

Annabi v BJ's Wholesale Club, Inc.

2025 NY Slip Op 35390(U)

February 10, 2025

Supreme Court, Dutchess County

Docket Number: Index No. 2021-54514

Judge: Edward T. McLoughlin

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This opinion is uncorrected and not selected for official publication.

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 DUTCHESS**

ISAM M. ANNABI,

Plaintiff,

– against –

BJ'S WHOLESALE CLUB, INC., BJ'S WHOLESALE CLUB HOLDINGS, INC., DP 123 LLC, DP 126 LLC, ALPINE COMMONS SHOPPING CENTER, ALPINE IMPROVEMENTS LLC, TOP QUALITY SEALCOAT, INC., DLC MANAGEMENT CORPORATION, C-III ASSET MANAGEMENT LLC,

Defendants.

DECISION & ORDER

Index No.: 2021-54514

Motion Seq. No.: 5 & 6

MCCLOUGHLIN, J., Acting Supreme Court Justice

The Court read and considered the following papers in determining (1) the motion of defendants Top Quality Sealcoat, Inc. and C-III Asset Management LLC (Seq. #5) for summary judgment dismissing the complaint and all cross claims insofar as asserted against them and (2) the motion of defendants BJ's Wholesale Club, Inc. and BJ's Wholesale Club Holdings, Inc. (Seq. #6) for summary judgment dismissing the complaint and all cross claims insofar as asserted against them:

NYSCEF Docket Numbers: 91-125, 128-139

FACTUAL BACKGROUND

On November 16, 2018, the plaintiff was allegedly injured when he slipped and fell on snow and ice on a sidewalk directly in front of an entrance of a BJ's Wholesale Club store in the Alpine Commons Shopping Center located at 1404 U.S. Route 9, Wappingers Falls, New York. At the time of the accident, defendant Top Quality Sealcoat, Inc. (hereinafter "Top Quality") was contracted to perform snow removal services for the shopping center, including the area where the accident

occurred. By filing a summons and verified complaint on November 3, 2021, the plaintiff commenced this action to recover damages for personal injuries against Top Quality, among other defendants. Defendants BJ's Wholesale Club, Inc. and BJ's Wholesale Club Holdings, Inc. (hereinafter collectively "BJ's") answered and asserted cross claims against all other codefendants for indemnification, contribution, and breach of the contract to procure insurance. Defendants Alpine Improvements LLC (hereinafter "Alpine") and DLC Management Corporation (hereinafter "DLC") answered and asserted cross claims against all other codefendants for common-law indemnification and contribution. Top Quality and defendant C-III Asset Management LLC (hereinafter "C-III") also answered and asserted cross claims for common-law indemnification and contribution against all other codefendants. Defendant Alpine Commons Shopping Center has not appeared in this action. By stipulation dated September 26, 2022, the action was discontinued, without prejudice, with respect to all claims against defendants DP 123 LLC and DP 126 LLC.

As relevant here, by Decision and Order dated October 17, 2023, this Court granted the motion of Alpine and DLC for leave to reargue their earlier motion for summary judgment dismissing the complaint insofar as asserted against them and, upon reargument, granted their motion (*see* NYSCEF Docket No. 78). This Court found that Alpine and DLC did not own, occupy, control, or make special use of the subject premises on the date of the accident and, therefore, owed no duty of care to the plaintiff. In reaching that conclusion, this Court noted, in the Decision and Order, that a snow-plowing service agreement, dated November 15, 2018 (hereinafter "the service agreement," NYSCEF Docket No. 107), governed Top Quality's snow-plowing services at the premises at the time of the accident. The Court noted that the service agreement demonstrated that, at the time of the accident, the property was owned by a nonparty, CIII CD06-CD2, and managed by a nonparty, KeyPoint Partners, LLC (hereinafter "KeyPoint").

By notice of motion dated August 29, 2024, Top Quality and C-III move for summary judgment dismissing the complaint and all cross claims insofar as asserted against them (Motion Sequence No. 5). By notice of motion dated August 28, 2024, BJ's moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it (Motion Sequence No. 6).

