STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

JOSEPH GALLIPOLI,

Plaintiff,

-against-

GLOBALFOUNDRIES, INC. a/k/a
GLOBALFOUNDRIES U.S., INC. and
THE GALLIVAN CORPORATION,

Defendants.

DECISION & ORDER
Index No.: 20183476
RJI No.: 45-1-2019-0374

PRESENT: HON. DIANNE N. FREESTONE
Supreme Court Justice

APPEARANCES:

David I. Iversen, Esq.
E. Stewart Jones Hacker
Attorney for Plaintiff
Troy, New York

Norah M. Murphy, Esq.
Law Office of Theresa J. Puleo
Attorney for Defendant GlobalFoundries, Inc.
Hartford, Connecticut

Nicholas J. Berwick, Esq.
Amhuty, Demers & McManus, Esqs.
Attorney for Defendant Gallivan Corporation
Clifton Park, New York

Plaintiff Joseph Gallipoli commenced this personal injury action on October 23, 2018 by filing a summons and complaint in the Saratoga County Clerk's Office.[1] On November 26, 2018, plaintiff filed an amended summons and complaint. Thereafter, defendant The Gallivan Corporation (hereinafter individually referred to as "Gallivan") served an answer to the amended

[1] It is worth noting that, on or about January 2, 2020, this matter was reassigned from the Hon. Thomas D. Nolan, Jr. to this Court pursuant to the directives of the Administrative Judge. Further, on or about February 9, 2021, this matter was converted to electronic filing (see NYSCEF Document No. 2).

complaint, which interposed five affirmative defenses and a cross claim against defendant GlobalFoundries, Inc. a/k/a GlobalFoundries U.S. Inc. (hereinafter individually referred to as "GlobalFoundries"). Subsequently, GlobalFoundries served an answer to the complaint asserting various affirmative defenses and a cross claim against Gallivan.

At approximately 12:00 p.m. on December 22, 2016, plaintiff, an employee of a subcontractor at GlobalFoundries, reportedly slipped and fell while exiting a van at the GlobalFoundries plant situated in the Town of Malta, County of Saratoga. GlobalFoundries entered into a general services agreement with Gallivan. GlobalFoundries and Gallivan entered into a separate statement of work, subject to the terms and conditions of the general services contract, for snow removal administration and landscaping. The statement of work provided for "snow plowing and removal for the various site roadways, parking lots and walk way areas within the GLOBALFOUNDRIES site as detailed in the … 'Snow Removal' Map" during the relevant time period at issue. Plaintiff brought this action against GlobalFoundries and Gallivan (hereinafter collectively referred to as "defendants") seeking damages for his injuries. Plaintiff contends that defendants negligently maintained the parking area where plaintiff fell.

Following joinder of issue and discovery, Gallivan moved for summary judgment dismissing plaintiffs' complaint together with any cross claims contending that plaintiff fell in an area where they had no duty to maintain (see NYSCEF Document Nos. 31 – 48). In support of their motion for summary judgment, Gallivan proffered, *inter alia*, the pleadings, deposition testimony, photographs and the general services agreement and related Statement of Work for snow removal. Plaintiff opposed Gallivan's motion by attorney's affirmation with supporting exhibits A through H (see NYSCEF Document Nos. 51-60). On May 10, 2021, Gallivan submitted an attorney's affirmation in reply (see NYSCEF Document No. 61).

