IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ERIN BREITIGAN, Plaintiff, v. ACME MARKETS, INC., ALBERTSON'S INC., SUPERVALU, INC., REGENCY CENTERS CORPORATION, INC., METRO COMMERCIAL MANAGEMENT SERVICES, INC., and THE BRICKMAN GROUP, LTD., Defendants, THE BRICKMAN GROUP, LTD., Third Party Plaintiff, v. CHRISTOPHER KALINOWSKI, Individually and d/b/a HUSTLE CONSTRUCTION, Third Party Defendant.	)	C.A. No. 07C-02-162 PLA

ON THIRD PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
DENIED

Submitted: April 16, 2008
Decided: May 8, 2008

This 8th day of May, 2008, upon consideration of the Motion for Summary Judgment filed by Third Party Defendant Christopher Kalinowski individually and d/b/a Hustle Construction ("Hustle"), it appears to the Court that:

1. The Regency Centers, LP, owner of the Pike Creek Shopping Center, entered into an Agreement to Perform Services (the "Agreement") on October 7, 2005 with The Brickman Group, Ltd. ("Brickman") for snow removal and maintenance of the shopping center.[1] Exhibit 1A to the Agreement required Brickman to remove snow from all public areas in the shopping center after a snowfall of two or more inches or when directed by the property manager of the shopping center.[2]

2. Brickman then entered into a Snow Subcontractor Agreement (the "Subcontract") with Hustle to provide snow removal and treatment services for the shopping center.[3]

3. Plaintiff Erin Breitigan ("Breitigan") filed a Complaint on February 16, 2007 in which she alleged that she slipped and fell on ice in the Pike Creek Shopping Center on February 19, 2005 at approximately 6:05

[1] Docket 32 (Third Party Def.'s Mot. for Summ. J.), Ex. 2.

[2] *Id.*, Ex. 2.

[3] *Id.*, Exs. 3 & 4.

p.m. [4] One of the named defendants was Brickman. Brickman then filed a Third Party Complaint against Hustle alleging that Hustle had a duty to perform snow removal and treatment services on February 19, 2005.

4. Hustle has now filed the instant motion for summary judgment. It argues that it never received an invoice from Brickman for any services on February 19, 2005, although it did receive invoices for snow removal services on other dates.[5] Hustle also notes that there was no snow or ice cover throughout the day of February 19, 2005,[6] and Breitigan herself admitted that there was no snowfall or any snow on the ground.[7] As a result, Hustle contends that it is entitled to judgment as a matter of law because it had no duty to perform snow removal services on February 19, 2005.

5. Brickman does not dispute the absence of snowfall on February 19, 2005, or that Hustle never received an invoice for snow removal services. It contends, however, that summary judgment is inappropriate at

[4] Docket 1 (Complaint), ¶¶ 8-11.

[5] Docket 32, Ex. 5.

[6] *Id.*, Ex. 6.

[7] *Id.*, Ex. 7 (Dep. Tr. of Erin Breitigan), 52:7-14, 54:9-18.

this stage because discovery is still ongoing.[8] Because the shopping center owners, Brickman, and Hustle have not testified or completed written discovery, it is still reasonably possible that discovery could lead to evidence that Hustle was directed to perform snow removal services on February 19, 2005. Should the evidence support Hustle's position after discovery is completed, Brickman concedes that Hustle may then be entitled to summary judgment.

6. When considering a motion for summary judgment, the Court's function is to examine the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[9] The court must "view the evidence in the light most favorable to the non-moving party."[10] "The moving party bears the initial burden of demonstrating that the undisputed facts support his legal claims."[11] If the proponent properly supports his claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact

[8] Defendants Acme Markets, Inc., Albertson's, Inc., Supervalu, Regency Centers Corporation, Inc., and Metro Commercial Management Services, Inc. joined in and adopted Brickman's response. Docket 36.

[9] Super Ct. Civ. R. 56(c).

[10] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. Ct. 2005).

[11] *Id.* at 879.

for resolution by the ultimate fact-finder."[12] Summary judgment will not be granted if, after viewing the record in a light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[13] If, however, the record reveals that there are no material facts in dispute and judgment as a matter of law is appropriate, then summary judgment will be granted.[14]

7. In this case, it is undisputed that Hustle had a duty to remove snow from the Pike Creek Shopping center in two instances: (1) upon two or more inches of snow accumulation, or (2) upon the direction of the property manager. Although there is no evidence that snow had fallen, there may still exist evidence that someone from Brickman directed Hustle to remove snow on that day. In fact, because discovery is ongoing, there has been no evidence obtained from (1) the Pike Creek Shopping Center owners, (2) Brickman, the snow removal contractor, or (3) Hustle, the snow removal subcontractor. The absence of an invoice for February 19, 2005 from Brickman to Hustle, without further discovery, does not foreclose the possibility that Hustle was directed to the site but failed to perform

[12] *Id.* at 880.

[13] *Id.* at 879.

[14] *Id.*

services.[15] Because there is still a genuine issue of fact, and neither written discovery nor depositions have been completed, summary judgment is premature.[16]

8. For all of the foregoing reasons, the Court concludes that there is a genuine issue of material fact about whether Hustle owed a duty to Brickman to remove snow on February 19, 2005. If the record supports Hustle's position after discovery is completed, Hustle may renew its motion at that time. Accordingly, Third Party Defendant's Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Joseph J. Longobardi, III, Esq.
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Megan T. Mantzavinos, Esq.
Michael K. Tighe, Esq.

[15] *See Vanaman v. Milford Mem'l Hosp., Inc.*, 272 A.2d 718, 720 (Del. 1970) ("Any application for such a judgment must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom.").

[16] *See Hampton v. Warren-Wolfe Assocs., Inc.*, 2004 WL 838847, at *2 (Del. Super. Ct. Mar. 25, 2004).