Ingrassia v Retail Prop. Trust
2011 NY Slip Op 33352(U)
December 8, 2011
Supreme Court, Nassau County
Docket Number: 1511/10
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

x

JASMINE INGRASSIA,

Plaintiff(s),

-against-

THE RETAIL PROPERTY TRUST, NEWMARK KNIGHT FRANK GLOBAL MANAGEMENT SERVICES, LLC and AAA MAINTENANCE, LLC,

Defendant(s).

x

Index No. 1511/10

Motion Submitted: 10/5/11
Motion Sequence: 003, 005, 006

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................XXX
Answering Papers..XXXX
Reply...XXX
Briefs: Plaintiff's/Petitioner's.......................................
Defendant's/Respondent's..................................

This motion by the defendant The Retail Property Trust ("the Trust") for an order pursuant to CPLR § 3212 granting it, inter alia, summary judgment against the defendant Newmark Knight Frank Global Management Services, LLC ("Newmark Knight") requiring it to defend and indemnify it in this action is granted as provided herein.

This motion by the defendant Newmark Knight for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint and all cross-claims against it is granted to the extent provided herein.

This motion by the defendant Trust for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint against it is denied.

The plaintiff in this action seeks to recover damages for personal injuries she sustained on December 20, 2008 as she was walking to work on the sidewalk adjacent to Nordstrom's at the Roosevelt Field Mall. The mall property is owned by the defendant Trust. The defendant Newmark Knight was under contract to perform snow removal services at the mall. The defendant AAA Maintenance, LLC was under contract to perform snow removal services on the adjacent roadway and in the parking lot. The action against AAA Maintenance, LLC has been dismissed. The Trust and Newmark Knight seek summary judgment dismissing the complaint against them. In addition, Newmark Knight seeks summary judgment dismissing the Trust's cross-claims for contractual and common law indemnification and in the alternative, the Trust seeks summary judgment adjudging Newmark Knight liable contractually and/or pursuant to common law for defending and indemnifying it in this action. The Trust also seeks summary judgment on its breach of contract claim based upon Newmark Knight's alleged failure to procure insurance for it.

The facts pertinent to the determination of this motion are as follows:

The plaintiff testified at her examination-before-trial in a companion case against the mall's managing agent Simon Property Group, Inc. that it had snowed "heavy and hard" the day before her accident and that although it was cold on the day of her accident, it was not precipitating. She testified that on the day of her accident, she parked her car in the parking garage across the street from Nordstrom's where she worked at approximately 7:00 a.m. and that while walking on the sidewalk adjacent to Nordstrom's, she fell on a patch of ice.

Emilio Maza, a contract manager for Newmark Knight at the time of the plaintiff's accident, testified at his examination-before-trial that Newmark Knight only had responsibility for snow and ice removal at the seven main entrances of the mall. He testified that the sidewalk itself was the responsibility of the mall's Operations Director and that Newmark Knight would not take care of it unless specifically called upon to do so. He testified that when called upon to care for the sidewalk, the Operations Director would tell him how many people were needed. He testified that on the day of the accident, Newmark Knight probably had nine employees performing snow and ice removal at the mall. He testified that they started at 3:00 a.m. or 5:00 a.m. and that by 7:00 a.m., they had done the entrances and one round of the perimeter of the mall using gravity pushers and shovels supplied by the Trust, including applying ice melt in front of Nordstrom's. He testified that while he was monitoring the work that was being done on the morning in question, he got a call around 7:00 a.m. that someone had fallen near the employees' entrance of Nordstrom's. He testified that he did not go to the location immediately but when he arrived there "the site was clean" and no additional work needed to be done. When shown photographs of the site where the plaintiff fell, Maza admitted that it was Newmark Night's responsibility to clear the snow and ice there that day.

Vincent D'Antone, the Assistant Mall Manager since June 2008, testified at his examination-before-trial that Newmark Knight was responsible for maintaining the outside grounds including snow and ice removal.

The contract submitted by the Trust, which it represents to be its agreement with Newmark Knight renders Newmark Knight "liable for any injury caused to the [mall] or any persons or property thereon by him or any of its employees or subcontractors in the performance of the services required [t]hereunder." It also required of Newmark Knight to "indemnify and hold [the Trust] harmless from any loss, cost, damage or liability or other expense whatsoever that [the Trust] may suffer or incur as the result of a failure of materials and workmanship . . . ." Newmark Knight also agreed to defend, indemnify and hold the Trust harmless from and against all third-party claims for bodily injury relating to or resulting from its performance or alleged non-performance of its services. Finally, the agreement required Newmark Knight to procure commercial general liability insurance naming the Trust as an additional insured.

"On a motion for summary judgment pursuant to CPLR § 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (***Sheppard-Mobley v. King***, 10 A.D.3d 70, 74, 778 N.Y.S.2d 98 (2d Dept., 2004), aff'd. as mod., 4 N.Y.3d 627 (2005), *citing* ***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Winegrad v. New York Univ. Med. Ctr.***, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (***Sheppard-Mobley v. King, supra***, at p. 74; ***Alvarez v. Prospect Hosp., supra; Winegrad v. New York Univ. Med. Ctr., supra***. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (***Alvarez v. Prospect Hosp., supra***, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *(See,* ***Demshick v. Community Housing Management Corp.***, 34 A.D.3d 518, 521, 824 N.Y.S.2d 166 (2d Dept., 2006), *citing* ***Secof v. Greens Condominium***, 158 A.D.2d 591, 551 N.Y.S.2d 563 [2d Dept., 1990]).

"'A property owner will not be held liable for accidents occurring on its property as a result of the accumulation of snow and/or ice until a reasonable period of time has passed, following the cessation of the storm, within which the owner has the opportunity to ameliorate the hazards caused by storm.'" (***Lanos v. Cronheim***, 77 A.D.3d 631, 632, 909 N.Y.S.2d 101 (2d Dept., 2010), *quoting* ***Sfakianos v. Big Six Towers, Inc.***, 46 A.D.3d 665, 846 N.Y.S.2d 584 [2d Dept., 2007]). "On a motion for summary judgment, the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based

upon the circumstances of the case." (***Lanos v. Cronheim, supra***, at p. 632, *citing* ***Valentine v. City of New York***, 57 N.Y.2d 932, 443 N.E.2d 488, 457 N.Y.S.2d 240 [1982]).

If the storm was in progress at the time of the accident or the defendants' efforts had not yet begun or were still on-going, they would be shielded from liability. (***Lanos v. Cronheim, supra***; ***Rodriguez v. City of New York***, 52 A.D.3d 299, 859 N.Y.S.2d 186 (1st Dept., 2008). Here, however, there is no evidence that establishes that the storm continued at the time of the plaintiff's accident. The plaintiff's expert meteorologist's anticipated testimony on which the Trust relies in Reply establishes at best only that "light precipitation resumed during the evening hours of December 19, 2008 and continued into the **early morning hours** of December 20, 2008 (emphasis added)." It follows: "After 2:00 a.m. on December 20, 2008, only light snow fell, at times intermittently." The plaintiff's expert meteorologist "is expected to testify that an ice and/or melt/rain water that persisted into [the] early . . . morning hours before 2:00 a.m. on December 20, 2008 would have frozen and formed ice and remained as ice on the concrete sidewalk and paved surfaces until after the time of the plaintiff's slip and fall at 7:15 a.m. [and] that the aforesaid ice would have remained on all **untreated** ground surfaces at 7:15 a.m. on December 20, 2008 . . . (emphasis added)."

It is far from clear that the storm continued until when the plaintiff fell on December 20th. Furthermore, the evidence presented here indicates that efforts to clear the area where the plaintiff fell were not on-going but were in fact completed prior to her fall, leaving open the question of whether Newmark Knight's efforts either created the dangerous condition or it remained on account of their negligence. (*See*, ***Gil v. Manufacturers Hanover Trust Co.***, 39 A.D.3d 703, 833 N.Y.S.2d 634 (2d Dept., 2007); ***Tucciarone v. Windsor Owners Corp.***, 306 A.D.2d 162, 761 N.Y.S.2d 181 [1st Dept., 2003]).