The proponent of a summary judgment motion is obligated to make a prima facie showing of entitlement to judgment as a matter of law by tendering admissible evidence demonstrating the absence of a material question of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Pullman v Silverman, 28 NY3d 1060, 1062 [2016]; Andrew R. Mancini Associates, Inc. v Mary Imogene Bassett Hosp., 80 AD3d 933, 935 [3d Dept 2011]; Smith v Allen, 124 AD3d 1128 [3d Dept 2015]; Freitag v Village of Potsdam, 155 AD3d 1227, 1229 [3d Dept 2017]). If the moving party meets its initial burden, the burden then shifts to the nonmoving party to produce evidence sufficient to demonstrate a material issue of fact to avoid summary judgment (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Stonehill Capital Mgt., LLC v Bank of the W., 28 NY3d 439, 448 [2016]; U.W. Marx, Inc. v Koko Contr, Inc., 97 AD3d 893, 894 [3d Dept 2012]; Hicks v Berkshire Farm Ctr. & Servs. for Youth, 123 AD3d 1319 [3d Dept 2014]). It is well settled that a court reviewing a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party (see Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012]; Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015]; Winne v Town of Duanesburg, 86 AD3d 779, 780 [3d Dept 2011]; Marra v Hughes, 123 AD3d 1307 [3d Dept 2014]). A court "'may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned'" (Rock-Wright v O'Connor, 172 AD3d 1507, 1509 [3d Dept 2019], quoting Glick & Dolleck v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]).

First, with regard to the Gallivan's motion seeking summary judgment dismissing plaintiff's amended complaint, Gallivan asserts that there is no cognizable theory under which it can be held liable since there is no showing that Gallivan had a contractual relationship with plaintiff. Gallivan contends that plaintiff "fell in a grassy area which Gallivan had no duty to

maintain." Gallivan further contends that it did not owe a duty of care to plaintiff and that, under the seminal case of Espinal v Melville Snow Contrs. (98 NY2d 136 [2002]), there is no basis to hold it liable for plaintiff's injuries. Specifically, Gallivan maintains that it "did not negligently create or exacerbate the dangerous condition which allegedly caused plaintiff's injuries ..., plaintiff did not detrimentally rely on Gallivan's performance of any alleged duty, and the contract did not displace [GlobalFoundries] duty to maintain their premises." In opposition, plaintiff argues there are questions of fact; as "to what material was under the ice on which plaintiff fell," whether Gallivan created or exacerbated a dangerous condition, whether Gallivan displaced GlobalFoundries duty to maintain the premises, and whether plaintiff detrimentally relied on Gallivan performing its snow removal duties.

A threshold question in this negligence action is whether Gallivan, as an alleged tortfeasor, owed a duty of care to plaintiff (see Luby v Rotterdam Sq., L.P., 47 AD3d 1053, 1054 [3d Dept 2008]; Sciscente v Lill Overhead Doors, Inc., 78 AD3d 1300, 1301 [3d Dept 2010]; Durrans v Harrison & Burrowes Bridge Constructors, Inc., 128 AD3d 1136, 1137 [3d Dept 2015]). "Generally speaking, a limited contractual agreement to provide snow removal services —standing alone— will not give rise to tort liability in favor of a noncontracting injured third party" (Baker v Buckpitt, 99 AD3d 1097, 1098 [3d Dept 2012]; see Jubie v Emerson Mgt. Enterprises, LLC, 189 AD3d 2030 [3d Dept 2020] Belmonte v Guilderland Assoc., LLC, 112 AD3d 1128, 1129 [3d Dept 2013]; Hannigan v Staples, Inc., 137 AD3d 1546, 1548 [3d Dept 2016]). However, the Court of Appeals has recognized three exceptions to the aforementioned general rule and found that a snow removal contractor "may be said to have assumed a duty of care to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches 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" (Dunham v Ketco, Inc., 135 AD3d 1032, 1033-1034 [3d Dept 2016], quoting Espinal v Melville Snow Contrs., 98 NY2d at 140; see Kelley v Schneck, 106 AD3d 1175, 1179 [3d Dept 2013]; Billera v Merritt Const., Inc., 139 AD3d 52, 58 [3d Dept 2016] ; Santos v Deanco Servs., Inc., 142 AD3d 137, 140 [2d Dept 2016]).

