Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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SUSAN LELLA,

Index No.:8107/10

Plaintiff(s),

Motion Date:3/20/12

- against -

Motion Cal. No.: 19

Motion Seq. No: 4

JP MORGAN CHASE BANK, N.A. AND WINDSOR PARK ASSOCIATES, LLC AND REALTY MANAGEMENT ASSOCIATES LLC, ALL COUNTIES SNOW REMOVAL CORP., LANDSCAPING WITH JP SYKES, INC.,

Defendant(s).

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MORGAN CHASE BANK, N.A.

Third-Party
Index No.:350226/11

Third-Party Plaintiff(s),

- against -

ALL COUNTIES SNOW REMOVAL CORP.,

Third-Party Defendant(s).

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ALL COUNTIES SNOW REMOVAL CORP.,

Fourth-Party
Index No.:350251/11

Fourth-Party Plaintiff(s),

- against -

LANDSCAPING WITH J.P. SYKES, INC.,

Fourth-Party Defendant(s).

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The following papers numbered 1 - 34 read on this motion by the fourth-party defendant Landscaping with J.P. Sykes, Inc. for an order granting summary judgment; a cross-motion by defendant/third-party defendant/fourth-party plaintiff All Counties Snow Removal Corp. for an order granting summary judgment; and a cross-motion by defendant/third-party plaintiff JP Morgan Chase Bank, N.A. for an order granting summary judgment.

Papers

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Upon the foregoing papers it is **ORDERED** that the motion and cross-motions are considered together and decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff on February 12, 2010 when she fell on the sidewalk located in front of the premises located at 215016 73rd Avenue, in the County of Queens, City and State of New York. This action was commenced on April 1, 2010 by the filing of a summons and complaint. On May 3, 2011, defendant JP Morgan Chase Bank, NA ("Chase") commenced a third-party action against All Counties Snow Removals Corp. ("All Counties"). On May 13, 2011, third-party defendant All Counties commenced a fourth-party action against Landscaping with J.P. Sykes, Inc. ("Sykes"). By order dated October 21, 2011, this court granted plaintiff's application for leave to amend the complaint by adding All Counties and Sykes as defendants in the main action.

In her complaint and amended complaint, plaintiff alleges that she fell due to ice on the subject sidewalk. It is uncontested that the subject property is owned by defendant Windsor Park Associates, LLC ("Windsor"), managed by defendant Realty Management Associates, LLC ("Realty") and leased to defendant Chase. It is also uncontested that, defendant Chase contracted its obligation for snow removal to defendant/third-party defendant/fourth-party plaintiff All Counties who subcontracted the job to defendant/fourth-party defendant Sykes.

Defendant/fourth-party defendant Sykes now moves, pursuant to CPLR §3215, for an order granting summary judgment. The 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

(*See, Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion.

CPLR §3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding, as a matter of law, that the cause of action or defense has no merit. The evidence submitted in support of the motion must be viewed in the light most favorable to the non-movant (*See, Grivas v. Grivas*, 113 AD2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 AD2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 NY2d 553, 557 [1977]).

Generally, a snow removal contractor's contractual obligation, standing alone, will not give rise to tort liability in favor of third parties unless "(1) the snow removal contractor, in failing to exercise reasonable care in the performance of its duties, launched a force or instrument of harm; (2) the plaintiff detrimentally relied on the continued performance of the snow removal contractor's duties; or (3) the snow removal contractor has entirely displaced the owner's duty to maintain the premises safely" (*Schultz v Bridgeport & Port Jefferson*, 68 AD3d 970, at 971, quoting *Castro v Maple Run Condominium Assn.*, 41 AD3d 412, 413, 837 NYS2d 729 [2nd Dept. 2007]; *Crosthwaite v Acadia Realty Trust*, 62 AD3d 823, 879 NYS2d 554 [2nd Dept. 2009]). It is well-settled that a failure to remove snow is not negligence and liability will not result unless it is shown that the defendant made the area more hazardous through his or her removal efforts (*See, Spicehandler v. New York*, 303 NY 946 [1952]; *Yen Hsia v. City of New York*, 295 AD2d 565 [2d Dept. 2002]; *Case v. City of New York*, 295 AD2d 464 [2d Dept. 2002]; *Klein v. Chase Manhattan Bank*, 290 AD2d 420 [2d Dept. 2002]); *Palmer v. City of New York*, 287 AD2d 553 [2d Dept. 2001];*Prado v. City of New York*, 276 AD2d 765 [2nd Dept. 2000]; *Alexis v. Lessey*, 275 AD2d 754 [2d Dept. 2000]; *Goldstein v. Moskowitz*, 271 AD2d 489 [2d Dept. 2000]; *Lakhan v. Singh*, 269 AD2d 427 [2d Dept. 2000]; *Bautista v. City of New York*, 267 AD2d 265 [2d Dept. 1999]; *Rector v. City of New York*, 259 AD2d 319 [1st Dept. 1999]).

In support of this motion, defendant/fourth-party defendant Sykes submits, *inter alia*, the pleadings, the amended pleadings, the third-party pleadings, the fourth-party pleadings, the deposition transcript of its President John Pierson, a copy of the proposed agreement between it and defendant/third-party defendant/fourth party plaintiff All Counties. In his deposition, Mr. Pierson testified that his company was hired by defendant/third-party defendant/fourth party plaintiff All Counties to perform snow removal at the subject location and that defendant/fourth-party defendant Sykes did perform such snow removal on February 11, 2010, the day before plaintiff's accident.

Mr. Pierson further testified that, pursuant to the agreement between All Counties and Sykes, Sykes would only clean a location when specifically called in by All Counties and that, following snow removal, it was All Counties' employees who performed final inspections of the work. Mr. Pierson also stated that, on February 11, 2010, he personally supervised snow removal in the area, which consisted of shoveling the sidewalk and putting down approximately 25- 35 pounds of salt on the sidewalk. Finally, Mr. Pierson testified that he was not aware of any complaints made regarding the subject sidewalk and that defendant/third-party defendant/fourth party plaintiff All Counties did not notify him to return to the location after the snow removal was completed.

The movant also submits the deposition transcript of Philip Faicco, a Supervisor with defendant/third-party defendant/fourth party plaintiff All Counties. In his deposition, Mr. Faicco testified that the movant is a subcontractor of defendant/third-party defendant/fourth party plaintiff All Counties, that pursuant to the agreement between the parties, defendant/fourth-party defendant Sykes would be notified of when to conduct snow removal and that, after such removal, employees of All Counties inspected the premises. Thus, defendant/fourth-party defendant Sykes has amply demonstrated that no material issues of fact exist as to its liability for the happening of plaintiff's accident. Accordingly, the burden now shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*See, Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]).

In opposition to the motion, neither plaintiff nor defendant/third-party plaintiff Chase submits any evidence defendant/fourth-party defendant Sykes, in failing to exercise reasonable care in the performance of its duties, launched a force or instrument of harm. Further, the opposing parties have failed to prove, or to assert, that the plaintiff detrimentally relied on the continued performance of the Sykes' duties as snow removal contractor. Instead, both parties assert that a question of fact remains as whether defendant/fourth-party defendant Sykes has entirely displaced defendant Windsor, as owner, or defendant/third-party plaintiff Chase's duty to maintain the premises safely. Plaintiff and defendant/third-party plaintiff Chase each assert that, as defendant/fourth-party defendant Sykes has failed to produce a fully executed copy of its contract with defendant/third-party defendant/fourth party plaintiff All Counties, this court cannot determine the extent of its duties. However, defendant/fourth-party defendant Sykes does submit a copy of its fully-executed agreement annexed to its Reply Affirmation. Additionally, both the deposition testimony of witnesses for defendant/third-party defendant/fourth party plaintiff All Counties and for defendant/fourth-party defendant Sykes support the movant's contention that it did not have exclusive responsibility for snow removal at the subject location. In their respective depositions,

Mr. Faicco and Mr. Pierson state that defendant/fourth-party defendant Sykes only responded to the subject premises when called by All Counties and that All Counties performed the final inspections of the premises, monitored upcoming storms and made all decisions regarding snow removal in the area. Other than the speculation of their respective attorneys, plaintiff and defendant/third-party plaintiff Chase have produced no evidence that defendant/fourth-party defendant Sykes displaced defendant Windsor's or defendant/third-party plaintiff Chase's duty to maintain the premises safely. It is well-settled that mere conjecture and surmise is insufficient to defeat summary judgment (See *Elder v. Elder*, 2 AD3d 671 [2d Dept. 2003]). Thus, the plaintiff and defendant/third-party defendant Chase have failed to submit evidence that any material issues of fact remain in this action. Accordingly, summary judgment is granted, and the amended complaint and fourth-party complaint are hereby dismissed as against defendant/fourth-party defendant Landscaping with J.P. Sykes, Inc.

The cross-motions by defendant/third-party defendant/fourth-party plaintiff All Counties and defendant/third-party plaintiff Chase are hereby denied. Pursuant to CPLR §2215, cross-motions may only be brought against the moving party. In their respective applications, the cross-movants seek an order granting summary judgment and dismissing the amended complaint and third-party complaint against them. However, it is defendant/fourth-party defendant Sykes, not plaintiff or Chase, the complainant and third-party complainant, respectively, who makes the instant motion. Accordingly, the cross-motions are denied in their entirety.

Dated: May 22, 2012

***JANICE A. TAYLOR, J.S.C.***

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