SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. JAMES V. BRANDS
Justice.

SUPREME COURT: DUTCHESS COUNTY

FRANK V. RIZZO,

Plaintiff,

-against-

DECISION AND ORDER
ON TWO MOTIONS
Index No.: 2017-50718

SORBARO CO., LOVE MANAGEMENT CORP.,
and LEHIGH LAWNS AND LANDSCAPING, INC.,

Defendants.

The following papers were read and considered on the two separate motions for summary judgment motion filed by the defendants.

NYSCEF Docs. 23-82

This action arises out of a slip and fall incident that occurred on 2/16/2016 at 7:00 am during the course of plaintiff's employment as a delivery specialist for Papa John's pizza franchise. He is charged with making food deliveries to several franchise sites within a certain region. Plaintiff sustained injuries due to a slip and fall on snow and ice in the parking lot in front of the Papa John's site located at the West Side Plaza in Poughkeepsie, New York. The site is owned by Sorbaro Co. which had a snow removal contract with Lehigh Lawns and Landscaping, Inc. ("Leigh Lawn").

According to plaintiff, he was in route from Albany on the date of the incident, which he recalls as being "very cold and snow on the roads". He arrived at the Poughkeepsie site at 6:50a.m. and observed a "sheet of ice" in the parking lot. Counsel states that Rizzo had salt in his truck to spread on the ground during his delivery route. Rizzo held onto his tractor trailer to walk approximately 8 feet alongside his trailer to retrieve the salt and shovel, he removed the latch to retrieve same, he took a step back to open the door, at which time he slipped on the icy parking lot pavement. (*See* Rizzo EBT).

Defendants now separately move for summary judgment.

Leigh Lawn's Motion

Leigh Lawn contends that it did not owe a duty to plaintiff, a non-contracting party, since this matter does not fall within the three exceptions set forth in *Espinal v Melville Snow Contrs.*,

98 N.Y.2d 136, 140 [2002]. Specifically, Leigh Lawn contends it did not fail to exercise reasonable care in performance of its duties under the snow removal contract with Sorbaro; it did not launch a force or instrument of harm; it did not entirely displace plaintiff's snow removal obligation; nor did plaintiff detrimentally rely on Leigh Lawn's continued performance of its duties. (*Espinal v. Melville Snow Contrs, supra.* at 140). There is no evidence that Leigh Lawn left the premises in a more dangerous condition after having plowed the parking lot the prior evening. Counsel contends that the snow removal contract executed by Sorbaro and Leigh Lawn was not comprehensive and did not displace property owner Sorbaro from its duty to maintain a reasonably safe premise. Leigh Lawn was not informed that plaintiff was making an early morning delivery, thus Leigh Lawn reported at 8:20a.m. as usual to perform its contractual duties to salt the area in preparation for the store to open at 9:00a.m.

Based on the foregoing, Leigh Lawn also requests dismissal of Sorbaro's cross-claim for indemnification since there is no evidence that Leigh Lawn owed a duty of reasonable care to plaintiff or a duty independent of its contractual duty with Sorbaro (*citing Foster v. Herbert Sleepoy Corp.*, 76 AD3d 210 [2nd Dept. 2010]).

Sorbaro's Cross-Motion against Leigh Lawns

Sorbaro claims that it is entitled to common law contribution and indemnification from Leigh Lawn since Sorbaro had a comprehensive snow removal agreement with Leigh Lawn whereby Leigh Lawn had the exclusive duty to inspect and initiate any necessary snow/salt efforts at the premises. Counsel cites certain provisions of the snow removal agreement whereby counsel contends that Leigh Lawn was charged with the exclusive duty of "snowplowing, pre-storm salt service and 'straight salting' during an ongoing event, and afterwards as well." (LaRose Aff. ¶6). Counsel states that the snow removal contract does not charge Sorbaro with any duty to contact Leigh Lawn to begin any snow removal related work.

Counsel cites the deposition testimony of Alan Leigh, the Chief Executive Officer of Leigh Lawn. Leigh testified that on the night before the incident, Leigh Lawn performed pre-storm salting at 10:11a.m.-10:23a.m. Leigh Lawn later performed plowing at 10:00p.m.-11:00p.m.; and performed further salting on the following day at 8:20a.m. (after the incident). The records indicate that the night before the incident, Alan Leigh inspected the premises sometime between midnight at 3:16a.m. (EBT p. 51). Counsel contends that the foregoing facts coupled with the weather conditions of snow turning to freezing rain and sleet overnight demonstrates that Leigh Lawn had the exclusive duty to inspect the premises, assess the weather conditions, and perform any snow/salt efforts required based on the weather conditions leading up to the incident.

Also cited is the testimony of Thomas Heaslip of Sorbaro indicating that Sorbaro was not notified of any expected morning delivery at Papa John's on the date of the incident. He further states that Sorbaro never performed any site inspections for weather issues in the past and never gave any instructions to Leigh Lawn with respect to its snow/salt efforts. It is based on the foregoing that Sorbaro asserts entitlement to contribution and indemnification from Leigh Lawns.

Sorbaro's Cross-Motion against Plaintiff

Sorbaro cross-moves for summary judgment against plaintiff based upon two main arguments. First, counsel adopts the arguments set forth by Leigh Lawn to the extent that Sorbaro, by and through its contractor Leigh Lawn, did not launch a force or instrument of harm; did not leave the premises in a more dangerous condition after having plowed the parking lot the prior evening; did not entirely displace plaintiff's snow removal obligation; nor did plaintiff detrimentally rely on Leigh Lawn's continued performance of its duties. (*Espinal v. Melville Snow Contrs, supra*. at 140). Secondly, counsel contends that the weather conditions data demonstrates that there was a storm in progress which began as snow and turned into sleet and freezing rain causing icy conditions to form overnight. Sorbaro, by and through its contractor Leigh Lawn, is entitled to a reasonable period of time following the storm to remedy any hazardous conditions caused by the storm, which in fact occurred prior to that plaza's regular business hours (*see* LaRose Aff. ¶12).

Plaintiff's Opposition

Plaintiff contends that defendants failed to meet the initial burden of demonstrating entitlement to summary judgment. Furthermore, even if the defendants met their initial burden, plaintiff argues that there are issues of fact related to: (i) whether Leigh Lawn was responsible for worsening the conditions by plowing 8 hours prior to the incident without spreading sand/salt; and (ii) whether Sorbaro created or exacerbated the dangerous condition or (iii) whether Sorbaro knew or should have known of the dangerous condition and failed to take reasonable measures to remedy the dangerous condition prior to the incident.

The following facts are asserted by plaintiff. Rizzo testified that there was no snow fall at the time he drove into Poughkeepsie on the morning of the incident. There was no snow or ice on the roadways in the near vicinity of the plaza or in an adjacent parking lot not owned by Sorbaro. There was no evidence of sand or salt having been applied to the icy portions of the parking lot of the plaza on the morning of the incident. Rizzo had been to the plaza about 150 times in the past to make morning deliveries, all of which were made at the front of the Papa John's store between 6:00a.m. and 10:00a.m. (Rizzo Aff. ¶4, ¶5, ¶6).

As it relates to Leigh Lawn, plaintiff contends that Leigh Lawn created or exacerbated the parking lot condition by having plowed the parking lot between 10:03p.m.-11:00p.m. of the prior evening, clearing the snow mix without having treated the area with salt thereby allowing an untreated layer of sleet and freezing rain to form a sheet of ice. Same was left untreated for up to 8 hours. Notably, Rizzo stated that the adjacent parking lot was plowed yet did not have the same icy condition. Also cited is the weather data and affidavit of meteorologist Kathryn Whittaker in support of the contention that Leigh Lawn's treatment of the parking lot created or exacerbated the icy condition.

As it relates to Sorbaro, plaintiff contends that Sorbaro is liable for Leigh Lawn's creation of the dangerous condition. In the alternative, plaintiff contends that Sorbaro had actual

or constructive notice of the dangerous condition of its parking lot and failed to take reasonable measures to alleviate the condition prior to plaintiff's fall. Counsel cites conflicting meteorological data to challenge Sorbaro's reliance on the 'storm in progress' theory. Plaintiff's meteorologist states that the initial storm ceased well over 4 hours prior to the incident, there being only 1/100" of an inch precipitation of rain freezing upon contact at 6:05a.m.-6:10a.m. (*See* Rubin Aff. pg. 7-8 *citing Vosper v Fives 160th Street, LLC*, 110 A.D.3d 544 [1st Dept. 2013]; *Powell v MLG Hillside Associates, L.P.*, 290 A.D.2d 345 [1st Dept. 2002]). The meteorologist further states that it did not rain until after the incident. Counsel contends that the icy condition upon which plaintiff fell was the same condition that existed when Mr. Leigh inspected the premises at 3:12a.m. and thus defendants knew or should have known of the dangerous condition. It is alleged that since Sorbaro relied on the judgment of its agent Leigh Lawn, then the knowledge of Mr. Leigh o/b/o Leigh Lawn can be imputed onto Sorbaro. (*See id.* at pg. 9). Further, Sorbaro should have known about plaintiff's early morning deliveries which he had been making for the past 2 years.

Upon due considerations of the motion papers, it is hereby

ORDERED that defendants' motions for summary judgment are denied. The record raises issues of fact to be resolved by a trier of fact, including the conflicting meteorological data as to whether there was a 'storm in progress' at the time of the incident, whether Leigh Lawn's snow removal efforts of plowing the parking lot but electing not to apply salt on the prior evening created or exacerbated the condition creating a sheet of ice left untreated the following morning, whether Leigh Lawn had an exclusive duty to perform snow removal related work, whether Sorbaro had actual or constructive notice of the dangerous condition yet failed to take any appropriate measures to remedy same prior to plaintiff's fall, and whether Leigh Lawns breached any contractual duty owed to Sorbaro by failing to perform the services for which Sorbaro retained it so as to warrant indemnification. It is further

ORDERED that counsel are directed to appear for a pre-trial conference on **October 31, 2018 at 9:15a.m.** Counsel are reminded that jury selection is scheduled for January 22, 2019 at 9:30a.m.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Dated: October 3, 2018
Poughkeepsie, New York

ENTERED:

HON. JAMES V. BRANDS, J.S.C.

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Love Management Corp. *(Non-appearing Defendant)*

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Brands' Chambers, please do not submit any copies. Submit only the original papers.