Amato v In-Towne Shopping Ctrs. Co.
2014 NY Slip Op 31583(U)
June 18, 2014
Sup Ct, Suffolk County
Docket Number: 09-29874
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 09-29874
CAL No. 13-01121OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Acting Justice of the Supreme Court

MOTION DATE 11-19-13 (#001)
MOTION DATE 12-10-13 (#002)
ADJ. DATE 2-4-14
Mot. Seq. # 003 - Mot D
004 - Mot D

PAMELA AMATO,

Plaintiff,

- against -

IN-TOWNE SHOPPING CENTERS CO.,

Defendant.

ZAKLUKIEWICZ, PUZO & MORRISSEY, LLP
Attorney for Plaintiff
2701 Sunrise Highway, P.O. Box 2
Islip Terrace, New York 11752

NEWMAN MYERS KREINES GROSS HARRIS, P.C.
Attorney for Defendant/Third-Party Plaintiff
14 Wall Street, 22nd Floor
New York, New York 10007

IN-TOWNE SHOPPING CENTERS CO.,

Third-Party Plaintiff,

- against -

NATURESCAPE LANDSCAPE MANAGEMENT.

Third-Party Defendant.

NICOLINI, PARADISE, FERRETTI & SABELLA, PLLC
Attorney for Third-Party Defendant
114 Old Country Road, Suite 500
Mineola, New York 11501

Upon the following papers numbered 1 to 87 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 -22, 23-69 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 70-71, 72-73, 74-79 ; Replying Affidavits and supporting papers 80-81, 82-83, 84-87 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination, and it is further

ORDERED that the portion of the motion by the third-party defendant, Naturescape Landscape Management ("Naturescape") for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the portion of the motion by the third-party defendant, Naturescape Landscape Management ("Naturescape") for summary judgment dismissing the third-party complaint asserted against it is denied; and it is further

ORDERED that the portion of the motion by the defendant/third-party plaintiff, In-Towne Shopping Centers Co. ("In-Towne"), for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the portion of the motion by the defendant/third-party plaintiff, In-Towne for summary judgment dismissing all counterclaims asserted against it and granting its claims against third party defendant Naturescape for contractual indemnification, common law indemnification, contribution and for attorney's fees and disbursements is denied; and it is further

ORDERED that the portion of the motion by the defendant/third-party plaintiff, In-Towne Shopping Centers Co. ("In-Towne"), for summary judgment against defendant Naturescape for breach of contract is granted.

This is an action to recover for personal injuries allegedly suffered by plaintiff Pamela Amato ("Amato") on Saturday, December 15, 2007 at approximately 1:30 p.m. Plaintiff alleges that she slipped and fell on a patch of icy snow immediately adjacent to the driver's door of her motor vehicle while she was exiting said vehicle in the In-Towne (also referred to as Kohl's) shopping center parking lot located at 346 Route 25A, Rocky Point, in the Town of Brookhaven. Negligence is alleged against the defendant In-Towne, the owner of the shopping center and adjacent parking lot where the accident occurred. Prior to the date of the accident, non-party Staller Associates, Inc., acting as the managing agent for In-Towne, entered into a contract with third-party defendant Naturescape for snow removal services at the shopping center's parking lot. In-Towne brought the third-party complaint against defendant Naturescape for contractual indemnification, common law indemnification, contribution, breach of contract and for attorney's fees and disbursements incurred in the defense of this lawsuit.

Third-party defendant Naturescape now moves for summary judgment dismissing the complaint and third-party complaint as well as any cross-claims. In support of the motion Naturescape submits, *inter alia*, its attorney's affirmation, the pleadings, the depositions of the plaintiff, held on March 2, 2012 and October 4, 2012, the deposition of defendant In-Towne, by Raquel Noriega, the deposition of defendant In-Towne, by Oscar Menjivar, the deposition of third-party defendant Naturescape, by Steven Gallina, a copy of a contract between Naturescape and Staller Associates for the period 11/1/07 to 4/31/08, a copy of an indemnification agreement between Staller Associates and Naturescape, dated November 15, 1996 and a copy of an invoice from Naturescape to Staller Associates dated 12/14/07.

Defendant/third-party plaintiff In-Towne cross-moves for summary judgment dismissing plaintiff's complaint, with prejudice, granting judgment against defendant Naturescape as to the causes

of action asserted in the third-party complaint, for attorney's fees and disbursements incurred in the defense of this lawsuit and dismissing any and all counterclaims asserted against it. In support of the cross motion In-Towne submits, *inter alia*, its attorney's affirmation, the pleadings, the depositions of the plaintiff, the deposition of defendant In-Towne, by Raquel Noriega, the deposition of defendant In-Towne, by Oscar Menjivar, the deposition of third-party defendant Naturescape, by Steven Gallina, and a certified copy of meteorological records pertaining to the local climatological data for Islip, New York for December 2007. Plaintiff submits her attorney's affirmation in opposition to both the motion and cross motion.

Plaintiff Amato testified that the accident occurred in the parking lot of Kohl's shopping center on Route 25A in Rocky Point in the handicap parking area in front of a Famous Footware store, where she intended to shop. The parking lot appeared to have been plowed on December 15, 2007. It was a nice day, but the temperature was freezing. She was wearing leather snow boots. She was driving a 1998 Honda Civic. She pulled into a handicap space. There was an empty handicap space to the left of her vehicle. She could see part of the blue line, the rest was covered "by dirty like solid packed icy snow". She believed that to the right there was snow that had been plowed into an empty parking space. There was a median with some snow on it, but a path had been cleared in the median for people to walk. There was no snow piled in the roadway. There was some snow in the space she pulled into and some to her left, nothing was totally clear. She opened her door to get out. She placed her left foot on the ground, then took her right foot out and her feet flew out from under her. She landed seated with her back to the car. She did not hit the car. An unknown gentlemen helped her up, they both slipped on the first attempt. The area where her feet were was "like dirty, icy, full of gravel". The gentlemen help her to the sidewalk. A police car pulled up and she spoke to the officer. She went into Famous Footware and told the girl at the register that she had fallen and that the handicapped parking area was icy and had not been properly taken care of. She then went home. No one took pictures of the area where the accident occurred.

Raquel Noriega testified as a witness for defendant In-Towne. She is employed by Staller Associates as a loss prevention manager. She processes all incoming claims and handles maintenance of insurance policies. Staller Associates is the managing agent for the In-Towne Shopping Center. There was an insurance policy in place on the date of the accident for the shopping center. Tenants were in charge of clearing snow from the walkways directly in front of their stores. Her company was in direct contact with Naturescape, which was in charge of plowing the parking lot. Naturescape would plow after receiving a call from someone in the maintenance department. She was not aware of any complaints about snow at the In-Towne shopping center in December of 2007. Complaints would have been made to the maintenance department. If work had to be done as a result of the complaint, a work order would issue. No complaints, written or otherwise, were received from customers or store owners between December 1 and December 15 of 2007. A work order for snow and ice removal was issued to Naturescape on December 13, 2007. Naturescape would only put down salt and/or if her company requested it. It might or might not be reflected in a work order because it may be requested when the phone call is made. She identified a copy of the December 13, 2007 work order. The work order does not reflect any request that salt or sand be put down. Naturescape would plow the entire parking lot. Naturescape was paid based upon the amount of snow accumulation that would be cleared. She was not aware of any others slip and fall accidents between December 1 and December 15 of 2007.

Oscar Menjivar testified as a witness for defendant In-Towne. He is employed by Staller Associates as a construction manager. Prior to that he was a construction maintenance supervisor, which was the position he held in December of 2007. As part of his job he had dealings with Naturescape, which had a contract for snow removal at the In-Towne Shopping Center. He signed the contract on behalf of Staller on October 9, 2007. They would call Steve Gallina at Naturescape when snow removal was required and a work order would be prepared and faxed to Naturescape. He was not aware of them coming to plow without a phone call. Snow on the sidewalks was the responsibility of the tenants of the stores. In December of 2007, if snow plowing services were performed, they would be inspected within 24 hours. If the work was not acceptable, another phone call would be made to the contractor and a new work order would be generated. He did not have an independent recollection of inspecting the work performed by Naturescape on December 13, 2007.

Steven Gallina testified as a witness for Naturescape. He is the owner of Naturescape, which provides landscaping, snow removal and other services. He identified a copy of a snow removal contract with Staller Associates for the In-Towne Shopping Center, which included December of 2007. Naturescape was paid according to the amount of snow that had to be cleared. They also offer salt/and or sanding, but that was not something that they did automatically. They would receive a telephone call from Staller when snow removal would be required. They would also be faxed a work order. The time of day that they plowed would depend on the storm. Naturescape provided the equipment and the manpower. Their truck or trucks carried a salt/sand mixture. He identified the work order received from Staller on December 13, 2007, as well as a copy of the invoice sent to Staller for their services on that date. The invoice indicated that only snow plowing was performed. They would check that the lot was completely clear before they left the job. However, he noted that you never remove all of the snow down to the asphalt. They usually piled the snow onto the landscape island in the center of the parking lot. The rest would be taken care of by salting and sanding, Once the plowing was done, they would not come back to the site unless they received a call to do so. Someone from Staller would always come and check their work. They did not receive any complaints from Staller for the plowing done on that date.

Defendant In-Towne has submitted a certified copy of meteorological records from the National Climatic Data Center setting forth local climatological data for Islip, New York in December of 2007. The records are from Long Island McArthur Airport, the weather station closest to the site of the alleged accident. As such, it is proof in proper evidentiary form to establish the weather conditions set forth therein (*see* CPLR 4528). On December 13, 2007, freezing rain, snow and ice pellets fell from 11:00 a.m. to 8:00 p.m.. On December 14, 2007 the temperature ranged from 29 degrees to 43 degrees with an average of 36 degrees. At 1:00 p.m. the temperature was 42 degrees. At 4:00 p.m. the temperature was 41 degrees. At 7:00 p.m. the temperature was 36 degrees. At 10:00 p.m. the temperature was 35 degrees. The temperature did not go below freezing until 4 a.m. on December 15, 2007, when it was 31 degrees. At 7:00 a.m. it was 28 degrees. By 10:00 a.m. it was 30 degrees and remained at 30 degrees until the approximate time of the alleged accident at 1:30 p.m.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]).

The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, 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 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 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]). To establish a prima facie case of liability in a slip and fall accident involving snow and ice, a plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*see* ***Zabbia v Westwood, LLC***, 795 NYS2d 319 [2d Dept 2005]; ***Tsivitis v Sivan Associates, LLC***, 292 AD2d 594, 741 NYS2d 545 [2d Dept 2002]). However, a defendant moving for summary judgment in a slip and fall case has the initial burden of establishing that it neither created the alleged dangerous condition, nor had actual or constructive notice of its existence for a sufficient length of time to remedy it (***Baratta v Eden Roc NY, LLC***, 95 AD3d 802, 943 NYS2d 230 [2d Dept 2012]). Furthermore, a plaintiff seeking to hold a snow removal contractor liable must show that by virtue of a defendant's snow removal contract, defendant displaced the duty of the landowner to safely maintain the premises (***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]) and assumed a duty to plaintiff to exercise reasonable care to prevent all foreseeable harm to the plaintiff such that the plaintiff detrimentally relied on the defendant's performance of the defendant's duties under the snow removal contract (*see* ***Palka v Servicemaster Management Services***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Pavlovich v Wade Associates, Inc.***, 274 AD2d 383, 710 NYS2d 615 [2d Dept 2000]), or that the defendant's actions "advanced to such a point as to have launched a force or instrument of harm" (***Pavlovich v Wade Associates, Inc.***, *supra*).

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (***Espinal v Melville Snow Contrs.***, *supra*; ***Figueroa v Lazarus Burman Assocs.***, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, the contractor is required to establish that it did not perform any snow removal operations related to the condition which caused plaintiff's injury or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (***Prenderville v International Serv. Sys.***, 10 AD3d 334, 781 NYS2d 110 [1st Dept 2004]). The speculative claim that a contractor caused or created an alleged icy condition through incomplete snow removal is insufficient to defeat the contractor's motion for summary judgement (***Crosthwaite v Acadia Realty Trust***, 62 AD3d 823, 879NYS2d 554 [2d Dept 2009]; ***Zabbia v Westwood, LLC***, *supra*). Liability will not attach for its failure to remove all the snow and ice from a particular area, because such

failure is not an affirmative act of negligence (***Stallone v Long Island Rail Road***, 69 AD3d 705, 894 NYS2d 65 [2d Dept 2011]; ***Groninger v Village of Mamaroneck***, 67 AD3d 733, 888 NYS2d 205 [2d Dept 2010]; ***Zwielich v Incorporated Village of Freeport***, 208 Ad2d 920, 617 NYS2d 871 [2d Dept 1994]).

Third-party defendant Naturescape has established its entitlement to summary judgment dismissing the complaint. Naturescape completed its snowplow work on December 13, 2007. According to both Naturescape and defendant/third-party plaintiff In-Towne's managing agent, Staller Associates, the snowplow work was always inspected within 24 hours of its completion (the fact that Staller's witness could not recall this particular job, more than four and a half years later is not determinative). No complaint was made by Staller or received by Naturescape as to the work done on December 13, 2007 and Naturescape was not called back to do any further work. More than 24 hours passed between the completion of Naturescape's plowing and the plaintiff's alleged accident. The weather data introduced into evidence establishes that melting of any accumulated snow and ice would have occurred and would have then re-frozen early in the morning of December 15, 2007. Thus conditions at the time of the accident were not the same as they were at the time Naturescape completed its work. Any ice or snow condition that existed at the time of the alleged accident were not created by Naturescape. In response, plaintiff fails to raise any issue of fact, but engages in speculation unsupported by evidence.

Accordingly, third-party defendant Naturescape's motion for summary judgment dismissing the plaintiff's complaint is granted.

Defendant/third-party plaintiff In-Towne has also established its entitlement to summary judgment. The record establishes that defendant/third-party plaintiff In-Towne's managing agent, Staller Associates contacted Naturescape to remove snow from the parking lot of the subject shopping center on December 13, 2007. The work was completed and, as per the parties' longstanding and consistent practice, would have been inspected within the next 24 hours. Since no complaints were made by Staller to Naturescape, the work was found to be satisfactory. The Staller witnesses also established the they received no complaints as to the condition of the parking lot prior to the plaintiff's alleged accident. Thereafter, as already noted, weather data introduced into evidence establishes that melting of any accumulated snow and ice would have occurred and would have then only have re-frozen early in the morning of December 15, 2007. Thus, conditions at the time of the accident were in existence for a few hours, at best, and therefore, there was not actual or constructive notice of the existence of the alleged condition for a sufficient length of time for it to be discovered and remedied. In response, plaintiff once again fails to raise any issue of fact, beyond speculation unsupported by evidence.

In light of these facts and the relevant law, defendant/third-party plaintiff In-Towne's motion for summary judgment dismissing the plaintiff's complaint is granted.

The Court now turns to the third-party defendant Naturescape's motion for summary judgment dismissing the third party complaint and defendant/third-party plaintiff In-Towne's cross motion for summary judgment for contractual indemnification, common law indemnification, contribution, breach of contract and for attorney's fees and disbursements. With regard to the issues of

dismissal of the third-party complaint and any cross-claims or counterclaims, contractual indemnification, common law indemnification, contribution, and for attorney's fees and disbursements, both the motion and the cross motion are denied.

