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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Hedy Feingold and Martin Feingold,

Plaintiffs,

-against-

JP Morgan Chase & Company,

Defendants.

Index No.: 16220/2007

Attorneys [See Rider Annexed]

Motion Sequence No.: 003; MD
Motion Date: 2/28/13
Submitted: 4/4/13

JP Morgan Chase & Company,

Third-Party Plaintiff,

-against-

TWMS L.I.,

Third-Party Defendant.

Motion Sequence No.: 005; XMD
Motion Date: 2/28/13
Submitted: 4/4/13

JP Morgan Chase & Company,

Second Third-Party Plaintiff,

-against-

All Counties Snow Removal Corp.,

Second Third-Party Defendant.

Upon the following papers numbered 1 to 68 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 40; Notice of Cross Motion and supporting papers, 50 - 62; Answering Affidavits and supporting papers, 40 - 49; 63 - 64; Replying Affidavits and supporting papers, 67 - 68; Other, Affirmation in Partial Support, 65 - 66; it is

ORDERED that the motion by third-party defendant TWMS L.I. (TWMS) for an order lifting the stay imposed in this action and granting leave to renew its prior motion for summary judgment, which was denied by order of this Court dated October 4, 2011 is granted; and it is further

ORDERED that, upon renewal, the motion by third-party defendant TWMS for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the cross-motion by second third-party defendant All Counties Snow Removal Corp. Inc. (All Counties) for summary judgment is denied; and it is further

ORDERED that the derivative cause of action asserted in the complaint on behalf of Martin Feingold, now deceased, has been withdrawn by stipulation and the caption of this action is amended accordingly.

This is an action to recover damages, personally and derivatively, for the injuries allegedly sustained by Hedy Feingold as a result of a slip and fall accident that occurred on March 4, 2006. Plaintiff allegedly slipped and fell on ice, snow and broken concrete on the sidewalk alongside a Chase parking lot located at 42 West Main Street in Smithtown, New York. Defendant JP Morgan Chase & Company (Chase) commenced a third-party action against third-party defendant TWMS, alleging that TWMS had been hired to perform snow and ice remove on the subject premises and that its negligence caused plaintiff's accident. Chase commenced a second third-party action against defendant All Counties, alleging that All Counties had been hired to perform snow and ice removal in the parking lot of the subject premises and that its negligence caused plaintiff's accident. In an order dated October 4, 2011, this Court denied TWMS's prior motion for summary judgment without prejudice, finding that a determination could not be rendered at that time without substitution of a legal representative for plaintiff Martin Feingold, who passed away on November 10, 2009. TWMS now moves for an order lifting the stay and for leave to renew its prior motion and has submitted letters testamentary appointing plaintiff Hedy Feingold as executrix of the estate of Martin Feingold. It also submits a stipulation withdrawing the second cause of action for loss of services on behalf of decedent plaintiff, Martin Feingold, which is signed by Hedy Feingold, as executrix of the estate of Martin Feingold, and the attorneys for All Counties, Chase, and TWMS.

TWMS argues that there is no triable issue of fact as to its liability, that it owed no duty to plaintiff, and that the service contract between it and Chase should be construed in accord with the parties' intent. In support of its motion for summary judgment, TWMS submits copies of the pleadings, an affidavit of Cliff Tatum, photographs of the subject area where plaintiff allegedly fell, a service contract for janitorial services between it and Chase, and excerpts of the deposition testimony of plaintiff, Mauro Sabando, Edith Reinwald and Philip Faicco.

Cliff Tatum, the Executive Vice President of TWMS, states in his affidavit that he was involved in negotiating the contract between Chase and TWMS to provide maintenance services at the bank. There is an ATM drive-through to the south of the bank and a parking lot which is surrounded by a chain-link fence and pursuant to the maintenance contract, TWMS performed snow

and ice removal services on a portion of the sidewalk adjacent to the drive-through and the sidewalk area north of the drive-through. The company did not provide snow removal services in the parking lot or on the sidewalk alongside the chain-link fence where plaintiff's accident allegedly occurred. Tatum further states in his affidavit that TWMS never received any complaints from Chase that it was supposed to maintain the area where plaintiff's accident occurred.

All Counties Snow Removal cross-moves for summary judgment dismissing the complaint against it on the ground that it was not responsible for snow removal on the sidewalk where plaintiff fell. In support of its motion, All Counties adopts the evidence submitted by TWMS and also submits copies of the pleadings, excerpts of the deposition testimony of plaintiff, Faicco, and Reinwald, a copy of the maintenance agreement between it and Chase, and a climate summary for March 1, 2006 to March 6, 2006.

At her examination before trial, plaintiff testified that on the morning of the subject accident, she was walking from the parking lot of the Chase bank to the entrance when she slipped and fell on ice. She testified that the parking lot was enclosed by a chain-linked fence, and that directly in front of where her car was parked was an ATM drive-through area. She testified that she intended to walk towards the drive- through area to the entrance of the bank, but that the opening to the drive-through area was blocked by a two-foot high mound of snow which prevented her from walking in that direction. Plaintiff testified that she had to walk back towards the area where her vehicle entered the parking lot, and walked on the sidewalk alongside the fence to get to the entrance of the bank. As she was walking, she observed that a large portion of the sidewalk was covered with patches of ice. She described that area of the sidewalk where she fell as very icy and horribly broken-up, causing her to slip and fall. She further testified that there appeared to be a pathway shoveled on the sidewalk, but that it was not cleaned well.

