| **Johnson v Avalonbay Communities, Inc.** |
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| 2018 NY Slip Op 31904(U) |
| August 9, 2018 |
| Supreme Court, New York County |
| Docket Number: 155998/2015 |
| Judge: Barbara Jaffe |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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SCOTT JOHNSON,

Plaintiff,

- v -

AVALONBAY COMMUNITIES, INC., MIDWAY SERVICES, INC.,

Defendants.

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INDEX NO. 155998/2015

MOTION DATE

MOTION SEQ. NO. 4, 5, 6

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number 80-188 were read on this application for summary judgment

HON. BARBARA JAFFE:

By notice of motion, defendant Avalonbay Communities, Inc., moves pursuant to CPLR 3212 for an order summarily dismissing plaintiff's complaint and any cross-claims against it and granting it summary judgment on its claims against other parties (mot. seq. four). The Brickman Group Ltd., a third-party defendant and second third-party plaintiff, opposes, as does plaintiff, while second third-party defendant Bosco & Sons Mason Contractors, Inc., partially opposes.

By notice of motion, defendant/third-party plaintiff Midway Services, Inc., moves pursuant to CPLR 3025(b) for an order granting it leave to serve a second amended verified answer containing the affirmative defense of "special employee" and deeming it served on the parties *nunc pro tunc*, and pursuant to CPLR 3212 granting it summary dismissal of plaintiff's

complaint and any cross claims asserted against it (mot. seq. five). Brickman and plaintiff oppose, and Avalonbay partially opposes.

By notice of motion, Brickman moves for an order summarily dismissing the third-party complaint, declaring that the subject indemnification provision is unenforceable, and granting it judgment on its third-party claims against Bosco. Bosco opposes and Avanlonbay partially opposes.

The motions are consolidated for disposition.

## I. FACTUAL BACKGROUND

On or about February 23, 2014, while employed by JF Frame Plumbing & Heating and working at a construction site at 1299 Corporate Drive in Westbury, New York, plaintiff was allegedly injured when he fell as a result of a dangerous condition. (NYSCEF 1).

Avalonbay was the owner of the site, while Midway was the general contractor. Avalonbay had hired Brickman to perform snow removal services at the site, and Brickman subcontracted with Bosco to perform the snow removal services.

Plaintiff testified at a deposition, as pertinent here, that he slipped on a patch of ice after exiting his work trailer, owned by Midway, which was located in the parking lot at the construction site, following a work meeting held in the trailer. Although plaintiff parked his car in the same parking lot before entering the trailer, he did not notice the ice until after he fell. He described the ice as black, and similar in color to the asphalt on the lot.

The deposition testimony of various witness reflects the following:

(1) no party received any complaints about the ice before plaintiff's accident;

(2) two days before the accident, Bosco's president fully salted and plowed the site, which was completed at 2 pm the day before plaintiff's accident; and

(3) weather records indicate that the day before plaintiff's accident, all precipitation ended at 9 am and the temperature remained above freezing until 6 am the day of the accident.

## II. PROCEDURAL BACKGROUND

By summons and complaint dated June 11, 2015, plaintiff asserts that defendants violated Labor Law §§ 200 and 241(6). (NYSCEF 1).

On or about July 29, 2015, Midway answered and interposed cross claims against Avalonbay for indemnification and contribution. (NYSCEF 2). A month later, Midway filed an amended answer. (NYSCEF 4).

Avalonbay filed its answer on or about September 15, 2015, and asserted a cross claim against Midway for indemnity and/or contribution. (NYSCEF 4).

On or about March 23, 2016, Midway filed an amended summons and third-party complaint against Brickman, alleging that plaintiff suffered a grave injury under the Worker's Compensation Law and that Brickman is liable for common law and contractual indemnity and for failing to procure insurance. (NYSCEF 22).

Brickman answered and interposed a counterclaim against Midway for contribution, apportionment, and common law and contractual indemnification, and a cross claim against Avalonbay for the same. (NYSCEF 25).

On or about August 15, 2016, Brickman, suing as Brightview Landscapes, LLC f/k/a The Brickman Group Ltd. LLC, commenced a second third-party action against Bosco for indemnity, contribution, and failure to purchase insurance. (NYSCEF 31).

