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SHORT FORM ORDER

INDEX No. 09-26401
CAL No. 14-01005OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 7-16-14 (006, 007, 008)
MOTION DATE 8-13-14 (009)
ADJ. DATE 10-1-14
Mot. Seq. # 006 - MD # 008 - MD
007 - MotD # 009 - XMD

GRACE MCCOY,

Plaintiff,

- against -

MEDFORD LANDING, L.P.,

Defendant.

GRUENBERG KELLY DELLA
Attorney for Plaintiff
700 Koehler Avenue
Ronkonkoma, New York 11779

JEFFREY S. SHEIN & ASSOCIATES, P.C.
Attorney for Defendant Medford Landing/Third-Party Plaintiff and Second Third-Party Plaintiff
575 Underhill Boulevard, Suite 112
Syosset, New York 11791

MEDFORD LANDING, L.P.,

Third-Party Plaintiff,

- against -

HARTE LANDSCAPING, INC.,
HARTE LANDSCAPING CORP., and
HARTE CONTRACTING CORP.,

Third-Party Defendants.

CONGDON, FLAHERTY, O'CALLAGAN,
REID, DONLON, TRAVIS & FISHLINGER
Attorney for Third-Party Defendant Harte
333 Earle Ovington Boulevard - Suite 502
Uniondale, New York 11553-3625

BRILL & ASSOCIATES, P.C.
Attorney for Second Third-Party Defendant NGM Insurance Company
111 John Street, Suite 1070
New York, New York 10038

MEDFORD LANDING, L.P.,

Second Third-Party Plaintiff,

- against -

NGM INSURANCE COMPANY,

Second Third-Party Defendant.

Upon the following papers numbered 1 to 99 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; 24 - 52; 53 - 76; Notice of Cross Motion and supporting papers 77 - 81; Answering Affidavits and supporting papers 82 - 84; 85 - 86; 87 - 89; 90 - 91; Replying Affidavits and supporting papers 92 - 99; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purpose of this determination these motions for summary judgment (# 006) by Medford Landing LP, (# 007) by Medford Landing LP, and (# 008) by Medford Landing LP are consolidated and decided together with the cross motion (# 009) by Harte Landscaping Corp.; and it is further

ORDERED that the motion (# 006) by Medford Landing LP for summary judgment on its claims against third-party defendant Harte Landscaping Corp. s/h/a Harte Landscaping, Inc., Harte Landscaping Corp., and Harte Contracting Corp. for contractual and common-law indemnification and for breach of contract is denied; and it is further

ORDERED that the motion (# 007) by Medford Landing LP for summary judgment declaring that it is entitled to additional insured status under the insurance policy issued by NGM Insurance Company to Harte Landscaping Corp. and that NGM is obligated to defend and indemnify it in the underlying actions and reimburse it for all legal fees is decided as follows; and it is further

ORDERED that the motion (# 008) by Medford Landing LP for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the cross motion (# 009) by Harte Landscaping Corp. s/h/a Harte Landscaping, Inc., Harte Landscaping Corp., and Harte Contracting Corp. for summary judgment dismissing the third-party complaint against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on February 3, 2009 at approximately 9:00 p.m. when she slipped and fell on ice in the parking lot of premises located at 500 Addison Place in Medford, New York, owned and managed by Medford Landing LP ("Medford"). The gravamen of the complaint is that the defendants were negligent in failing to properly maintain, manage and control the premises and in creating a hazardous condition. Prior to the accident, Medford entered into a snow removal contract with Harte Landscaping Corp. s/h/a Harte Landscaping, Inc., Harte Landscaping Corp., and Harte Contracting Corp. ("Harte"). Pursuant to the terms and conditions of the contract, Harte procured primary commercial general liability insurance for $1,000,000 from NGM Insurance Company ("NGM"), which issued a policy bearing the number MVP94280, in which Medford was an additional insured in its capacity as owner of the premises.

Medford moves (# 008) for summary judgment dismissing the complaint against it on the grounds that it did not create the alleged dangerous condition, and that it had no actual or constructive notice of the condition. In support, Medford submits, *inter alia,* the pleadings, the bill of particulars, and the transcripts of the deposition testimony given by the plaintiff, George Tamborello, a representative of Medford Landing, and Eric Striffler, a representative of Harte. In addition, although Medford avers that there was a snow storm in progress when the plaintiff fell, it submits the uncertified meteorological records which are not in admissible form. Thus, the court finds the storm in progress claim to be without any evidentiary support.

At her examination before trial, the plaintiff testified to the effect that it was snowing during the day of the accident, and the snow stopped at about 6:30 p.m. After work at around 7:30 p.m., she walked to her apartment located at 10 Addison Place in Medford, half a mile away from work. When she walked towards the dumpster located at the end of the parking lot across from her apartment building, she slipped and fell on snow and ice on the parking lot about two feet in front of the dumpster. She observed three inches of snow in the area of the accident. When she walked over the same area two days prior to the accident, she observed patches of ice and snow in the area.

