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SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI – COURT OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

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CANDICE DORSEY,

Plaintiff,

-- against –

VERIZON NEW YORK, INC. and
DYNASERV INDUSTRIES, INC.,

Defendants.

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INDEX NO: **22988/08**

MTN SEQ NO: 001 - MG

ORIG MTN DATE: 10/14/10

FINAL MTN DATE: 02/16/11

UPON the following papers numbered 1 to 4 read on this Motion:
1. Defendant VERIZON's Motion;
2. Plaintiff's Opposition;
3. Defendant DYNASERV's Opposition;
4. Defendant VERIZON's Reply;

it is,

ORDERED, that the application of Defendant VERIZON is hereby granted in all respects.

Defendant VERIZON moves this Court for an Order, pursuant to CPLR §3212, granting summary judgment on its cross claims against Defendant DYNASERV for contractual indemnification, common law indemnification and breach of contract for its failure to procure insurance naming Defendant VERIZON as additional insured on its policy of liability insurance.

This action arises out of a claim by Plaintiff against Defendants VERIZON and DYNASERV for personal injury damages sustained by Plaintiff after slipping on a patch of ice. Plaintiff allegedly suffered serious bodily injury resulting from the slip, incurring extensive medical care and treatment for pain and suffering.

Plaintiff's alleged slip occurred on the sidewalk located in front of Defendant VERIZON's 10 Adams Street property (Sidewalk). During the period encompassing the alleged incident Defendant VERIZON contracted with Defendant DYNASERV for landscaping services, including snow and ice removal. The Contract between Defendant VERIZON and Defendant DYNASERV (Contract) covered many of Defendant VERIZON's properties, including 10 Adams Street. The Contract outlines the "Open Up Procedure" Defendant DYNASERV must follow at the start of "any accumulation of snow or ice" (*see*: Contract Exhibit B3, Paragraphs 2.1 – 2.6). The Contract subsequently describes the "Maintenance Procedure" Defendant DYNASERV must follow after a snowfall begins as:

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> 3.1) [Defendant DYNASERV] will be on call, available for and will provide additional snow plowing, sanding and deicing and snow removal at locations identified with a Snow Code A or B throughout a continual snow fall or ice problem and or to clear sidewalks and driveways from snow mounds left by city/town snow plows or from any drifting as part of the per storm cost. [Defendant DYNASERV] will take direction from the [VERIZON] Property Manager or the designated Customer Service Center…
>
> 3.2) Upon any accumulation of snow or ice occurring during working hours, [Defendant DYNASERV] is responsible for maintaining safe vehicle and pedestrian ingress & egress throughout the duration of the snow fall for locations coded "A" or "B"…
>
> 3.3) In the event of temperature fluctuations above and below freezing such as day melting and cold overnight, [Defendant DYNASERV] will monitor all locations including all walkways, driveways and stairways for ice conditions. [Defendant DYNASERV] will spread a sand and ice melting material mix (or other ice melting/traction mixture as specified by the Property Manager) on driveways, parking lots, etc., and calcium chloride on stairways and [walkways] to alleviate said conditions …

(*see*: Contract Exhibit B3, Paragraphs 3.1 – 3.3). The Contract lists Defendant VERIZON's 10 Adams Street Property as a "Code B" property.

The Contract also contains an "INDEMNIFICATION" clause and an "INSURANCE" clause. In the "IMDEMNIFICATION" clause, the Contract states that:

> [Defendant DYNASERV] shall Defend, indemnify and hold harmless [Defendant VERIZON] … from any claims … that may be made: (i) by anyone for injuries (including death) to persons or damage to property, resulting in whole or in part from the acts or omissions of [Defendant DYNASERV] … (*see*: Contact, Paragraph 18(a))

In regards to whether Defendant DYNASERV must offer indemnification when the "act or omission" is brought on by the negligence of Defendant VERIZON,

> The foregoing indemnity shall not apply in cases of Claims that arise from the sole negligence, misconduct or other fault of Verizon. It shall apply, however, if a Claim is the result of the joint negligence, joint misconduct, or joint fault of [Defendant DYNASERV] and [Defendant VERIZON], but in such case, the amount of the Claim for which [Defendant VERIZON] is entitled to indemnification shall be limited to that portion of such Claim that is attributable to the negligence, misconduct or other fault of [Defendant DYNASERV]. (*see*: Contact, Paragraph 18(a))

In the "INSURANCE" clause, the Contract states that:

> [Defendant DYNASERV] shall secure and maintain at its expense during the term of this agreement (i) Commercial General Liability Insurance ... with limits of at least $2,000,000, combined single limit for each occurrence .... (*see*: Contact, Paragraph 19(a))

Defendant VERIZON brings forth this motion for summary judgment on its cross-claim against Defendant DYNASERV, arguing that Defendant DYNASERV must contractually and by common law indemnify it against this lawsuit, as Plaintiff's claim arose from Defendant DYNASERV's failure to clear the sidewalk of ice. Defendant VERIZON also argues that Defendant DYNASERV breached the Contract by not securing property insurance for it. Defendant DYNASERV responded that the indemnification clause did not apply in this matter because it was Defendant VERIZON who, if anyone, was negligent. Defendant DYNASERV did not Defend the insurance allegation.