With regard to the third Espinal exception, GlobalFoundries entered into a three-year service contract with Gallivan for the property at issue effective October 2, 2015 through September 30, 2018. The snow removal portion of the agreement indicated that Gallivan agreed to provide all necessary labor, supervision, materials and equipment for snow/ice plowing, snow-removal and sanding as required. Gallivan agreed to be responsible for "plowing/clearing snow/ice from roads, parking lots, building entrances, building loading dock areas including steps and all walkways." Gallivan further agreed that

> "[a]s soon as the snowfall begins salting and plowing begins, however, as stated below, [Gallivan] will be on call at all times and will respond as needed in the event small snowfall or icing event(s) create hazardous road and/or lot conditions. Response to icing events will be immediate, there is no amount trigger."

Gallivan also agreed to be "on call at all times during [the] winter season" and to be responsible for monitoring the weather conditions and to "self-respond." Brendan Gallivan, owner of Gallivan, testified that his company took care of the ground maintenance in the summer and the snow removal in the winter at the GlobalFoundries facility in Malta. Mr. Gallivan testified that Gallivan had "a facility ... just outside the gates [and] pretty much [was] there around the clock during any anticipated events." Mr. Gallivan further elaborated that Gallivan was "there every day, just about every day." Mr. Gallivan agreed that "Gallivan Corporation was responsible for keeping track of the weather and if there was anticipated precipitation [Gallivan] would be on-site." Mr. Gallivan testified that "assuming there was [not] any fenced-in construction areas, if

there was pavement, [Gallivan] serviced it." Mr. Gallivan testified that he did not recall any times when GlobalFoundries had to contact Gallivan to come to the site for snow and ice removal. Mr. Gallivan testified that Gallivan was physically on-site on the date of the accident. Mr. Gallivan further testified that Gallivan "had so many people on-site" and that they were in "most of the areas at all times." Mr. Gallivan testified that Gallivan's people on-site were there "around the clock" and constantly drove around the property to address any concerns that were pointed out by GlobalFoundries. James Mulligan, the director of environmental health, safety and security at GlobalFoundries, testified that it was his understanding that "as soon as there [was] precipitation [in the form of snow, ice and sleet] accumulating on the surfaces, Gallivan was on-site." Based upon the terms of the contract at issue and the deposition testimony proffered herein, the Court finds that "there is an issue of fact [as to] whether [Gallivan's] contract with [GlobalFoundries] was so 'comprehensive and exclusive' [that it] entirely displaced [Gallivan's] duty to maintain the premises safely" (Musilli v Kohler Co., 50 AD3d 1600, 1601 [4th Dept 2008], quoting Espinal v Melville Snow Contrs., 98 NY2d at 140, accord Palka v Servicemaster Mgt. Services Corp., 83 NY2d 579, 588 [1994]; see Garcia v Mack-Cali Realty Corp., 52 AD3d 420, 421 [1st Dept 2008]).

Furthermore, the Court finds that Gallivan's motion for summary judgment dismissing the amended complaint against it must also be denied since "[t]here is an issue of fact on the record before [the Court] concerning the precise location where plaintiff fell" (Meyers-Kraft v Keem, 64 AD3d 1172, 1173 [4th Dept 2009]; see Macht v J.S. Cinemas, Inc., 18 AD3d 1102, 1103 [3d Dept 2005]["*Conflicting versions of the accident's location must be resolved by a jury*"]). In the case at bar, plaintiff testified that, on the morning of the incident, he rode a shuttle and was dropped off by door 7 at the FAB 8 building. Plaintiff testified that there was "a little bit of snow on the ground" and that it had not been shoveled or cleared. At approximately 10:00 a.m., plaintiff

