

<b>Higgins v JPH Mgt., Inc.</b>
2018 NY Slip Op 30739(U)
April 26, 2018
Supreme Court, New York County
Docket Number: 150403/2010
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

TERRY HIGGINS and VANESSA HIGGINS,

INDEX NO. 150403/2010  
MOTION DATE 04-11-2018  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

Plaintiff,  
-against-

JPH MANAGEMENT, INC. and NADJA OLGA ZUBRIK, as Trustee of the NOVO TRUST,

Defendants.

JPH MANAGEMENT, INC. and NADJA OLGA ZUBRIK, as Trustee of the NOVO TRUST,

Third-Party Plaintiffs,  
-against-

PETER J. BARCIA, INC., GENERAL LANDSCAPING, INC. and PHIL GIORGI, JR.,

Third-Party Defendants.

The following papers, numbered 1 to 13 were read on this motion by third-party defendant Peter J. Barcia, Inc. for summary judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 5</u>
Answering Affidavits — Exhibits _____	<u>6 - 9, 10 - 11</u>
Replying Affidavits _____	<u>12 - 13</u>

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that Third-Party Defendant Peter J. Barcia Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing claims asserted against it in the Verified Amended Complaint and Third-Party Complaint, is granted. Third-Party Defendant, General Landscaping, Inc.'s motion pursuant to CPLR §3212 for summary judgment, alternatively pursuant to CPLR §3211 dismissing the third-party plaintiff's complaint and all cross-claims in their entirety, filed under Motion Sequence 005, is granted as to those causes of action in the third-party complaint for contractual indemnification. The remainder of the relief sought in Motion Sequence 005, is denied. Peter J. Barcia Inc.'s cross-motion pursuant to CPLR §3212 for summary judgment on General Landscaping Inc.'s cross-claims against it, filed under Motion Sequence 005, is granted.

This is an action to recover for personal injuries sustained on February 27, 2010 at approximately 7:45 a.m. when plaintiff, Terry Higgins, allegedly slipped and fell on ice on the exterior front landing and steps while he was exiting his apartment building, "Rye Terrace" complex, located at 150 Theodore Fremd Ave., A Building, Rye, New York, 10508 (hereinafter referred to as the "premises"). Plaintiffs allege that ice had accumulated due to dripping icicles from the roofline due to poor drainage and "ice damming" of the gutters above the landing. It is further alleged that the the icicles formed as a result of improper cleaning and maintenance of the property, failure to prevent a re-freezing condition, installation of improper gutters, failure to maintain the gutters, that the staircase itself was not properly sanded or

MOTION/CAUSE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

saltec, and no steps were taken to remedy the condition after the ice formation. Plaintiffs claim that the bushes were not trimmed enough so that Mr. Higgins could grasp the handrail to avoid falling (Mot. Exh.D, Mot. Seq. 005, Exh. B).

Defendant and Third-Party Plaintiff Nadja Olga Zubrik as Trustee of the Novo Trust is the owner of the building. Defendant JPH Management, Inc. (hereinafter referred to individually as "JPH") is the building management and employed the superintendent Arthur Sheer.

Plaintiffs commenced this action by Summons and Complaint dated November 16, 2010. On August 24, 2011 plaintiffs amended the complaint to allege the multiple causes of Terry Higgins' injuries. Defendants answered the complaint and on April 25, 2013 commenced a third-party action alleging that the plaintiffs' injuries were caused by the Third-Party Defendants in an area they controlled, and seeking contractual and common law indemnification (Mot. Exh. B, Mot. Seq. 005, Exh. E). Peter J. Barcia Inc. is a home improvement company that allegedly contracted with the defendants to install and maintain the building gutters. General Landscaping, Inc. (hereinafter referred to individually as "GLI") is allegedly the contractor responsible for performing snow and ice clearing, tree trimming and maintenance of the bushes at the property. Phil Georgi, Jr. was allegedly the masonry contractor retained in the 1990's to repair the landing and steps where it is alleged plaintiff fell.

Third-Party Defendant Peter J. Barcia Inc. seeks an Order pursuant to CPLR §3212 for summary judgment dismissing the claims asserted against it in the Verified Amended Complaint and Third-Party Complaint.

Third-Party Defendant, GLI's motion filed under Motion Sequence 005 seeks an Order pursuant to CPLR §3212 granting summary judgment dismissing all claims and cross-claims asserted against it, alternatively pursuant to CPLR §3211 dismissing the Third-Party plaintiffs' complaint and all cross-claims in their entirety.

