

Cicalese v JFM Concrete Corp.
2024 NY Slip Op 35606(U)
June 28, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 619729/2020
Judge: Maureen Liccione
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SHORT FORM ORDER

INDEX No. 619729/2020CAL. No. 202301161MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 78 - SUFFOLK COUNTY**PRESENT:**Hon. MAUREEN T. LICCIONE
Justice of the Supreme CourtMOTION DATE 11/20/23 (001)MOTION DATE 2/16/24 (002)ADJ. DATE 2/28/24 (001)ADJ. DATE 3/20/24 (002)

Mot. Seq. # 001 MotD

Mot. Seq. # 002 MD

-----X
ANTHONY CICALESSE,

Plaintiff,

- against -

JFM CONCRETE CORP., JFM
MAINTENANCE INC., BRUNO
DEALMEIDA and BRIGHTVIEW
LANDSCAPE SERVICES, INC.,Defendants.
-----X

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Upon the following papers read on these motions for summary judgment and for a default judgment: Notice of Motion and supporting papers by defendant Brightview Landscape Services, Inc. (001), filed October 10, 2023; Answering Affidavits and supporting papers by plaintiff, filed December 20, 2023; Replying Affidavits and supporting papers by defendant Brightview Landscape Services, Inc., filed February 6, 2024; Answering Affidavits and supporting papers by defendants JFM Maintenance, Inc. and Bruno Dealmeida, filed February 6, 2024; Replying Affidavits and supporting papers by defendant Brightview Landscape Services, Inc., filed February 16, 2024; Answering Affidavits and supporting papers by plaintiff (002), filed February 16, 2024; Answering Affidavits and supporting papers by defendant JFM Concrete Corp., filed March 12, 2024; it is

ORDERED that theses motions are consolidated for purposes of this determination; and it is

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ORDERED that the motion by defendant Brightview Landscape Services, Inc. for, inter alia, summary judgment dismissing the complaint and all cross-claims is granted to the extent set forth herein and is otherwise denied; and it is further

ORDERED that the motion by plaintiff for an order, pursuant to CPLR 3215, granting leave to enter a default judgment against defendant JFM Concrete Corp., is denied; and it is further

ORDERED that the Court, on its own motion, pursuant to CPLR 3215 (c), dismisses the complaint as against JFM Concrete Corp. as abandoned.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Anthony Cicalese as a result of a motor vehicle accident that occurred on New Highway in Farmingdale, New York, on January 4, 2018. The accident allegedly occurred during a snowstorm, when a bobcat owned by defendant JFM Maintenance Inc. and operated by defendant Bruno Dealmeida came into contact with a vehicle operated by plaintiff. Plaintiff also asserts causes of action against defendant JFM Concrete Corp., which has not appeared in this action, and defendant Brightview Landscape Services, Inc. (hereinafter Brightview), which allegedly subcontracted snow removal services to defendant JFM Maintenance Inc. Brightview asserts a cross-claim against its codefendants, and JFM Maintenance and Dealmeida asserts a cross-claim against JFM Concrete Corp. and Brightview.

Brightview now moves for an order granting summary judgment dismissing the complaint against it and ordering JFM Maintenance Inc. to pay its attorneys' fees, arguing that the complaint and cross-claims should be dismissed as against it because it did not owe plaintiff a duty of care, did not own or operate the bobcat, and did not control the means and methods of JFM Maintenance's snow removal work. In support of the motion, Brightview submits, among other things, the pleadings, the parties' deposition transcripts, photographs, and a "Snow Service Partner Agreement" (hereinafter Agreement) between it and JFM Maintenance. Plaintiff argues in opposition that Brightview was negligent "in the direction and control over the [codefendants]." Plaintiff submits, among other things, the pleadings, the parties' deposition transcripts, photographs, and plaintiff's own affidavit.

Plaintiff testified that the accident occurred during a blizzard, when there was about a foot of snow on the ground. He testified that as he was driving, a bobcat with an attached snowplow "came flying out into the road in [his] path," that he applied his brakes and swerved to the left, but that he "ended up hitting the bucket of the machine." Plaintiff testified that after the accident, the driver of the bobcat called his supervisor, who came to the scene after approximately 20 minutes, and that the supervisor then "called Brightways, the landscaping company." He further testified that the supervisor then "basically screamed at his employee," and that the supervisor said to the bobcat driver, "I told you not to leave the [] parking lot." Plaintiff testified that a man from "Brightways or Brightview" came to the scene and told plaintiff "the name of the company that they subbed the snow out to," because "they subbed the snow removal out to a separate company, that's who was doing the snow removal, JFM Construction."

