ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

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JENNIFER REED and KENNETH REED,

Plaintiffs,

Index No. 610302/2017
Sequence # 002

- against -

Part 16
12/3/18

HOLBROOK ASSOCIATES DEVELOPMENT CORP,

Defendant.

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HOLBROOK ASSOCIATES DEVELOPMENT CORP,

Third-Party Plaintiffs,

- against -

CML LANDSCAPING, INC. and CML LANDSCAPING & TREE SERVICE, INC,

Third-Party Defendants.

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Upon the foregoing papers, the motion of the third-party defendants CML Landscaping, Inc., and CML Landscaping & Tree Service, Inc. (hereinafter collectively "CML"), seeking an Order granting dismissal of the third-party complaint, all cross-claims and/or counterclaims, pursuant to CPLR Sections, 3211(a)(1) and (7), or, alternatively, granting CML summary judgment pursuant to CPLR Section 3211(c), is denied, as determined below.

This is an action for personal injuries allegedly sustained by the plaintiff, on March 9, 2015, when she slipped and fell in the parking lot located at 470 Patchogue Holbrook Road, Holbrook, New York 11741 (hereinafter "subject premises") due to an alleged accumulation of ice. Defendant/third-party-plaintiff, Holbrook Associates Development Corp. (hereinafter "Holbrook") alleges that it hired CML to remove snow from the subject property and that CML breached its duty in connection with its snow removal work performed prior to and on the date of plaintiff's action. Holbrook alleges four causes of action in its third-party complaint as and against

CML for common law indemnity and contribution, contractual indemnity and breach of agreement to procure general insurance.

CML contends that the third-party action should be dismissed as a matter of law based upon documentary evidence which establishes that CML did not perform any snow removal services at the subject premises on the date of the alleged incident and that any ice condition present on the date of the accident was the result of thawing and refreezing due to above-freezing temperatures, the obligation of which to maintain same rested with Holbrook rather than CML.

In support of its motion, CML submit, *inter alia*, copies of the verified complaint and third-party complaint, the Affidavit of Frank Catizone, the owner and president of CML, including a copy of the snow removal agreement between CML and Holbrook, copies of CML records of services performed for Holbrook in March 2015 and a copy of a certified weather report for March 5, 2015 through March 10, 2015. Defendants also submit the Affidavit of meteorologist Steven Roberts, CCM, including, a report he prepared of his analysis of the weather conditions from March 6, 2015 through March 9, 2015, and the certified climatological records from the U.S. Department of Commerce regarding meteorological conditions for March 2015, including the date of plaintiff's fall on March 9, 2015.

The Affidavit of Frank Catizone (hereinafter "Catizone") states that CML and Holbrook entered into a snow removal contract that was in effect on the date of plaintiff's alleged incident. Catizone attests that CML performed snow removal services on behalf of Holbrook on March 5, 2015 and again on March 20, 2015. The Catizone affidavit also states that the terms of the contract provide that thawing and refreezing is the responsibility of the property manager.

The affidavit of Steven Roberts incorporates his meteorological report, dated September 20, 2018 inclusive of his opinions as to the weather conditions that occurred at the subject premises prior to and including the date of plaintiff's accident. Roberts report states that he analyzed weather observations for March 6, 2015 through and including March 9, 2015 for the location of the subject indecent, which showed that the high temperatures for March 6, 2015, March 7, 2015, March 8, 2015 and March 9, 2015 in Fahrenheit degrees was approximately 27 degrees, 35 degrees, 47 degrees and 51 degrees respectively. Roberts concludes his report stating that, in his opinion, there was no snow or ice accumulation on these days.

The certified climatological records from the U.S. Department of Commerce regarding meteorological conditions for March 2015 in the location of the subject incident show that there was no precipitation on the day of the subject incident.

In opposition, plaintiff contends that CML's motion is premature and prior to discovery wherein the exact defect and location that caused the plaintiff's alleged injury has not been established. Plaintiff further contends that CML assumes plaintiff's fall to have occurred due to

melting and re-freezing of snow, but fails to address CML's agreement with Holbrook to apply sand as part of its obligations under the snow removal contract.

In support of its opposition, plaintiffs submits the affidavit of Jeff Pliskin (hereinafter "Pliskin"), President of Pliskin Realty Management, LLC, the managing agent of Holbrook. In his affidavit Pliskin states that there is no minimum amount of precipitation that triggers the deployment of CML's services on any given date and that the snow removal contract includes a specific indemnity provision wherein CML agreed to hold harmless, indemnify the owner from and against any and all claims, damages, liabilities, losses and expenses.

A motion to dismiss pursuant to CPLR 3211(a)(1) "may appropriately be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" *(Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; see Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231). Cervini v. Zononi, 95 A.D.3d 919, 944 N.Y.S.2d 574 [2d Dept. 2012].* "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" *Fontanetta v. John Doe 1, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569 [2d Dept. 2010].*

In reviewing a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory *(see Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; Morone v. Morone, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154; Rochdale Vil. v. Zimmerman, 2 A.D.3d 827, 769 N.Y.S.2d 386).* "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" *(Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). Lupski v. County of Nassau, 32 A.D.3D 997, 822 N.Y.S.2d 112 [2d Dept. 2006].* In addition, "[a] court is, of course, permitted to consider evidentiary material…in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" and "the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one'" *See, Nasca v. Sgro, 130 A.D.3d 588, 13 N.Y.S.3d 188 [2d Dept. 2015], citing Sokol v. Leader, 74 A.D.3d 1180, 904 N.Y.S.2d 153.).* "Indeed, a motion to dismiss pursuant to CPLR 3211 (a) (7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" *Id. [citations omitted].*

The facts alleged in the complaint and the affidavits in opposition to the motion to dismiss are deemed true and must be construed in the light most favorable to the plaintiff, with all doubts resolved in the plaintiff's favor *(Global Marine Power, Inc. v Kuston Engines & Performance Engineering, LLC, 108 AD3d 501) [2d Dept 2013]; Weitz v Weitz, 85 AD3d 1153 [2d Dept 2011];*

Cornely v Dynamic HVAC Supply, LLC, 44 AD3d [2d Dept 2007]; Brandt v Toraby, 273 AD2d 429, 430 [2d Dept 2000]).

Upon this Court's review of the parties' submissions, issues of fact exist with regard to CML's obligations pursuant to the snow removal contract and its obligations associated with indemnification and obtaining liability insurance. Accordingly, the instant pre-answer motion to dismiss is denied.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

February 20, 2019

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Hon. John M. Galasso, J.S.C.

ENTERED
FEB 22 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE