SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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BRIAN JARAMILLO, Index No: 704387/2014

Plaintiff, **DECISION AND ORDER**

-against- Motion Sequence Number 7

S.A.C. & S.A.C., LLC, CUSHMAN & WAKEFIELD, INC., and GLOBAL INDUSTRIAL SERVICE, INC.,

Defendants.

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S.A.C. & S.A.C., LLC,

Third-Party Plaintiff,

-against-

VERIZON GLOBAL REAL ESTATE,

Third-Party Defendant.

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The following papers, found on NYSCEF, were read on this motion by defendants S.A.C. & S.A.C. LLC ("S.A.C."), Cushman & Wakefield Inc. ("C & W") and Global Industrial Services Inc. ("Global") for an order granting summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits	EF 131-153
Opposing Affirmation	EF 155
Reply Affirmation--Exhibits-Affidavit of Service	EF 157-160

SALVATORE J. MODICA, J.:

The motion by defendants C & W and Global for an order granting summary judgment dismissing the complaint is granted. The motion by defendant S.A.C. for an order granting summary judgment dismissing the complaint is, however denied.

Plaintiff Brian Jaramillo commenced this action to recover damages for personal injuries he allegedly sustained when he slipped and fell on snow and ice at approximately

8:20 a.m. or 8:25 a.m. on February 4, 2014, during the course of his employment as a manager by Verizon at its facility premises located at 19-19 46th Street, Astoria, Queens County, New York. The accident occurred in the "store garage" or parking lot for FIOS trucks. The only employee vehicles permitted to park in the lot were those belonging to the managers, including the plaintiff.

Plaintiff initially commenced the within action against S.A.C., Dynaserv Industries Inc. and Cellco Partnership, on June 16, 2014, and alleged separate causes of action against each defendant for negligence. Defendant S.A.C. in its verified answer interposed 14 affirmative defenses, and a cross claim against said co-defendants. After issue was joined, plaintiff discontinued the action against Dynaserv Industries Inc., pursuant to a stipulation dated May 1, 2015, and discontinued the action against Cellco Partnership pursuant to a stipulation dated February 28, 2017.

Defendant S.A.C. commenced a third party action against Verizon Global Real Estate and Verizon New York, Inc., and the third party defendants served their answers. Said third party action was discontinued only as to Verizon New York Inc., pursuant to a stipulation e-filed on March 23, 2017. Verizon New York, Inc. commenced a second third party action against C & W, and following joinder of issue, Verizon discontinued said action pursuant to a stipulation dated July 15, 2016.

On December 18, 2014, plaintiff commenced a separate action against C & W and Global, alleging causes of action against each defendant for negligence (Index Number 709684/2014). Defendant C & W in its verified answer interposed seven affirmative defenses and a cross claims against Global. Global served an answer to C &W's cross claims. Global in its answer interposed three affirmative defenses, and separately asserted cross claims against C & W. After issue was joined, the Court, in an order dated June 14, 2016, and entered on June 22, 2016, granted S.A.C.'s motion to consolidate the within action with the action commenced under Index Number 709684/2014.

This Court, in an order dated November 27, 2017 and entered on December 22, 2017, granted the plaintiff's motion to restore the matter to the calendar and to amend the caption, as well as other relief. The note of issue was filed on June 15, 2018. Pursuant to a so-ordered stipulation dated July 30, 2018, the parties' time in which to move for summary judgment was extended to November 30, 2018. Defendants within motion for summary judgment was timely filed on November 21, 2018.

Insofar as pertinent to the within motion, plaintiff alleges that defendant S.A.C., the property owner, defendant C & W, the service provider hired by Verizon, and defendant Global, the company subcontracted C & W to perform snow removal services, were

negligent in allowing the snow and ice to exist in the "store garage" or parking lot, creating a dangerous condition on the subject premises.

In support of the within motion, defendants submit the deposition testimony of the plaintiff and that of Frank D'Agostino, an employee of C &W. Plaintiff Brian Jaramillo testified that he commenced his employment as a manager with Verizon for approximately a month before the date of the accident, and was at the subject location for approximately two weeks prior to the accident. He worked from 8 a.m. to 5 p.m., Monday through Friday, and his primary responsibility in the morning was to ensure that the FIOS technicians got into their trucks and left the facility so that they could get to their locations or first calls. The accident occurred on February 6, 2014, at 8:20 or 8:25 a.m., in the Verizon "store garage", or parking lot.

Plaintiff testified that the day before his fall it had snowed a couple of inches and at the time he left work, the snow had been plowed and pushed towards the sidewalk and the driving lane. He did not recall cleaning snow off his car and did not recall any snow between his car and car parked next to him, or having to walk in the snow to order to enter his car. He stated he was extra careful walking in the parking lot, that he was not able to see the blacktop in the driving lane, and that he drove slowly to make sure he did not skid. He did not observe anyone plowing, or putting down ice melt, salt or sand, the day before he fell and he never saw anyone from Verizon perform any snow removal. He also testified that he did not know who performed snow removal at the subject premises.

On the morning of the accident, it was cold, and plaintiff was wearing winter boots. He stated that when he left his house that morning he did not have to clear snow from his vehicle's windows and that the main streets had been plowed the prior evening. When he entered the entrance to the subject parking lot, he noticed that it looked the same as it did the day before, with snow on the ground and in the driving lane. He stated that he could see tire marks in the snow and that he parked his car in one of the manager's parking spots just outside of the door of the building where his office was located. He exited his car, stepping onto snow, one or two inches deep, and carefully walked into the office building.

He left the building approximately 20 minutes later and went to "the parking lot to do the rounds and make sure the guys were getting into their trucks and not hanging around so that they could leave and start walking" (Tr 124). He stated that he walked around the lot for 5 to 10 minutes before the accident; that he was mostly on the driving lanes; that he was walking on packed dirty snow and it was slippery; that some snow was loose from the tire tracks which were visible in the parking lane; and there was some snow in front of the trucks but it did not prevent the drivers from getting out.

Plaintiff stated that he wanted to walk past a bay of trucks to the outer ring of the lot and cut through the parking bay, at the bottom of the building, as the trucks were pulling out on the driving lanes, and he did not want to be in their way. The vehicles in said parking bay were parked rear bumper to rear bumper, where there was a significant amount of snow, 3-4 inches higher than in the driving lanes and that he fell at the division of the bay itself. He stated that there was not a truck parked in the space where he fell; that snow had remained there from the day before; that it was slippery; and that he did not know that he had slipped on white ice until after he fell. He was in the middle of an empty parking space, and as the trucks engines were on, and as there were trucks on either side of the space where he fell, he could not be seen or heard.

Plaintiff stated when he fell he knew he had broken his left leg, and slid out of the space on his back to the driving lane where others were able to assist him. He was removed by ambulance to a hospital where surgery was performed the same day. He sustained a broken tibia and fibula, and remained in the hospital for approximately 20 days and was unable to work for approximately one year.

Frank D'Agostino, testified that he had been a senior portfolio manager employed by C &W since 2013. He was responsible for providing services in a geographic area that included the subject premises. He identified an agreement between C & W and Global, whereby Global agreed to provide snow removal services, for all sites in his geographic area, including the subject premises. Mr. D'Agostino stated that he did not know if he visited the subject Verizon site prior to the date of the accident; did not have any contacts at said site; and did not recall having any contact with Global. He stated that his subordinate, Robert Collins, a portfolio manager, was responsible for the sites in Queens, including the subject premises, and that if Verizon wanted services performed at the subject site, it would most likely call Collins or create a work order online.

Mr. D'Agostino stated, and that "anytime it snowed they [Global] were expected to salt the location before the storm and start snow removal as soon as the weather indicated" (Tr. 15). Said snow removal services included the driving lanes and any open areas in the parking lot that the client had opened up for service. He stated that he did not know where plaintiff fell in the lot; that he was provided with information that plaintiff fell between cars, and that said area would not normally be plowed by Global. Mr. D'Agostino stated that Collins' contact person at Global was a supervisor named Julio, and that in event of a snow emergency, Global was expected to respond with any requests from Collins. Mr. D'Agostino stated that Collins is no longer employed by C & W.

Defendants also submit an affidavit from Mr. D'Agostino, in which he states that he

is familiar with the Master Services Agreement between Verizon[1] and C & W. He states that a "protocol" was established between Verizon and C & W, whereby Verizon through its on-site supervisors, would arrange for its service vehicles to be moved about the parking lot so that the areas could be opened up and accessed for snow removal by Global. He further states that it was not C &W's responsibility, and by extension Global, to clear snow in between parked vehicles, and that any snow that accumulated in between parked vehicles remained the responsibility of Verizon, until the vehicles were moved and Global could gain access.

It is well settled that "the proponent of a summary judgment motion 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 [1986]). Failure to make such prima facie "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 [1985]; *see, Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). "A defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case" (*Lorenzo v 7201 Owners Corp.*, 133 AD3d 641, 641[2d Dept 2015]; *see*, *Shahid v City of NY*, 144 AD3d 1127, 1129 [2d Dept 2016]; *Kanic Realty Assoc., Inc. v Suffolk County Water Auth.*, 130 AD3d 876, 878 [2d Dept 2015]; *Williams v CVS Pharmacy, Inc.*, 126 AD3d 890, 892-893[2d Dept 2015]; *Montemarano v Atlantic Express Transp. Group, Inc.*, 123 AD3d 675, 675-676 [2d Dept 2014]).

A real property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when the defendant created a dangerous condition or had actual or constructive notice thereof (*Viera v Rymdzionek*, 112 AD3d 915 [2d Dept 2013]; *see Cody v Dilorenzo*, 304 AD2d 705 [2d Dept 2003]). However, an out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct (*see, Garcia v Town of Babylon Indus. Dev. Agency*, 120 AD3d 546 [2d Dept 2014]; *Wenzel v 16302 Jamaica Ave., LLC*, 115 AD3d 852 [2d Dept 2014]).

Here, it is asserted that S.A.C. is an out-of-possession landlord, and in order to demonstrate the absence of any contractual obligation for snow and ice removal, defendants have submitted the lease between S.A.C. and Verizon New York. Inc., but have failed to authenticate the lease. As S.A.C. has not submitted an affidavit or a transcript of its

[1]The Master Services Agreement dated September 1, 2012, is between C & W and Verizon Sourcing LLC.

deposition testimony, if any, it may not rely upon the lease as admissible evidence supporting its motion for summary judgment (*see, IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd.*, 84 AD3d 637 [1st Dept 2011]). Therefore, that branch of the motion which seeks to dismiss the complaint as to defendant S.A.C., is denied.

As regards defendant C & W, it is asserted that it was merely a service provider under the Master Services Agreement at the time of plaintiff's accident, and was likewise out of possession and did not retain control over the area where the accident occurred. It is further asserted that C & W in the first instance did not have a duty to clear snow and ice from areas that were not cleared of Verizon vehicles, and that until and unless the area was cleared by the Verizon Supervisor (Jose) the area remained under Verizon's control and it was Verizon's duty to make sure the area was safe for its employees to pass.

C & W, in support of the within motion for summary judgment, has submitted copies of its contract with Verizon Sourcing LLC, its contract with Global, and emails between Robert Collins of C & W and Julio Rios of Global, and between Collins and D'Agostino, concerning plaintiff's accident.

The Court will not consider the emails submitted by the defendants since they have not been authenticated by their authors, and no deposition testimony or affidavit has been submitted by Mr. Collins. In addition, Mr. D'Agostino made no reference to these emails at his deposition or in his affidavit. Finally, there is no admissible evidence which demonstrates that plaintiff made a statement to Collins as to how the accident occurred and Collins' description of the accident, is inadmissible hearsay. The statements contained in the email regarding statements made to Collins by Jacques Bulter, a Verizon employee, regarding the condition of the parking lot, is also inadmissible hearsay.

C & W, pursuant to the Master Services Agreement with Verizon Sourcing LLC, dated September 1, 2012, and commencing on January 1, 2013, was appointed as a service provider to provide real estate services described in the agreement for certain Verizon facilities, also described in the agreement. C & W, pursuant to the terms of said agreement, as set forth in Attachment 2-A to Appendix 2, was responsible for certain "Base Service Obligations" which listed under subsection 3.1 the following snow removal services : "3.1.1 plowing, stacking, removal not to exceed 2 inches per event; 3.1.2 paths, driveways & sidewalks free to bare surface, not to exceed 1 inch per event; and 3.1.3 de-icing material in applications & quantities, per event".

The Court notes that C & W did not have a contractual relationship with either the property owner or the tenant, Verizon New York Inc., and was not the managing agent for either of these entities. Rather, C & W's service agreement is with Verizon Sourcing LLC,

which specifically provides at Article 20, paragraph 20.8, that neither party shall be deemed a representative or agent of the other. The evidence presented establishes that C & W entered into a Service Contract dated April 15, 2013, with Global, an independent contractor, to perform all of its duties under the agreement with Verizon Sourcing LLC with respect to snow removal, as well as certain other services, not relevant here.

"As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties" (*Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 810 [2d Dept 2013]; *see, Diaz v Port Auth. of NY & NJ*, [2d Dept 2014]; *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 1103 [2d Dept 2010]).

The Court of Appeals has, however, recognized three exceptions to the general rule: "(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" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002][citations and internal quotation marks omitted]).

"As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars" (*Glover v John Tyler Enters., Inc.*, 123 AD3d 882, 882 [2nd Dept. 2014]; *see, Turner v Birchwood on the Green Owners Corp.*, AD3d , 2019 WL 1646000, 2019 NY Slip Op 02920 [2nd Dept. April 17, 2019] [reversing court below and observing: "With respect to the cross claims, HP established, prima facie, that Birchwood and Kaled were not entitled to contribution, since HP did not owe a duty of reasonable care to the plaintiff or a duty of reasonable care independent of its contractual obligations to Birchwood and Kaled."].

Here, given the allegations in the complaint, defendants C& W and Global have established their prima facie entitlement to judgment as a matter of law through evidence that the plaintiff was not a party to the snow removal contracts, and thus owed him no duty of care (*see, Bronstein v Benerson Dev. Co.. LLC*, 116 AD3d 837 [2d Dept 2018]; *Koslosky v Malmut*, 149 AD3d 925, 926 [2d Dept 2017] ; *Leibovici v Imperial Parking Mgt. Corp.*, 139 AD3d 909, 910 [2d Dept 2016]). C & W has established that it contracted out all of its snow removal duties to Global, and that C & W did not perform any snow removal at the subject premises. As the pleadings do not allege facts which would establish the applicability of any of the *Espinal* exceptions, defendants C & W and Global are not required to affirmatively demonstrate that these exceptions did not apply in order to establish their prima

facie entitlement to judgment as a matter of law (*see, Bronstein v Benerson Dev. Co.. LLC*, 116 AD3d at 837; *Koslosky v Malmut*, 149 AD3d at 926; *Leibovici v Imperial Parking Mgt. Corp.*, 139 AD3d at 910).

In opposition, plaintiff has failed to raise an issue of fact as to whether C & W or Global launched a force or instrument of harm (*see, Espinal v Melville Snow Contrs.*, 98 NY2d at 142). "A snow removal contractor cannot be held liable for personal injuries on the ground that the snow removal contractor's passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition'" (*Somekh v Valley Natl. Bank*, 151 AD3d 783, 786 [2d Dept 2017], *quoting Santos v Deanco Servs., Inc.*, 142 AD3d 137, 138 [2d Dept 2016]; *see Bronstein v Benderson Dev. Co., LLC*, 167 AD3d at 839; *Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d at 811).

Plaintiff alleges that he slipped and fell on white ice beneath a layer of snow in the parking lot. No evidence has been presented regarding the cause, creation, or exacerbation of the icy condition. No evidence was presented as to when the ice first materialized or how long it had been present before the accident. No climatology records have been submitted regarding the nature of the most recent snowfall, the air temperature prior, during, and after the snowfall, or potential snowmelt and refreeze. There is no evidence as to when the parking lot was plowed in relation to the time of the plaintiff's accident, and there is no evidence as to whether the vehicles in the area of plaintiff's accident had been moved prior to the accident. A failure to remove the snow layer and apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a preexisting ice condition from improving (*see, Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]; *Santos v Deanco Servs., Inc.*, 142 AD3d at 138; *Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d at 811; Foster v Herbert Slepoy Corp., 76 AD3d at 215). Plaintiff, thus, has not raised a triable issue of fact as to the first *Espinal* exception.

The Court further finds that plaintiff has not raised a triable issue of fact as to the second *Espinal* exception as there is no evidence that he detrimentally relied upon either C & W's or Global's continued performance of its contractual snow removal duties.

Finally, plaintiff's counsel's contentions are insufficient to raise an issue of fact as to the third *Espinal* exception. Global's contract is limited in scope to janitorial, landscaping and snow removal duties, and thus did not displace all of C & W duties under its contract with Verizon Sourcing LLC. The evidence presented, in addition, is insufficient to establish that C & W's contract with Verizon Sourcing LLC, displaced all of the duties of the tenant, Verizon New York Inc., to maintain the property under its lease with S.A.C.

In view of the foregoing, that branch of the defendants' motion which seeks to dismiss the complaint is granted as to defendants C & W and Global, and is denied as to defendant S.A.C. for the reasons stated above.

The foregoing constitutes the decision, order, and opinion of the Court.

Dated: Jamaica, New York
April 23, 2019

Honorable Salvatore J. Modica
J.S.C.