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Dealmeida testified that on the day of the accident he was operating a bobcat owned by his employer, JFM Maintenance. He testified that he received instructions from a supervisor regarding his responsibilities, which were to clean the parking lot area of the airport. Dealmeida testified that his co-worker was in a “big machine,” and that he used a bobcat “to clean around the cars and the entrance where the big machine couldn’t get.” He further testified that his co-worker instructed him “to make a pile on one side of the parking lot and clean all the parking spots around the cars and to clean around the entrance.” Dealmeida stated that after the accident, he called “the guy who was with [him] because he was in charge.”

John Cuniha testified that he is the president of JFM Maintenance Inc. and JFM Concrete Corp., and that JFM Maintenance is the entity that was charged with doing work at Republic Airport in January of 2018. He testified that JFM Maintenance was subcontracted by Brightview to perform snow removal services at Republic Airport. When asked whether Brightview controlled, directed, or supervised the work done at Republic Airport, Mr. Cuniha stated that they did, and when asked how, he testified, “[w]ell, it’s just – if stuff needs to be done, they call, and we go and do it.” He testified that Brightview did not provide equipment to JFM Maintenance, and that Brightview did not give JFM Maintenance any instructions on how to operate the bobcat.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 48 NYS2d 316 [1985]). If such a showing is made, the burden shifts to the party opposing the motion for summary judgment, who must proffer evidence in admissible form sufficient to establish the existence of any material issue of fact which requires a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138, 746 NYS2d 120, 122 [2002]). Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138, 746 NYS2d 120, 122 [2002]; *Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 781, 183 NYS3d 428, 430 [2d Dept 2023]). There are three exceptions to this rule, where the contracting party may be found to have assumed a duty of care: “(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; (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, 746 NYS2d 120, 123 [internal quotation marks and citations omitted]; *Reisert v Mayne Constr. of Long Is., Inc.*, 165 AD3d 854, 855, 85 NYS3d 490, 491 [2d Dept 2018]). “Where the pleadings do not allege facts which would establish the applicability of any of the *Espinal* exceptions, a defendant is not required to affirmatively demonstrate that the exceptions do not apply in order to

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establish its prima facie entitlement to judgment as a matter of law” (*Canciani v Stop & Shop Supermarket Co., LLC*, 203 AD3d 1011, 1013, 166 NYS3d 174, 177 [2d Dept 2022] [internal quotations omitted]).

Here, Brightview has established its prima facie entitlement to summary judgment dismissing the complaint by submitting evidence that there was no privity of contract between it and plaintiff (*see Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 183 NYS3d 428). Additionally, as the pleadings fail to allege facts that would establish the applicability of any of the *Espinal* exceptions, Brightview was not required to prove that the exceptions did not apply (*see Reisert v Mayne Constr. of Long Is., Inc.*, 165 AD3d 854, 85 NYS3d 490; *Koslosky v Ross-Malmut*, 149 AD3d 925, 52 NYS3d 400 [2d Dept 2017]). Regardless, none of the *Espinal* exceptions are applicable here. Brightview submitted evidence that establishes that it subcontracted with JFM Maintenance for snow removal services; that Brightview did not own or operate the bobcat; that Brightview did not instruct JFM Maintenance or Bruno Dealmeida on how to operate the bobcat; and that it did not control the manner in which JFM Maintenance performed snow removal.

Plaintiff failed to raise a triable issue of fact in opposition. Plaintiff alleges that Brightview was negligent in its direction and control over its codefendants. Plaintiff also submits his own affidavit, wherein he states, for the first time, that he had “several” conversations with Brightview, and that he “came to learn that Brightview Landscape Services, Inc. was supervising the snow removal for that area.” However, his deposition testimony was bereft of any statements that Brightview was supervising the snow removal services at the airport. Moreover, the evidence establishes that at the time of the accident Dealmeida was being supervised by his co-worker from JFM Maintenance, who drove him to the work site, gave him instructions on how to perform the snow removal, and allegedly indicated after the accident that Dealmeida had been instructed not to leave the parking lot. Therefore, plaintiff has failed to establish that Brightview directed or controlled the snow removal at the airport.