The Trust's reliance on ***Joseph v. Pitkin Carpet Inc.***, (44 A.D.3d 462, 843 N.Y.S.2d 586 [1st Dept., 2007]) is misplaced. The plaintiff's fall here was not caused by a failure to remove all of the snow: She slipped on ice and a defendant may be liable when its efforts made the sidewalk more dangerous, i.e., increased the hazard. (***Joseph v. Pitkin Carpet Inc., supra***, at p. 463, *citing* ***Sanders v. City of New York***, 17 A.D.3d 169, 793 N.Y.S.2d 30 (1st Dept., 2005); ***Glick v. City of New York***, 139 A.D.2d 402, 526 N.Y.S.2d 464 [1st Dept., 1988]). The defendant Trust's motion for summary judgment dismissing the complaint against it must therefore be denied.

As for Newmark Knight, a contractual obligation standing alone will not give rise to tort liability in favor of a third party. (***Foster v. Herbert Slepoy Corp.***, 76 A.D.3d 210, 213, 905 N.Y.S.2d 226 (2d Dept., 2010), *citing* ***Espinal v. Melville Snow Contractors, Inc.***, 98 N.Y.2d 136, 138, 773 N.E.2d 485, 746 N.Y.S.2d 120 [2002]). There are however three exceptions to this general rule:

> "[A] party who 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: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] 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 Contractors, Inc., supra***, at p. 140; *see also,* ***Church ex rel. Smith v. Callanan Industries, Inc.***, 99 N.Y.2d 104, 111-112, 782 N.E.2d 50, 752 N.Y.S.2d 254 [2002]).

The defendant Newmark Knight has established its entitlement to summary judgment dismissing the complaint against it by demonstrating that the plaintiff was not a party to its contract with the Trust and it accordingly owed her no duty. (***Foster v. Herbert Slepoy Corp., supra***, at p. 214). And, since the plaintiff has not alleged facts in her complaint or her Bill of Particulars which would call any of the Espinal exceptions into play, Newmark Knight need not establish that they did not apply in order to obtain summary judgment. (***Foster v. Herbert Slepoy Corp., supra***, at p. 214). The burden accordingly shifts to the plaintiff to establish the existence of a material issue of fact with respect to Newmark Knight's liability.

The plaintiff has not opposed Newmark Knight's motion. Plaintiff and Newmark Knight entered into a stipulation of discontinuance dated August 10, 2011. The defendant Newmark Knight's motion is granted to the extent that the complaint against it is accordingly dismissed.

The Trust's cross-claim against Newmark Knight is converted to a third-party claim. (***Baten v. North Fork Bancorporation, Inc.***, 85 A.D.3d 697, 925 N.Y.S.2d 548 [2d Dept., 2011]).

The agreement submitted by the Trust in support of its motion will be accepted as representing its agreement with Newmark Knight. While Newmark Knight maintains that it has never been "authenticated," it nevertheless presumes that it is "at least partially accurate." And, in its response to the Notice to Admit, Newmark Knight only faulted the absence of additional documentation, i.e.,bid proposals, which are irrelevant to the determination of this motion. In fact, Newmark Knight actually produced the portions of the contract on which the Trust presently relies in discovery as representing the parties' agreement. The same agreement was produced at depositions and its validity was never called into question. The liability, indemnity and insurance requirements are not called into question.

"The right to contractual indemnification depends upon the specific language of the contract." (***George v. Marshalls of MA, Inc.***, 61 A.D.3d 925, 930, 878 N.Y.S.2d 143 (2d Dept., 2009), *citing*, ***Canela v. TLH 140 Perry St. LLC***, 47 A.D.3d 743, 744, 849 N.Y.S.2d 658 [2d Dept., 2008]). "The 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." (***George v. Marshalls of MA, Inc., supra; Hooper Assoc. v. AGS Computers***, 74 N.Y.2d 487, 491-492, 548 N.E.2d 903, 549 N.Y.S.2d 365 (1989); *see also*, ***Kielty v. AJS Construction of L.I., Inc.***, 83 A.D.3d 1004, 922 N.Y.S.2d 467 (2d Dept., 2011); ***Roldan v. New York University***, 81 A.D.3d 625, 916 N.Y.S.2d 162 [2d Dept., 2011]).

The parties agreement rendered Newmark Knight "liable for any injury caused to persons by him or its employees in the performance of services required" under the agreement. The Trust has conclusively established that the accident arose out of or occurred in connection with work done by Newmark Knight. The Trust is accordingly entitled to contractual indemnification.

In any event, even if the validity of their agreement has not been established, the Trust would nevertheless be entitled to common law indemnity from Newmark Knight. "'The principle of common law or implied indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party.'" (***George v. Marshalls of MA, Inc., supra*** at p. 929, *citing* ***Curreri v. Heritage Prop. Inv. Trust, Inc.***, 48 A.D.3d 505, 507, 852 N.Y.S.2d 278 [2d Dept., 2008]). "'If, in fact, an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of the contractor, then the contractor may be held liable for indemnification to an owner.'" (***George v. Marshalls of MA, Inc., supra*** at p. 929, *citing* ***Curreri v. Heritage Prop. Inv. Trust, Inc., supra***). To obtain common law indemnification, the Trust must show that it was not negligent and that Newmark Knight was responsible for the negligence that contributed to the accident. (***George v. Marshalls of MA, Inc., supra*** at p. 929, *citing* ***Benedetto v. Carrera Realty Corp.***, 32 A.D.3d 874, 875. 822 N.Y.S.2d 542 [2d Dept., 2006]; *see also*, ***Kielty v. AJS Construction of L.I., Inc., supra***). The Trust has met that burden. Whether Newmark Knight was contractually obligated to shovel the sidewalk surrounding the mall at all times or only when called upon to do so is irrelevant because it is beyond dispute that **if** the sidewalk's condition at the time of the plaintiff's fall was caused by anyone, it was Newmark Knight. That the tools and supplies were furnished by the Trust is also irrelevant because there is no evidence that they in any way played a role here. The Trust is entitled to common law indemnification in what has become a third-party claim. (***Raquet v. Brown***, 90 N.Y.2d 177, 681 N.E.2d 404, 659 N.Y.S.2d 237 [1997]).

Turning to the Trust's breach of contract claim, "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must

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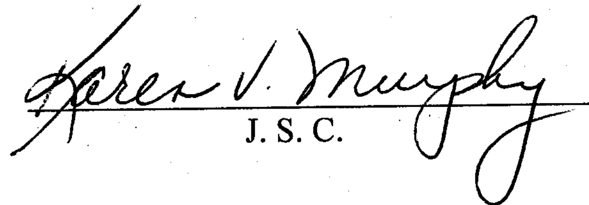
demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with (citations omitted)." ***(DiBuono v. Abbey, LLC***, 83 A.D.3d 650, 652, 922 N.Y.S.2d 101 [2d Dept., 2011]). The Trust has met that burden. Newmark Knight opposes on the ground that the policies have not been placed before the court and therefore, priority cannot be determined. It is precisely for that reason that the Trust is entitled to summary judgment: Newmark Knight has not produced a policy nor has it submitted any evidence whatsoever that it procured the insurance covering the Trust as required by the parties' agreement. The court notes that the Trust's entitlement to summary judgment on this claim would lay to rest Newmark Knight's claim that the Trust is not entitled to recover because its role in the accident is unclear. (*See*, ***DiBuono v. Abbey, LLC, supra***, at p. 652, *citing* ***McGill v. Polytechnic Univ.***, 235 A.D.2d 400, 651 N.Y.S.2d 992 [2d Dept., 1997]).

In conclusion, the complaint against Newmark Knight is dismissed. The Trust's claims against Newmark Knight are converted to third-party claims and the Trust is granted summary judgment against Newmark Knight requiring it to defend and indemnify it contractually and under common law here. The Trust is also granted summary judgment against Newmark Knight on its breach of contract claim based upon Newmark Knight's failure to procure insurance as required by their contract.

The foregoing constitutes the Order of this Court.

Dated: December 8, 2011
Mineola, N.Y.



J. S. C.

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