Avalonbay thereafter asserted cross claims against Bosco for contribution and common law and contractual indemnity. (NYSCEF 37).

## III. AVALONBAY'S MOTION

### A. Claims against Avalonbay

At oral argument on the motions, plaintiff withdrew his claim against Avalonbay for violations of Labor Law §§ 200 and 241(6), but retained his claim for common law negligence. Plaintiff asserts that there is a triable issue as to whether Avalonbay had or should have had constructive notice of the ice, observing that it presented no expert testimony as to when the ice may have formed or how long it may have been present before the accident.

To prevail on a motion for summary judgment in a slip-and-fall case, the defendant must establish, *prima facie*, that it neither created the condition that caused the plaintiff's fall, nor did it have actual or constructive notice of that condition. (*Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-975 [2d Dept 2012], *lv dismissed* 20 NY3d 965; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011]).

An owner or occupant of premises has a duty to remove an accumulation of snow or ice inside or outside the premises which may be dangerous, or to take other measures to ensure the safety of the premises, when it has actual or constructive notice of the existence of the condition and a reasonable opportunity to act. (*See eg Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]; *Helms v Regal Cinemas, Inc.*, 49 AD3d 1287, 1288 [4th Dept 2008]; *Blackwood v New York City Tr. Auth.*, 36 AD3d 522, 523 [1st Dept 2007]; *Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735-36 [1st Dept 2005], *affd* 6 NY3d 734; *Hussein v New York City Tr. Auth.*, 266 AD2d 146, 146-47 [1st Dept 1999]; *Zonitch v Plaza at Latham LLC*, 255 AD2d 808, 808-809 [3d Dept 1998]; 86 NY Jur 2d, Premises Liability § 341; 355 [2016]; 15 NY Prac, New York Law of Torts § 12:11 [2015]). A defendant has constructive notice of a dangerous

condition where it is "visible and apparent and . . . exist[s] for a sufficient length of time before the accident to permit the defendant to discover and remedy it." (*Arcabascio v We're Assoc., Inc.*, 125 AD3d 904, 904 [2d Dept 2015]).

Here, there is no evidence that Avalonbay had actual notice of the icy condition, as it denies receipt of any complaints about the icy condition or that anyone saw the ice before plaintiff's fall. Moreover, plaintiff's testimony supports Avalonbay's position that it had no constructive notice of the icy condition, as he saw no ice before his fall, describing it as "black ice." Not only did plaintiff see no ice before his accident, but he crossed the parking lot without incident before his fall, and offers no evidence as to the duration of the alleged icy condition. (*See Pena v City of New York*, 161 AD3d 522 [1st Dept 2018] [defendant showed lack of constructive notice based on plaintiff's testimony that crosswalk appeared safe for crossing and she did not see black ice until after fall]; *Killeen v Our Lady of Mercy Med. Ctr.*, 35 AD3d 205 [1st Dept 2006] [no actual or constructive notice of black ice absent complaints and as plaintiff did not notice ice before he fell]).

The testimony of Midway's employee that he saw ice in the parking lot before plaintiff's accident does not constitute evidence that the ice he saw was the ice on which plaintiff slipped and there is no evidence that the entire parking lot was icy, and plaintiff testified that although having walked in the area after parking his car and entering the trailer, he saw no ice until after his fall. (*See e.g., Voss v D & C Parking*, 299 AD2d 346 [2d Dept 2002] [defendant established lack of notice based on evidence that there was no visible ice in parking lot and plaintiff did not see ice on which she fell; "defendant's general awareness that some dangerous condition may have existed in the parking lot is insufficient, as a matter of law, to charge it with constructive notice of the specific condition . . . which caused the plaintiff's injuries."]; *see also Slates v New*

*York City Hous. Auth.*, 79 AD3d 435 [1st Dept 2010], *lv denied* 16 NY3d 708 [2011] [that defendant's employee also fell on date of plaintiff's accident did not constitute proof of notice absent evidence that employee notified NYCHA of her accident]; *Reagan v Hartsdale Tenants Corp.*, 27 AD3d 716 [2d Dept 2006] [expert's affidavit as to origin of ice insufficiently speculative and conclusory as it addressed general conditions in vicinity rather than origin of specific ice on which plaintiff fell]).

