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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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PAULA SCHRECK,

Plaintiff,

-against-

KIMCO BAYSHORE LLC, JET SANITATION SERVICE CORP., BDH LANDSCAPING CORP., "JOHN DOE" PROPERTY MANAGEMENT COMPANY and "JOHN DOE" CONTRACTORS,

Defendants.

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INDEX NO.: 06224/2014
CALENDAR NO.: 20170119 7OT
MOTION DATE: 3/8/18
MOTION SEQ. NO.: 002 MG
003 MD

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Upon the following papers read on these motions for summary judgment and conditional indemnification ; Notice of Motion and supporting papers 1 - 13, 32 - 43 ; Answering Affidavits and supporting papers 14 - 21, 22 - 29, 44 - 50 ; Replying Affidavits and supporting papers 30 - 31, 51 - 52 ;(~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion of defendant Jet Sanitation Service Corp., and the motion of defendant KIMCO Bayshore, LLC, are consolidated for purposes of this determination; and it is

ORDERED that the motion (motion sequence no. 002) of defendant Jet Sanitation Service Corp. for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (motion sequence no. 003) of defendant KIMCO Bayshore, LLC, for a conditional order of indemnity is denied.

This action was commenced by plaintiff Paula Schreck to recover damages for injuries she allegedly sustained on February 17, 2014, when, while in the employ of nonparty Pier 1 Imports, she fell from a step ladder while disposing of refuse in a dumpster at a location known as 1871 Sunrise Highway, Bay Shore, New York. Plaintiff alleges that an accumulation of ice

and snow on the ground caused the ladder to slip and induced her fall. Defendant KIMCO Bayshore, LLC ("KIMCO") is alleged to be the owner of the subject property, defendant BDH Landscaping Corp. ("BDH") is alleged to have been negligent in plowing snow at the premises, and defendant Jet Sanitation Service Corp. ("Jet") is alleged to have placed its dumpster in a location making snow removal difficult.

Jet now moves for summary judgment in its favor, arguing that its sole function was to place a dumpster at the subject premises and then remove refuse from the dumpster at regular intervals. It further argues that it had no role in snow removal, salting, or sanding of the parking lot where the dumpster in question was located. In support of its motion, it submits copies of the pleadings, transcripts of the parties' deposition testimony, and four photographs.

KIMCO moves for a conditional order of indemnity in its favor, arguing BDH is obligated to indemnify it against any damages arising from BDH's work. In support of its motion, it submits copies of the pleadings, transcripts of the parties' deposition testimony, and a copy of a contract between it and BDH.

Plaintiff testified that at just prior to 10:00 a.m. on the date in question, she was preparing a Pier 1 Imports retail store for its morning opening. She stated that she was directed by her supervisor to take the store's bagged garbage to an exterior dumpster for disposal. The dumpster was located approximately 12 steps from the store's side door. Asked to describe the condition of the asphalt between the door and the dumpster, plaintiff indicated that it was covered by "snow and ice." She testified that there were "mounds of snow" as tall as her knees surrounding the dumpster, preventing her from opening its side panels and placing bags inside. She stated that she positioned an approximately 5-foot-high, metal A-frame ladder as near to the dumpster as she could to gain access to the dumpster's open top. Plaintiff indicated that atop the ladder, which was positioned both on asphalt and ice, she was able to more easily deposit the garbage bags. Upon questioning, she testified that using a ladder to gain access to the top of the dumpster was a common occurrence at work regardless of the weather.

Plaintiff further testified that in the moments before her accident, she had finished placing most of the garbage bags into the dumpster, climbing half-way up the ladder, throwing the bag into the dumpster's open top, then climbing down the ladder and retrieving another bag. She indicated that on her final trip up the ladder, she "went to put [a bag of garbage] into the dumpster reaching over and felt [herself] falling back." Asked to state the cause of her fall, plaintiff "believe[s] [she] was too far away from the dumpster," but could not recall if the ladder moved in any manner. Later in her deposition, plaintiff indicated that she had already deposited the bag of trash into the dumpster before she started to fall. Upon further questioning she denied that the ladder, which was owned by her employer, was defective in any way, that she had ever complained about the location of the dumpster, or that she had ever complained about a snowy condition.

Bryan Schretzmayer, deposed on behalf of BDH, testified that he is its president and sole owner. He indicated that BDH performs landscaping as well as snow and ice removal services. He stated that BDH entered into a service contract with KIMCO to plow snow from its parking lots, and to apply rock salt. Such service contract was in effect at the time of plaintiff's alleged incident. In response to questions regarding where snow plowed from the parking lots would be deposited, Mr. Schretzmayer testified that it would be placed "[a]way from all stores . . . on grassy areas . . . and [when possible] at a low end of the parking lot so [that] there is no runoff." He stated that the positioning of the snow was "strategic and then policed then after [sic]." He further testified that while it is BDH policy "not to push towards any dumpsters, so there is access", there was nothing in its contract with KIMCO requiring that plowed snow not be placed near dumpsters. He indicated that the area around the dumpster in question was plowed and no additional hand shoveling would have been done.

Gregory Essopos testified that he is employed by KIMCO Realty as a property manager. He indicated that KIMCO Realty owns various properties through its subsidiaries, and that his responsibilities include managing the "day-to-day operations of common areas of a shopping center, includ[ing] maintenance of the parking lots, landscaped areas, roofs, [and] any other property that is deemed common." Mr. Essopos testified that KIMCO, a subsidiary of KIMCO Realty, owned the subject premises. He indicated that on October 11, 2012, KIMCO executed a two-year snow removal contract with BDH. Such agreement, he explained, covered "[a]ll areas that are commonly used by tenants and customers," and that tenants had no individual responsibility for snow removal. Mr. Essopos further stated that KIMCO did not maintain any snow removal equipment of its own at the subject premises, nor was there a minimum snow accumulation that triggered BDH's services. However, he testified that upon any snowfall, BDH was required to contact him. He indicated he would then inspect the premises and, if he believed that snow plowing was warranted, BDH and KIMCO would reduce an agreement to writing following the terms of their prior executed contract. Mr. Essopos further testified KIMCO does not have any employee who visits the subject premises on a daily basis. He indicated that while he is required to perform quarterly inspections of the premises, he would visit on other occasions in response to tenant complaints or other specific issues.

Fred Redavid testified he has been employed by defendant Jet for 43 years and that he is a general manager. He stated that Pier 1 Imports has never been a customer of Jet, and that West Rock Management Company ("West Rock") is the entity to whom the subject dumpster was rented. Upon questioning, Mr. Redavid indicated that Jet has no responsibility for gaining access to a dumpster. Rather, it was West Rock's responsibility to ensure the subject dumpster was free of obstructions and that Jet's trucks were able to empty it. Mr. Redavid did not recall ever receiving a complaint that the subject dumpster was inaccessible.

A party moving for summary judgment "must make a *prima facie* showing of entitlement

to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see, Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see, O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see, Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see, Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). A real property owner "will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" (*Bader v Riv. Edge at Hastings Owners Corp.*, 159 AD3d 780, 780, 72 NYS3d 145 [2d Dept 2018], quoting *Cuillo v Fairfield Prop. Servs., L.P.*, 112 AD3d 777, 778, 977 NYS2d 353 [2d Dept 2013]). Because a finding of negligence "must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138, 746 NYS2d 120 [2002]). Further, "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*id.*).

Jet has established a *prima facie* case of entitlement to summary judgment in its favor (*see, Nealy v Pavarini-McGovern, LLC*, 135 AD3d 917, 24 NYS3d 372 [2d Dept 2016]; *see, generally, Alvarez v Prospect Hosp.*, *supra*). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care — and thus be potentially liable in tort — to third persons: (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" (*Espinal v Melville Snow Contrs.*, *supra* at 140 [internal quotation marks and citations omitted]). Through the depositions of the witnesses, Jet demonstrated it placed its dumpster in a reasonable manner and that it had no duty to maintain a defect-free walking surface in its vicinity. Jet, therefore, demonstrated that as a third-party contractor it owed no duty to plaintiff (*see, Trombetta v G.P. Landscape Design, Inc.*, 160 AD3d 677, 73 NYS3d 230 [2d Dept 2018]; *Santos v Deanco Servs., Inc.*, 142 AD3d 137, 35 NYS3d 686 [2d

Dept 2016]; *see, generally, Espinal v Melville Snow Contrs., supra*). Thus, the burden shifted to the opposing parties to raise a triable issue (*see, generally, Vega v Restani Constr. Corp., supra*).

BDH and plaintiff each oppose Jet's motion. BDH argues Jet has not eliminated all triable issues, namely whether its practice of not removing trash located outside of dumpsters contributed to plaintiff's fall. That argument is unavailing, given plaintiff's testimony that it was snow and ice piled in front of the subject dumpster that forced her to place her ladder farther from the dumpster than she usually would. Further, there is no evidence that Jet was required to do anything other than empty its dumpsters or that some additional trash removal was even contemplated by its client, nonparty West Rock (*see, Troia v City of New York*, 162 AD3d 1089, 2018 NY Slip Op 04770 [2d Dept 2018]; *see, also, Espinal v Melville Snow Contrs., supra*).

Plaintiff's counsel argues, in a non-specific manner, that Jet's placement of its dumpster somehow contributed to plaintiff's alleged injuries. The "launch of a force or instrument of harm has been interpreted as requiring that the contractor create or exacerbate the dangerous condition" (*Santos v Deanco Servs., Inc., supra* at 141). However, neither at her deposition, nor in her submitted affidavit, did plaintiff testify that the subject dumpster's positioning within its enclosure played any role in her alleged fall. Accordingly, the motion by defendant Jet Sanitation Service Corp. for summary judgment dismissing the complaint and all cross claims against it is granted.

Turning to the motion by KIMCO for conditional contractual indemnification in its favor as to BDH, KIMCO has failed to establish *prima facie* entitlement to such order (*see, Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 47 NYS3d 121 [2d Dept 2017]; *Gikas v 42-51 Hunter St., LLC*, 134 AD3d 987, 24 NYS3d 87 [2d Dept 2015]). "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 616, 934 NYS2d 437 [2d Dept 2011]). The right to contractual indemnification "depends upon the specific language of the contract, [and] [t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Shaughnessy v Huntington Hosp. Assn., supra* at 999-1000 [internal citations and quotations omitted]; *see, Castillo v Port Auth. of New York & New Jersey*, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]). "In addition, 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" (*De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 606, 63 NYS3d 473 [2d Dept 2017], quoting *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808, 888 NYS2d 81 [2d Dept 2009] [internal quotations omitted]; *see Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 30 NYS3d 270 [2d Dept 2016]).

The contract executed by KIMCO and BDH contains broad indemnification provisions in KIMCO's favor. Specifically, the contract provides, in relevant part, that BDH will:

> Agree to INDEMNIFY, SAVE & HOLD HARMLESS [KIMCO] of and from all liabilities, claims, losses, damages, injury causes and actions, suits of whatsoever nature for personal injury, including death resulting therefrom, and for property damage, alleged to arise out of, or any conditions of the work performed under this Contract, whether by [BDH] or by any sub-contractor of [BDH] and whether any claim, cause of action, or suit is asserted against [BDH] serverally, jointly, or jointly and severally.

The same contract further provides:

> [BDH] will and hereby agrees to INDEMNIFY, SAVE & HOLD HARMLESS [KIMCO] from all costs of any nature, including without limitation investigation, adjustment, attorney's fees, expert's fees, court costs, administrative costs, and other items of expense arising out of any claim, cause of action or suit of the kind and nature set forth [above].

KIMCO argues that since it relied upon BDH for snow and ice remediation, and engaged in no such activities itself, it would be liable only vicariously for damages resulting from snow or ice conditions on its premises. It is clear from a reading of the aforementioned contract that BDH was responsible for the removal or snow and ice from "all paved and concrete areas" of the subject premises. It is undisputed that the area upon which the subject dumpster was located was paved. Thus, BDH was contractually obligated to ensure that such area was clear of snow and ice by any means necessary. However, in light of Mr. Essopos's testimony that BDH was expected to contact him prior to its commencement of plowing operations, and that KIMCO retained the right to require additional services should its inspection of the premises reveal deficiencies in BDH's work, it is clear that BDH did not entirely displace KIMCO's obligation to maintain the premises (*see, Hutchings v Garrison Lifestyle Pierce Hill, LLC*, 157 AD3d 1034, 68 NYS3d 585 [3d Dept 2018]; *Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 53 NYS3d 762 [4th Dept 2017]).

Therefore, questions of fact remain as to KIMCO's and BDH's liability such as whether the alleged snow/ice condition was a proximate cause of plaintiff's alleged injuries, whether KIMCO was negligent in its "monitoring of the snow removal process and the designation of the placement of the snow storage areas" (*Mathey v Metro. Transp. Auth.*, 95 AD3d 842, 845, 943 NYS2d 578 [2d Dept 2012]), and whether the alleged snow/ice condition was the result of natural accumulation, or of being pushed by BDH's plow. As KIMCO failed to prove itself free

of all negligence in this matter, as required by the cases cited herein, its application for an order of indemnification is premature (*see, Caban v Plaza Constr. Corp.*, 153 AD3d 488, 61 NYS3d 47 [2d Dept 2017]; *Hannigan v Staples, Inc.*, 137 AD3d 1546, 29 NYS3d 575 [3d Dept 2016]; *Arriola v City of New York*, 128 AD3d 747, 9 NYS3d 344 [2d Dept 2015]; *All Am. Moving & Stor., Inc. v Andrews*, 96 AD3d 674, 949 NYS2d 17 [1st Dept 2012], *see, generally, De Souza v Empire Tr. Mix, Inc.*, *supra*).

Accordingly, the motion by KIMCO for an order establishing its right to conditional indemnification is denied.

Dated: September 13, 2018

HON. PAUL J. BAISLEY, JR.
J.S.C.