Toback v Fedcap
2018 NY Slip Op 32383(U)
September 25, 2018
Supreme Court, New York County
Docket Number: 156794/2013
Judge: Debra A. James

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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GREGORY TOBACK and YOLANDA TOBACK,

Plaintiffs,

- v -

FEDCAP and (discontinued) U.S. GENERAL SERVICES ADMINISTRATION,

Defendants.

INDEX NO. 156794/2013

MOTION DATE 11/17/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 78, 79, 80, 81, 82, 83, 84, 86, 88

were read on this motion for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR 3212, of defendant Fedcap Rehabilitation Services, Inc., i/s/h/a "Fedcap" (motion sequence number 002) is granted, and the complaint is dismissed with costs and disbursements to such defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion for partial summary judgment, pursuant to CPLR 3212, of plaintiffs Gregory and Yolanda Toback is denied.

DECISION

In this action, defendant Fedcap (Fedcap) moves for summary judgment to dismiss the complaint as against it, and plaintiffs Gregory Toback (Toback) and his wife, Yolanda, (together, plaintiffs) cross-move for summary judgment on the complaint (motion sequence number 002). For the following reasons, the motion is granted, and the cross motion is denied.

Background

On February 8, 2013, Toback was injured when he slipped and fell while attempting to avoid snow removal activity that was being performed on the sidewalk in front of the building located at 26 Federal Plaza in the County, City and State of New York (the building).

The defendant, U.S. General Services Administration (GSA) is an office of the United States federal government, the building's owner, that is tasked with managing the building. Co-defendant Fedcap Rehabilitation Services, Inc., i/s/h/a "Fedcap," is a maintenance company that contracted with the GSA to perform snow removal services at the building.

Toback was deposed on March 4, 2015, and stated that, at the time of his accident, he was employed by the United States Government's Department of Homeland Security as a deportation

officer in the office of Immigration and Customs Enforcement and was stationed in the building. Toback further stated that his accident took place at approximately 3:00 p.m. on February 2, 2013, when he left the building to get lunch. Toback testified that there was snow on the sidewalk, though he could not remember how much or for how long it had been there. Toback specifically stated that he was walking east on the north side of Reade Street, toward the intersection with Centre Street, when he observed a maintenance employee wearing a Fedcap jacket pushing a "snow brush" (i.e., a hand operated snow plow equipped with brushes on the front of it) toward him. Toback also stated that the Fedcap employee pushed the snow brush straight toward him, that he didn't stop, and that the employee instead motioned for him (Toback) to move to the left and get out of his way. Toback further stated that he did attempt to move to his left, where a bench was located on the sidewalk, but that he slipped while doing so. Toback finally stated that he could not recall whether his body came into contact with either the snow brush or the bench, because of striking his head and losing consciousness during the fall, and that he thereafter woke up on the other side of the bench with a broken left leg.

Plaintiffs have also submitted an affidavit from Toback, wherein he reiterates and confirms the above testimony.

Fedcap was deposed on January 19, 2016 via George Rios (Rios), who manages the Fedcap employees at the building. Rios first stated that Fedcap's snow removal responsibilities at the building were governed by the terms of the maintenance services contract between Fedcap and the GSA that was in effect for the period of October 1, 2009 through September 30, 2014 (the Fedcap contract). Rios next stated that no incident report was ever filed with respect to Toback's accident, as would have been required by both federal police procedure and the Fedcap contract. Finally, Rios examined the Fedcap employee logbook that had been prepared for February 8, 2013 and stated that it did not contain any information about what the individual Fedcap employees had done on that day. Fedcap has also presented an affidavit from Rios, wherein he repeats that he could not locate any incident reports regarding Toback's accident and that there was no mention of any such incident in the Fedcap daily logbook; he further states that he interviewed every Fedcap employee who could have operated a snow brush, and was told that none of them were aware of Toback's accident.

The relevant portion of the Fedcap contract provides, as follows:

"C.4.3 Snow and Ice Removal

"The Contractor [i.e., Fedcap] shall perform snow and ice removal services for the snow and ice removal program. Snow and ice removal from all entrances, steps, landings,

sidewalks, approaches, vehicular courts and parking areas are included as part of the basic (standard) services . . .

"The Contractor shall clear snow and ice before the normal building operating hours and as directed by the Contracting Officer's Representative (COR) [i.e., GSA] to prevent a slip hazard. The Contractor shall remove snow and ice and shall apply chemicals and sand as necessary to maintain a snow and ice free environment prior to the opening of the building. The Contractor is authorized to divert the workforce, or such part thereof, to accomplish the task. The Contractor shall notify the COR of the diversion within one (1) hour. The COR retains the right to determine what type of services will be required and the duration of diverted services needed for the removal of snow and ice. When such employees are no longer needed, they shall return to their normal duties, and the Contractor will not be penalized for that portion of the normal daily work which otherwise would have been performed.

"A. The COR may order snow and ice removal services outside of normal building operating hours (i.e., weekends, holidays and overnight hours).

* * *

"C.4.3.1 Snow or Other Emergency Conditions

"In the event snow or ice removal is required . . . the Contractor shall divert its workforce, or such part thereof, from their normally assigned duties in order to meet the condition. When such employees are no longer needed, they shall return to their normal duties, and the Contractor will not be penalized for that portion of the normal daily work which otherwise would have been performed."

(emphasis in original).

Procedural History

Plaintiffs commenced this action on July 25, 2013 by filing a summons and complaint that sets forth causes of action for: 1) negligence (on behalf of Toback); and 2) loss of consortium (on behalf of Yolanda Toback). Fedcap filed an answer on September

16, 2013 that includes a cross claim against the GSA for contribution and indemnification. Plaintiffs discontinued this action against the GSA via a stipulation dated August 26, 2013. Now before the court is Fedcap's motion for summary judgment to dismiss the complaint as against it, and plaintiffs' cross motion for summary judgment on their negligence claim on the issue of liability only (motion sequence number 002).

Discussion

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 (1st Dept 2003).

Here, plaintiffs' first cause of action sounds in negligence. According to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages,

causation and foreseeability." Hyatt v Metro-North Commuter R.R., 16 AD3d 218, 218 (1st Dept 2005).

In its motion, Fedcap raises three arguments that it contends refutes Toback's negligence claim. First, Fedcap argues that it "owed no duty to the plaintiff," because New York law provides that a snow removal contractor only owes a duty of care to the party with which he or she contracted, which is GSA, and not to third parties. Fedcap cites the Court of Appeals' decision in Espinal v Melville Snow Contrs. (98 NY2d 136 [2002]), which noted that well established case law has:

> " identif[ied] 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, 'launche[s] 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."

98 NY2d at 140 (internal citations omitted).

The Court in Espinal reviewed an agreement between a property owner and a snow removal contractor whose terms provided that:

> "[the contractor] was obligated to 'clear, by truck and plow, snow from vehicular roadways, parking and loading areas, entrances and exits of the captioned property when snow accumulations exceed three (3) inches.' In addition, [the contractor] agreed that upon [the owner's] request, it would spread a mixture of salt and sand on certain areas of the property. As for snow removal, [the contractor] contracted to plow 'during the late evening and early morning hours, and not until all accumulations have ceased, on a one time plowing per

snowfall basis. If there is a plowable accum. by 4 A.M., and it is still snowing, [the contractor] will provide a limited plowing to open up the property before 9 A.M., and if accum. continue, [the contractor] will plow a second time during the day or in the evening after all accumulations have ended.'"
98 NY2d at 141.

The Court held that:

"By the express terms of the contract, [the contractor] was obligated to plow only when the snow accumulation had ended and exceeded three inches. This contractual undertaking is not the type of 'comprehensive and exclusive' property maintenance obligation contemplated by Palka. [The contractor] did not entirely absorb [the owner's] duty as a landowner to maintain the premises safely. Indeed, the contract stated that '[i]t is the responsibility of the property manager or owner to decide whether an icy condition warrants application(s) of salt-sand by [the contractor]. Owner must inspect property within 12 hours of work. Any defect in performance must be communicated immediately.' Although [the contractor] undertook to provide snow removal services under specific circumstances, [the owner] at all times retained its landowner's duty to inspect and safely maintain the premises. [The contractor] was under no obligation to monitor the weather to see if melting and refreezing would create an icy condition."
98 NY2d at 141.

Fedcap notes that, as the contract at issue in Espinal, "it is clear from the snow removal portion of the maintenance contract between the GSA and Fedcap that snow removal procedures are dictated by the GSA," because the Fedcap contract: 1) requires Fedcap to perform its snow removal duties before the building's normal operating hours, as directed by the GSA; 2) requires Fedcap to notify the GSA if it must divert maintenance workers from their normal tasks to perform snow removal; 3) reserves to the GSA the right to decide which maintenance workers may or may not be diverted from their normal duties in

order to perform snow removal, as well as the duration of such diversion; 4) reserves to the GSA the right to decide whether and when Fedcap must perform snow removal outside of the building's normal operating hours, and which chemicals Fedcap may use in that work; 5) requires Fedcap to submit an annual snow removal plan, and/or updates to such plan, to the GSA for the GSA's approval; and 6) requires Fedcap to submit lists to the GSA of non-regular employees that it wishes to assign to work at the building for the GSA's approval. Fedcap then argues that, like the contract in Espinal, the court should not interpret the instant Fedcap contract to grant Fedcap "the exclusive responsibility [for snow removal, so] as to impose a duty [of care] to a third party."

In their opposition papers, plaintiffs completely ignore this argument, and fail to discuss the third Espinal exception to the general rule that snow removal contractors bear no duty of care to third parties unless their service contracts disclose the intent to "entirely displace" the property owner's duty of care. The court finds that the Fedcap contract cannot reasonably be read in this way. Instead, GSA retained its prerogatives of direction and control over Fedcap's employees with respect to snow removal at the building. As a result, as a matter of law, Fedcap cannot be found to owe any duty of care to

third parties who are injured due to its snow removal activity at the building.

Thus, the court finds that Fedcap is entitled to the summary judgment that it seeks, and that its motion to dismiss the instant complaint should be granted.

For the foregoing reasons, the court need not address Fedcap's two remaining dismissal arguments. Further, on the same grounds as the granting of Fedcap's motion, this court concomitantly determines that plaintiffs' cross motion for the countervailing judgment shall be denied.

9/25/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE