

Palmentiero v Heritage Mgt. Servs., LLC
2025 NY Slip Op 35376(U)
January 13, 2025
Supreme Court, Westchester County
Docket Number: Index No. 60394/2021
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

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CAROL PALMENTIERO,
Plaintiff,

Index No. 60394/2021

-against-

DECISION AND ORDER

HERITAGE MANAGEMENT SERVICES, LLC,
PAUL M. BOOGAARD, as President of HUNTER’S
BROOK CONDOMINIUM, HUNTER’S BROOK
CONDOMINIUM, and SCENIC LANDSCAPING, INC.

Motion Sequence Nos.: 1, 2

Defendants.

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HERITAGE MANAGEMENT SERVICES, LLC,
PAUL M. BOOGAARD, as President of HUNTER’S
BROOK CONDOMINIUM, HUNTER’S BROOK
CONDOMINIUM,

Third Party Plaintiffs,

-against-

SCENIC LANDSCAPING, INC.

Third Party Defendant.

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MALONE, J.

Plaintiff commenced this tort action to recover damages for personal injuries sustained by Plaintiff after she slipped and fell on January 20, 2020 at approximately 6:00pm, in the parking lot of the condominium complex owned by Defendant Hunter’s Brook Condominium (“Hunter’s Brook”) and managed by Defendant Heritage Management Services, with Defendant Paul M. Boogaard serving as President of the Condominium Board (Condominium Defendants) and snow removal company Defendant Scenic Landscaping, Inc. (Scenic).

The Condominium Defendants commenced a third-party action sounding in contractual and common law indemnification and failure to procure insurance against Scenic, with whom Hunter's Brook had a contract for Scenic to perform all landscaping and snow removal.

Issue has been joined, the Note of Issue has been filed, and by Notices of Motion the Condominium Defendants and Scenic Defendant move for summary judgment: 1) The Condominium Defendants (Motion Seq. No. 1) seek dismissal of Plaintiff's claims or, in the alternative, granting summary judgment on its third-party claim for breach of contract against Scenic for failure to procure insurance; and 2) Scenic Defendant (Motion Seq. No. 2) seeks to dismiss Plaintiff's main claim of negligence and the third-party claims of contractual and common law indemnification and failure to procure insurance.

The motions are fully submitted and came before the Court on January 9, 2025, for oral argument with Plaintiff appearing by Elliot Weinreb, Esq.; Condominium Defendants appearing by Laurie Tascione, Esq. and Scenic Defendant appearing by Laura Liotti, Esq.

Based on the Court's review and consideration of the NYSCEF case file, the motion papers uploaded to NYSCEF with document numbers 63-95, 99-105, 108-117, and the record on oral argument, Condominium Defendants' motion is denied; and Scenic's motion is granted as follows:

It is undisputed that Hunter's Brook and Scenic entered into a contract in 2019 for Scenic to provide Hunter's Brook "with top quality year-round service for all phases of grounds maintenance including lawn cutting, planting bed maintenance, shrub trimming, leaf removal, and snow and ice removal from all roadways, driveway, walkways, and parking areas and that Scenic was to procure insurance naming Hunter's Brook as an additional insured with a \$2 million limit, but the agreement does not contain an indemnification clause (NYSCEF Doc. No. 92).

Summary Judgment

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, Condominium Defendants and Scenic 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.

Condominium Defendants’ Motion

“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 property owner will be held liable for a slip and fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence (*Coelho v. S & A Neocronon, Inc.*, 178 A.D.3d 662 [2d Dept. 2019]). Thus, a defendant who moves for summary judgment in a slip and fall case has the initial burden of showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*id.* at 92-93). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see Ahmetaj v. Mountainview Condo.*, 171 A.D.3d 683 [2d Dept 2019]).

[INTENTIONALLY LEFT BLANK]

The Condominium Defendants argue that they owed Plaintiff no duty of care because they did not receive notice of a dangerous condition. The Condominium Defendants also argue that the snowy condition Plaintiff slipped on was open and obvious and not inherently dangerous as a matter of law, or the condition was trivial and not actionable.

Plaintiff opposes the Condominium Defendants' motion arguing that they failed to meet their *prima facie* burden demonstrating a lack of constructive notice though the submission of inspection logs or maintenance records. Plaintiff also argues that the condition was not open and obvious since it was dark at the time of the fall. Finally, Plaintiff argues the Condominium Defendants failed to meet their *prima facie* burden demonstrating the condition was trivial as a matter of law given no photo of the condition was submitted with Condominium Defendants' motion and, in any event, whether the condition is trivial is generally a jury question in all but the most exceptional circumstances.

Here, the Condominium Defendants failed to proffer any evidence as to when the subject parking lot had last been inspected prior to the Plaintiff's fall. Although the Condominium's Defendants' property manager testified that she made weekly inspections to the entire condominium complex, she did not testify that she inspected the subject parking lot to check for snow or ice prior to the Plaintiff's accident (*see Rinkle v. 58-42 Main St. Corp.*, 39 Misc.3d 1236(A) (Supreme Court, Queens County 2013) *citing Baratta v. Eden Roc NY, LLC*, 95 A.D.2d 802 (2d Dept.2012)).

In addition, Condominium Defendants fail to meet their *prima facie* burden demonstrating that the subject snow or ice condition was trivial as a matter of law, since Condominium Defendants submit no evidence that the alleged slippery condition was physically insignificant and that the characteristics of the condition did not increase the risks posed to Plaintiff (*see Mejias v. City of New York*, 183 A.D.3d 886 (2d Dept 2020)). Indeed, given the slippery characteristics of snow and ice on the ground, it would be exceptionally rare where such a condition could be found trivial as a matter of law, even in trace amounts. Tellingly, Condominium Defendants cite to no case which has found a snow or ice condition in a parking lot after dark constituted a trivial defect as a matter of law.

Likewise, the Court finds Condominium Defendants have not demonstrated that the subject snow or ice condition which allegedly caused Plaintiff's fall was not inherently dangerous as a

matter of law, and whether the condition was open and obvious merely creates an issue of fact as to Plaintiff's comparative fault (*see Cupo v. Karfunkel*, 1 A.D.3d 48 [2d Dept 2003]).

Finally, Condominium Defendants have not eliminated issues of fact as to whether Scenic breached its contractual obligations to procure liability insurance with limits of \$2 million on behalf of Defendants.

With respect to the third-party claims against Scenic, the Condominium Defendants allege that Scenic breached the \$2 million insurance procurement provision by procuring limits of \$1 million. Scenic submitted the policy and argues that it procured the requisite insurance, but it only appears to provide \$1 million per claim and \$1 million in the aggregate. However, there is a schedule of insurance which provides for a \$2 million aggregate, but it is unclear whether that aggregate would apply to a personal injury claim (NYSCEF Doc. No. 94). Without testimony or other evidence interpreting the policy or contract, a triable issue of fact exists, warranting denial of the motion. Therefore, the motion of Heritage Management, Mr. Boogaard, and Hunter's Brook, under Sequence 1, is denied in its entirety.

Scenic's Motion

A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (*see Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136. [2002]). However, the Court of Appeals has recognized three exceptions to the general rule, namely where the contracting party affirmatively launches an instrument of harm; where the plaintiff detrimentally relied on the contractor's performance; or where the contracting party has entirely displaced the other party's duty to maintain the premises (*Id.* at 140, *Mavis v Rexcorp Realty, LLC*, 143 A.D.3d 678 [2d Dept 2016]) Further, as part of its *prima facie* showing, a contracting defendant is only required to negate the applicability of those *Espinal* exceptions that were expressly set forth in the plaintiff's Complaint or Bill of Particulars (*see Foster v. Herbert Slepoy Corp.*, 76 A.D.3d 210 [2d Dept 2010]).

Scenic moves to dismiss Plaintiff's complaint arguing that no privity of contract exists between Plaintiff and Scenic and that Scenic did not affirmatively launch an instrument of harm (*see Espinal*) by failing to clear the snow from around the parked cars. Scenic also submits the contract demonstrating there is no contractual indemnification provision; thus, the Condominium

Defendant's third-party Complaint should be dismissed and Scenic further argues that common law indemnification cannot stand if Scenic is not liable to Plaintiff.

Plaintiff opposes Scenic's motion with respect to her claims by arguing Scenic has not shown a lack of constructive notice and that Scenic launched an instrument of harm by failing to use reasonable care in shoveling between vehicles. Plaintiff does not submit any evidence Scenic affirmatively created the subject condition.

Here, since Plaintiff does not expressly set forth an *Espinal* exception in the Complaint or Bill of Particulars, Scenic met its *prima facie* burden entitling it to Summary Judgment by demonstrating that Plaintiff was not a party to snow removal contract (*see Laronga v. Atlas-Suffolk Corp.*, 164 A.D.3d 893 [2d Dept 2018]). In opposition, Plaintiff fails to submit evidence which raises an issue of fact as to whether any of the *Espinal* exceptions apply, since there is no evidence Scenic removed or otherwise disturbed snow between the parked cars, or that the snow removal contract comprehensively displaced the owner's duty to maintain the entire parking lot in a safe condition (*id.* at 896).

“[M]erely plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area . . . cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm.” *Foster v. Herbert Slepoy Corp.*, 76 A.D.3d 210, 215 (2d Dept. 2010); *Henriquez v. Inserra Supermarkets, Inc.*, 89 A.D.3d 899, 902 (2d Dept. 2011) (“[B]y merely plowing the snow, as required by the contract, defendant's actions could not be said to have created or exacerbated a dangerous condition”).¹

Therefore, Scenic's motion with respect to Plaintiff's claims is granted and those claims are dismissed.

The Condominium Defendants also oppose Scenic's motion on the third party claims for common law indemnification by arguing that Scenic can be liable for common-law indemnification even in the absence of a duty running to the Plaintiff if the Plaintiff's injuries are attributable to the negligent performance or nonperformance of snow removal solely within the province of Scenic. The Condominium Defendants also allege Scenic failed to procure the requisite insurance.

¹ Both cases cite to *Fung v. Japan Airlines Co., Ltd.* 9 NY3d 351, 361 (2007), which quotes *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 142 (2002).

Scenic's motion is also granted with respect to the third-party contractual indemnification claim since the contract between Scenic and Hunter's Brook clearly does not contain an indemnification provision.

However, with respect to the remaining third party claims, it is well settled that a snow contractor may be liable under a theory of common law indemnification even in the absence of a duty running to the plaintiff if the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of the contractor (*see Mitchell v. Fiorini Landscape, Inc.*, 284 A.D.2d 313 [2nd Dept 2001]). Here, since Scenic exercised control over certain aspects of safely maintaining the parking lot during snowy conditions, there is a question of fact as to whether Scenic had a contractual obligation to remove snow from the area Plaintiff fell and whether plaintiff's injuries are attributable solely to Scenic's failure to do so (*see Murphy v. M.B. Real Est. Dev. Corp.*, 280 A.D.2d 457 [2d Dept. 2001]).

Likewise, issues of fact exist as to whether Scenic breached its contractual obligations to procure liability insurance with limits of \$2 million. Again, the insurance policy submitted with Scenic's motion appears to set forth, under Item 4, a policy limit of \$1 million per occurrence, and \$1 million in the aggregate, below the limits required by the contract (*see* NYSCEF Doc. No. 94). Although the policy's schedule of insurance under Item 5 sets forth a general aggregate limit of \$2 million, in the absence of testimony or other evidence interpreting the policy or contract, it is unclear on these facts whether Scenic met its contractual obligations to procure the requisite insurance contemplated by the agreement with Hunter's Brook. Thus, that portion of Scenic's motion is denied.

Accordingly, it is hereby

ORDERED, that Defendants' Heritage Management Services, LLC, Paul M. Boogaard, as President of Hunter's Brook Condominium and Hunter's Brook Condominium (Mot. Seq. 1) is denied in its entirety; and it is further

ORDERED, that Defendant Scenic Landscaping, Inc.'s summary judgment motion (Mot Seq. 2) against Plaintiff is granted; and it is further

ORDERED, that Defendant/Third Party Defendant Scenic Landscaping, Inc.'s motion to dismiss third party contractual indemnification is granted; and it is further

ORDERED, that the Third Cause of Action for contractual indemnification in the Third-Party Complaint is DISMISSED; and it is further

ORDERED, that Defendant/Third Party Defendant Scenic Landscaping, Inc.’s motion to dismiss all other third-party cross claims is denied; and it is further

ORDERED, that the caption is amended in light of the foregoing as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CAROL PALMENTIERO,

Index No. 60394/2021

Plaintiff,

-against-

HERITAGE MANAGEMENT SERVICES, LLC,
PAUL M. BOOGAARD, as President of HUNTER’S
BROOK CONDOMINIUM, and HUNTER’S BROOK
CONDOMINIUM,

Defendants.

-----X

HERITAGE MANAGEMENT SERVICES, LLC,
PAUL M. BOOGAARD, as President of HUNTER’S
BROOK CONDOMINIUM, HUNTER’S BROOK
CONDOMINIUM,

Third Party Plaintiffs,

-against-

SCENIC LANDSCAPING, INC.

Third Party Defendant.

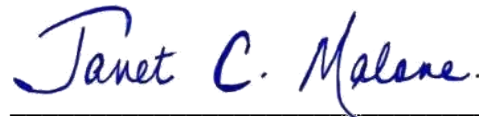
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and it is further

ORDERED, that the parties shall appear for an in -person settlement conference on **March 3, 2025, at 9:30am** 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: White Plains, New York
January 13, 2025



Hon. Janet C. Malone, J. S. C.