

Dehaan v Twin Brook Manor Homeowners Assn., Inc.
2025 NY Slip Op 35367(U)
January 13, 2025
Supreme Court, Westchester County
Docket Number: Index No. 54204/2021
Judge: Janet C. Malone
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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, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
RICHARD C. DEHAAN and AMANDA DEHAAN,

Index No. 54204/2021

Plaintiffs,

DECISION AND ORDER

-against-

MOTION SEQ. NOS. 1-2

TWIN BROOK MANOR HOMEOWNERS
ASSOCIATION, INC., KATONAH MANAGEMENT
GROUP, INC., PUTNAM PROPERTY
MANAGEMENT LLC,

Defendants.

-----X
MALONE, J.

Now before the Court for determination are two motions:

(1) Defendant Putnam Property Management, LLC’s (“Putnam”) motion (Seq. No. 1) for summary judgment, dismissing Plaintiffs’ Complaint in its entirety, and all cross-claims against it, with prejudice (NYSCEF Doc. Nos. 53-75; 109-110); and

(2) Defendants Twin Brook Manor Homeowners Association, Inc. (“Twin Brook”) and Katonah Management Group, Inc.’s (“Katonah”) motion (Seq. No. 2) for summary judgment pursuant to CPLR R. 3212 dismissing Plaintiff’s complaint against Twin Brook and Katonah, in its entirety, with prejudice, along with all other claims and cross-claims against Twin Brook and Katonah and granting Twin Brook and Katonah judgment on its cross-claims against Putnam. (NYSCEF Doc. Nos. 76-92; 106-107).

Plaintiffs oppose both motions (NYSCEF Doc. Nos. 101-102); Twin Brook and Katonah oppose Putnam’s motion to dismiss its cross-claims (NYSCEF Doc. Nos. 98-99); and Putnam opposes Twin Brook and Katonah’s motion to dismiss its cross-claims (NYSCEF Doc. Nos. 104-105).

The motions have been consolidated for purposes of this decision and upon review and consideration of the foregoing papers filed with NYSCEF document numbers 53-92; 98-110, the

motions are determined as follows:

Background

Twin Brook Manor is a townhome condominium complex located in Carmel, New York, where Plaintiffs reside and is managed by Katonah pursuant to a written agreement (the “Management Agreement”) with Twin Brook (NYSCEF Doc. No. 72). Pursuant to a written agreement with Twin Brook, Putnam performed snow removal services at Twin Brook Manor during the 2018 – 2019 winter season (the “Snow Contract”)(NYSCEF Doc. No 73).

Plaintiff Richard C. DeHaan (“Richard”) and his wife, Plaintiff Amanda Dehaan (“Amanda” and collectively, “Plaintiffs”), commenced this action on April 7, 2021 seeking damages for personal injuries sustained by Richard the morning of January 30, 2019, when he slipped and fell while walking his dog in icy, snowy conditions in the parking lot of Twin Brook Manor (the “property”), where Plaintiffs resided (Summons and Complaint, NYSCEF Doc. No. 58).

Defendants Twin Brook and Katonah appeared and answered on June 7, 2021 with general denials, sixteen affirmative defenses and cross-claim against Defendant Putnam (NYSCEF Doc. No. 59). Putnam appeared and answered on June 25, 2021, with general denials, twelve affirmative defenses and two cross-claims against Twin Brook and Katonah (NYSCEF Doc. No. 60) and answered Twin Brook and Katonah’s cross claims on July 28, 2021 (NYSCEF Doc. No. 81). Discovery ensued and was completed; Note of Issue was filed on October 19, 2023 (NYSCEF Doc. No. 51).

Legal Analysis

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact, but “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.” *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978). The function of the Court on a summary judgment motion “is not to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012); *Martinez v. 281 Broadway Holdings, LLC*, 183 A.D.3d 716, 719 (2d Dept 2020); *Charlery v. Allied Tr. Corp.*, 163 A.D.3d 914, 915, (2d Dept. 2018); *see Chimbo v. Bolivar*, 142 A.D.3d 944, 945 (2d Dept. 2016).

As the proponent of their respective summary judgment motions, Defendants Twin Brook, Katonah and Putnam must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact.” *Winegrad v. New York University Medical Center*, 64 N.Y.S.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.S.2d 557, 562 (1980); *see also* CPLR § 3212. The parties’ competing contentions must be viewed in a light most favorable to the non-moving party. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763, 27 N.Y.S.3d 468 (2016). If the moving party meets its burden, the burden shifts to the non-moving party to establish, through admissible evidence, the existence of disputed issues of material fact for trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). The non-moving party must produce evidence in the record and may not rely on conclusory statements or contentions. *Id.* Instead, the opponent of a motion must lay bare affirmative proof sufficient to establish that real defenses exist warranting a trial.

Cause or Location of Accident

“A defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall. If a plaintiff is unable to identify the cause of a fall, any finding of negligence would be based upon speculation. That does not mean that a plaintiff must have personal knowledge of the cause of his or her fall. Rather, it means only that a plaintiff’s inability to establish the cause of his or her fall whether by personal knowledge or by other admissible proof—is fatal to a cause of action based on negligence.” *Pol v. Gjonbalaj*, 125 A.D.3d 955, 955-56 (2 Dept. 2015)(internal citations and quotations omitted).

Here, Defendants’ argument that Richard’s failure to identify the exact location of his fall requires dismissal of the complaint is unavailing. First, Defendants fail to cite to any case law that requires a Plaintiff to pinpoint the exact location of his fall. Second, Richard’s deposition taken over four dates: April 14, 2022, August 10, 2022; September 1, 2022 and September 14, 2022 (NYSCEF Doc. Nos. 62, 63, 64, and 65, respectively), reveals that he consistently stated that he fell in the vicinity of the speed bump and due to a dusting of snow, did not see the ice underneath prior to his fall (NYSCEF Doc. No. 62 at 47:11-52”3; 69:2-70:18; 74:17-75:13; NYSCEF Doc.No. 63 at 25:3-26:17; NYSCEF Doc. No. 64 at 16:16-17:6; NYSCEF Doc. No. 65 at 147:13-148-8).

Additionally, Amanda's testimony corroborates his testimony since she testified that when Richard came home he stated he slipped on ice around the speedbump (NYSCEF Doc. No. 66 at 64:9-64:15; 66:9-13; 72:14-21; 77:6-79:8).

Moreover, even if Richard subsequently changed his testimony, any purported inconsistent testimony does not establish Defendants' prima facie burden and only creates a triable issue of fact that calls into question Richard's credibility. *Simpertegui v. Carlyle House Inc.*, 227 A.D.3d 486, 486(1st Dept. 2024) ("inconsistencies in plaintiff's account of the accident [calls] into question his overall credibility and the circumstances underlying his claimed injuries" creating triable issues of fact).

Viewing all evidence in the light most favorable to Richard, all reasonable inferences must be resolved in his favor and Defendants' motions on this basis must be denied. *Boyd v. Rome Realty Leasing Ltd. P'ship*, 21 A.D.3d 920, 921 (2d Dept. 2005).

Twin Brook/ Katonah Duty of Care

"An owner ... in possession of real property owes a duty to maintain the property in a reasonably safe condition" *Sweeney v Hoey*, 211 AD3d 1071, 1072 (2d Dept 2022); see *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976). "A defendant property owner 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" *Braxton v. Brown*, 226 AD3d 954, 556 (2d Dept. 2024)(internal citations omitted). "General awareness that snow or ice may be present during winter months was legally insufficient to constitute notice of the particular condition that caused the injured plaintiff's fall" *Bombino-Munroe v. Church of St. Bernard*, 163 A.D.3d 616, 618 (2d Dept. 2018).

"To establish the lack of constructive notice, a defendant must offer some evidence as to when the area in question was last ... inspected relative to the time of the accident" *Hegeman v City of Newburgh*, 208 AD3d 461, 462 (2d Dept. 2022).

Twin Brook and Katonah argue that they had no notice of the dangerous condition as Richard did not complain nor were they under any duty to inspect the property in the early morning hours between 6:00 a.m. and 6:30 a.m. However, Twin Brook and Katonah fail to establish that they did not have actual or constructive notice of the icy conditions. The self-serving deposition transcripts of Bryan Hao, co-owner of Katonah and Linda Capizzi, current Vice President of Twin

Brooks, without accompanying business records showing prior complaints is not sufficient to meet their burden that they did not receive any complaints regarding snow or ice in the winter of 2018-2019 prior to date of the accident. *Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 677 (2d Dept 2021)(“Mere reference to general ... inspection practices is insufficient to establish a lack of constructive notice”)

Twin Brook and Katonah “cannot establish its entitlement to judgment as a matter of law merely by pointing out gaps in the plaintiff’s case” *Miller v Terrace City Lodge No. 1499, Improved Benevolent Prot. Ord. of the Elks of the World of Yonkers, New York, Inc.*, 197 AD3d 643, 644 (2d Dept 2021).

