Supreme Court of the State of New York
COUNTY OF KINGS: Trial Term Part 35 X
CYNTHIA SPENCER,

Plaintiff,

Index No. 500407/09

-against-

DECISION AND ORDER

BROOKLYN HOSPITAL, SCHUR MANAGEMENT COMPANY, and ASHLAND PLACE HOUSES, INC.,

Defendants,

X

Recitation as required by CPLR 2219(a), of the papers considered in support of this motion and cross-motion for summary judgment.

Papers	Numbered
Order to Show Cause/Motion/ Cross-Motion and	1-12; 13-31
Affidavits Annexed.....	32-33
Opposition papers.....	34-38
Reply papers.....	39; 40; 41
Memorandum of law.....	42, 43

Upon the foregoing cited papers, the Decision/Order on this motion and cross-motion is as follows:

In this action to recover damages for personal injuries, defendants The Brooklyn Hospital Center s/h/a Brooklyn Hospital and Ashland Place Houses, Inc. [collectively Hospital defendants] move for an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing all claims and cross-claims asserted against them. Hospital defendants also move for an award of summary judgment against co-defendant Schur Management [Schur] on their cross-claims for indemnification and defense costs. Schur cross-moves for an order granting it summary judgment dismissing the plaintiff's complaint and all asserted cross-claims as well as an award of summary judgment on its cross-claim against the Brooklyn Hospital defendants for breach of contract to procure an insurance policy and for its litigation costs.

At about 6:45 A.M. on March 18, 2007, plaintiff allegedly injured her elbow when she slipped and fell on a patch of "black ice" on the public sidewalk abutting the Maynard

Building located at 240 Willoughby Street, Brooklyn, New York. On the date of plaintiff's accident, the Maynard Building was owned by the Hospital defendants and was managed by Schur. Plaintiff testified that right before her accident she was walking down Willoughby Street, on her way to work, looking straight ahead, and did not observe any snow or ice on the sidewalk. Plaintiff testified that as she was about to cross Willoughby Street, when before the area of the cross-walk, her right foot slipped forward causing her to fall to the ground. Plaintiff testified that she did not know what caused her to slip and fall until after she was on the ground. At that point plaintiff noticed a patch of "black ice" measuring 2 feet x 1 foot located approximately 1 foot from the curb.

Hospital defendants move for summary judgment on liability on the ground that they neither created nor had notice of any icy or slippery condition on the sidewalk in front of the Maynard Building where plaintiff had her accident.

Section 7-210 of the Administrative Code of the City of New York (the Sidewalk Law), imposes tort liability upon certain landowners, including the Hospital defendants herein, for the negligent failure to remove snow and ice from the sidewalk abutting their property (*see* Administrative Code of City of NY § 7-210; *Martinez v Khaimov*, 74 AD3d 1031 [2d Dept 2010]). However, the Sidewalk Law is not a strict liability statute and an injured party must still establish negligence on the part of the landowner (*see Gyokchyan v City of New York*, 2012 NY Slip Op 3302 [2d Dept]). Hospital defendants, as the proponents of a motion for summary judgment, have the initial burden of demonstrating that they neither created the dangerous condition nor had actual or constructive notice of it (*see Mignogna v 7-Eleven, Inc.*, 76 AD3d 1054 [2d Dept 2010]).

Here, however, Hospital defendants failed to establish, *prima facie,* their entitlement to judgment as a matter of law by showing that they did not create the allegedly icy condition through negligent snow removal efforts (*see Plotits v. Houaphing D. Chaou, LLC*, 81 AD3d 620 [2d Dept 2011]). In support of their motion, Hospital defendants submit the deposition testimony of their vice president of facilities management, Paul Wong, and of their engineer/fire safety manager, John McDonald, who at the time of plaintiff's accident, was employed by Schur as the building's superintendent. The witnesses' testimony reflects that in March 2007, Schur, and not Hospital defendants, was responsible for removing snow/ice from the abutting public sidewalk. However, Hospital defendants also submit the testimony of Robert Gethard, Schur's commercial property manager for the subject property, whose testimony indicates that when there was a snow fall greater than 2 inches, as there was two days prior to plaintiff's accident, Hospital defendants would drive their snow plow onto the public sidewalk abutting the premises and clear the snow, ice and/or slush. In view thereof, Hospital defendants' own submissions raise triable issues of fact as to whether they undertook snow removal efforts in the days before plaintiff's accident and, if so, whether such snow removal efforts led to the formation of the ice patch which allegedly caused plaintiff to fall.

Even assuming Hospital defendants established that they did not create the allegedly dangerous condition, their submissions fail to establish that they lacked constructive notice of its existence to avoid potential liability under the Sidewalk Law (*see Martinez v Khaimov*, supra). The submitted deposition testimony of their managing agent's employees, Mr. Gethard and Mr. McDonald, reflect the general snow removal and inspection practices after a storm and do not indicate when the sidewalk was last inspected and salted prior to plaintiff's accident (*see Mignogna v 7-Eleven, Inc.*, supra].

