

Kebreau v Crescent Land Dev. Assoc., LLC
2024 NY Slip Op 35679(U)
September 6, 2024
Supreme Court, Nassau County
Docket Number: Index No. 604419/2021
Judge: Eileen C. Daly-Sapraicone
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SUPREME COURT – STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. EILEEN C. DALY-SAPRAICONE,
JUSTICE OF THE SUPREME COURT

-----X
FARADINE KEBREAU,
Plaintiff,

TRIAL/TAS, PART 21
Index No.: 604419/2021

-against-

Motion Seq. No.: 003, 004
Motion Submitted: 03/06/24

DECISION AND ORDER

CRESCENT LAND DEVELOPMENT
ASSOCIATES, LLC, TGI FRIDAY'S INC. and
TGI FRIDAY'S NY, LLC,
Defendants.

-----X
CRESCENT LAND DEVELOPMENT ASSOCIATES,
LLC,
Third Party Plaintiff,

-against-

KPCLANDSCAPING, INC.,
Third Party Defendant.

-----X
The following papers were read on this motion

NYSCEF
DOCUMENT NUMBERS

Notice of Motion, Statement of Material Facts, Affirmation, Exhibits	92 – 110
Affirmation in Opposition, Counter-Statement of Material Facts	113 – 114
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Upon the foregoing papers, Defendant/Third Party Defendant KPC LANDSCAPING INC. (hereinafter, KPC) moves this Court for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing Plaintiff FARADINE KEBREAU (hereinafter, Plaintiff)'s complaint and for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing CRESCENT LAND

DEVELOPMENT ASSOCIATES LLC's (hereinafter, Crescent) cross claims for contractual indemnification, common law indemnification, and contribution; and defendants Crescent (hereinafter, Motion Sequence No. 003), TGI FRIDAY'S INC., and TGI FRIDAY'S NY, LLC (hereinafter collectively, TGI Friday's) move this Court for an Order pursuant to CPLR § 3212 for summary judgment on Crescent's third party complaint and/or cross-claims against KPC for contractual defense and indemnification (including reimbursement of attorneys' fees and court expenses) pursuant to KPC's snow removal service agreement (hereinafter, the Agreement) and for an Order pursuant to CPLR § 3212 for summary judgment dismissing all claims and cross claims against TGI Friday's (hereinafter, Motion Sequence No. 004). The motions are consolidated for disposition and determined as set forth hereinafter.

Background and Relevant Facts

This action arises from a slip and fall incident on February 5, 2021, where Plaintiff was allegedly injured when she slipped on slushy snow in the parking lot adjacent to TGI Friday's located in the Crescent Plaza shopping center. Crescent owns the shopping center, including the parking lot. TGI Friday's is the lessee of the restaurant adjacent to the parking lot. KPC is the snow removal contractor for Crescent Plaza.

On the date of the incident, Plaintiff went to TGI Friday's to pick up her takeout order. When she exited her vehicle in the parking lot, she slipped on slushy snow. Plaintiff testified, while on the ground she noticed there was snow all around her on the parking lot and the sidewalk of the restaurant (NYSECF Doc # 102, p. 32, 124).

Pursuant to the lease agreement between Crescent and TGI Friday's, TGI Friday's was not responsible for snow and ice removal in the parking lot. (NYSECF Doc # 138). TGI Friday's was responsible for clearing ice and snow from the sidewalks abutting TGI Friday's.

Pursuant to the snow removal contract for the parking lot owned by Crescent where Plaintiff's incident occurred, a description of KPC's services is described as follows:

- A. KPC is authorized and directed to automatically provide snow removal services when snow accumulation reaches two inches (2"). KPC's snow removal service shall begin immediately once an accumulation of two inches (2") of snow has been reached...
- D. KPC is directed to monitor weather conditions at the job location, and when two inches (2") of snow accumulation has not been reached, KPC will use its best efforts to contact Customer [Crescent] to advise its recommendation concerning the performance of salt/sand services... (NYSECF Doc # 18).

Additionally, pursuant to the snow removal contract KPC shall obtain and maintain at its cost and expense throughout the term of the Agreement various insurance coverages and limits, including commercial general liability insurance, with the policy endorsed to cover Crescent as an Additional Insured. The policy shall contain a waiver of subrogation

endorsement in favor of Crescent. (NYSECF Doc # 18).

Furthermore, pursuant to the snow removal contract,

KPC shall, to the fullest extent permitted by law at its own cost and expense, **defend, indemnify and hold harmless Customer Crescent Land Development Associates, LLC, Broadwall Management Corp., and The Feil Organization, and their Directors, Officers, Employees, Servants, Representatives and Agents, from and against any and all claims, allegations, losses (including attorney fees, witnesses' fees and all court costs), damages, expenses and liabilities (including statutory liability), in connection with any injury and/or death of any person or damage to or loss of any property, which arise out of or relate to KPC's (or any of its subcontractor's) snow removal services set forth herein,** or are caused in whole or in part directly or indirectly, by any negligent or wrongful act, error or omission, or breach of this agreement by KPC, or any activity of KPC and/or its Subcontractors, and their Employees, Agents, and Representatives...(NYSECF Doc # 18 [emphasis added]).

Michael Smith (hereinafter, Smith), KPC's on site supervisor for snow removal, testified at his deposition that he recalled removing snow from Crescent Plaza in January and February 2021 as it caused a state of emergency. Smith testified it was no longer snowing on February 5, 2021 (NYSECF Doc # 106, p. 24). Smith testified he applied salt to the surface of the parking lot 15-20 times from January 31, 2021 to February 5, 2021 (NYSECF Doc # 106, pp. 55-56). Smith testified that while he applied salt, he also visually inspected the parking lot to determine where and when additional salt was needed (NYSECF Doc # 106, pp. 57-59). Smith testified he monitored and inspected conditions of the parking lot until all of the snow was gone and the temperature was over 32 degrees (NYSECF Doc # 106, p. 83). During Smith's continued deposition testimony, he referred to the Storm Logs (NYSECF Doc # 136) and testified that on February 5, 2021, he spot salted the parking lot (NYSECF Doc # 107, pp. 20-21). Smith did not perform any snow removal on February 5, 2021 (NYSECF Doc # 136).

Applicable Law

It is well settled that on a motion for summary judgment the moving party bears the burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once such a showing has been made, the burden shifts to the non-moving party to demonstrate the existence of material issues of fact warranting trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Failure of the non-moving party to present sufficient evidence of a factual issue requires that the motion be granted (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"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 and ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition. Under the 'storm in progress' rule, a property owner will not be held responsible for accidents caused by snow or ice that accumulates on its premises during a storm 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. However, once a property owner elects to engage in snow removal activities, the owner must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm" (*Talamas v Metropolitan Transp. Auth.*, 120 AD3d 1333 [2d Dept 2014] [internal quotation marks and citations omitted]).

"A contractor or subcontractor's limited contractual undertaking to provide snow removal services generally does not give rise to a duty of care to persons not a party to the contract, absent evidence that the contractor or subcontractor [1] assumed a comprehensive maintenance obligation, [2] created or exacerbated a dangerous condition or launched a force or instrument of harm, or [3] that the plaintiff detrimentally relied on the contractor's continued performance of its obligation" (*Lattimore v First Mineola Co.*, 60 AD3d 639, 642 [2d Dept 2009]; *see Espinal v Melville Snow Contrs., Inc.*, 98 N.Y.2d [2002]).

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" *Barnes v New York City Hous. Auth.*, 43 AD3d 842, 844 [2d Dept 2007]). A finding of causation is not necessary to trigger an indemnification clause (*see id.*). Further, a showing of lack of duty to Plaintiff (*see Espinal v Melville Snow Contrs., Inc.*, 98 N.Y.2d [2002]) is insufficient, on its own, to satisfy its *prima facie* burden as to the cross claims (*see English v Wainco Goshen 1031, LLC*, 218 AD3d 444 [2d Dept 2023]).