Additionally, Twin Brook and Katonah’s reliance on Adam Brandt’s, Putnam’s Owner, claim that he did not observe any snow or ice on the driving surfaces, after he purportedly serviced the property and inspected the property is misplaced since Brandt testified he did not recall if he cleared the snow; then changed his testimony that he did recall clearing the snow on the date of the accident and then backtracked later in his deposition and testified about what it was his custom to do in clearing the snow and not what he actually remembered doing. (NYSCEF Doc. No. 71 14:8-25; 16:8-24; 20:21-22:6; 49:20-50:11; 69:10-70:8).

Putnam’s Duty of Care

While “a contractual obligation [for snow and ice removal] standing alone, will not give rise to tort liability in favor of a third party.” (*Tomala v Islandia Expressway Realty, LLC*, 216 AD3d 696, 698 [2d Dept 2023], citing *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002]); “a party that enters into a contract to render services may be said to have assumed a duty of care, and thus, be potentially liable in tort to third persons, where (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party’s duties, or (3) the contracting party has entirely displaced the other party’s duty to maintain the premises safely” *Martinelli v Dublin Deck, Inc.*, 198 AD3d 635, 637 (2d Dept 2021).

Putnam is correct that it need not eliminate all the *Espinal* exceptions if not plead by Plaintiff’s in their complaint (*Foster v. Herbert Slepoy Corp.*, 76 A.D.3d 210, 214 (2d Dept. 2010)(finding that snow removal contractor “was not required to negate the possible applicability of any of the three [Espinal] exceptions” and need only rebut that which is plead in Plaintiff’s

complaint). Here, Plaintiffs allege that Putnam, in failing to exercise their duties with reasonable care, launched an instrument of harm.

Putnam failed to meet its burden since it failed to demonstrate through testimony or other documentary evidence that the snow removal efforts they undertook, to the extent they undertook them, did not create or exacerbate the hazardous icy condition, launching an instrument of harm, upon which Richard fell. *See Gwinn v Christina's Polish Rest., Inc.*, 117 AD3d 789, 986 NYS2d 182 (2d Dept. 2014).

Brandt's testimony fails to establish Putnam's burden since Brandt initially testified he did not recall plowing and salting the morning of Richard's accident but later on in his deposition testified that he remembered that he plowed snow sometime between 4-6:30am and that it was his custom to snow plow between 4 and 6am ; he then stated it would have been his custom to be there between 3:30 and 6:00am (NYSCEF Doc. No. 71 at 49:20-50:11; 69:10-70:8). Additionally, he could not recall the weather that day either or the storm that occurred overnight and could only testify about what was customarily done. *Id.* at 14:8-25; 16:8-24. While Brandt testified he kept monthly logs regarding weather and snow clean up, no records were provided with the motion. *Id.* at 19:2-28.

Other than this self-serving testimony, Putnam failed to submit any documentary evidence such as logbooks about what was exactly done on the date of the accident and days prior and whether "the condition upon which the plaintiff fell was created during a single storm" on January 30, 2019 or from conditions that existed prior to the storm as testified to by Amanda. *Flournoy v. Marcy Residence, LLC* 202 AD3d 931, 932 (2d Dept. 2022) ("Court properly denied the defendant's motion for summary judgment dismissing the complaint" when defendant failed to submit documentary evidence of its snow removal efforts).

Since the defendants failed to meet their initial burden, we need not consider the sufficiency of the plaintiff's opposition papers. *Pol v. Gjonbalaj*, 125 A.D.3d 955, 955-56 (2d Dept. 2015)

Storm in Progress Rule

Both Twin and Katonah as well as Putnam argue that Plaintiffs' complaint should be dismissed because of the storm was in progress. A defendant moving for summary judgment in an action predicated upon the presence of snow or ice may satisfy that burden by "presenting evidence that there was a storm in progress when the injured plaintiff allegedly slipped and fell" *Beaton v. City of New York*, 196 A.D.3d 625, 626 (2d Dept 2021) .

“Under the storm in progress rule, a property owner [or snow contractor] 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” *Amato v. Brookhaven Professional Park L.P.*, 162 A.D.3d 620, 620 (2d Dept. 2018).

Here, Defendants failed to establish prima facie that a storm was in progress at the time of the accident. Defendants submitted only certified weather records from the Danbury Connecticut Municipal Airport (NYSCEF Doc. Nos. 75; 92). However, Defendants failed to submit an expert affidavit to explain these records and the climatological data; and/or why the weather data from Danbury, Connecticut is relevant to weather conditions in Carmel, New York. *Pankratov v. 2935 OP, LLC*, 160 A.D.3d 757, 758 (2d Dept. 2018)(“Defendants established their entitlement to judgment as a matter of law by submitting certified weather records and a meteorologist's affidavit showing that a winter storm was in progress at the time that plaintiff slipped and fell on ice covering the sidewalk in front of defendants' building). Thus, Defendants’ summary judgment motion on the basis of storm in progress is denied.