As Hospital defendants fail to meet their *prima facie* burden for an award of summary judgment on liability, it is unnecessary to determine the sufficiency of the plaintiff's papers in opposition (*see Sabatino v 425 Oser Ave., LLC*, 87 AD3d 1127 [2d Dept 2011]). Accordingly, Hospital defendants motion for summary judgment on liability is denied.

Moreover, Schur fails to establish its *prima facie* entitlement to judgment as a matter of law dismissing the plaintiff's complaint as asserted against it on the ground that it owed no duty to the plaintiff. "Ordinarily, the breach of a contractual obligation to maintain and inspect building premises is not sufficient in and of itself to impose tort liability upon the promisor to noncontracting third-parties" (*Kaehler-Hendrix v Johnson Controls, Inc.*, 58 AD3d 604, 606 [2d Dept. 2009]). There are, however, three exceptions to this general rule and 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 its duties, "launches 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 Contrs.*, 98 NY2d 136, 140 [2002] [citations omitted]).

When the plaintiff's pleadings allege the applicability of any of the *Espinal* exceptions, a defendant has to negate the possible applicability of those exceptions in order to establish its *prima facie* showing of entitlement to summary judgment (*see Foster v Herbert Slepoy Corp.* 76 AD3d 210 [2d Dept 2010]). Here, viewed in the light most favorable to the plaintiff (*see Rubistello v Bartolini Landscaping, Inc.*, 87 AD3d 1003 [2d Dept, 2011]), the pleadings assert, *inter alia*, that defendants were negligent in failing to properly shovel and clean the sidewalk and created the allegedly dangerous icy condition. Schur therefore, is required to eliminate triable issues of fact as to whether, in allegedly failing to exercise reasonable care in its snow removal duties, it launched a force or instrument of harm (*see Robles v Bruhns*, 99 AD3d 980 [2d Dept 2012]). Schur, however, fails to do so. Although Schur takes the position that it had no participation or responsibility for snow removal on the public sidewalk, triable issues of fact exist as to whether Schur performed snow removal in the days prior to plaintiff's accident. Mr. Gethard testified that after the Hospital defendants would plow the public sidewalk, Schur's employees would clean up whatever residual snow or ice remained with a snowblower or by hand. Mr. Gethard also testified that it was Schur's responsibility to

inspect for black ice. Moreover, Mr. McDonald testified that Schur employees were required, even during a heavy snowfall, to shovel the snow, put salt outside, and to make sure the sidewalk was clear. And, contrary to Mr. Gethard's testimony, Mr. McDonald testified that he, along with another Schur employee, would operate the snowplow.

Schur also argues that plaintiff has failed to establish any evidence of its negligent snow or ice removal. However, Schur, as the proponent of this cross-motion for summary judgment, has the burden of demonstrating "that it did not launch a force or instrument of harm as a result of a failure to exercise reasonable care in the performance of its snow removal services" (*Rubistello v Bartolini Landscaping, Inc.*, supra at 1005]. Schur cannot satisfy its burden by pointing to gaps in the plaintiff's proof (*see Does v Orange-Ulser Bd. of Coop. Educ. Servs.*, 4 Ad3d 387 [2d Dept 2004]. As Shur fails to come forward with any evidence concerning the performance of its snow removal efforts, it fails to establish its *prima facie* entitlement to judgment as a matter of law. Accordingly, Schur's motion for summary judgment on liability is denied.

That branch of Hospital defendant's motion for summary judgment on its cross-claim against Schur for contractual indemnity including defense costs is denied as premature as there are questions of fact as to Hospital defendant's own negligence (*see Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612 [2d Dept 2011])[1]. In light thereof, Schur's cross-motion to dismiss Hospital defendants' motion for contractual indemnification is also denied

However, that branch of Schur's cross-motion seeking summary judgment against Hospital defendants' on its cause of action to recover damages for breach of contract for failure to procure insurance is granted.(*see DiBuono v Abbey, LLC*, 83 AD3d 650 [2d Dept 2011]) Schur demonstrates that although the parties' management agreement requires the Hospital defendants to maintain an insurance policy naming Schur as an additional insured, no such policy was procured. In opposition, Hospital defendants fail to raise a triable issue of fact, since it does not submit any evidence demonstrating that it complied with its insurance obligation under the agreement (*see Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686 [2d Dept 2012]). Moreover, "[b]ecause the insurance procurement clause is entirely independent of the indemnification provisions in the contract a final determination of liability for the failure to procure insurance "need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575 [1st Dept 2012] *citing Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999]). Accordingly, Schur is entitled to recover from Hospital defendants

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[1] At this juncture, because there has been no determination as to actual negligence, the court is not making any findings as to whether the broad indemnification provision offends General Obligations Law § 5-323 (*see generally Dwyer v Central Park Studios, Inc.*, 98 AD3d 882 [1st Dept 2012]; *cf. Port Parties, LTD v Merchandise Mart Properties, Inc.*, 102 AD3d 539 [1st Dept 2013]).

all out-of-pocket expenses resulting from the breach including reasonable attorney's fees (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111 [2001]).

This constitutes the decision/order of the Court.

Dated: June 3, 2013

Enter,

Karen B. Rothenberg
J.S.C.

Karen B. Rothenberg
Justice, Supreme Court

FILED
KINGS COUNTY CLERK
2013 JUN 12 AM 8:40