The right to contractual indemnification depends upon the specific language of the contract (***Cunha v City of New York***, 45 AD3d 624, 850 NYS2s 116 [2d Dept 2007]; ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588, 590 [4th Dept 1995]). "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009]; *see* General Obligations Law § 5–322.1; ***Mikelatos v Theofilaktidis***, 105 AD3d 822, 823, 962 NYS2d 693 [2d Dept 2013]; ***Ventimiglia v Thatch, Ripley & Co., LLC***, 96 AD3d 1043, 1047-1048, 947 NYS2d 566 [2d Dept 2012]; ***Rodriguez v Tribeca 105, LLC***, 93 AD3d 655, 939 NYS2d 546 [2d Dept 2012]). The principle of common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party (*see* ***Arrendal v Trizechahn Corp.***, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81[2d Dept 2009]). An award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties (*see* ***Aragundi v Tishman Realty & Constr. Co., Inc.***, 68 AD3d 1027, 891 NYS2d 462 [2d Dept 2009]; ***Coque v Wildflower Estates Developers, Inc.***, 31 AD3d 484, 818 NYS2d 546 [2d Dept 2006]).

The indemnification clause agreed to by the third-party defendant Naturescape states, in relevant part "that you shall indemnify and hold harmless Staller Associates, Inc., its subsidiaries and affiliates and all companies managed by Staller Associates, Inc., from and against any and all losses (including attorney's fees, witnesses and court costs), damages, expense and liability...claims for damages resulting from injury and/or death of any person or damage to any property arising out of your operations as contractor or subcontractor, except that which arise from the negligence of Staller Associates, Inc., its subsidiaries and affiliates and all companies managed by Staller Associates, Inc." Here, there is an issue of fact as to whether the plaintiff's claim in this matter arises from Naturescape's operations under the contract with Staller Associates. The work was completed and, as per the parties' longstanding and consistent practice, would have been inspected within the next 24 hours. Since no complaints were made by Staller to Naturescape, the work was found to be satisfactory. The record herein establishes that Naturescape completed it snow plowing activities on December 13, 2007. The weather data introduced into evidence establishes that melting of any accumulated snow and ice would have occurred and would have then re-frozen early in the morning of December 15, 2007. As a result, conditions at the time of the accident were not the same as they were at the time Naturescape completed its work. Thus, there is an issue of fact created as to whether the plaintiff's claim in this matter arose from Naturescape's snow removal operations under the contract with Staller Associates or from the changing weather conditions which occurred over the more than 30 hour interval between the completion of snow plowing and the alleged accident. Therefore, both the motion and cross motion regarding these issues must be denied (*see* ***County of Orange v Reclamation Inc. Of Kingston***, 81 AD3d 770, 917 NYS2d 231 [2d Dept 2012]).

The applicable rules governing contribution, may be quickly summarized. The basic requirement for contribution now codified in CPLR 1401, is that the culpable parties must be "subject to liability for damages for the same personal injury, injury to property or wrongful death" (***Dole v. Dow Chem. Co.*** 30 NY2d 143, 331 NYS2d 382 [1972]). No liability being found as against either the defendant/third-party plaintiff In-Towne or the third-party defendant Naturescape, this cause of action is moot.

Defendant In-Towne's cross motion for summary judgment for damages for breach of contract, based upon Naturescape's failure to procure insurance naming the client as an additional insured, is granted. Naturescape admits that it failed to comply with the insurance provision of the applicable contract that required it to procure insurance naming the client as an additional insured (*see* ***Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership***, 304 AD2d 738, 739, 759 NYS2d 107 [2d Dept 2003]; *see also* ***Keelan v Sivan***, 234 AD2d 516, 651 NYS2d 178 [2d Dept 1996] ***Kinney v Lisk Co.***, 76 NY2d 215, 557 NYS2d 283 [1990]). The extent of damages, if any, shall be determined at trial.

Dated: June 18, 2014

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**