SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 9

X

KATHLEEN RUIZ,

Plaintiff,

-against-

Index No.: 603081/16
Motion Sequence...01
Motion Date...08/20/18

CLK-HP 275 BROADHOLLOW, LLC,

Defendant.

X

CLK-HP 275 BROADHOLLOW, LLC

Third-Party Plaintiff,

-against-

OP SNOW, INC.,

Third-Party Defendant.

X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Affirmation in Reply.....x

Upon the foregoing papers, the motion by the Third-Party Defendant, OP SNOW, INC. ("OP SNOW"), seeking an Order pursuant to CPLR § 3212, granting it summary judgment and dismissing the Third-Party Complaint, is decided as provided herein.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff, KATHLEEN RUIZ, on January 13, 2015, when she slipped and fell on ice in the parking lot located at 275 Broadhollow Road, Melville, New York. The Plaintiff commenced this action by the filing of a Summons and Complaint on May 2, 2016 against the Defendant/Third-Party Plaintiff, CLK-HP 275 BROADHOLLOW, LLC (hereinafter "CLK"). Issue was joined by CLK by the filing of a Verified Answer on December 30, 2016. The Defendant/Third-Party Plaintiff, CLK, subsequently filed a Third-Party Summons and Complaint on March 14, 2017, against OP SNOW. Thereafter, OP SNOW filed its Verified Answer with cross-claims on April 13, 2017.

The Plaintiff, KATHLEEN RUIZ, alleges that the accident occurred as a result of the Defendant's negligence in, *inter alia*, failing to maintain the premises by allowing the area to become and/or remain in a dangerous, defective and hazardous condition; failing to take suitable and reasonable precautions for the safety of persons on or using the area; and failing to warn the Plaintiff and others of known dangers (*See* Verified Bill of Particulars at ¶ 9, annexed to OP SNOW's Motion as Exhibit "B").

At her Examination Before Trial ("EBT"), the Plaintiff testified that the accident occurred in the parking lot of the Capital One building located at 275 Broadhollow Road, Melville, New York, which was her place of employment at that time (*See* Plaintiff EBT Transcript at pp. 10-12, annexed to OP SNOW's Motion as Exhibit "C"). On the date of the accident, the Plaintiff planned to arrive at work at 7:00 a.m. (*Id.* at p. 20). She was wearing sneakers, gym pants and a gym shirt that morning (*Id.* at p. 21). At 6:00 a.m. on the morning of the accident, the Plaintiff went to the gym in another building located at

265 Broadhollow Road which is separated from the Capital One building by a large parking lot (*Id.* at pp. 22-23). After using the gym facilities, the Plaintiff went back to her vehicle and moved it to another parking spot for work (*Id.* at pp. 23-24). The Plaintiff did not recall seeing any ice, snow, sand or salt on the ground when she pulled into the parking spot for work (*Id.* at pp. 30-31). It was not snowing that day. The Plaintiff exited her vehicle and proceeded to walk to the Capital One building (*Id.* at p. 38). The Plaintiff testified that a vehicle operated by Peter Tannazza came to a stop to let her cross the parking lot (*Id.* at p. 40). She walked about one car length past the vehicle when she slipped (*Id.* at p. 43-44). The Plaintiff attested that when she slipped, she was looking forward and did not recall seeing any snow or ice on the ground from the time she left her vehicle to the time she slipped (*Id.*). She slipped with her right foot when the right side of her body came into contact with the ground (*Id.* at pp. 45-46).

According to the Plaintiff, she remained on the ground for approximately one minute until Mr. Tannazza helped her get up (*Id.* at p. 48-49). The Plaintiff testified that after the fall when she got up is when she observed a patch of ice directly underneath her where she had landed. She described the ice patch as a "circle of ice" (*Id.* at p. 49-50). The Plaintiff could not recall whether there were any footprints on the patch of ice to indicate others had traversed the area (*Id.* at p. 147).

While she did not observe any salt on the ground, the Plaintiff did observe bags of salt in the back of a white pickup truck that was parked to the right of where she fell. The pickup truck was parked in a spot that contained a sign that read "CLK-HP Parking Only". (*Id.* at pp. 51-53, 79, 85).

The Plaintiff testified that she never made any complaints of ice in the parking lot prior to her fall, nor was she aware of any other individuals that made such complaints. The Plaintiff traversed the same area to go to work each day and never observed ice in the area where she fell prior to the incident. (*Id.* at pp. 137, 139)

The Defendant, CLK, produced two witnesses for an EBT, John Burke, the Vice President of CLK Commercial Management, CLK's management company, and Jose Diaz, CLK's building manager. Burke confirmed that CLK is the owner of 275 Broadhollow Road and that the building is managed by CLK Commercial Management (*See* Burke EBT at pp. 22-23, 26, annexed to OP SNOW's Motion as Exhibit "E"). Burke testified that pursuant to the contract between the management company and OP SNOW, OP SNOW was required to provide snow removal services on the premises when there was a snowfall of at least one inch (*Id.* at pp. 22-23, 26; *see also* Contract dated 10/27/14, annexed to OP SNOW's Motion as Exhibit "H", at Exhibit 1, ¶ E attached to Contract). In addition to snow removal services, OP SNOW would apply salt upon completion of snow removal. CLK's building manager, Diaz, would regularly inspect the parking lot for ice conditions and would either apply salt himself or call OP SNOW to salt the parking lot (*See* Burke EBT at pp. 22-25, 37, 44-45, Exhibit "E").