At her examination before trial, Edith Reinwald, the Branch Manager of the Chase bank, testified that Chase is responsible for maintaining the sidewalk along the chain-linked fence of its parking lot. She testified that if she determined that snow and ice removal were necessary, she would call the facilities department of Chase to request snow removal, and a snow removal company would respond within an hour. She inspected the area after the job was done. She explained that no Chase employees ever conducted snow or ice removal of the sidewalk or parking lot. She admitted that there have been instances where the company performing snow removal services blocked the entrance way from the parking lot, forcing customers to walk around onto the sidewalk. She also testified that in the morning when she walks to the bank from the parking lot, she walks through the pedestrian entrance which plaintiff alleges was blocked with snow, but does not recall snow or ice blocking the entrance on the day of the accident.

At his examination before trial, Philip Faicco, a supervisor employed by All Counties, testified that All Counties had a contract with the subject Chase bank to plow and salt the parking lot area. He testified that if there is snow accumulations over half an inch, he would go plow the snow. He testified that he would generally enter the parking lot from the ATM drive-through area, and plow the snow to the southeast corner of the parking lot near the dumpster. He explained that

if there was not enough snow to plow, he would apply salt on the ground of the parking lot before more snow accumulates. He testified that he is responsible for keeping the pedestrian entrances clear of snow, and that the last snow event prior to the accident occurred on March 2, 2006. He further testified that when he left the parking lot the evening of March 2nd there was no snow blocking the pedestrian entrances and exits in the parking lot.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

Fundamental to recovery in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Ordinarily, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third-party (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]). However, tort liability in favor of a non-contracting third-party may arise in a situation where the snow removal contractor has launched a force or instrument of harm in failing to exercise reasonable care in the performance of his duties, or where there has been detrimental reliance by the injured non-contracting third-party on the contractor's continued performance of the snow removal contractor's duties, or where the snow removal contractor has entirely displaced the property owner's duty to maintain the premises in a reasonably safe manner (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Lehman v North Greenwich Landscaping, LLC***, 65 AD3d 1291, 887 NYS2d 136 [2d Dept 2009]; ***Georgotas v Laro Maintenance Corp.***, 55 AD3d 666, 865 NYS2d 651 [2d Dept 2008]).

Here, TWMS failed to establish its prima facie entitlement to judgment as a matter of law. Section L of the contract between Chase and TWMS, entitled Snow-Ice Removal (24 hours per day, 7 days per week), states in relevant part as follows:

1. The Contractor shall provide supplemental personnel from its back-up work force to facilitate the early removal of snow or ice in a concerted effort to keep the entrance ways to and around the Building(s) clear at all times.

2. Snow and/or ice shall not be allowed to accumulate on plaza, sidewalks,

walkways, entrance ways, loading dock areas, etc.

While the affidavit of Tatum states that TWMS did not provide snow removal service on the sidewalk where plaintiff's accident occurred, the language of the contract between it and Chase creates a triable issue of fact as to whether TWMS is responsible to remove snow and ice from the subject area. Accordingly, the motion by TWMS for summary judgment dismissing the third-party complaint against it is denied.

Second third-party defendant All Counties failed to establish its *prima facie* entitlement to summary judgment as a matter of law (*see* ***Denardo v Ziatyk***, 95 AD3d 929, 943 NYS2d 591 [2d Dept 2012]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]). While All Counties demonstrated that it was not responsible for snow removal on the sidewalk where plaintiff fell, it failed to establish that it was not negligent in its removal of snow and ice from the parking lot, or that it did not create a condition which prevented plaintiff from safely walking from the parking lot directly to the bank (*see* ***Marmol v North Isle Vil., Inc.***, 48 AD3d 760, 856 NYS2d 117 [2d Dept 2008]; ***Morris v Nacmias***, 245 AD2d 432, 666 NYS2d 202 [2d Dept 1997] *see generally* ***Carthans v Grenadier Realty Corp.***, 38 AD3d 489, 832 NYS2d 234 [2d Dept 2007]). Here, plaintiff testified that the drive-through area was blocked by a two-foot high mound of snow which prevented her from walking through the area to reach the bank, causing her to use the adjacent sidewalk where she fell. Faicco testified that when he left the parking lot on the evening of March 2nd , two days before plaintiff's accident, there was no snow blocking the drive through area. The conflicting deposition testimony regarding the condition of the parking lot area at the time of the accident raises issues of credibility which can not be resolved on a summary judgment motion (*see* ***Tenkate v Top Mkts., LLC***, 38 AD3d 987, 831 NY2d 565 [3d Dept 2007]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). Furthermore, the climate summary report submitted by All Counties, which is not certified and is not accompanied by an expert affidavit, is insufficient to demonstrate that the alleged accumulation of snow was not present at the time of the accident (*see* ***Buroker v Country View Estate Condominium Assn***, 54 AD3d 795, 864 NYS2d 468 [2d Dept 2008]; ***Duffy-Duncan v Berns & Castro***, 45 AD3d 489, 847 NYS2d 36 [1st Dept 2007]; ***Calix v New York City Tr. Auth.***, 14 AD3d 583, 789 NYS2d 219 [2d Dept 2005]). Accordingly, the cross-motion by All Counties for summary judgment dismissing the second third party complaint against it is denied.

Dated: 7/3/2013

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

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