KPC's Motion – Seq. # 003

KPC moves for summary judgment dismissing Plaintiff's complaint as well as Crescent's cross claims for indemnification and contribution. KPC submits in support of its motion pleadings¹, deposition transcripts, the snow removal contract, Smith's handwritten notes (Storm Logs) for billing, and the Affidavits of George Busch² and Meteorologist Mark Kramer.

1) KPC's motion for summary judgment dismissing Plaintiff's complaint

KPC claims it did not owe a duty of care to Plaintiff since a contractual obligation, standing alone, will not give rise to tort liability. KPC claims the exceptions held in *Espinal v Melville Snow Contrs., Inc.*, 98 N.Y.2d [2002] do not apply. Specifically, regarding the first *Espinal* exception where the contractor fails to exercise reasonable care and launches a force or instrument of harm, KPC argues "Plaintiff failed to establish that the slushy snow she claims caused the accident was

¹ The Court notes that the Amended Complaint, including KPC as a direct defendant (as granted by Mahon, J. on April 29, 2022) was not included within the pleadings attached. (*see* NYSECF Doc # 96 and 97).

² The exhibit attached (NYSECF Doc # 109) only includes the last page and appears to be missing paragraphs one through nine).

longstanding and the product of residual snow left behind by KPC's snow removal activities" (NYSECF Doc # 94, KPC's Affirmation, ¶46). Additionally, KPC argues "[P]laintiff at bar cannot offer any evidence that KPC failed to remove snow properly and in doing so left the parking lot less safe than before they began their work" (NYSECF Doc # 94, KPC's Affirmation, ¶47). KPC claims there is no evidence as to when or how the slushy snow was created and any statement to the contrary would be speculative and conjecture. As such, KPC argues there is no basis to find that KPC launched a force or instrument of harm. KPC argues, the second *Espinal* exception does not apply since plaintiff did not detrimentally rely upon KPC's continued performance of its duties since Plaintiff did not know who or what KPC was. KPC claims the third *Espinal* exception that the contract is comprehensive, exclusive, and entirely displaces Crescent's duty to maintain the premises does not apply. KPC argues although it was responsible for snow removal in the parking lot, Crescent maintained control of the property. KPC contends it did not agree to assume all of Crescent's safety related obligations. KPC claims liability cannot attach in the absence of any evidence establishing that KPC created the slushy snow where Plaintiff fell or had actual or constructive notice of it.

Here, KPC simply argues that Plaintiff has failed to establish that the slushy snow she claims caused the accident was longstanding and the product of the residual snow left behind by KPC's snow removal activities. The Court finds that KPC has not established its prima facie entitlement to summary judgment through the tender of sufficient evidence demonstrating there is no issue of fact to be tried. KPC must make its affirmative case and may not do so by merely pointing out gaps in the Plaintiff's case (*see Totten v Cumberland Farms, Inc.*, 57 AD3d 653, 654 [2d Dept 2008]). Accordingly, as KPC has failed to demonstrate its prima facie entitlement to summary judgment, the Court need not consider Plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Based on the foregoing, KPC's motion for summary judgment dismissing Plaintiff's complaint is denied.

2) KPC's motion for summary judgment dismissing Crescent's cross claims

KPC's branch of its motion for summary judgment dismissing Crescent's cross claims for contractual indemnification, common law indemnification, and contribution is denied as premature.

"It is generally said that a cause of action for indemnity accrues on the date payment is made by the party seeking indemnity" (*Bay Ridge Air Rights, Inc. v State* 44 N.Y.2d 49 [1978]). Regarding contribution "[l]ike a claim for indemnification, a claim for apportionment of damages does not generally accrue until payment is made by the party seeking apportionment". *Id.*

Here, it is premature to dismiss claims sounding in indemnification and contribution prior to a finding of judgment on behalf of the party seeking said contribution and indemnification. Liability for the underlying cause of action remains undetermined and as a result such claims are premature until a judgment is obtained (*Martinez v Fiore*, 90 A.D.2d 483 [2d Dept 1982]).