Indemnification

Paragraph 9 of the Snow Contract, entitled “HOLD HARMLESS”, states that:

The Contractor shall save and hold the Owner and the Agent (KMG) harmless from and against all liability, damage, loss, claims, demands, and actions of any nature whatsoever, for any reason whatsoever, which arise out of or are connected with, or are claimed to arise out of or be connected with, any of the work done by the Contractor or its agents, servants, subcontractors, or employees or which arise out of or are connected with any accident or occurrence which happens, or is alleged to have happened, in or about the place where such work is being performed or in the vicinity thereof, including without limiting the generality of the foregoing, all liability, damages, loss, claims, attorneys’ fees, demands and actions on account of personal injury, death or property loss to the Owner, its employees, agents, subcontractors or to any other person.

“A party’s right to contractual indemnification depends upon the specific language of the relevant contract. A promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” *Alvarenga v Castagna Realty Co., Inc.*, 224 AD3d 648, 649 (2d Dept 2024).

“To obtain summary judgment dismissing the contractual indemnification cross-claim, [Putnam] was required to demonstrate, prima facie, that the indemnification provision of the snow removal contract was not triggered or was unenforceable” *Eng. v. Wainco Goshen 1031, LLC*, 218 A.D.3d 444, 445 (2d Dept. 2023). Whereas, “a party seeking contractual indemnification pursuant to a contract ... must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” *Mogrovejo v. HG Hous. Dev. Fund Co., Inc.*, 207 A.D.3d 461, 463 (2d Dept. 2022).

Here, a plain reading of the language of the indemnification clause “. . . or which arise out of or are connected with any accident or occurrence which happens, or is alleged to have happened, in or about the place where such work is being performed or in the vicinity thereof” the contract could potentially be interpreted to require Putnam to indemnify Twin Brook and Katonah for any claims that arise in the vicinity of Putnam’s work and due to Twin Brook and Katonah’s negligence. Without a savings clause such as to “the fullest extent permitted by applicable law”, it is unclear whether the indemnification clause is limited to Putnam’s own negligence or was not contemplated. *Mendieta v. 333 Fifth Ave. Assn.*, 65 AD3d 1097, 1101(2d Dept. 2009).

Thus, summary judgment is not warranted in favor of Putnam or Twin Manor and Katonah motion regarding the contractual indemnity clause due to its ambiguity as to whether it was intended to cover Twin Manor and Katonah’s own negligence in violation of General Obligations Law § 5–322.1. *Alvarado v. SC 142 W. 24 LLC*, 209 A.D.3d 422, 424 (2d Dept. 2022); *Vasquez v. Manhattan College*, 223 AD3d 601 (1st Dept. 2024).

While a “property owner may be entitled to common-law indemnification from a snow removal contractor if the plaintiff’s injuries were attributable to the negligence or nonperformance of an act solely within the province of the snow removal contractor”, cross claims for “contribution” are only appropriate if Putnam owed “a duty of reasonable care independent of its contractual obligations to the owner (i.e. Espinal)” *Abramowitz v Home Depot USA, Inc.*, 79 AD3d 675, 677 (2d Dept 2010).

As Putnam’s negligence in performance of its duty under the snow removal contract is a triable issue of fact, Putnam and Twin Brook and Katonah’s summary judgment motions on the cross claims for common law indemnification and contribution are denied.

Putnam’s motion to dismiss the cross claim for failure to obtain insurance coverage and Twin Brook and Katonah’s motion to grant them summary judgment on Putnam’s failure to obtain insurance coverage is also denied as it is unclear from Putnam’s one page submission (NYSCEF

Doc. No. 105) whether Putnam secured \$1,000,000 in coverage and whether said coverage listed Twin Brook and Katonah as additional insureds.

Accordingly, it is hereby

ORDERED, that Defendant Putnam Property Management, LLC's motion (Seq. No. 1) for summary judgment, dismissing Plaintiffs' Complaint is denied in its entirety; and it is further

ORDERED, that Defendants Twin Brook Manor Homeowners Association, Inc. and Katonah Management Group, Inc.'s motion (Seq. No. 2) is denied in its entirety; and it is further

ORDERED, that parties are to appear for an in-person settlement conference on February **18, 2025 at 10:00am** in Courtroom 1401 before the Hon. Janet C. Malone, J.S.C. at the Westchester County Supreme Court located at 111 Dr. Martin Luther King, Jr. Blvd, White Plains, New York.

This constitutes the Decision and Order of the Court.

Dated: January 13, 2025
White Plains, New York

ENTER:



HON. JANET C. MALONE, J.S.C.