As to Brightview’s application to recover attorneys’ fees from JFM Maintenance, “[i]n New York, attorneys’ fees are ‘merely an incident of litigation and [are] not recoverable absent a specific contractual provision or statutory authority’” (*Matter of Lillian G.*, 208 AD3d 871, 874, 174 NYS3d 451, 454-455 [2d Dept 2022], quoting *Levine v Infidelity, Inc.*, 2 AD3d 691, 692, 770 NYS2d 83, 84 [2d Dept 2003]). Moreover, “a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491, 549 NYS2d 365, 367 [1989]; *see LG Funding, LLC v Johnson & Son Locksmith, Inc.*, 170 AD3d 1153, 1154, 96 NYS3d 640, 642 [2d Dept 2019]). Here, the Agreement between Brightview and JFM Maintenance states that “[s]ervice partner agrees to indemnify . . . Brightview . . . from and against any and all actual, alleged, or threatened claims, losses, settlements, fines, liabilities, deficiencies, costs, or expenses (including reasonable attorneys’ fees) . . . that are incurred or otherwise required to be paid by any such Indemnified Party, and result from . . . (i) the performance of the Service as a result of Service Partner’s acts or omissions.” Brightview has failed to establish that its claim for attorneys’ fees resulted from JFM Maintenance’s “acts or omissions,” and its motion for attorneys’ fees is therefore denied.

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Accordingly, Brightview's motion for summary judgment in its favor dismissing the complaint and cross-claims against it is granted, and is otherwise denied.

Plaintiff moves, pursuant to CPLR 3215, for leave to enter a default judgment against JFM Concrete Corp. In support of its motion, plaintiff submits, among other things, the pleadings, an uncertified copy of the police report, the parties' deposition transcripts, and plaintiff's affidavit. JFM Concrete Corp. submits its attorney's affirmation in opposition, wherein it requests that the complaint be dismissed against it as abandoned based on plaintiff's failure to move for a default judgment within one year.

Pursuant to CPLR 3215 (c), if a plaintiff fails to seek entry of a default judgment against a party within one year of such party's default, "the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." "The language of CPLR 3215 (c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts 'shall' dismiss claims for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned" (*HSBC Bank USA, N.A. v Lem*, 194 AD3d 1027, 1028, 149 NYS3d 214, 216 [2d Dept 2021] [internal citation omitted], quoting *HSBC Bank USA, N.A. v Grella*, 145 AD3d 669, 671, 44 NYS3d 56, 58 [2d Dept 2016] [internal quotation marks omitted]; see *Wells Fargo Bank v Aucapina*, 193 AD3d 1106, 147 NYS3d 608 [2d Dept 2021]). However, the failure to timely seek entry of a default judgment may be excused upon a showing of sufficient cause why the complaint should not be dismissed, which requires plaintiff to provide a reasonable excuse for the delay in moving for leave to enter a default judgment, and to demonstrate that it has a potentially meritorious action against the defaulting party (see *Deutsche Bank Natl. Trust Co. v Brathwaite*, 197 AD3d 557, 153 NYS3d 55 [2d Dept 2021]; *U.S. Bank N.A. v Moster*, 196 AD3d 663, 152 NYS3d 459 [2d Dept 2021]).

Here, plaintiff has failed to provide a reasonable excuse for his delay in moving for a default judgment (see *U.S. Bank N.A. v Dickerson*, 223 AD3d 930, 205 NYS3d 100 [2d Dept 2024]; *Shields v Cohen*, 222 AD3d 1019, 203 NYS3d 139 [2d Dept 2023]). Plaintiff's attorney's affirmation states that, after JFM Maintenance and Bruno Dealmeida filed their answer on or about September 16, 2021, "the Affirmant's office was under the impression that said Verified Answer was being submitted on behalf of JFM Concrete Corp., JFM Maintenance Inc. and Bruno Dealmeida, and as such did not move for Default within (1) one year." However, the Answer states it is submitted on behalf of "JFM Maintenance, Inc. and Bruno Dealmeida," it was served upon JFM Concrete Corp., it asserts a cross-claim against JFM Concrete Corp., and it contains a Demand for Insurance Information against JFM Concrete Corp. Moreover, at John Cuniha's June 2, 2023 deposition, he testified that JFM Maintenance Inc. is a separate entity from JFM Concrete, that JFM Maintenance was the entity responsible for doing the work at Republic Airport in January 2018, and that JFM Concrete did not have any responsibilities with respect to said work. Furthermore, Mr. Cuniha's attorney stated that his firm "only represent[s] JFM Maintenance and Bruno [Dealmeida] in this action. We don't represent Concrete." Finally, plaintiff's proffered excuse is unconvincing because in its request for judicial intervention, filed on January 5, 2022, it affirmed that JFM Concrete Corp. was unrepresented and that issue had not been joined.

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Accordingly, plaintiff's motion for leave to enter a default judgment against JFM Concrete Corp. is denied, and the complaint as against it is dismissed as abandoned (*see* CPLR 3215 [c]; ***U.S. Bank N.A. v Moster***, 196 AD3d 663, 152 NYS3d 459; ***GMAC v Minewiser***, 115 AD3d 707, 981 NYS2d 580 [2d Dept 2014]).

Dated: June 28, 2024


J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION

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