testified that he then needed to go back outside to go to an FPI trailer "to do something on the computer." Plaintiff testified that Justin Berg, another pipefitter, transported him to the trailer in a van. Plaintiff testified that, after he completed said work, Mr. Berg drove the van back to the FAB 8 building and parked perpendicular to the building in the area between door 7 and door 9. Plaintiff testified that the surface near where Mr. Berg parked was made up of "blacktop, concrete and stones." Plaintiff further testified that he believed the surface where the van pulled in and came to a stop "was blacktop." Plaintiff testified that there were tire tracks and footmarks and "a dusting of snow on the ground." Plaintiff testified that he had witnessed snow within an hour of his fall and that there were "flurries all day on and off." Plaintiff testified that Mr. Berg parked and that they "both got out of the vehicle, walked towards the back of the vehicle, and [then plaintiff] was laying on the ground." Plaintiff testified that it happened "super fast" and that he "slipped" when he "stepped on ice." Mulligan testified that the location where plaintiff fell, as specified in the incident report, was comprised of "gravel and grass." Mr. Gallivan was unable to identify or observe "grass or gravel" in the picture taken as part of the incident report depicting the general location of the fall. Joseph Ralph Walsh, Jr., a site safety officer employed by FPI Mechanical a subcontractor at GlobalFoundries, testified that plaintiff was employed by FPI Mechanical. Walsh testified that he was the on-site safety supervisor for FPI Mechanical at the time of plaintiff's incident. Walsh testified that he completed the GlobalFoundries initial on-site accident report and took several pictures at the time of the subject incident. Walsh testified that "there was ice around [the van] the day of the incident." Walsh testified that the van was parked on snow and ice and that he could not tell what material was under the snow and ice it was parked on. Walsh further testified that, although there are grassy areas between stairwell seven and stairwell nine, he did not know if the subject van was parked on top of grass. Viewing this evidence

in the light most favorable to plaintiff, as the nonmoving party, the Court finds that Gallivan failed to conclusively establish that it did not owe a duty to plaintiff (see Prusky v McCarty, 126 AD3d 1171, 1172 [3d Dept 2015]).

Likewise, the Court finds that Gallivan's motion to dismiss GlobalFoundries cross claim for indemnification must be denied. "Indemnification is the right to complete reimbursement for a liability imposed by law" (1 Warren's Negligence in the New York Courts § 8.01 [2020]). "A right of indemnification may be created by an express agreement between the parties, or it may arise by operation of law as an implied, or common law, right to indemnity" (Id.). "[A] party's right to contractual indemnification depends upon the specific language of the relevant contract" (Morris v Home Depot USA, 152 AD3d 669, 672 [2d Dept 2017]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (Bleich v Metropolitan Mgt., LLC, 132 AD3d 933, 934 [2d Dept 2015]).

Gallivan tendered a copy of the parties' agreement which states that

> "[Gallivan] will indemnify, defend, and hold [GlobalFoundries] and its subsidiaries, affiliates, customers, agents, officers, directors and employees harmless from and against all claims, damages, losses and reasonable expenses … to the extent arising out of or resulting in whole or in part from (A) any breach of this agreement by [Gallivan], (b) Any claim that services or work product provided hereunder or the use thereof infringe a third party patent (all claim types), copyright, trademark, trade secret, or other intellectual property right, or (C) any negligent act or omission of any [Gallivan] employee, agent, or subcontractor."

Gallivan claims that the alleged incident did not arise out of Gallivan's contract or performance thereof since "Gallivan had no duty to remove snow and ice or salt the area where the fall occurred." As stated above, the Court has found that there is a question of fact concerning the precise location where plaintiff fell. Furthermore, the Court finds there is a triable issue of fact as to whether Gallivan was negligent in the performance of the snow removal contract (see Payton v

5391 Tr. Rd., LLC, 107 AD3d 1461, 1462 [4th Dept 2013]; Hannigan v Staples, Inc., 137 AD3d 1546, 1550 [3d Dept 2016]).

Based on the foregoing, Gallivan's motion for summary judgment is denied in its entirety, without costs. The Court is hereby uploading the original Decision and Order into the NYSCEF system for filing and entry by the County Clerk. Counsel for plaintiff is still responsible for serving notice of entry of this Decision and Order in accordance with the Local Protocols for Electronic Filing for Saratoga County.

Signed this 3rd day of June 2021, at Saratoga Springs, New York.

Dianne N. Freestone
HON. DIANNE N. FREESTONE
Supreme Court Justice

ENTER

Craig A. Hayner
Entered Saratoga County Clerk