Avalonbay thus establishes that it lacked constructive notice of the condition. (*See eg. Hall v Staples Office Superstore E., Inc.*, 135 AD3d 706 [2d Dept 2016] [contention that defendant had notice of black ice or that ice formed as result of improper snow removal conclusory and speculative, and plaintiff testified that she saw no ice in area where she fell before fall and that she safely traversed same area only minutes before accident]; *Robinson v Trade Link Am.*, 39 AD3d 616 [2d Dept 2007] [plaintiff did not notice ice in area before his fall and safely traversed area minutes before fall]; *Murphy v 136 N. Blvd. Assocs.*, 304 AD2d 650 [2d Dept 2003] [plaintiff slipped on black ice which she did not see before fall and thus failed to show that condition visible and apparent for sufficient length of time; no evidence offered as to duration of ice before fall or whether defendant received prior complaints]; *see also Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541 [1st Dept 2015] [plaintiff's testimony did not support allegation that ice on which he slipped was old or preexisting, as he did not recall seeing ice on sidewalk when he walked there night before accident]).

Moreover, the weather records plaintiff offers are not certified and thus inadmissible (*see Morabito v 11 Park Place LLC*, 107 AD3d 472 [1st Dept 2013] [unaffirmed report from weather reporting company, absent certified weather records or admissible climatological records, inadmissible]; *see also Hanifan v COR Dev. Co., LLC*, 114 AD3d 1569 [4th Dept 2016]

[plaintiff's allegations insufficient to raise triable issue as she relied on inadmissible printouts from weather data website and defendant's general snow removal practices]), and even if they were, he offers no expert affidavit to explain them.

For all of these reasons, plaintiff fails to raise a triable issue as to Avalonbay's liability.

B. Avalonbay's claim against Midway

Absent any opposition to Avalonbay's motion for summary judgment on its claim for contractual indemnification against Midway, it is granted.

C. Avalonbay's claim against Brickman

1. Contractual indemnification

Pursuant to the contract between Avalonbay and Brickman, governed by the law of the Commonwealth of Virginia, Brickman agreed to indemnify Avalonbay against personal injury claims resulting from the snow and ice removal services referenced in the agreement, and specifically to indemnify it against claims brought by third parties that might arise out of or relate in any way to the agreement. The agreement also provides that Brickman need not indemnify Avalonbay for "the sole gross negligence or willful misconduct" of Avalonbay or its agents or employees, and it is. (NYSCEF 101, 102).

The snow removal portion of the agreement provides that all parking areas must be plowed and salted pursuant to the scope of the agreed-upon work, and while snow must be cleared upon the accumulation of approximately two inches or when called by the management company, salting was to be performed without request as warranted by the existing ice and snow conditions. Upon management's request for additional salting in the event of refreezing, Brickman was to respond within two hours. (*Id.*). It is undisputed that Brickman was responsible

for the removal of snow and ice in the area of the construction site, including the parking lot. (NSYCEF 96).

a. Contentions

Avalonbay asserts that as Brickman was responsible for ice removal, any ice present in the parking lot before plaintiff's accident was its responsibility, and that plaintiff's injury arose from and was related to Brickman's agreement with Avalonbay. (NYSCEF 81).

Brickman denies responsibility for plaintiff's accident, and also argues that the indemnification provision at issue is unenforceable as it violates General Obligations Law (GOL) § 5-322.1, Virginia Code § 11-4.1, and applicable case law. It contends that it subcontracted its snow and ice removal services to Bosco, with Avalonbay's knowledge and consent, and that it performed no services itself as Bosco performed and was responsible for performing the snow and ice removal services, including on the days before and day of plaintiff's accident. It observes that its duty to remove snow arose only upon a snow accumulation of at least two inches, whereas Bosco was required by the subcontract to remove snow and ice at the outset of a storm regardless of accumulation. Thus, as Brickman performed no ice removal services and would not have been required to do so until two inches of snow had accumulated, plaintiff's accident did not arise from or relate to its agreement with Avalonbay. (NYSCEF 148).