Diaz testified at his EBT that he was responsible for snow removal in January 2015 only in the entrance areas (*See* Diaz EBT Transcript at p. 19, annexed to OP SNOW's Motion as Exhibit "F"). As part of his job duties, Diaz is also responsible for addressing minor issues in the parking lot. If Diaz observed a small area of ice, he would apply ice melt (*Id.* at p. 19-22). However, if the area was larger, CLK would contact OP SNOW to

address the ice condition. Diaz also testified that he uses a pickup truck in the course of his employment with CLK (*Id.*)

In support of its motion, OP SNOW submits the EBT transcript of its President, Gus Wade. Wade confirmed that OP SNOW was contracted to provide snow and ice removal services at the subject premises in January 2015 (*See* Wade EBT Transcript at p. 16, annexed to OP SNOW's Motion as Exhibit "G"). Wade testified that OP SNOW would generally perform the plowing for snowfalls with an accumulation of one to two inches and that salt was always applied to the parking lot areas after the plowing was completed (*Id.* at p. 23-25). Wade further testified that OP SNOW would apply salt on other occasions when called by the property manager after Diaz's inspection of the property (*Id.* at p. 29). According to Wade, OP SNOW applied salt to the subject premises on January 13, 2015 (the morning of the Plaintiff's accident), between 7:00 a.m. and 8:00 a.m. (*Id.* at p. 40-41). Wade testified that the salt was applied in response to a call from CLK regarding a complaint of black ice. When asked whether the subject work was performed in response to a call from CLK or whether OP SNOW conducted an inspection on its own, Wade testified that he believes that it was most likely in response to a call from CLK because of the reference on the invoice to "frozen patches of black ice". Wade explained that OP SNOW is not obligated to visit CLK properties and inspect the premises for a "stand-alone salting like this" (*Id.* at pp. 41-42). Wade further testified that OP SNOW would respond to any call for additional service when it did not snow within one hour. Moreover, as required by the Contract, OP SNOW procured an insurance policy which

named CLK as an additional insured (*Id.* at pp. 22-23, 28-29, 32-33, 46-47, 74-75; *see also* Certificate of Liability Insurance, annexed to OP SNOW's Motion as Exhibit "I").

OP SNOW proffers an invoice it generated dated January 9, 2015, to demonstrate that the last snowfall before the Plaintiff's accident for which OP SNOW was required to automatically provide snow removal services was January 9, 2015 (*See* Exhibit "J"). Also submitted is the invoice dated January 13, 2015, which reflects, in pertinent part, "FROZEN PATCHES OF BLACK ICE-7AM THRU 8AM SERVICE" (*Id.*).

Pursuant to certain provisions of the snow removal Contract contained within Exhibit "I", entitled "Scope of Services", OP SNOW was required to, *inter alia*:

> H. Supply and apply rock salt...at the conclusion of snow clearing to prevent icing conditions.
>
> ***
>
> K. Monitor prevailing weather conditions to assure timely arrival at the site, and be available, as necessary, at all times and days of the week to respond to the clearing of snow as described in this Agreement.
>
> (*See* Contract, annexed as Exhibit "H").

Moreover, "Schedule A" of the Contract provides a pricing guide for the amount CLK would be charged for snow removal which was dependent upon the accumulation of snow (by inches). Salt application was charged per hour, per yard, per truck and/or per bag (*Id.*). Notably, "Schedule A" also reflected:

> Ice control sand/salt mix spread on parking areas will be $95.00 per yard on an "On-Call" basis. Estimated 1 yard needed. It is the responsibility of Owner to decide when and how much is needed.
>
> (*Id.* at p. 10)

Third-Party Defendant, OP SNOW, now moves for summary judgment arguing that it owed no duty of care to the Plaintiff. OP SNOW contends that there was no snow fall on the date of the accident and thus it was not required to provide snow and ice removal services pursuant to the term of the Contract. It is further contended that since the Plaintiff's accident occurred before 7:00 a.m. when she was reporting to work, and the invoice reflects that salt was spread between 7:00 a.m. and 8:00 a.m. which was in response to a call from CLK regarding a complaint of black ice, OP SNOW could not have created the black ice condition. Lastly, OP SNOW asserts that CLK's claim for contractual indemnification must be dismissed because OP SNOW established that it was not negligent, and also proffered evidence demonstrating that it duly procured an insurance policy naming CLK as an additional insured.