Top Quality and C-III contend that C-III was merely a loan-servicing company for a trust that owned the subject property and, because C-III did not own, occupy, control, or make special use of the premises, it owed no duty of care to the plaintiff. They further contend that Top Quality likewise owed no duty of care to the plaintiff because its contractual obligation to provide snow-plowing services does not give rise to tort liability in favor of a third party, and none of the exceptions to that rule apply here. In support of their motion, Top Quality and C-III submit, *inter alia*, deposition transcripts from the plaintiff (*see* NYSCEF Docket No. 117), Tom Pinkerous (Top Quality's president) (*see* NYSCEF Docket No. 118), and from an employee of C-III at the time of the accident, Scott Bukhair (*see* NYSCEF Docket No. 122); the service agreement; and an affirmation from Mr. Bukhair (*see* NYSCEF Docket No. 123).

The plaintiff's deposition testimony established the following details of the accident. A snowstorm occurred the night before the accident. Around 1:00 p.m., he arrived at the BJ's store, noticing that the parking lot had been plowed but that the sidewalk in front of the store's entrance remained covered with snow, approximately one and a half inches deep. He went inside the store for about 10 minutes and then realized that he did not have his membership card to make a purchase. Upon exiting to retrieve the card from his vehicle, the plaintiff stepped on "fresh" snow on the sidewalk (*see* NYSCEF Doc. No. 117, p 47). He felt ice beneath the snow, causing his feet to fly up and his shoulders to hit the ground. He testified that there were no snow piles on the sidewalk and that the sidewalk had neither been salted nor shoveled.

Tom Pinkerous, the president of Top Quality, testified that DLC owned the shopping center before the plaintiff's accident and had employed Top Quality for snow-plowing services. He was not familiar with C-III and never received payment from it, although he had heard of KeyPoint, which he understood to be the management company for the shopping center at the time of the accident. He testified that KeyPoint must have been the entity that hired Top Quality to perform snow removal work. The service agreement was the contract between Top Quality and KeyPoint for snow removal at the shopping center, and it was in effect at the time of the accident. According to Pinkerous, the service agreement provides that Top Quality's duty to plow is triggered by a snowfall of one inch or more. Pinkerous testified that he would arrive on site before each storm to pre-salt. Top Quality began its snow-removal work at the shopping center around 1:00 p.m. on the day before the accident and continued on the date of the accident. On the date of the accident, four Top Quality employees were performing snow removal work at the shopping center, two of whom were assigned to shovel sidewalks. According to Pinkerous, by 12:00 p.m. on that day, all sidewalks had been shoveled and salted, and everything was clear. He confirmed that the sidewalk area in front of BI's, where the plaintiff fell, was within the area Top Quality was obligated to clear. Pinkerous testified that he did not receive any calls or notices from KeyPoint regarding snow or ice removal on the day of the accident.

Scott Bukhair, who worked for C-III as a servicing officer at the time of the accident, testified that C-III is a loan-servicing company and had never owned or managed the shopping center. Bukhair testified that C-III was not a party to the service agreement because the shopping center was owned by a trust at the time of the accident, and C-III acted solely as the servicer on behalf of that trust. In his affirmation, Bukhair further avers that C-III operates as a rated special servicer of commercial real estate loans on behalf of various trusts. The original owner of the shopping center was Alpine, which received a loan in 2005, secured by the subject property. In 2006, that loan was sold and pooled

into a CMBS trust, with C-III named as the special servicer for the trust. In January 2018, Alpine defaulted on the loan, and the trust foreclosed on the subject property on October 30, 2018. At the time of the accident, the property was still owned by the trust, and C-III was still functioning as the special servicer.

In opposition to Top Quality and C-III's motion, the plaintiff submits an attorney's affirmation and a response to Top Quality and C-III's statement of material facts. In the affirmation, the plaintiff's counsel contends that there are triable issues of fact as to whether Top Quality exclusively performed snow removal and thereby entirely displaced the owner's and the manager's duty to maintain the subject premises in a safe condition. Counsel argues that the service agreement suggests that Top Quality was responsible for comprehensive snow removal at the shopping center. Counsel argues that the evidence showing that Top Quality was solely responsible for snow removal throughout the shopping center, including the sidewalk where the plaintiff's accident occurred, supports the argument that Top Quality displaced the owner's and the manager's duty to maintain the premises and thus owed a direct duty of care to the plaintiff. Counsel further argues that there are triable issues of fact concerning C-III's control over the premises.

