SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

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GLADYS E. OCASIO and ANGEL OCASIO,

Plaintiffs,

-against-

NICOLIA'S, LLC, PORCELANOSA NEW YORK, INC. PORVEN, LTD. AND ENTERPRISE RENT-A-CAR,

Defendants.

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NICOLIA'S, LLC,

Third-Party Plaintiff,

-against-

S&J, INC.,

Third-Party Defendant.

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TRIAL/IAS PART 16

Index No.: 602167-16

Mot. Seq. 001
Mot. Date: 4-10-17

Submit Date: 5-31-17

The following papers have been read on this motion:

Notice of Motion, dated 3-8-17.....1
Affirmation in Opposition, dated 3-20-17.....2
Affirmation in Opposition, dated 4-6-17.....3
Reply Affirmation, dated 5–17.....4

The motion by the Third-Party defendant S&J Landscaping & Construction, Inc. i/s/h/a S&J, Inc. ("S&J") pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint as to it is granted.

Gladys E. Ocasio and her spouse allege that she suffered personal injuries on January 22, 2015, when she tripped, slipped and fell on broken and slippery condition in

front of premises located at 775 Old Country Road in Westbury, New York. Defendant and Third-Party Plaintiff Nicolia's LLC ("Nicolia's") owns that property, and leased it to its co-defendants.[1] Nicolia's had contracted with S&J for snow removal services, and sued S&J for contribution and for common law and/or contractual indemnification in a third-party action. S&J moves for summary judgment.

S&J contends that it last performed snow removal 12 days before the accident. Its agreement with Nicolia's was that it was to perform its services when two or more inches of snow fell, and that, according to certified weather records only "trace amounts" of snow had fallen on January 22. Further, it never was asked to perform snow removal on that date. Thus, it can have no liability to Nicolia's for a failure to perform. It also asserts that, even assuming that it had the obligation to perform, it still is not liable because it owed no duty to the injured plaintiff under *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002). In support of the factual contentions noted, S&J provides certified copies of U.S. Department of Commerce weather records for the subject period, and the affidavit of Paul Ramalhete, the supervisor of S&J's snow removal division, attaching a copy of its contract with and invoices to Nicolia's, bearing dates of service.

In response, Nicolia's counsel contends that the motion is premature because no significant disclosure has occurred, including the deposition of Ramalhete. Counsel

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[1] It should be noted that in co-defendant Enterprise Rent-A-Car's cross motion for summary judgment, decided simultaneously herewith, Enterprise asserts it leased 775-A, not 775, but that is not material to the issues presented here. The Court's notation of the address thus should not be interpreted as a finding of fact, but merely as reciting an allegation found in plaintiffs' Supplemental Bill of Particulars.

asserts that Nicolia's position is that the work done by S&J some 12 days before the accident was not done in a workmanlike manner, and allowed for a buildup of ice that was the cause of the slip and fall. Further, this disclosure may reveal that S&J "launched a force of harm" or had exacerbated a condition. Plaintiffs join in the opposition to the motion, on the same ground, specifically noting the provisions of CPLR 3212(f), which permits a court either to deny or adjourn the motion on the basis cited. Plaintiffs also contend that the records relied upon show temperature fluctuations, which may have led to water runoff and re-freezing if plowing were done improperly. They also note that the moving papers do not contain copies of S&J's Replies to counterclaims, rendering the motion procedurally defective as the same is required by CPLR 3212(b).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor. CPLR 3212 (b). This burden cannot be met simply by demonstrating that there are gaps in the adversary's case or that a key factual claim cannot be established by the motion opponent. *See River Ridge Living Center, LLC v ADL Data Systems, Inc.,* 98 AD3d 724 (2d Dept. 2012); *see also Calderone v Town of Cortlandt,* 15 AD3d 602 (2d Dept. 2005). In negligence cases, there may be more than one proximate cause of the injury-causing occurrence (*Lopez v Reyes-Flores,* 52 AD3d 785 [2d Dept. 2008]), and thus the proponent of the motion must establish freedom from comparative negligence as a matter of law. *Pollack v Margolin,* 84 AD3d 1341 (2d Dept. 2011). Absent this initial showing, the court should deny the motion, without passing on the sufficiency of the

opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If such a *prima facie* case is made, the burden shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