Crescent and TGI Friday's Motion – Seq - # 004

Crescent moves for summary judgment on its third-party complaint and/or cross claims against KPC for contractual defense and indemnification (including reimbursement of attorneys' fees and expenses) pursuant to KPC's snow removal agreement; and TGI Friday's moves for summary judgment dismissing all claims and cross claims.

1) Crescent's Motion

In support of its motion, Crescent argues pursuant to the Agreement of non-party Jeffrey Management Company³ (hereinafter, Jeffrey), and KPC, KPC performed snow and ice removal services to the parking lot, including the days preceding the incident through and including the evening of February 5, 2021, and February 6, 2021. Crescent argues according to the invoice, Storm Logs, and Smith's deposition testimony, on February 5, 2021, KPC performed spot salting (NYSECF Doc 134, pp. 57-58). Crescent argues there is no dispute that the Agreement was in full force and effect at the time of the incident and that Plaintiff's alleged fall on slushy snow in the parking lot was due to KPC's failure to remove all the snow and ice when it performed its continued work.

Crescent also argues that in addition to the snow and ice removal services, pursuant to the Agreement and Smith's deposition testimony, KPC was required to monitor the weather conditions, including changes in temperature and conduct visual inspections of the property to determine whether further snow removal or salt and sand applications were required. (NYSECF Doc #134, pp. 57, 83, 89-90, 94-95, and 97-98). Crescent argues that Smith testified during his deposition that the snow is removed from the parking lot and put into piles throughout the perimeter of the parking lot. During the day, when the temperatures increase, the snow melts and runs into the parking lot. As the temperature drops, whatever did not dry from the sun will refreeze. Therefore, Smith testified KPC will inspect the parking lot and salt and sand areas that had melted and refroze. Crescent argues further that Smith testified KPC is responsible for constantly monitoring the premises, 24 hours per day (NYSECF Doc # 134, pp. 72 and 98).

Accordingly, Crescent claims there is no dispute that KPC continued to monitor the storm and the premises to perform the snow and ice removal services as set forth in the Agreement up until and after Plaintiff's incident. Crescent argues, the indemnity language within the Agreement clearly and unambiguously evidences that KPC is to defend and indemnify and hold harmless Crescent (including the reimbursement of attorneys' fees) as Plaintiff's claim and alleged injuries arise out of/relate to the performance of the Agreement, including the monitoring the parking lot. Crescent has attempted to tender its defense to KPC, with no success and as a result, has incurred expenses defending this action.

In opposition, KPC argues indemnification is not warranted. KPC contends that in order to establish entitlement to indemnity, Crescent must establish that the indemnification provision in the Agreement was triggered. KPC argues Crescent mistakenly assumes there is direct proof that the slushy snow on which Plaintiff fell arose out of or relates to KPC's snow removal services. KPC argues it cannot be held liable for passive omissions and it owed no duty under the *Espinal*

³ The management company for the shopping center and parking lot, and an agent for Crescent.

exceptions. KPC claims there is no proof that Plaintiff's incident arose out of KPC's snow removal activities and as a result, the indemnification provision was not triggered.

Here, Crescent has demonstrated its prima facie entitlement to summary judgment regarding its third-party complaint and cross claim for contractual indemnification. Crescent established Plaintiff's claim arose out of/relates to KPC's snow removal services as demonstrated by Smith's deposition testimony, the invoice, and Storm Logs which show the continual monitoring and performance of services in the days preceding the fall up until February 6, 2021. Plaintiff's complaint falls squarely within KPC's indemnity obligation as it arises out of KPC's snow removal services (*see Barnex v New York City Hous. Auth.*, 41 AD3d 842 [2d Dept 2007]). In opposition KPC failed to raise an issue of fact. KPC's alleged lack of duty to Plaintiff under *Espinal* is irrelevant. KPC is required to demonstrate that the indemnification provision was not triggered or was otherwise unenforceable which it failed to do (*see English v Wainco Goshen 1031 LLC*, 218 AD3d 444 [2d Dept 2023]). Based on the foregoing, Crescent's motion for summary judgment on its contractual indemnification claim is granted to the extent of determining that KPC is obligated to indemnify and defend Crescent in this action.