Peter J. Barcia Inc. cross-moves under Motion Sequence 005, seeking an Order pursuant to CPLR §3212 granting summary judgment on GLI's cross-claims asserted against it.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

Peter J. Barcia, Inc. has made a prima face showing that it is entitled to summary judgment. Peter J. Barcia, Inc. has shown that it was an independent contractor with a contractual obligation to Defendant/Third-Party Plaintiff JPH, was hired to repair or replace gutters on the premises in 2006, and is not liable to the plaintiffs as non-contracting third parties. The plaintiffs and Defendant/Third-Party Plaintiffs fail to raise an issue of fact.

A finding of negligence requires a breach of duty, and the threshold determination to be made in tort cases is whether the alleged tortfeasor owed the plaintiff a duty of care (Espinal v. Melville Snow Contractors, Inc., 98 N.Y. 2d 136, 773 N.E. 2d 485, 746 N.Y.S. 2d 120 [2002]). Generally, "breach of a contractual obligation will not be sufficient in and of itself to impose tort liability for non-contracting third-parties upon the promisor." (Church ex rel. Smith v. Callanan Indus., Inc., 99 N.Y. 2d 104, 782 N.E. 2d 50 [2002]). There are three exceptions to the general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his 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 (253 East 62<sup>nd</sup> Street, LLC v. Moluka Enterprises, LLC, 155 A.D. 3d 489, 56 N.Y.S. 314 [1<sup>st</sup> Dept. 2017] citing to Espinal v. Melville Snow Contractors, Inc., 98 N.Y. 2d 136, supra). A defendant launches an instrument of harm when the failure to exercise reasonable care creates a condition that is less safe, or exacerbates a dangerous condition (Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y. 3d 253, 878 N.E. 2d 1001, 848 N.Y.S. 2d 585 [2007]).

Plaintiffs and the Defendants/Third-Party Plaintiffs have not shown that there was detrimental reliance on the performance of Peter J. Barcia Inc.'s contractual duties. There are no allegations that Terry Higgins relied on Peter J. Barcia Inc.'s performance of contractual duties, or that he was either a party to, or aware of, the contractual arrangement between Peter Barcia, Inc. and JPH (See Hughey v. RHM-88, LLC, 77 A.D. 3d 520, 912 N.Y.S. 2d 175 [1<sup>st</sup> Dept., 2010] citing to Eaves Brooks Costume Co. v. Y.B.H. Realty Corp. 76 N.Y. 2d 220, 556 N.E. 2d 1093, 557 N.Y.S. 2d 286 [1990]). William Cummings Executive Vice President of JPH, stated at his deposition on October 29, 2013, that Peter J. Barcia, Inc. was retained on a "work-for-hire" basis with JPH contacting Peter J. Barcia, Inc. to arrange for work, and the last work performed related to repair or replacement of the gutters was around 2004 (Mot. Ex. I, pgs 44-47). Peter Barcia, the owner of Peter J. Barcia Inc. testified at his deposition that the company was never hired to perform snow and ice removal services at the premises (Mot. Ex. K, pg. 69).

There was no issue of fact raised that Peter J. Barcia displaced the duties of JPH or GLI to maintain the property such that they could be potentially liable to the plaintiff (McCord v. Olympia & York Maiden Lane Co., 8 A.D. 3d 634, 779 N.Y.S. 2d 542 [2<sup>nd</sup> Dept., 2004] and Daniels v. Kromo Lenox Associates, 16 A.D. 3d 111, 791 N.Y.S. 2d 17 [1<sup>st</sup> Dept. 2005]). Peter J. Barcia Inc. had not performed maintenance work on the premises for years and any work performed was a result of a management determination made between Arthur Sheer and Williams Cummings (Mot. Ex. I, pgs. 43-44).

Plaintiffs and the Defendants/Third-Party Plaintiffs fail to raise and issue of fact that Peter J. Barcia Inc. launched an instrument of harm. A defendant launches an instrument of harm when the failure to exercise reasonable care creates a condition that is less safe, or exacerbates a dangerous condition (Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y. 3d 253, 878 N.E. 2d 1001, 848 N.Y.S. 2d 585 [2007]). To the extent that plaintiff argues that Peter J. Barcia Inc. was negligent in the gutter work performed at the premises in 2006, this argument is speculative with out sufficient evidentiary support or expert testimony. Plaintiff has not shown that there is a causal connection between the existence of dripping snow and icicles and the installation of gutters by Peter J. Barcia, Inc. The affidavit of Joseph C. Cannizzo, P.E., a professional engineer and expert on behalf of Peter J. Barcia, Inc., establishes that there is no evidence that the company is liable for the code or regulatory violations cited by plaintiff. Mr. Cannizzo has shown that the bigger gutters (six inches instead of the initial five inches) replaced by Peter J. Barcia Inc.'s subcontractor, Gutter King, were standard and appropriate under the building, roofing and construction standards, and the increased size did not cause the alleged dripping snow or icicles on the eaves and gutters or the February 27, 2010 accident.