A motion for summary judgment shall be granted, when upon all the papers and proof submitted, movant establishes its cause of action sufficiently to warrant the Court, as a matter of law, to direct judgment in its favor (*see:* ***Friends of Animals Inc v Associated Fur Manufacturers Inc,*** 46 NY2d 1065 [1979]; CPLR §3212(b)). Even when movant establishes a *prima facie* case in support of summary judgment, opponent retains an opportunity to defend movant's Motion by showing facts sufficient to require a trial on any issue of fact (*see:* ***Zuckerman v New York***, 49 NY2d 567 [1980]; CPLR §3212(b)).

This Court finds that Defendant VERIZON's cross claims are ripe for summary judgment; there remains no question of fact for a jury to decide. Both Defendants disagree as to which party, if either, was negligent in allowing the ice to accumulate on the Sidewalk. That disagreement, however, is not based on a disagreement of facts, but rather on a differential reading of the plain language of the Contract. Neither party disputes each other regarding the facts surrounding the Plaintiff's slip. Neither party disputes each other regarding the past actions of the Defendants in relation to the Contract. Neither party disputes the validity of the Contract. This Court can make a judgment based on the undisputed facts presented, and a jury trial on Defendant VERIZON's cross claims are not necessary. A trial on the facts will be necessary to determine the final question of negligence between Plaintiff and Defendants, but that is a separate issue from this summary judgment.

Given that this case is ripe for summary judgment, this Court must determine whether Defendant VERIZON has established its *prima facie* case in support of its cross claims. According to the "INDEMNIFICATION" clause, Defendant DYNASERV must indemnify Defendant VERIZON when Plaintiff's claims arise from the acts or omissions of Defendant DYNASERV (*see:* Contact, Paragraph 18(a)). Additionally, the Contract makes it clear that if Plaintiff's claim arose solely from Defendant VERIZON's negligence, the "INDEMNIFICATION" clause does not apply. *id.*

This Court shall find the opponent must indemnify movant when there is clear intent to do so from the contract (*see*: ***Balyszak v Sienna College,*** 882 NY2d 335 [2009]). Based on the

"INDEMNIFICATION" clause, there is a clear intent to indemnify, as long as Defendant VERIZON is not solely negligent. Therefore, this Court's decision as to whether to apply the "INDEMNIFICATION" clause, and therefore whether to grant summary judgment to Defendant VERIZON, depends on who was at fault, if either party, in letting ice accumulate on the Sidewalk.

Defendant DYNASERV argues that according to ***Martinez v City of New York***, Defendant VERIZON must prove that it was free of negligence with regard to the happening of the plaintiff's accident (*see*: ***Martinez v City of New York,*** 901 NYS2d 339 [2 Dept 2010]). The actual language of the case is broader: "The right to contractual indemnification depends upon the specific language of the contract." *id.* Since the Contract makes it clear that if both Defendants are negligent, the "INDEMNIFICATION" clause applies, Defendant DYNASERV's argument that Defendant VERIZON must prove that it was free from negligence is false. As per ***Martinez v City of New York,*** and in accordance with the Contract, Defendant VERIZON must prove that Defendant DYNASERV, if either party was negligent, is a negligent party as a matter of law (*supra*). If both Defendants are potentially at fault, the Contract makes it clear that the "INDEMNIFICATION" clause applies, to the degree that both parties are negligent.

A close analysis of the Contract is necessary to determine this issue. Under the "Maintenance Procedure", the Contract outlines three procedures for Defendants to follow, which both cite in their motions. In the paragraph 3.1, Defendant DYASERV agrees to be on call to provide additional deicing services at 10 Adams Street, and will take direction from Defendant VERIZON (*see*: Contract Exhibit B3, Paragraphs 3.1). Defendant DYNASERV argues that the "on call" language and the fact that it must "take direction" from Defendant VERIZON, proves that without any direction to deice the Sidewalk, it had no contractual duty to do so. Defendant VERIZON conceded that it never called Defendant DYNASERV to de-ice the Sidewalk on or about the date of Plaintiff's slip. Defendant VERIZON does argue, however, that paragraph 3.1 itself is not dispositive of Defendant DYNASERV's duty to deice the Sidewalk. Defendant VERIZON highlights that Paragraph 3.1 only refers to "additional" de-icing. This Court agrees that paragraph 3.1 only refers to additional de-icing, and although paragraph 3.1 does not give Defendant DYNASERV a duty to de-ice, it does not completely abrogate it from having a duty anywhere else in the Contract.