In partial opposition to Top Quality and C-III's motion, BJ's takes no position on the branch of the motion seeking summary judgment dismissing the complaint insofar as asserted against them, but it argues that the portion of the motion seeking dismissal of BJ's cross claims should be denied. BJ's contends that there remains a question of fact sufficient to maintain its cross claims for common-law indemnification and contribution against Top Quality.

In support of its own motion for summary judgment, BJ's contends that the evidence shows that BJ's was responsible only for the interior of the store and had no responsibility for snow or ice removal on the sidewalk area where the plaintiff's accident occurred. BJ's therefore argues that it owed no duty to the plaintiff. BJ's submits, among other things, deposition transcripts from the

plaintiff, Pinkerous, Bukhair, and BJ's manager, Jorge Cedeno (*see* NYSCEF Docket No. 105), as well as the service agreement and a lease agreement governing BJ's tenancy at the shopping center. Specifically, Mr. Cedeno testified that he worked at the BJ's store as a general manager at the time of the accident. He did not know who owned or managed the shopping center, but he explained that BJ's employees were responsible only for the interior of the store and were not responsible for snow or ice removal on the sidewalk where the accident occurred.

The plaintiff concedes and does not oppose BJ's motion, acknowledging that BJ's did not have a duty to remove snow and ice from the location of the accident.

DISCUSSION

It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

"Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property" (*Reeves v Welcome Parking Ltd. Liab. Co.*, 175 AD3d 633, 634 [2d Dept 2019]; *see Rodriguez v Propark Exec. Mgt. Co., LLC*, 207 AD3d 584, 585 [2d Dept 2022]; *Canciani v Stop & Shop Supermarket Co., LLC*, 203 AD3d 1011, 1013 [2d Dept 2022]). "In the absence of ownership, occupancy, control, or special use, a party generally cannot be

held liable for injuries caused by the dangerous . . . condition of the property” (*Reeves v Welcome Parking Ltd. Liab. Co.*, 175 AD3d at 634). Furthermore, “[a] limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties” (*Laronga v Atlas-Suffolk Corp.*, 164 AD3d 893, 895 [2d Dept 2018]; see *Martins v Stickle*, 227 AD3d 798, 800 [2d Dept 2024]; *Santos v Deanco Servs., Inc.*, 104 AD3d 933, 933 [2d Dept 2013]). Nevertheless, a snow removal contractor “may assume a duty of care, and thus be liable in tort to third parties, (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches 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” (*Martins v Stickle*, 227 AD3d at 800 [internal quotation marks and brackets omitted]; see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Nesbitt v Advanced Serv. Solutions*, 224 AD3d 841, 842 [2d Dept 2024]). “Where the pleadings do not allege facts that 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 establish its prima facie entitlement to judgment as a matter of law” (*Nesbitt v Advanced Serv. Solutions*, 224 AD3d at 842-843; see *Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 781-782 [2d Dept 2023]; *Laronga v Atlas-Suffolk Corp.*, 164 AD3d at 896).

Here, Top Quality has demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by coming forward with proof that the plaintiff was not a party to its snow removal contract, i.e., the service agreement, and that it thus owed no duty of care to the plaintiff (see *Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d at 782; *Laronga v Atlas-Suffolk Corp.*, 164 AD3d at 895-896; *Diaz v Port Auth. of NY & NJ*, 120 AD3d 611, 612 [2d Dept 2014]). Although it, in fact, did so, Top Quality was not required to affirmatively demonstrate

that the three *Espinal* exceptions did not apply as part of its prima facie showing, since the plaintiff failed to allege facts in his pleadings that would establish the possible applicability of any of the exceptions (see *Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d at 782; *Sampaiolopes v Lopes*, 172 AD3d 1128, 1130 [2d Dept 2019]; *Hsu v City of New York*, 145 AD3d 759, 760 [2d Dept 2016]).