Arthur Sheer the building superintendent hired by JPH, stated at his deposition that third-party defendant GLI last cleaned the gutters in 2009, prior to the February 27, 2010 accident. Peter J. Barcia, Inc. did not clean the gutters or perform general maintenance prior to the accident (Mot. Ex. J, pg. 108, lines 3 - 25, pg. 29 lines 1-3).

Defendants/Third-Party Plaintiffs argument that Mr. Barcia's testimony cannot be relied upon for summary judgment because he did not inspect his subcontractor's, Gutter King, work is unavailing. Mr. Barcia testified at his deposition that he did inspect the work after it was completed and that he also spoke to the subcontractor's employees, asked why an auxiliary leader was replaced, and they advised it was not needed. Mr. Barcia agreed with the subcontractor's assessment (Mot. Ex. K, pgs. 25 lines 13-20, 26 lines 1-16, and pgs. 40-41). It was reasonable for Mr. Barcia to make the determination that the gutters

would work properly after he performed inspection when the work was completed and found no defects.

Peter J. Barcia Inc.'s cross-motion pursuant to CPLR §3212 for summary judgment on General Landscaping Inc.'s cross-claims against Peter J. Barcia, Inc. for indemnification and negligence, filed under Motion Sequence 005, is granted. GLI did not establish Peter Barcia Inc.'s liability or provide arguments that would raise an issue of fact to avoid summary judgment on the cross-claims.

GLI has made a prima facie showing of entitlement to summary judgment under Motion Sequence 005 dismissing the claims asserted in the third-party complaint for contractual indemnification. The failure to have a written contract requiring indemnification establishes entitlement to summary judgment dismissing the cause of action for contractual indemnification (*Sniatecki v. Violet Realty, Inc.*, 98 A.D. 3d 1316, 951 N.Y.S. 2d 628 [4<sup>th</sup> Dept., 2012]). Defendants/Third-Party Plaintiffs' conceded that there was no written contract, rather GLI was told what needed to be done by the superintendent or showed up, and afterward sent a bill for the services performed (Mot. Seq. 005, Exh. J, pgs. 25-26, and Exh. K pgs. 43-45, 46 lines 1-8, 58-60). Defendants/Third-Party Plaintiffs failed to raise any issues of fact on the contractual indemnification cause of action asserted in the third-party complaint.

Plaintiffs and Defendants/Third-Party Plaintiffs have raised issues of fact warranting denial of GLI's motion for summary judgment on the causes of action asserting negligence and common law indemnification.

There remains issues of fact as to whether GLI's services displaced the Defendants/Third-Party Plaintiffs liability by negligently clearing the handrails of the bushes so that the plaintiff was unable to hold on to it before he fell. Roberto Sanchez the vice-president of GLI testified at his deposition that the company was responsible for trimming the bushes to clear the handrails and took responsibility for trimming bushes that were overgrown at the stairway without being told, and performed an inspection of its work (Mot. Seq. 005, Exh. L, pgs. 41 lines 5 - 21 and 44 - 45). Plaintiff testified at his deposition that he was aware that GLI as the landscaper was retained to trim the bushes by the handrail (Mot. Seq. 005, Exh. M, pg. 126).

There also remains an issue of fact as to whether plaintiffs detrimentally relied on GLI's services in cleaning the gutters and removing debris to prevent dripping icicles from the roofline due to poor drainage and "ice damming" and as to the manner of snow removal on the day before the accident (*Mastroddi v. WDG Dutchess Associates, Ltd. Partnership*, 52 A.D. 3d 341, 861 N.Y.S. 2d 11 [1<sup>st</sup> Dept., 2008]). Mr. Sanchez testified that GLI was the entity responsible for cleaning the gutters on December 3, 2009 before plaintiff's accident (Mot. Seq. 005, Exh. L, pgs. 37, 40 and 93 lines 17-23).