Paragraph 3.2 gives Defendant DYNASERV a duty to maintain the Sidewalk free of ice throughout the duration of the snowfall (*see*: Contract Exhibit B3, Paragraphs 3.2). Although Defendant VERIZON makes note of this paragraph as evidence of Defendant DYNASERV's duty, this Court finds that this paragraph does not apply to the current situation. At the time of Plaintiff's alleged slip, the snowfall had concluded, making the paragraph irrelevant to the current case.

The final paragraph under the "Maintenance Procedure" most clearly influences this decision. Paragraph 3.3 charges Defendant DYNASERV with a duty to monitor the Sidewalk when there are temperature fluctuations and to spread a de-icing mixture to alleviate the icy conditions (*see*: Contract Exhibit B3, Paragraphs 3.3). According to the weather records that Defendant DYNASERV's provided, the day before Plaintiff's alleged slip, the temperature fell as low as 28 °F and rose as high as 35 °F. That temperature fluctuation is clearly the type that paragraph 3.3

referred to. Paragraph 3.3 clearly gives Defendant DYNASERV a duty to monitor and the Sidewalk and use the sand and ice melting material mix. This Court finds that Plaintiff's alleged slip did arise, in whole or in part, from the acts or omissions of Defendant DYNASERV, such that, the "INDEMNIFICATION" clause was triggered.

This Court acknowledges Plaintiff's Affirmation in Partial Opposition, arguing that it opposes any ruling that limits Defendant VERIZON's liability or strikes any portion of Plaintiff's claims. Plaintiff relies on §205-2 of the Code of the Town of Oyster Bay, which establishes a duty on landowners to keep sidewalks free of ice, among other things. A claim of indemnification does not alter the duties of a defendant; alternatively, it just changes who pays for the violation of them. Therefore, this ruling does not abridge the claims of Plaintiff or liability of Defendant VERIZON, just which Defendant would pay for Defendant VERIZON's liability, if found liable. If this Court finds Defendant VERIZON to be liable, Defendant DYNASERV must indemnify Defendant VERIZON and pay damages to Plaintiff.

Furthermore, this ruling must be understood narrowly, as Plaintiff still retains the burden of proving that Defendants acted negligently in all the ways she pleaded; this decision does not mean that Defendant DYNASERV is automatically liable for damages. Defendant DYNASERV argued in its Affirmation in Opposition that it was not negligent because the Sidewalk was clear. Those arguments should be saved for the case involving the Plaintiff. Defendant VERIZON just needed to prove that, should negligence be determined, it will be the economic responsibility of Defendant DYNASERV, whether Defendant DYNASERV was negligent itself, or not. Defendant DYNASERV retains the opportunity to defend itself at trial.

There is no reason this Court need consider Defendant VERIZON's claim for indemnification by common law, since Defendant DYNASERV already has an obligation to indemnify Defendant VERIZON because of its contractual obligations.

Defendant DYNASERV will be required to reimburse Defendant VERIZON for attorney's fees incurred thus far, in addition to any damages they may be liable for. The contract clearly states in the "INDEMNIFICATION" clause that Defendant DYNASERV will have to "defend" Defendant VERIZON. New York State has ruled that when one party puts off defending the other, although there was a duty to do so in an indemnification clause, they will be liable for past attorney fees incurred while defending the action. (*see*: ***Perchinsky v State of New York***, 660 NYS2d 177 [1997]).

This Court also grants Defendant VERIZON's application for its claim of breach of contract for failure to procure insurance naming Defendant VERIZON as additional insured on its policy for liability coverage. New York state recognizes agreements to procure insurance as legitimate provisions of contracts in "contractor" settings (*see*: ***Kinney v G W List Co***, 76 NY2d 215 [1990]). After Defendant VERIZON claimed that Defendant DYNASERV failed to name them on their liability insurance policy, Defendant Dynaserv did not offer any evidence that it did not breach the contract. Given the lack of any evidence to support Defendant DYNASERV, this Court must find in favor of Defendant VERIZON.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the above referenced application of Defendant VERIZON is hereby granted in all respects.

Settle Judgment on 10 days notice.

Dated: Riverhead, New York
July 29, 2011

HON. JEFFREY ARLEN SPINNER, JSC

FINAL DISPOSITION	✓ NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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