In opposition to Top Quality's prima facie showing, the plaintiff failed to raise a triable issue of fact as to whether the service agreement constituted the type of comprehensive and exclusive agreement that entirely displaced the owner's and the manager's duty to maintain the premises safely, such that Top Quality assumed a duty to the plaintiff (see *Vogle v North Country Prop. Mgt., LLC*, 170 AD3d 1491, 1493-1494 [3rd Dept 2019]; *Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1396-1397 [4th Dept 2017]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]; *Lehman v North Greenwich Landscaping, LLC*, 65 AD3d 1291, 1292-1293 [2d Dept 2009], *aff'd* 16 NY3d 747 [2011]). Although the service agreement—entered into between KeyPoint, as agent for the property owner, and Top Quality—placed upon Top Quality the obligation for clearing snow and ice throughout the shopping center, the service agreement preserved KeyPoint's control and oversight over the snow removal operations contracted to Top Quality. For instance, the service agreement reserved KeyPoint's right to approve Top Quality's personnel. It also required Top Quality to consult with, advise, and cooperate with KeyPoint regarding its snow-plowing services, and to notify KeyPoint of any personal injury or property damage relating to Top Quality's services. The service agreement further required Top Quality to ensure that its employees, subcontractors, and agents conducted their activities at the property in accordance with KeyPoint's rules and regulations; and provided that, at KeyPoint's option, Top Quality's employees and subcontractors would be subject to KeyPoint's administrative supervision in their work at the property. The agreement also required Top Quality—and its subcontractors, employees, agents, and representatives—to provide KeyPoint with

Material Safety Data Sheets for all chemicals and substances proposed for use at the property, subject to KeyPoint's approval. The contract further stipulated that snow must be stored in designated areas, with KeyPoint having the authority to direct Top Quality to remove snow to an off-site location; and that no snow removal or piling was to occur at the property without KeyPoint's authorization. Lastly, the service agreement appears to limit Top Quality's snow removal obligation to snow accumulations of one inch or more (*see Somekh v Valley Natl. Bank*, 151 AD3d 783, 786 [2d Dept 2017]; *Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 901-902 [2d Dept 2011]; *Lattimore v First Mineola Co.*, 60 AD3d 639, 642 [2d Dept 2009]; *Linarello v Colin Serv. Sys., Inc.*, 31 AD3d 396, 397 [2d Dept 2006]). Accordingly, the branch of Top Quality's motion seeking summary judgment dismissing the complaint insofar as asserted against it is granted.

With respect to C-III, it established prima facie that it did not own, manage, control, occupy, or make special use of the subject premises at the time of the plaintiff's accident and thus owed no duty of care to the plaintiff by offering proof that it merely served as the servicer for the trust that owned the property at the time of the accident (*see Orellana v Cannon*, 227 AD3d 1013, 1013 [2d Dept 2024]; *Engelman v County of Suffolk*, 214 AD3d 769, 770 [2d Dept 2023]). In opposition, the plaintiff's speculation about C-III's control over the property was insufficient to raise a triable issue of fact (*see Bockstruck v Town of Islip*, 219 AD3d 439, 442 [2d Dept 2023]; *Javid v Sclafmore Constr.*, 117 AD3d 907, 908 [2d Dept 2014]). Therefore, the branch C-III's motion seeking summary judgment dismissing the complaint insofar as asserted against it is granted.

The motion of BJ's for summary judgment dismissing the complaint insofar as asserted against it is also granted. As the plaintiff properly concedes, BJ's established prima facie that it was not responsible for maintaining the sidewalk area where the accident occurred or for performing snow and ice removal in that area, and thus owed no duty of care to the plaintiff (*see Canciani v Stop & Shop Supermarket Co., LLC*, 203 AD3d at 1013-1014; *Guzman v Jamaica Hosp. Med. Ctr.*, 163

AD3d.636, 637 [2d Dept.2018]). Because the plaintiff has no viable claims against BJ's, the cross claims of BJ's asserted against Top Quality and C-III must also be dismissed.

Based upon the foregoing, it is

ORDERED that the motion of defendants Top Quality Sealcoat, Inc. and C-III Asset Management LLC (Seq. #5) for summary judgment dismissing the complaint and all cross claims insofar as asserted against them is granted; and it is further

ORDERED that the motion of defendants BJ's Wholesale Club, Inc. and BJ's Wholesale Club Holdings, Inc. (Seq. #6) for summary judgment dismissing the complaint and all cross claims insofar as asserted against them is granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 10, 2025
Poughkeepsie, New York



Hon. Edward T. McLoughlin, AJSC

To: Counsel of record via NYSCEF