There remain issues of fact as to whether GLI's snow removal efforts contributed to plaintiffs' injuries (*Gushin v. Whispering Hills Condominium I*, 96 A.D. 3d 721, 946 N.Y.S. 2d 202 [2<sup>nd</sup> Dept., 2012]). Mr. Sanchez testified that GLI had allegedly performed snow removal on the stairs and landing on February 26, 2010, the day before plaintiff's slip and fall (Mot. Seq. 005, Exh. L, pg. 78). Arthur Sheer the building superintendent testified at his deposition that GLI cleaned the stairs and landing of the premises first starting on February 26, 2010 at 11:00a.m. in the morning and that he then went back to conduct further snow removal at the same location between 5:00p.m. and 6:00p.m. (Mot. Seq. 005, Exh. K, pg. 76- 77 lines 2 - 9 and 73). GLI has not established that the work performed by Arthur Sheer removes any detrimental reliance. Mr. Sanchez also testified that he was in Mexico on February 26, 2010 and called his employees by cellphone to perform the snow removal work (Mot Seq. 005, Exh. L, pgs. 80 and 86). Mr. Sanchez's testimony as to



the manner snow removal work was performed by his workers is hearsay and not probative (De La Cruz v. Lettera Sign & Elec. Co., 77 A.D. 3d 566, 909 N.Y.S. 2d 448 [1<sup>st</sup> Dept. 2010]).

Common law Indemnification requires that the party seeking indemnity establish that (1) it was not negligent beyond any statutory liability and (2) that the proposed indemnitor's negligence contributed to the causation of the accident (Correia v. Professional Data Management, Inc., 259 A.D. 2d 60, 693 N.Y.S. 2d 596 [1<sup>st</sup> Dept 1999]). A party seeking common law indemnification cannot recover until negligence has been determined ( Lopez v. New York Life Insurance Company, 90 A.D. 3d 446, 934 N.Y.S. 2d 136 [1<sup>st</sup> Dept., 2011] citing to Prenderville v. International Serv. Sys., Inc., 10 A.D. 3d 334, 781 N.Y.S. 2d 110 [1<sup>st</sup> Dept. 2004]).

There remain issues of fact as to whether GLI's negligence contributed to or caused of the alleged accident. GLI cannot obtain summary judgment dismissing the Defendants/Third-Party Plaintiff's cause of action for common law indemnification until a final determination is rendered at trial.

GLI made no arguments stating the basis for dismissal pursuant to CPLR §3211, and that relief is denied.

Accordingly, it is ORDERED that third-party defendant Peter J. Barcia Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing claims asserted against it in the Verified Amended Complaint and Third-Party Complaint, is granted, and it is further,

ORDERED that Peter J. Barcia Inc.'s cross-motion pursuant to CPLR §3212 for summary judgment on General Landscaping Inc.'s cross-claims against it, filed under Motion Sequence 005, is granted, and it is further,

ORDERED that all claims and cross-claims asserted against Peter J. Barcia Inc. in the Amended Complaint and Third-Party Complaint and cross-claims asserted by Third-Party Defendant General Landscaping Inc.'s are severed and dismissed, and it is further,

ORDERED that the caption is amended and shall read as follows,

TERRY HIGGINS and VANESSA HIGGINS,

Plaintiff,

-against-

JPH MANAGEMENT, INC. and NADJA OLGA  
ZUBRIK, as Trustee of the NOVO TRUST,

Defendants.

JPH MANAGEMENT, INC. and NADJA OLGA  
ZUBRIK, as Trustee of the NOVO TRUST,

Third-Party Plaintiffs,

-against-

GENERAL LANDSCAPING, INC. and  
PHIL GIORGI, JR.,

Third-Party Defendants.

and it is further,

**ORDERED** that pursuant to e-filing protocol, Defendants/Third-Party Plaintiffs shall to serve a copy of this Order with Notice of Entry on the remaining parties, the General Clerk's Office (Room 119), and upon the Clerk of the County (Room 141-B), within twenty (20) days of entry of this order, and said clerks shall mark their records to reflect the amended caption, and it is further,

**ORDERED** that Third-Party Defendant, General Landscaping, Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing all claims and cross-claims asserted against it, alternatively pursuant to CPLR §3211 dismissing the third-party plaintiff's complaint and all cross-claims in their entirety, filed under Motion Sequence 005, is granted only as to dismissal of those causes of action in the third-party complaint for contractual indemnification, and it is further,

**ORDERED** that those causes of action in the third-party complaint for contractual indemnification asserted against General Landscaping, Inc., are severed and dismissed, and it is further,

**ORDERED** that the remainder of the relief sought in Third-Party Defendant, General Landscaping, Inc.'s motion filed under Motion Sequence 005, is denied, and it is further,

**ORDERED** that the Clerk of the Court shall enter judgment accordingly.

**ENTER:**

Dated: April 26, 2018

  
\_\_\_\_\_  
**MANUEL J. MENDEZ**  
J.S.C.

**MANUEL J. MENDEZ**  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
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