. 37-1).

The foregoing shall constitute the Decision and Order of the Court in this matter.

DATED: White Plains, New York
March 25, 2024

E N T E R:



HON. NANCY QUINN KOBA, J.S.C.

TO: All Counsel VIA NYSCEF