In reply, Avalonbay asserts that it is irrelevant whether Brickman performed the actual work, as the agreement requires it to indemnify for any claim arising from or relating to its agreement to perform snow and ice removal services, and observes that it was required to salt as warranted by the conditions. It also observes that the relevant testimony establishes that Brickman supervised and inspected Bosco's work. (NYSCEF 148).

b. Analysis

A party is entitled to be indemnified by another party pursuant to a contract or agreement if the intent to indemnify is "clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." (*Drzewinski v Atl. Scaffold & Ladder Co., Inc.*, 70 NY2d 774 [1987]; *see also Podhaskie v Seventh Chelsea Assocs.*, 3 AD3d 361 [1st Dept 2004] [indemnity contract must be viewed in light of "purpose of entire agreement and surrounding facts and circumstances"]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]). Moreover, "[a]dditional obligations may not be imposed beyond the explicit and unambiguous terms of the agreement." (*Millennium Holdings LLC v Glidden Co.*, 146 AD3d 539 [1st Dept 2017]).

Summary judgment on a contractual indemnification claim may be granted when the parties' agreement is unambiguous and clearly reflects their intention that one party indemnify the other for the injuries sustained. (*Roddy v Nederlander Prod. Co. of Am., Inc.*, 44 AD3d 556 [1st Dept 2007]).

That plaintiff fell on ice does not establish, as a matter of law, that his injury arose from or was related to Brickman's or Bosco's ice removal services, especially, as discussed above, there is no evidence as to how the ice formed or for how long it was present before the accident. (*See Hannigan v Staples, Inc.*, 137 AD3d 1546 [3d Dept 2016] [claim for contractual indemnification should have been denied; while agreement required contractor to indemnify against claims arising out of or resulting from performance of services, record did not establish

as matter of law that plaintiff's slip on ice patch arose out of or resulted from contractor's ice removal obligations]).

Moreover, while the agreement required Brickman to salt whenever the conditions warranted it, there is no evidence that the conditions on the day of plaintiff's accident warranted salting, especially as it is undisputed that there was no precipitation after 9 am on the day before plaintiff's accident, that Bosco finished salting the site at 2 pm the day before, and temperatures did not drop below freezing until 6 am the day of the accident. (*See e.g., Perales v First Columbia 1200 NSR, LLC*, 88 AD3d 1213 [3d Dept 2011] [contractor established that accident was not caused by or sustained in connection with performance of contract, as it was obligated to salt and sand "when conditions dictate," and it was undisputed that it salted parking lot on day of ice storm and day after, that there was no snow and ice present after salting, that plaintiff saw no ice or snow before accident, and there was no precipitation on day of accident]; *see also Kogan v N. St. Community, LLC*, 81 AD3d 429 [1st Dept 2011] [accident did not arise from contractor's performance of work where it was required to plow snow only if needed and to salt only after plowing, and there was no evidence of snowfall event that would have triggered duty to plow or inspect premises on date of accident]).

Avalonbay thus fails to establish, *prima facie*, its entitlement to judgment on its claim against Brick for contractual indemnification. In light of this result, I need not consider whether the indemnification provision is unenforceable.

D. Avalonbay's claim against Bosco

Even if Avalonbay is a third-party beneficiary of the contract between Brickman and Bosco, it has not established that plaintiff's accident arose from or was connected to Bosco's performance of its subcontract obligations, any acts or omissions by it, or any negligence.

E. Avalonbay's claims for common law indemnification

While Avalonbay has demonstrated its freedom from negligence with respect to plaintiff's accident, it has not, as detailed above, established that Brickman and Bosco were negligent.

IV. MIDWAY'S MOTION

Absent any opposition to Midway's motion to amend its answer to assert a "special employee" affirmative defense, it is granted.

A general employee of one employer may also be found to be a special employee of another, even if the general employer is responsible for paying the employee's wages and maintaining other employee benefits. A special employee is "one who is transferred for a limited time of whatever duration to the service of another," and the presumption of general employment may be overcome "upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer." (*Thompson v Grunman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). If an employee is deemed a special employee of an entity, it is barred from suing that entity pursuant to Workers' Compensation Law 11 and 29. (*Id.* at 560).

Here, Midway relies on the following factors to establish that plaintiff was its special employee: Midway's supervisor gave daily instructions to plaintiff and other plumbers as to the work to be done and held daily meetings; directed the scope of their work and where to work; Midway inspected the work on a daily basis; and Midway corrected the work or stopped it if necessary; and Midway supplied all of the materials to plaintiff and others. Midway also agreed to reimburse JFrame for each plumbers' salaries and it paid the additional costs of worker's compensation insurance. It denies that JFrame's president or supervisor was at the site on a regular basis or supervised the plumbers' work. (NYSCEF 144).

Plaintiff asserts that there is a triable issue as to whether he was Midway's special employee, as his director supervisor was a JFrame employee, who was on site five days a week and supervised his work, while Midway's supervisor merely provided him and other plumbers with general orders. Plaintiff also testified that JFrame's president came to the site once a week to supervise and inspect plaintiff's and the other employees' work. (NYSCEF 159).

As the issue of whether someone is a special employee is generally a question of fact and a finding of special employee status may be made "as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact" (*Thompson*, 78 NY2d at 557-558), given the factual dispute here as to who supervised plaintiff's work, Midway does not demonstrate, as a matter of law, that plaintiff was its special employee (*see Messina v New York City Tr. Auth.*, 84 AD3d 439 [1st Dept 2011] [triable issue as to whether plaintiff was special employee as record unclear as to which party assumed exclusive control over manner, details, and ultimate result of plaintiff's work]).

While Midway purports to move for summary dismissal of plaintiff's complaint and all cross claims against it, it addresses only plaintiff's Labor Law § 241(6) claim, which plaintiff withdrew at oral argument. The remainder of its motion is thus denied absent any argument in support thereof.

## V. BRICKMAN'S MOTION

Again, as there is no evidence that plaintiff's accident was related to Brickman's agreement with Avalonbay, Brickman is entitled to dismissal of Avalonbay's cross claim for indemnification.

Brickman also moves for judgment on its third-party claims for contractual and common law indemnity, contribution, and failure to procure insurance against Bosco. However, it also

fails to submit evidence demonstrating, *prima facie*, that plaintiff's accident arises from or is connected with Bosco's performance under the subcontract. That plaintiff slipped on ice does not establish, as a matter of law, that Bosco's services or failure to provide services had any connection to the ice. (*See Hannigan v Staples, Inc.*, 137 AD3d 1546 [3d Dept 2016] [claim for contractual indemnification should have been denied; while agreement required contractor to indemnify against claims arising out of or resulting from performance of services, record did not establish as matter of law that plaintiff's slip on ice patch arose out of or resulted from contractor's ice removal obligations]).

For the same reason, Brickman's claim for common law indemnification against Bosco also fails (*see Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102 [2d Dept 2010] [common law indemnification claim dismissed absent triable issues as to contractor's negligence related to ice which caused accident]), as does its contribution claim (*Cantor v Acorn Ponds Homeowners Assn., Inc.*, 127 AD3d 1124 [2d Dept 2015]).

Bosco's contract with Brickman required it to obtain additional insured coverage for the contractor and "client," defined as "each client specified on any Exhibit A hereto." Exhibit A to the contract, identifies Brickman as the contractor, but has no section related to a client, and it identifies the job at issue by the name of the site and its address. Nowhere is the name of Avalonbay Communities, Inc. reflected on the exhibit. Brickman thus fails to establish that Bosco breached an agreement to procure additional insured coverage for Avalonbay.

## VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Avalonbay Communities, Inc.'s motion for summary judgment (sequence four) is:

(1) granted as to plaintiff's claims against it, and the complaint is severed and dismissed as against it;

(2) granted as to its claim for contractual indemnification against Midway Services, Inc.; and

(3) is denied as to its cross claims for contractual and common law indemnification;

It is further

ORDERED, that defendant Midway Services, Inc.'s motion for leave to amend its answer and for summary judgment (sequence five) is:

(1) granted as to granting leave to amend its answer and deeming its Second Amended Verified Answer as served on the other parties *nunc pro tunc*;

(2) granted as to the dismissal of plaintiff's Labor Law 241(6) claim against it;

(3) and is otherwise denied;

And it is further

ORDERED, that second third-party plaintiff Brightview Landscapes, LLC f/k/a The Brickman Group LTD., LLC, motion (sequence six) is:

(1) granted to the extent of dismissing Avalonbay's cross claim for contractual indemnification against it; and

(2) otherwise denied.

8/9/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

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