Olendzki v Feldman
2014 NY Slip Op 33350(U)
December 18, 2014
Supreme Court, Suffolk County
Docket Number: 10-9900
Judge: Thomas F. Whelan

[* 1]

SHORT FORM ORDER

INDEX No. 10-9900

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 6-11-14
ADJ. DATE: 7-25-14
Mot. Seq. # 003 - MG
CDISP: No

RYSZARD OLENDZKI and HANNA OLENDZKA,

Plaintiffs,

- against -

JOHN FELDMAN, DIETRICH FELDMAN, FRANK CARDULLO, all individually and doing business as GREAT NECK APARTMENT CO. and GREAT NECK APARTMENT CO.,

Defendants.

PARKER, WAICHMAN LLP
Attorney for Plaintiffs
6 Harbor Park Drive
Port Washington, New York 11050

PAGANINI, CIOCI, PINTER, et al
Attorney for Defendants/Third-Party Ptfs.
3 Huntington Quadrangle, Suite 201S
Melville, New York 11747

JOHN FELDMAN, DIETRICH FELDMAN, FRANK CARDULLO, all individually and doing business as GREAT NECK APARTMENT CO. and GREAT NECK APARTMENT CO.,

Third-Party Plaintiffs,

- against -

BATZ BROTHERS,

Third-Party Defendant.

ANDREA G. SAWYERS, ESQ.
Attorney for Third-Party Defendants
3 Huntington Quadrangle, Suite 102S
P.O. Box 9028
Melville, New York 11747

Upon the following papers numbered 1 to 11 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 4-5; 6-7; Replying Affidavits and supporting papers 8-9; 10-11; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by third-party defendant Batz Brothers, Inc. for summary judgment dismissing the third-party complaint asserted against it is granted.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Ryszard Olendzki on March 17, 2007 at approximately 11:30 p.m. when he slipped and fell in the parking lot of an apartment building located at 1719 Great Neck Road in Copiague in New York, while heading to his apartment after exiting his wife's vehicle. Defendants John Feldman and Frank Cardullo are the co-owners of Great Neck Apartment Company, the landlord of the apartment building where the plaintiffs are tenants. Prior to the accident, John Feldman entered into a verbal snow removal contract with Batz Brothers, Inc. ("Batz Brothers" or "Batz"). Following the joinder of issue by the defendants in the main action, they brought a third party action against the Batz Brothers in which the defendants assert liability claims against the Batz Brothers under theories of contribution and common law and contractual indemnity.

At his deposition, the injured plaintiff, Ryszard Olendzki, explained the circumstances of his fall as including the following facts. On the night of the accident, the injured plaintiff, Ryszard Olendzki,. and his wife left their apartment to attend a party at a friend's home. While there, the injured imbibed in drinking several cups of vodka. Upon returning to their apartment, his wife parked their vehicle in the parking lot and she walked past parked vehicles and entered the apartment. The injured plaintiff exited from his front passenger side and observed that the area that he stepped onto was "a black heap of ice" and was very slippery. He stepped forward with his right foot. As he stepped with the left foot, it slipped, causing him to fall backward to the ground. He testified that the subject accident happened in the parking lot near his wife's vehicle.

At her deposition, the derivative plaintiff, Hanna Olendzka, described her experiences on the night of her husband's fall in her deposition testimony. She testified that she parked their vehicle in the middle of the second row and left the vehicle immediately and entered the apartment. She did not witness her husband's fall as she was already in their apartment. She did, however, hear her husband scream and observed him on the ground through the kitchen window. She returned to the parking lot and observed snow or ice on the ground where he was found but she has no recollection as to whether her husband was lying near their parked vehicle.

The third party defendant, Batz Brothers, now moves for summary judgment dismissing the third-party complaint asserted against it on the grounds that its verbal contract with the third party plaintiff contained no provisions obligating Batz to indemnify, defend nor hold the third party defendants harmless against the claims of the plaintiff. In addition, Batz asserts in its moving papers that its submissions establish, prima facie, that it was not negligent in the performance of its contractual duties which ran solely to the third party defendant landlord, who through its agent, Feldman, retained Batz Brothers to perform snow removal on the parking lot and alleyways on the premises under limited circumstances nor did it engage in conduct considered actionable under theories of tort law.

In support of its motion, Batz relies upon the deposition of its owner, Edward Batz, who testified that Batz Brothers was first retained in 2002 as a snow removal contractor by the third party corporate plaintiff and that Batz agreed to clear the parking lot if it snowed two inches or more and would attempt to do likewise with a one and one-half inch snowfall if the temperature fell below freezing. Although Batz originally provided sand and salt applications, those applications were halted by directives of the third party plaintiffs in 2005. Batz Brothers would initiate service without being directed by John Feldman and would perform snow removal on the subject parking lot under the contract terms for automatic deploy. Batz was not obligated to plow snow between parked vehicles but would do so

whenever there was sufficient space for the truck equipped with the plow to safely maneuver between such vehicles. Vacant spaces were plowed whenever Batz was on sight. Batz performed snow removal operations on March 16, 2007, the day prior to the plaintiff's fall under the terms of its contract with the third party plaintiffs although Batz has no recollection as to whether he cleared any empty spaces that day.

The Batz Brothers also rely upon the deposition testimony of third party defendant, John Feldman. He testified that he is the co-owner of Great Neck Apartment Company, the landlord of the apartment building in which the plaintiffs reside. Feldman's duties include collecting rents, taking maintenance requests, and overseeing daily operations and he confirmed that he entered into a verbal snow removal contract with Batz Brothers during the 2006 and 2007 period. Feldman further testified that while Batz Brothers were not responsible for clearing snow or ice between the vehicles in the parking lot, Batz Brothers would do so if the truck carrying the plow could fit between the parked vehicles. Feldman testified that although he learned that the subject accident happened in the parking lot, he did not see it.

Both the third party defendants and the plaintiffs oppose the instant motion by the Batz Brothers for summary judgment dismissing the third party complaint, but neither challenge Batz's demands for dismissal of the contractual indemnification/contract breach claims advanced in the third party complaint. These demands for dismissal of the contract claims are premised upon the absence of any contractual provisions obligating Batz to indemnify the corporate third party plaintiff, or to hold harmless or to purchase insurance under the terms of the verbal contract between Batz and the third party corporate plaintiff. The Batz Brothers are thus entitled to dismissal of the claims advanced in the third party complaint that sound in contractual indemnity and/or contract breaches (*see* ***Reimold v Walden Terrace, Inc.***, 85 AD3d 1144, 926 NYS2d 153 [2d Dept 2011]).

With respect to the remaining claims lodged against the Batz Brothers, which sound in common law indemnification and/or contribution, both the third party plaintiff and the plaintiffs contend that questions of fact exist in the record which preclude the granting of summary judgment dismissing these claims. For the reasons stated below, the court rejects these contentions finding due and sufficient proof of the absence of negligence on the part of the Batz Brothers.

Claims for common law contribution rest upon principles of apportionment among tort-feasors, rather than a shifting of the entire loss through indemnification, and such claim actionable are when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person (*see* ***Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.***, 69 NY2d 559 516 NYS2d 451[1987]). "In determining whether a valid third-party claim for contribution exists, the critical issue is whether the third-party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff's damages" (***Rosner v Paley***, 65 NY2d 736, 738, 492 NYS2d 13 [1985]; *see* ***Raquet v Braun***, 90 NY2d 177, 183, 659 NYS2d 237 [1997]; ***Rehberger v Garguilo & Orzechowski, LLP***, 118 AD3d 765, 987 NYS2d 193 [2d Dept 2014]).

In cases involving snow removal contractors, like the instant one in which a third party defendant has a limited contractual obligation to provide snow removal services, the contractual obligations imposed do not, per se, render the contractor liable in tort for the personal injuries of third parties (*see* ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611 990 NYS2d 882,[2d Dept 2014]; ***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 1103, 915 NYS2d 103 [2d Dept 2010]). It is only

where one or more of the following factors are shown to exist will contractor liability be implicated: (1) a services contractor, who may be deemed to have assumed a duty of care to the plaintiff, launches a force or instrument of harm in failing to exercise reasonable care in the performance of its contractual duties; or (2) the plaintiff detrimentally relied on the continued performance of the contracting party's duties; or (3) the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Torres v 63 Perry Realty***, ____ AD3d ___, 2014 NY SLIP Op 08830 [2d Dept 2014]). Where there are no allegations in a complaint, bill of particulars or third party complaint against the snow removal contractor regarding the possible applicability of any of these three *Espinal* exceptions, the contractor moving for summary judgment dismissing contribution claims against it need not establish the inapplicability of these exceptions in the first instance on its motion for summary judgment. Instead, a prima facie case for summary judgment is made by the contractor seeking dismissal of such claims by offering proof that the plaintiff was not a party to its snow removal contract with either landowner or the occupier of the subject premises and owed thus no duty of care to the plaintiff (*see* ***Ayala v Johnson Controls, Inc.***,120 AD3d 596, 990 NYS2d 893 [2d Dept 2014]; ***Knox v Sodexho Am., LLC***, 93 AD3d 642, 939 NYS2d 557 [2d Dept 2012]), and that it did not breach a duty of care owing to the plaintiff or third party plaintiff that was independent of Batz Brothers' contractual duties (*see* ***Del Vecchio v Danielle Assoc., LLC,*** 108 AD3d 583, 969 NYS2d 477 [2d Dept 2013]; ***Proulx v Entergy Nuclear Indian Point 2, LLC***, 98 AD3d 492, 949 NYS2d 178 [2d Dept 2012]).

Here, the moving papers established, prima facie, that the Batz Brothers engaged in no conduct which may be viewed as a breach of a duty owing to the plaintiff, since the plaintiff was not a party to the contract and that Batz, which had no duty to plow between parked cars, breached no assumed nor extra contractual duty owing to the third party corporate plaintiff by plowing the parking lot in accordance with the terms of its verbal contract with such corporate plaintiff. Such a showing was more than sufficient to establish a prima facie case for dismissal of the contribution claim asserted in the third party complaint since none of the pleadings or amplifications thereof put before the court contain allegations that the Batz Brothers' snow removal contract entirely displaced the third party defendants' duty to maintain the parking lot or that Batz, by merely plowing snow in accordance with its contract, launched an instrument of harm that caused or contributed to the injuries or that the injured plaintiff detrimentally relied upon the continued existence of the Batz Brother's contractual snow removal duties. While the third party plaintiff and the plaintiff attempted to establish in their opposing papers that Batz launched an instrument of harm by creating or exacerbating the icy condition that allegedly caused the injured plaintiff's fall, and thus breached duties owing to the plaintiff and/or the third party plaintiff, both relied upon surmise and conjecture rather than proof in admissible form from which a genuine question of fact on the issue of creation or exacerbation of any such condition might be discerned. The court considers the arguments regarding the existence of prior notice of the alleged icy condition on the part of the defendants and/or third party defendants advanced in the submissions of all parties except the defendants/third party plaintiffs, to be irrelevant. The court thus finds that the Batz Brothers are entitled to a dismissal of so much of the third party complaint that charges them with apportioned liability under theories of contribution.

Also granted are the claims asserted in the third party complaint which sound in common law indemnification. The key element of a cause of action for common law indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed the indemnitee by the indemnitor (*see* ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]). Because the predicate

for the application of the doctrine of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, an indemnitee claimant who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine as its liability is not solely vicarious (*see* ***Desena v North Shore Hebrew Academy***, 119 AD3d 631, 989 NYS2d 505 [2d Dept 2014]; ***Konsky v Escada Hair Salon, Inc.***, 113 AD3d 656, 978 NYS2d 342 [2d Dept 2014]). Consequently, evidence of participatory negligence on the part of an indemnitee claimant will warrant a dismissal of a claim against a snow removal contractor for common law indemnification in a suit initiated by a person injured by reason of a dangerous or defective condition existent on premises owned, occupied, manage or controlled by a defendant/third party plaintiff (*see* ***Desena v North Shore Hebrew Academy***, 119 AD3d 631, *supra*; ***Ruiz v Griffin***, 50 AD3d 1007, 856 NYS2d 214 [2d Dept 2008]; ***Kagan v Jacobs***, 260 AD2d 442, 687 NYS2d 732 [2d Dept 1999]). In addition, the absence of negligence or any misperformance of duties solely within the contractual province of the contractor will warrant a dismissal of a third party complaint containing a claim sounding in common law indemnification (*see* ***Cunningham v North Shore Univ. Hosp. at Glen Cove Hous., Inc.***, --- AD3d ----, 2014 WL 6780701, [2d Dept 2014]; ***Prouix v Entergy Nuclear Indian Point 2, LLC***, 98 AD3d 492, *supra*; ***Curreri v Heritage Prop. Inv. Trust, Inc.***, 48 AD3d 505, 852 NYS2d 278 [2d Dept 2008]; ***Roach v AVR Realty Co., LLC***, 41 AD3d 821, 839 NYS2d 173 [2d Dept 2007]; ***Baratta v Home Depot USA***, 303 AD2d 434, 435, 756 NYS2d 605 [2d Dept 2003]). In addition, a showing that the contractor had no duty to clean, clear, repair, inspect, monitor or otherwise maintain the portion of premises at which the fall occurred under the terms of its contract, will render claims for common law indemnification lacking in merit thereby subjecting them to dismissal on a motion by the contractor for such relief (*see* ***Arrendal v Trizechahn Corp.***, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; *cf.* ***Ruiz v Griffin***, 50 AD3d 1007, *supra*).

Here, the moving papers of the Batz Brothers established, prima facie, that it had no duty to clear ice or snow from the area of the parking lot at which the injured plaintiff's fall occurred or to monitor or maintain that area. The opposing papers submitted by the third party plaintiffs failed to controvert this showing or establish that questions of fact exist as to whether Batz's negligence or other misperformance of duties solely within its contractual province was a cause of the plaintiff's fall.

In view of the foregoing, the instant motion (#003) by the third party defendant for summary judgment against the third party plaintiffs is granted and the third party complaint is dismissed

Dated: 12/18/14

THOMAS F. WHELAN, J.S.C.