At his deposition, George Tamborello testified to the effect that at the time of the accident, he was a property manager of Medford, and Harte was hired by Medford to provide snow removal services for the parking lot including the area around the dumpster. Medford did not direct or supervise Harte's snow removal operations, including application of snow melt. The day after Harte performed snow removal operations, he conducted the walkthrough inspection. If he observed an icy condition in the parking lot, he would have his maintenance staff apply sand or snow melt. However, he had no recollection as to when the subject location was last inspected prior to the subject accident.

At his deposition, Eric Striffler testified to the effect that he is the owner of Harte. Medford entered into a snow removal contract with Harte during the winter of 2008 and 2009. According to the contract, Harte was free to decide where to pile snow. According to Harte's invoice, on January 28, 2009, Harte performed snow removal services at the subject premises and applied salt and sand. On January 29, 2009, Harte only applied salt and sand at the subject premises. Although he came back to the subject premises and conducted snow removal on the day of the accident, February 3, 2009, he had no recollection as to when he started plowing. He had no personal recollection of snow removal operations at the premises performed on January 28, 2009, January 29, 2009, and February 3, 2009.

A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only if it created the dangerous condition or had actual or constructive notice of the condition (*see* ***Devlin v Selimaj***, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; ***Morreale v Esposito***, 109 AD3d 800, 801, 971 NYS2d 209 [2d Dept 2013]; ***Gushin v Whispering Hills Condominium I***, 96 AD3d 721, 721, 946 NYS2d 202 [2d Dept 2012]). Thus, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Dhu v New York City Hous. Auth.***, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; ***Cruz v Rampersad***, 110 AD3d at 670, 972 NYS2d 302 [2d Dept 2013]; ***Santoliquido v Roman Catholic Church of Holy Name of Jesus***, 37 AD3d 815, 830 NYS2d 778 [2d Dept 2007]). To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see* ***Dhu v New York City Hous. Auth.***, *supra*; ***Oliveri v Vassar Bros. Hosp.***, 95 AD3d 973, 943 NYS2d 604 [2d Dept 2012]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Clark v AMF Bowling Ctrs., Inc.***, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; ***Moons v Wade Lupe Constr. Co.***, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Fasano v Green-Wood Cemetery***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]).

Here, Medford has failed to establish its entitlement to judgment as a matter of law by demonstrating that it lacked constructive notice of ice which allegedly caused the plaintiff to slip and fall in the parking lot in front of the subject dumpster (*see* ***Feola v City of New York***, 102 AD3d 827, 958 NYS2d 208 [2d Dept 2013]; ***Taylor v Rochdale Vil. Inc.***, 60 AD3d 930, 875 NYS2d 561 [2d Dept 2009]). Medford's property manager Tamborello testified at his deposition that he performed a walkthrough inspection on a regular basis, and that if he observed an icy condition in the parking lot, he would have his maintenance staff apply sand or snow melt. Medford did not proffer evidence demonstrating when the subject parking lot was last cleaned or inspected relative to the time of the subject accident. There are questions of fact as to whether a dangerous condition existed on the subject parking lot so as to create liability on the part of Medford; whether it had actual or constructive notice of the dangerous condition (*see* ***Rhodes-Evans v 111 Chelsea LLC***, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]); if so, whether reasonable inspections were made on the premises prior to the accident (*see* ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]); and whether the plaintiff was comparatively negligent (*see* ***Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]). Accordingly, Medford's motion for summary judgment is denied.

Medford also moves (# 006) for summary judgment on its claims against third-party defendant Harte for contractual and common-law indemnification and for breach of contract. In support, Medford submits, *inter alia,* the pleadings, the bill of particulars, and the transcripts of the deposition testimony given by the plaintiff, George Tamborello and Eric Striffler.

Here, Harte may be liable to Medford for common-law indemnification even in the absence of a duty running to the plaintiff, if the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of Harte (*see* ***Peycke v Newport Media Acquisition II***, 17 AD3d 338, 793 NYS2d 92 [2d Dept 2005]; ***Baratta v Home Depot USA***, 303 AD2d 434, 756 NYS2d 605 [2d Dept 2003]). There is a question of fact as to whether the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of Harte (*see* ***Franklin v Omni Sagamore Hotel***, 5 AD3d 348, 772 NYS2d 534 [2d Dept 2004]; ***Mitchell v Fiorini Landscape***, 284 AD2d 313, 726 NYS2d 673 [2d Dept 2001]). Moreover, Medford failed to establish its entitlement to summary judgment for contractual indemnification against Harte since a question of fact exists with respect to whether Harte breached the contract by failing to perform one or more of the services for which it was responsible (*see* ***Peycke v Newport Media Acquisition II***, *supra*; ***Baratta v Home Depot USA***, *supra*). These questions of fact preclude the granting of Medford's request for summary judgment for contractual and common-law indemnification and for breach of contract against Harte. Accordingly, Medford's motion for summary judgment on its claim for indemnification and breach of contract is denied.

Medford seeks summary judgment (# 007) declaring that it is entitled to additional insured status under the insurance policy issued by NGM to Harte for the policy period from December 3, 2008 to December 3, 2009. Medford contends that NGM is obligated to defend and indemnify it in the main action and reimburse it for all legal fees incurred to date in connection with the defense of the action. In support, Medford submits, *inter alia,* the pleadings, the bill of particulars, the transcripts of the deposition testimony given by the plaintiff, George Tamborello and Eric Striffler, and a copy of the insurance policy issued by NGM to Harte.

Here, according to the insurance policy issued by NGM to Harte, bearing the policy number MVP94280, "Owner [or] Lessee" was named as an additional insured. Moreover, Paragraph (c)(4) of the policy states that "[a]ny person(s) or organization(s) shown in the Schedule is also additional insured, but only with respect to liability ... caused ... by (a) your acts or omissions; or (b) the acts or omissions of those acting on your behalf." The adduced evidence submitted by Medford indicates that it is an additional insured under the subject policy. However, as discussed above, since there are several issues of fact as to the liability of Medford or Harte, the Court cannot determine at this juncture whether the plaintiff's accident would be covered under the subject insurance policy. In opposition, NGM submits only an affirmation of one of its attorneys, arguing that there is an issue of fact as to whether Medford is an additional insured under the subject policy, without any evidence in support of said assertion. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a party's request for summary disposition (*see* ***DePodwin & Murphy v Fonvil***, 38 AD3d 827, 833 NYS2d 394 [2d Dept 2007]; ***Carleton Studio v MONY Life Ins. Co.***, 18 AD3d 491, 793 NYS2d 919 [2d Dept 2005]). Accordingly, the branch of the motion by Medford for an order declaring that it is an additional insured under the subject policy is granted. However, the branch of the motion by Medford for an order declaring that NGM is obligated to defend and indemnify it in the main action and reimburse it for all legal fees incurred in connection with the defense of the action is denied as premature.

Harte moves (# 009) for summary judgment dismissing the third-party complaint asserted against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. Harte contends that it did not create the alleged dangerous condition.

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 (*see* ***Diaz v Port Auth. of NY & NJ***, 990 NYS2d 882, 2014 NY Slip Op 05830 [2d Dept 2014]; ***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 1103, 915 N.Y.S.2d 103 [2d Dept 2010]). However, in ***Espinal v Melville Snow Contrs.***, (98 NY2d 136, 746 NYS2d 120 [2002]), the Court of Appeals recognized that exceptions to this rule apply (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, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*id.*).

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of the plaintiff's injuries, it may be held liable in tort (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Figueroa v Lazarus Burman Assoc.***, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, Harte is required to establish that it did not perform any snow removal operations related to the condition which caused the plaintiff's accident or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (*see* ***Diaz v City of New York***, 93 AD3d 755, 940 NYS2d 654 [2d Dept 2012]; ***Schwint v Bank St. Commons, LLC***, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; ***Keese v Imperial Gardens Assoc., LLC***, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]).

Here, Harte's limited contractual undertaking to provide snow removal services is not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see* ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; ***Katz v Pathmark Stores***, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]). Nevertheless, Harte's submissions failed to establish its entitlement to judgment as a matter of law (*see* ***Keese v Imperial Gardens Assoc. LLC***, *supra*). There are questions of fact as to when Harte performed snow removal operations on the day of the accident; whether Harte had actual or constructive notice of the snow or ice condition on the subject parking lot; whether it properly performed snow removal operations related to the condition which caused the plaintiff's injury; whether it exercised reasonable care under the circumstances; and whether the plaintiff was comparatively negligent (*see* ***Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]). Accordingly, the branch of Harte's motion for summary judgment dismissing the third-party complaint against it on the ground that it was not negligent is denied.

Harte also seeks summary judgment dismissing the second cause of action of the third-party complaint for failure to procure a liability insurance policy naming Medford as an additional insured. In support, Harte submits, *inter alia,* the affidavit of Richard Yaus, a representative of Main Street America Group ("MSAG"), with a copy of the subject insurance policy.

In his affidavit, Richard Yaus stated that he is employed by MSAG, a holding company, where NGM Insurance Company ("NGM") is a company under its umbrella, and that a commercial general liability policy of insurance was issued by NGM to its named insured, Harte, under policy number MVP94280 from December 3, 2008 to December 3, 2009.

The Business Owners Common Policy Conditions (H)(1) under the subject policy states that "If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance."

The Insurance Requirements and Hold Harmless Agreement, which is attached to the subject snow removal contract, states in pertinent part that "The coverage afforded to the additional insured under this policy shall be primary insurance ... The amount of the insurer's liability under this policy shall not be reduced by the existence of such other insurance."

Here, while it is undisputed that Harte procured primary commercial general liability insurance from NGM, bearing the policy number MVP94280, in which Medford was an additional insured, there are issues of fact as to whether the coverage afforded to Medford as an additional insured under the subject insurance policy is primary and whether Harte failed to procure a liability insurance policy according to the terms of the snow removal contract. Accordingly, the branch of Harte's motion for summary judgment dismissing the second cause of action of the third-party complaint is denied.

Dated: January 30, 2015

HON. JAMES HUDSON, A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**