In opposition, counsel for the Defendant/Third-Party Plaintiff, CLK, contends that summary judgment should be denied as questions of fact exist as to whether OP SNOW commenced salting operations prior to the Plaintiff's fall and whether OP SNOW failed to use reasonable care in applying ice melt, thereby launching the instrument of harm. CLK further argues that the cause of action for contractual indemnification should not be dismissed because OP SNOW has failed to meet its burden that it was not contractually obligated to apply salt prior to the incident. Lastly, CLK contends that OP SNOW failed to proffer proof in admissible form establishing that OP SNOW procured the required insurance naming CLK as an additional insured.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to

judgment as a matter of law (*See* Alvarez *v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). The burden then placed upon the party opposing the motion requires that they produce "evidentiary proof in admissible form" sufficient to impose a trial as to the material issues of fact upon which the opposing claim depends (*See Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 [1988]; *Rebecchi v. Whitmore*, 172 A.D.2d 600 [2d Dept. 1991]).

A defendant who elects to engage in snow removal activities must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by a storm (*See Gwinn v. Christina's Polish Restaurant, Inc.*, 117 A.D.3d 789 [2d Dept. 2014]; *Petrocelli v. Marrelli Development Corp.*, 31 A.D.3d 623 [2d Dept. 2006]; *Chaudhry v. East Buffet & Restaurant*, 24 A.D.3d 493 [2d Dept. 2005]; *Olivieri v. GM Realty Co., LLC,* 37 A.D.3d 569 [2d Dept. 2007]).

While a limited contractual undertaking to provide snow or ice removal services, standing alone, will generally not give rise to tort liability in favor of an injured third party (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 141 [2002]), a duty to a non-contracting third party will arise where: (i) the contractor, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm; (ii) plaintiff detrimentally relies on the continued performance of contractor's duties; and (iii) the contractor entirely displaces the other contracting party's duty to safely maintain the premises (*Koelling v. Central General Community Services, Inc.*, 132 A.D.3d 734, 736 [2d Dept. 2015]; *Sarisohn v. Plaza Realty Services, Inc.*, 109 A.D.3d 654 [2d Dept. 2013]).

In the instant case, OP SNOW satisfied its *prima facie* burden that none of the *Espinal* exceptions apply. The record demonstrates that OP SNOW was required to

perform snow removal services at the subject premises without being called by CLK only upon the accumulation of at least one inch of snow. It is undisputed that it was not snowing on the date of the incident. Thus, based upon the Contract, OP SNOW was not automatically required to perform ice removal services prior to the Plaintiff's fall.

With regard to whether OP SNOW began applying salt prior to the incident, the Plaintiff's own testimony reflects that she did not observe any salt on the ground at any time prior to her fall. Moreover, the testimony of the witnesses produced on behalf of CLK, as well as the President of OP SNOW, demonstrates that OP SNOW did not create the ice condition that caused the Plaintiff to slip and fall. While there is no evidence of the time that CLK contacted OP SNOW to apply ice, the invoice from the date of the accident reflects that ice removal services were provided between the hours of 7:00 a.m. and 8:00 a.m. due to a complaint of "black ice". There is no evidence whatsoever to support an inference that OP SNOW performed the services in a negligent manner, other than assertions made by CLK's counsel in opposition.

The evidence also shows that OP SNOW's duties did not "entirely displace" CLK's duty to safely maintain the premises. Notably, CLK concedes that its building manager, Diaz, addressed "small ice issues" which would appear to include the small circle of ice observed by the Plaintiff after her fall.

Accordingly, this Court finds that OP SNOW, INC. has established its prima facie entitled to summary judgment as a matter of law. In opposition, the Defendant/Third-Party Plaintiff, CLK, failed to raise an issue of fact as to any of the exceptions set forth in *Espinal*.

Lastly, with respect to the cause of action for contractual indemnification, "[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 School Dist.*, 90 A.D.3d 612,616 [2d Dept. 2011]). "To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of...statutory [or vicarious] liability" (*Id.* at 616, quoting *Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65 [1st Dept. 1999] [internal quotations omitted]). "However, where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature" (*Id.*).

Guided by the foregoing, and given this Court's determinations set forth above, a conditional order of summary judgment is not appropriate. Further, the Certificate of Insurance proffered by OP SNOW sufficiently established that it named the CLK entities as additional insureds as required by the Contract. As such, CLK's argument that OP SNOW, INC. failed to satisfy its contractual obligation in procuring insurance is unsubstantiated.

Accordingly, it is hereby

ORDERED, that the motion by the Third-Party Defendant, OP SNOW, INC., seeking an Order granting it summary judgment, pursuant to CPLR § 3212, is **GRANTED**, and the Third-Party Complaint is **DISMISSED**; and it is further

ORDERED, that the remaining parties are reminded to appear for the previously scheduled Trial in the DCM Trial Part of this courthouse on **October 16, 2018 at 9:30 a.m.**

This constitutes the decision and Order of the Court.

DATED: Mineola, New York
October 15, 2018

HON. RANDY SUE MARBER, J.S.C.