The law regarding snow and ice removal service providers is well-established. The third-party defendant is such a provider, an independent contractor to the owner. This insulates it from liability to injured third parties unless 1) in performing its contractual duties it had launched a force or instrument of harm, 2) the plaintiff detrimentally relied on the continuing performance of its contractual duties, or 3) it had entirely displaced the owner's duty to maintain the premises in a safe condition. *Espinal v Melville Snow Contractors, Inc., supra,* 98 NY2d at 140). Further, in order to establish a viable claim for contribution against the contractor, a co-defendant or third-party plaintiff must be owed a duty of care by the contractor independent of its contractual

obligation (*Torchio v New York City Housing Auth.*, 40 AD3d 970 [2d Dept. 2007]; *see generally Raquet v Braun,* 90 NY2d 177 [1997]), and a claim for common-law indemnification must be based on proof that a negligent performance by the contractor was the sole cause of the accident. *Roach v AVR Realty Co., LLC,* 41 AD3d 821, 825 (2d Dept. 2007); *cf., Foster v Herbert Slepoy Corp.,* 76 AD3d 210, 216 (2d Dept. 2010) [summary judgment granted to contractor against plaintiff, denied as to claim for common-law indemnification by owner because issues existed as to duties and performance under oral contract]. A claim for contractual indemnification of course must be based on an agreement containing such a duty. *See, e.g., Echevarria v 158 Riverside Drive Housing Co., Inc.,* 113 AD3d 500 (1st Dept. 2014).

Here, the simple, one page agreement called on S&J to plow after 2 inches of snow or more had fallen, and that it would spread salt on the walkways. [2] There is no indemnification provision present in that agreement, nor evidence of any relationship or understanding between movant and Nicolia's beyond the contractual. Further, invoices demonstrate that no services were provided or had to be provided by S&J between January 9-10 and January 24 of 2015, and the absence of a need for such services in the interim period is supported by the meteorological records. The moving affidavit of Ramalhete shows no contact from Nicolia's seeking service for January 22, or any complaints thereafter about a past failure to perform such services. Based on this proof, the Court finds that S&J has made out its *prima facie* showing that it owed no duty to

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[2] In plaintiffs' Supplement Bill of Particulars a driveway entrance is identified as the location of the fall on January 22, 2015.

Nicolia's except that under its contract, was not solely responsible for the accident, and thus is entitled to judgment as a matter of law under the foregoing authority.

In response, the third-party plaintiff and the plaintiffs have failed to raise an issue of fact. In order to rely on CPLR 3212(f), specifically, that facts essential to justify opposition may exist but that such facts are within the exclusive knowledge and possession of the moving party, the opposing party must make some evidentiary showing supporting that conclusion, and may not base the need for further discovery on speculation or conjecture. *Firth v. State*, 287 AD2d 771 (3d Dept. 2001); *Urcan v. Cocarelli*, 234 AD2d 537 (2d Dept. 1996).

The Court disagrees that simply because the meteorological records show temperature fluctuations that this indicates that S&J's work was performed in a negligent manner and led to runoff and refreezing; this is no more than speculation and is insufficient. *Reagan v Hartsdale Tenants Corp.,* 27 AD3d 716, 718 (2d Dept. 2006). "By merely plowing the snow, as required by the contract, [third-party] defendant's actions could not be said 'to have created or exacerbated a dangerous condition' ". *Fung v Japan Airlines Co.,* 9 NY3d 351, 361(2007), quoting *Espinal, supra,* 98 NY2d at 142.

There is no proof, for example, that Nicolia's or its tenants had complained to S&J, or even to one another, about the condition of the areas plowed and/or salted by S&J and/or had made an attempt to secure remediation by S&J after the last service on January 9-10 had been rendered. Even at this early stage of the litigation, neither Nicolia's nor the plaintiffs have been foreclosed of the possibility of submitting an opposing affidavit indicating some dissatisfaction with S&J's performance, but no affidavit of any kind is

offered. The statements of counsel are without weight, as it is well settled that an attorney's affirmation that is not based on personal knowledge or supported by some competent evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007).

In short, there is simply no evidence – or some showing that such evidence might exist – that S&J launched a force of harm, or had some duty to the third-party plaintiff upon which a third-party claim might be fastened. The motion therefore should be granted.

The Court notes, but rejects, the procedural argument that the failure to annex a Reply to counterclaims is a fatal defect. Notwithstanding the language of CPLR 3212(b), a court may disregard such a defect pursuant to CPLR 2001 if a sufficiently complete record has been submitted and no substantial right of the motion opponents has been impaired as a result. *Long Island Pine Barrens Society, Inc. v County of Suffolk,* 122 AD3d 688, 691 (2d Dept. 2014); *U.S. Bank Nat. Assoc. v Eaddy,* 109AD3d 908 (2d Dept. 2013). That is the case here, and the Court thus will not deny the motion for this procedural lapse.

Any contentions not addressed here either are not essential to the result reached or are without merit.

This shall constitute the Decision and Order of this Court.

DATED: June 16, 2017
Mineola, NY

ENTERED
JUN 19 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

HON. DANIEL PALMIERI
Supreme Court Justice

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