2) TGI Friday's Motion

TGI Friday's argues in support of its motion for summary judgment that pursuant to the lease between TGI Friday's and Crescent, TGI Friday's was not responsible for the snow and ice removal in the parking lot where Plaintiff's incident occurred. TGI Friday's argues it did not cause or create the alleged snow or ice condition. TGI Friday's argues, more importantly, it did not own the property and thus had no duty to maintain the property in a safe condition. As such, TGI Friday's argues Plaintiff must come forward with evidence establishing TGI Friday's had an obligation to control or maintain the premises.

In opposition, Plaintiff contends there is no proof or evidence in the record to show TGI Friday's did not push the snow onto the parking lot thus creating the condition that allegedly caused Plaintiff to slip. Plaintiff argues that Randy Gross (hereinafter, Gross), TGI Friday's general manager, testified at his deposition that the employees cleaned the sidewalk and placed the snow and ice on the landscaping and not into the parking lot (NYSECF Doc # 133, pp. 22-23, 26). However, Gross testified he had no personal knowledge of the specific incident at issue, nor did he recall if he was working on the date of Plaintiff's fall. Plaintiff argues that Gross' testimony is what the TGI Friday's employees should have done, but he was unable to testify as to what actually happened on February 5, 2021. Plaintiff claims that TGI Friday's failed to eliminate all questions of fact and as a result their motion should be denied.

Additionally, in opposition, KPC argues that Smith testified at his deposition that he observed, on occasion, over his 26 years experience that TGI Friday's employees shoveled snow from the side walks surrounding the restaurant and pushed it into the parking lot. As such, like Plaintiff, KPC claims there is a question of fact as to whether this conduct was the proximate cause of the accident.

In Reply, TGI Friday's argues there is no evidence in the record to support the contention that any snow was placed by anyone from TGI Friday's in the area of Plaintiff's incident, at or around the date of her fall. Smith testified he did not recall if he saw anyone push snow from the sidewalk onto the parking during this particular storm. Further, TGI Friday's argues that during Smith's deposition, he identified the area on a photograph where this had occurred in the past, which was nowhere near the area Plaintiff identified during her deposition where she fell.

Here, TGI Friday's has established its prima facie entitlement to summary judgment based on its lease with Crescent. Plaintiff and KPC failed to raise an issue of fact. It is not disputed TGI Friday's was not responsible for the snow and ice removal in the parking lot and there is no evidence beyond speculation to support the contention that any snow was placed in the parking lot by anyone from TGI Friday's in the specific area and on the date of Plaintiff's incident. Based on the foregoing, TGI Friday's motion for summary judgment is granted.

Accordingly, it is:

ORDERED that KPC's motion for summary judgment pursuant to CPLR § 3212 (Motion Sequence No. 003) is **DENIED**; and it is further

ORDERED that Crescent's motion for summary judgment pursuant to CPLR § 3212 on its third-party complaint and cross claims for contractual indemnification against KPC (Motion Sequence No. 004, branch (a)) is **GRANTED**; and it is further

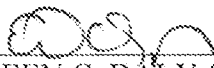
ORDERED that TGI Friday's motion for summary judgment pursuant to CPLR § 3212 dismissing all claims and cross claims (Motion Sequence No. 004, branch (b)) is **GRANTED**; and it is further

ORDERED that any relief not specifically addressed herein is **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: September 6, 2024
Mineola, New York

ENTER:


HON. EILEEN C. DALY-SAPRAICONE, J. S. C.

ENTERED

Sep 09 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE