SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:
HON. ANTHONY L. PARGA
JUSTICE

----------X **PART 6**

EDWARD GABRIEL,

Plaintiff,

INDEX NO. 17467/09

-against-

MOTION DATE: 03/13/12
SEQUENCE NO. 003

BALDWIN PROPERTIES MANAGEMENT LLC, TD BANK, N.A., and SIPALA LANDSCAPE SERVICES, INC.,

Defendants.
----------X

TD BANK, N.A.,

Third Party Plaintiff,

-against-

SIPALA LANDSCAPE SERVICES, INC.,

Third Party Defendant.
----------X

Notice of Motion, Memorandum of Law, Affs & Exs.....1
Affirmation in Opposition.....2

Upon the foregoing papers, the motion by defendants, Baldwin Properties Management LLC and TD Bank, N.A., for an order granting them summary judgment, pursuant to CPLR §3212, is denied to the extent directed below, except that defendant/third party plaintiff TD Bank, N.A. is granted conditional summary judgment over and against third party defendant Sipala Landscape Services, Inc., on contractual indemnity grounds only.

This is an action for personal injuries allegedly sustained by plaintiff Edward Gabriel on January 11, 2009 at the premises owned by defendant Baldwin Properties Management, LLC

(hereinafter "Baldwin") and leased to defendant TD Bank, N.A. (hereinafter "TD Bank"), located at 3222 Sunrise Highway, Wantagh, New York (hereinafter "the premises"). Plaintiff alleges that he was caused to suffer personal injuries when he slipped and fell on ice while walking on the walkway of said premises. In his verified bill of particulars, plaintiff alleges that defendants Baldwin and TD Bank were negligent in the ownership, leasing, occupancy, maintenance and repair of the premises and that the defendants were negligent in creating and/or having notice of a dangerous snow and ice condition at the premises.

Defendants Baldwin and TD Bank move for summary judgment on the grounds that there is no evidence of negligence on the part of said defendants and that they may not be held liable for any negligence on the part of the independent snow removal contractor, defendant Sipala Landscaping Services, Inc. (hereinafter "Sipala"). In the alternative, defendants Baldwin and TD Bank request an order granting them conditional summary judgment on contractual and/or common law indemnity grounds based upon the terms of the contract that was in effect at the time of the accident between TD Bank and Sipala, as well as Sipala's performance of snow removal services before the plaintiff's accident.

In support of their motion, movants submit the pleadings; plaintiff's verified bill of particulars; the deposition transcript of plaintiff; the deposition transcript of defendant TD Bank's witness, Vice President, Regional Facilities Manager of TD Bank, Andres Matos; the deposition transcript of Mike Sipala, president of defendant Sipala; a copy of the lease agreement that was in effect between Baldwin and TD Bank (the Court notes that the lease was originally between Baldwin and Commerce Bank, but it is undisputed that TD Bank took over Commerce Bank and that the parties adhered to the terms of the original lease agreement between Baldwin and Commerce Bank); a copy of the snow removal contract in effect between TD Bank and Sipala, together with the letter extending the contract through April 2009; and copies of Sipala's snow removal invoices for several days prior to the date of plaintiff's accident.

Movants contend that pursuant to the express terms of the lease agreement between Baldwin and TD Bank, TD Bank was responsible for maintaining the premises and for snow and ice removal. Further, Mr. Andres Matos, Vice President and Regional Facilities Director of TD Bank testified that TD Bank, and not Baldwin, was responsible for removing snow and ice from

the premises on the date of the accident. The Court notes that, pursuant to the terms of the lease agreement, TD Bank has previously agreed to defend and indemnify Baldwin in this action. Mr. Matos further testified that a written contract for snow removal was in effect on the date of the accident between TD Bank and Sipala. Pursuant to the terms of said contract, Sipala agreed to supply all labor, equipment and tools to properly perform its duties under the contract, and in the event of snow or freezing rain, Sipala was obligated to, at a minimum, salt and sand the TD Bank properties covered by the contract both before and after precipitation. The contract obligated Sipala to "keep all drives, parking areas, sidewalks, fire lanes, fire escapes and exit/entrance ways passable 24 hours a day, 7 days a week." Mike Sipala, president of defendant Sipala, also testified that there was a snow removal contract in effect at the time of the accident and that in the event of a snow fall of less than three inches, Sipala would remove snow at the premises with a shovel, and, in the event of a snow event greater than three inches, Sipala would plow the snow at the premises. Mr. Sipala testified that no matter the size of the snow event, Sipala would go to the premises and pre-treat the premises with salt or sand, even when a freezing rain was predicted during the winter months. Movants contend that the snow removal contract specifically obligated Sipala to indemnify and hold harmless TD Bank for all accidents arising out of any breach or alleged breach of Sipala's duties under the contract or in the event that Sipala was negligent for any services performed for TD Bank by Sipala.

Movants further contend that it is undisputed that defendant Sipala performed snow removal services pursuant to the contract on the day before the accident, as well as on the morning of the accident. Mr. Sipala testified that his records indicated that Sipala went to the premises in question and removed snow and ice from the premises and salted and sanded the premises on the day before the plaintiff's accident. He also testified that Sipala came to the premises on the morning of the accident and salted and sanded the premises. Mr. Sipala testifeid that a half inch of snow fell in Wantagh on the date of the accident, so his company went to the premises before the plaintiff's accident to apply salt and sand. Mr. Sipala and Mr. Matos both testified that the decision as to whether and when Sipala would go to the premises to remove snow and ice and salt or sand would be left entirely to Sipala. Mr. Sipala and Mr. Matos also testified that Sipala would leave a bag of salt or sand at the branch in question for TD Bank

employees to use at their discretion, should the need arise, however, employees would only use same when the bank was open. At the time of plaintiff's accident, around 11:00 a.m. on a Sunday, the bank was not yet opened for business.

Plaintiff testified that the accident occurred as he stepped onto the brick pavers that lined the entranceway to the front of the bank. He observed a sheet of clear ice on the ground before he stepped onto the brick pavers. He took one step onto the pavers, knowing that the ice was there, and slipped and fell. Plaintiff testified that it was below freezing at the time of the accident and that it had been "misting" the entire morning and was "misting" at the time of the accident. He also testified that the bank was not open at the time of his accident. Plaintiff never complained to anyone at the bank about an ice condition on the premises, nor was he aware of any prior accidents at that location. Similarly, neither Mr. Matos nor Mr. Sipala were aware of any complaints regarding ice at the entranceway of the premises or of any prior accidents at that location.

To begin, defendants Baldwin and TD Bank contend that Baldwin is an out-of-possession landlord entitled to summary judgment as the premises was leased in its entirety to TD Bank on the date of the accident and as the lease agreement in effect on the date of the accident places responsibility for maintenance of the premises, including snow removal, on TD Bank. Mr. Matos testified that Baldwin had no maintenance responsibilities for the exterior portion of the premises and that the lease agreement placed the maintenance and snow removal responsibilities on TD Bank. The evidence submitted demonstrates that TD Bank was the tenant at the premises at issue, that it was responsible for snow and ice removal, and that Baldwin was an out-of-possession landlord without control of the premises or a contractual obligation to perform maintenance thereto.

In opposition to this portion of defendants' motion, plaintiff contends that the retention of control of the premises or of the right to repair or maintain the property may make the owner liable for defects. Plaintiff contends that because the lease permits Baldwin the right to enter the premises for purposes or examining the premises, and as the lease prohibits the tenant from making any installations, alterations, or additions without obtaining written consent of Baldwin, Baldwin has retained control of the premises, making it liable herein. Additionally, plaintiff

contends that because the premises at issue are open to the public, the owner Baldwin has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress or egress, which may not be delegated to an independent contractor like Sipala.

Movants next contend that defendant TD Bank is entitled to summary judgment as there is no evidence that it was negligent; as it was precipitating at the time of plaintiff's accident; and as TD Bank's independent contractor Sipala performed snow removal services the day before the accident and on the morning of the accident.

Movants contend that TD Bank was not open at the time of the accident, that TD Bank had no notice of the condition, and that the only snow removal and salting and sanding that was performed at the premises was performed by defendant Sipala. As TD Bank employees would only use the bag of salt or sand left by Sipala when the bank was open, and as it was not yet open on the morning of the accident, there is no evidence that TD Bank caused, created, or worsened the condition at issue herein. Movants further contend that Sipala, by its own admission through its president, Mike Sipala, was solely responsible for snow removal at the premises at issue. Further, the deposition testimony of the parties indicates that the decision as to when and whether Sipala would go to the premises to remove snow and ice and place salt and sand was left entirely to Sipala, and that Sipala was responsible for cleaning snow and ice from all of the sidewalks and entrance ways at the premises. In addition, Sipala performed snow removal services, pursuant to the contract, on the day before the accident and on the morning of the accident, several hours prior to its occurrence.

Finally, movants contend that the plaintiff's testimony indicates that it was "misting" at the time of the accident and had been all morning. As such, defendants contend that the plaintiff's accident occurred during an ongoing precipitation event and therefore they were not obligated to clear snow and ice while the misting weather event was ongoing.

In opposition to said arguments, plaintiff contends that there are questions of fact as to whether the dangerous condition which caused plaintiff's injuries was caused by the defendants. Plaintiff contends that while moving defendants contend that Sipala performed snow and ice removal to the premises, they have failed to establish that "the dangerous condition was not caused or created by the manner in which the work was performed." Plaintiff further contends

that it is not required to prove notice of the unsafe condition when the condition was created by the defendants or their agents or employees, and that the defendants had a nondelegable duty to provide the public with a reasonably safe premises which could not be delegated to Sipala.

Generally, an out of possession landlord is not liable for injuries occurring on the premises unless it has retained control of the premises or is contractually obligated to perform maintenance and repairs. (*Brewster v. Five Towns Health Care Realty Corp.*, 59 A.D.3d 483, 873 N.Y.S.2d 199 (2d Dept. 2009)). Reservation of a right to enter the premises for the purposes of inspection and repair may constitute sufficient retention of control to impose liability for the dangerous condition, but only where the condition violates a specific statutory provision. (*Brewster v. Five Towns Health Care Realty Corp.*, 59 A.D.3d 483, 873 N.Y.S.2d 199 (2d Dept. 2009); *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008); *O'Connell v. L.B. Realty Co.*, 50 A.D.3d 752, 856 N.Y.S.2d 165 (2d Dept. 2008); *Blackwell v. James Holding Corp.*, 240 A.D.2d 527, 658 N.Y.S.2d 684 (2d Dept. 1997); *See also, Angwin v. FRF Ltd.*, 285 A.D.2d 570, 728 N.Y.S.2d 90 (2d Dept. 2001)). Further, a property owner or possessor may not be held liable for an alleged ice and/or snow condition unless the plaintiff proves that the owner either created the dangerous condition which is alleged to have caused the accident or had notice of the condition. (*Robinson v. Trade Link America*, 39 A.D.3d 616, 833 N.Y.S.2d 243 (2d Dept. 2007); *Voss v. D&C Parking*, 299 A.D.2d 346, 749 N.Y.S.2d 76 (2d Dept. 2002); *Javurek v. Gardiner*, 287 A.D.2d 544, 731 N.Y.S.2d 475 (2d Dept. 2001)). Accordingly, the moving defendants have made a prima facie showing of entitlement to summary judgment on liability grounds.

There are questions of fact, however, regarding whether the snow removal company, Sipala, was or was not negligent in its performance or nonperformance of snow and ice removal services at the TD Bank premises which prevent the granting of summary judgment to the movants upon liability grounds. No expert affidavit has been provided with respect to same, and there has been insufficient evidence set forth to establish Sipala's negligence, or conversely, its freedom from negligence, herein. (*See, i.e., Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351, 850 N.Y.S.2d 359 (2007)(merely plowing snow and salting after snow falls, is insufficient for a factual finding that the work either created or exacerbated a dangerous condition); *Tamhane v.*

Citibank, N.A., 61 A.D.3d 571, 877 N.Y.S.2d 78 (1st Dept. 2009); *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 773 N.E.2d 485 (2002)). While the general rule is that a party who retains an independent contractor is not liable for the negligence of the independent contractor where it has no right to supervise or control the work, there is a nondelegable duty exception to said rule where the party is under a duty to keep the premises safe. (*Backiel v. Citibank, N.A.*, 299 A.D.2d 504, 751 N.Y.S.2d 492 (2d Dept. 2002)). Owners of real property onto which members of the public are invited have a nondelegable duty to provide the public with reasonably safe premises and a safe means of ingress and egress. (*Sarisohn v. 341 Commack Road, Inc.*, 89 A.D.3d 1007, 934 N.Y.S.2d 202 (2d Dept. 2011); *Backiel v. Citibank*, N.A., 299 A.D.2d 504, 751 N.Y.S.2d 492 (2d Dept. 2002); *Arabian v. Benenson*, 284 A.D.2d 422, 726 N.Y.S.2d 447 (2d Dept. 2001); *Thomassen v. J & K Diner, Inc.*, 152 A.D.2d 421, 549 N.Y.S.2d 416 (2d Dept. 1989); *See also, Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 236 N.E.2d 632 (1968)). As such, an owner may be held vicariously liable for the negligence of its independent contractor if such negligence violated the owner's nondelegable duty to provide safe ingress and egress. (*Olivieri v. GM Realty Co.*, LLC, 37 A.D.3d 569, 830 N.Y.S.2d 284 (2d Dept. 2007); *Arabian v. Benenson,* 284 A.D.2d 422, 726 N.Y.S.2d 447 (2d Dept. 2001); *see also, Richardson v. Schwager Assoc.*, 249 A.D.2d 531, 672 N.Y.S.2d 114 (2d Dept. 1998)(holding that the owner subleased the premises to the tenant with knowledge that members of the public would be invited onto the premises and, therefore, the owner had a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress); *See also, Rosenberg v. Equitable Life Assur. Socy. of U.S.*, 79 N.Y.2d 663, 595 N.E.2d 840 (1992)(where the employer of an independent contractor has a nondelegable duty to keep the premises safe, "the employer cannot insulate itself from liability by claiming that it was not negligent: the employer is vicariously liable for the fault of the independent contractor because a legal duty is imposed on it which cannot be delegated"); *See also, Podlaski v. Long Island Paneling Ctr. of Centereach, Inc.*, 58 A.D.3d 825, 873 N.Y.S.2d 109 (2d Dept. 2009)(even if the independent contractor created the hazardous condition that resulted in injury to the plaintiff, the owner of a property onto which the public is invited may not avoid liability to the plaintiff for its alleged failure to maintain the walkway in a safe condition).

As members of the public were invited onto the premises at issue herein, Baldwin had a nondelegable duty to keep the premises reasonably safe and may be vicariously liable for the negligence of defendant Sipala. As there are questions of fact as to whether the alleged ice condition was caused, created, or worsened by the actions or inactions of the snow removal company, Sipala, there are, consequently, questions of fact regarding Baldwin's vicarious liability as the owner of the premises. Accordingly, defendant Baldwin's motion for summary judgment on liability grounds is hereby denied.

In addition, with respect to TD Bank's application for summary judgment on liability grounds, the lease at issue herein between Baldwin and TD Bank obligated defendant TD Bank to maintain the premises. Regardless of same, a tenant has a common law duty to remove dangerous or defective conditions from the premises it occupies, regardless of whether the lease obligates the landlord to maintain the premises. (*Sarisohn v. 341 Commack Road, Inc.*, 89 A.D.3d 1007, 934 N.Y.S.2d 202 (2d Dept. 2011), *Cohen v. Central Parking Sys.*, 303 A.D.2d 353, 756 N.Y.S.2d 266 (2d Dept. 2003)(the fact that the landlord was contractually responsible for snow and ice removal does not relieve the tenant from liability for the alleged dangerous condition on the premises); *McNelis v. Doubleday Sports*, 191 A.D.2d 619, 595 N.Y.S.2d 118 (2d Dept. 1993); *Reimold v. Walden Terrace, Inc.*, 85 A.D.3d 1144, 926 N.y.S.2d 153 (2d Dept. 2011)). Under the rubric of "nondelegable duty," a party who *retains* an independent contractor will be found vicariously liable for the negligence of the contractor where the employer is under a duty to keep the premises safe. (*Paul Brothers v. New York State Elec. & Gas Corp.*, 11 N.Y.3d 251, 898 N.E.2d 539 (2008); *Rosenberg v. Equitable Life Assur. Socy. of U.S.*, 79 N.Y.2d 663, 595 N.E.2d 840 (1992); *Stockdale v. City of New York*, 294 A.D.2d 195, 744 N.Y.S.2d 5 (2d Dept. 2002); *Olivieri v. GM Realty Co., LLC*, 37 A.D.3d 569, 830 N.Y.S.2d 284 (2d Dept. 2007)). "In such instances, the employer cannot insulate itself from liability by claiming that it was not negligent: the employer is vicariously liable for the fault of the independent contractor because a legal duty is imposed on it which cannot be delegated." (*Rosenberg v. Equitable Life Assur. Socy. of U.S.*, 79 N.Y.2d 663, 595 N.E.2d 840 (1992)). Further, the snow removal contract between TD Bank and Sipala herein is not the type of comprehensive and exclusive property maintenance obligation that obligated Sipala to maintain the entire premises, and as

such, it did not displace the duty of TD Bank, as tenant in possession, to duty to keep the premises in a safe condition. (*See, Tamhane v. Citibank*, N.A., 61 A.D.3d 571, 877 N.Y.S.2d 78 (1st Dept. 2009); *Castro v. Maple Run Condominium Assoc.*, 41 A.D.3d 412, 837 N.Y.S.2d 729 (2d Dept. 2007); *Linarello v. Colin Service Systems, Inc.*, 31 A.D.3d 396, 817 N.Y.S.2d 660 (2d Dept. 2006)). Accordingly, defendant TD Bank's motion for summary judgment on liability grounds is denied.

Further, the moving defendants contend that they are entitled to summary judgment based upon plaintiff's testimony that it was "misting" at the time of the accident. Moving defendants contend that since it was misting, they had no obligation to clear snow or ice during the ongoing precipitation event, but would have had a reasonable amount of time from the cessation of such event in which to remove the fallen precipitation, and as such, they cannot be held liable for the plaintiff's accident or injuries. Generally, a defendant has no duty to remove snow and ice during an ongoing storm, however, once the defendant undertakes snow removal efforts, it must do so in a reasonable manner and may be held liable for creating or exacerbating a dangerous condition. (*Salvanti v. Sunset Indus. Park Assoc.*, 27 A.D.3d 546, 813 N.Y.S.2d 110 (2d Dept. 2006); *Rugova v. 2199 Holland Ave. Apt. Corp.*, 272 A.D.2d 261, 708 N.Y.S.2d 390 (1st Dept. 2000)). As there is a question of fact as to whether the snow removal company's efforts on the morning of the accident were performed during the "misting" weather event, as there is a question of fact as to whether those efforts caused or exacerbated the icy condition at issue herein, and as TD Bank and Baldwin may be held vicariously liable for the negligence of Sipala, summary judgment on said ground is also denied.

Defendant TD Bank next contends that it is entitled to conditional summary judgment on contractual indemnity grounds over and against defendant Sipala. Defendant TD Bank contends that its contract with Sipala contains an express indemnity against loss. Pursuant to the snow removal contract, Sipala, was expressly obligated to indemnify and hold harmless TD Bank for all accidents arising out of any breach or alleged breach of Sipala's obligations under the contract, for any negligent performance of Sipala's obligations under the contract, for any act or omission of Sipala with respect to services or the performance of Sipala's obligations under the agreement, and for any services performed for TD Bank by Sipala. In addition, the contract

required Sipala to procure insurance naming TD Bank as an additional insured. TD Bank contends that it is undisputed that Sipala performed snow removal services at the location of the accident on the day of the accident and the day before the accident. Additionally, the evidence presented demonstrates that TD Bank had no notice of the alleged condition at issue, that it did not cause, create or exacerbate the icy condition, and that it did not supervise or control the work performed by Sipala with respect to snow and ice removal. As such, TD Bank has demonstrated that it was free from any negligence and, consequently, may be liable solely by virtue of vicarious liability, despite its duty to the plaintiff. To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and may be held liable solely by virtue of statutory or vicarious liability. (*Jamindar v. Uniondale Union Free School Dist.*, 90 A.D.3d 612, 934 N.Y.S.2d 437 (2d Dept. 2011); *Cava Constr. Co., Inc. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660, 871 N.Y.S.2d 654 (2d Dept. 2009)). Conditional judgment may be entered when indemnification is based upon an express contract to indemnify against loss. (*Reisman v. Bay Shore Union Free School Dist.*, 74 A.D.3d 772, 902 N.Y.S.2d 167 (2d Dept. 2010)). Indemnification agreements are enforceable when the agreement between the parties connotes an unmistakable intention to indemnify which can be clearly implied from the language and purpose of the entire agreement. (*Hogeland v. Sibley*, 42 N.Y.2d 153, 397 N.Y.S.2d 602 (1977); *Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 172, 556 N.Y.S.2d 991 (1990); *Castano v. Zee-Jay Realty Co.*, 55 A.D.3d 770, 866 N.Y.S.2d 700 (2d Dept. 2008); *See also, Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 344 N.Y.S.2d 336 (1973)). When coupled with an insurance procurement clause, the purpose of the indemnity clause is not to exempt the protected party from liability to the plaintiff, but to allocate the risk of liability to third parties between the indemnitor and indemnitee. (*Castano v. Zee-Jay Realty Co.*, 55 A.D.3d 770, 866 N.Y.S.2d 700 (2d Dept. 2008)). As the contract herein contains an express indemnification clause by which Sipala agreed to indemnify TD Bank against losses caused by Sipala's negligent actions or inactions and did not exempt TD Bank for liability for its own negligent actions, and as TD Bank demonstrated its freedom from negligence, TD Bank is granted conditional summary judgment on contractual indemnity grounds over and against Sipala.

Lastly, moving defendants contend that defendants TD Bank and Baldwin are entitled to common-law indemnity over and against Sipala and are therefore entitled to conditional summary judgment on said ground. To establish a claim for common-law indemnification, however, defendants must prove not only that they were not negligent, but also that the proposed indemnitor, Sipala, is responsible for the negligence, or in the absence of negligence that it had the authority to direct, supervise, and control the work giving rise to the injury. (*Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 A.D.3d 807, 888 N.Y.S.2d 81 (2d Dept. 2009); *Benedetto v. Carrera Realty Corp.*, 32 A.D3d 874, 822 N.Y.S.2d 542 (2d Dept. 2006)). As no such showing has been made by the moving defendants herein, and as there is a question of fact regarding the negligence of defendant Sipala, conditional summary judgment in favor of the movants on the basis of common-law indemnification is premature. Accordingly, movants application for conditional summary judgment over and against Sipala, based upon common-law indemnity grounds, is denied as premature.

This constitutes the decision and Order of this Court.

Dated: May 7, 2012

Anthony L. Parga, J.S.C.

Cc: Perez & Varvaro
333 Earle Ovington Boulevard
P.O. Box 9372
Uniondale, NY 11553-3644

Mallilo & Grossman, Esqs.
163-09 Northern Boulevard
Flushing, NY 11358

Joseph C. Tonetti, P.C.
548 West Jericho Turnpike
Smithtown, NY 11787