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SHORT FORM ORDER

PUBLISH

INDEX No. 14-12699
CAL. No. 16-00994OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

***PRESENT:***

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 7-28-16 (001)
MOTION DATE 10-18-16 (002)
MOTION DATE 11-1-16 (003)
ADJ. DATE 1-10-17
Mot. Seq. # 001 - MG
# 002 - MotD
# 003 - MG

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PETER LUKSIC,

Plaintiff,

- against -

KING KULLEN GROCERY CO., INC., INLAND WESTERN BAY SHORE GARDINER, L.L.C., AND RPAI US MANAGEMENT L.L.C.,

Defendant.

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INLAND WESTERN BAY SHORE GARDINER, L.L.C., AND RPAI US MANAGEMENT L.L.C.,

Third-Party Plaintiff,

-against-

MIDDLE ISLAND MAINTENANCE CORP.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 101 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32; 33 - 68 ; Notice of Cross Motion and supporting papers 69 - 71 ; Answering Affidavits and supporting papers 72 - 87; 88 - 90; 91 - 93 ; Replying Affidavits and supporting papers 94 - 95; 96 - 97; 98 - 99; 100 - 101; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (#001) by third-party defendant Middle Island Maintenance Corp, the motion (#002) by defendants and third-party plaintiffs Inland Western Bay Shore Gardiner LLC and RPAI US Management LLC, and the cross motion (#003) by defendant King Kullen Grocery Co., Inc. are consolidated for the purposes of this determination; and it is

***ORDERED*** that the motion by third-party defendant Middle Island Maintenance Corp. for summary judgment on the issue of liability is granted; and it is

***ORDERED*** that the motion by defendants and third-party plaintiffs Inland Western Bay Shore Gardiner, LLC and RPAI US Management LLC is determined as follows; and it is further

***ORDERED*** that the cross motion by defendant King Kullen Grocery Co. for summary judgment dismissing the complaint against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Peter Luksic as a result of a trip and fall accident that allegedly occurred on January 10, 2014. Plaintiff allegedly slipped and fell on ice while he was walking from the parking lot of a shopping center to a store operated by defendant King Kullen Grocery Co., Inc (hereinafter King Kullen). The shopping center where the accident occurred is owned and operated by defendants Inland Western Bay Shore Gardiner, LLC and RPAI US Management LLC (hereinafter referred to as the Management defendants). The Management defendants asserted cross claims against King Kullen for indemnification. The Management defendants also commenced a third-party action against third-party defendant Middle Island Maintenance Corp. (hereinafter Middle Island) for indemnification and breach of contract.

Middle Island now moves for summary judgment on the issue of liability, arguing that it cannot be held liable for the accident as there was a storm in progress. Middle Island also argues it did not owe a duty to plaintiff and did not a launch an instrument of harm. In support of its motion, it submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, certified climatological records, an expert affidavit of Thomas Elise, and photographs of the area where plaintiff allegedly fell.

The Management defendants move for summary judgment on the ground that they are out-of-possession owners and did not create or have notice of the alleged dangerous condition and that the storm in progress doctrine applies. They also move for summary judgment on their cross claims against King Kullen for indemnification and attorney's fees and for conditional summary judgment on their third-party claims against Middle Island for the same relief. In support of their motion, the Management defendants submit, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, certified climatological records, an expert affidavit of Thomas Elise, an affidavit of Mark Perin, the lease agreement between King Kullen and the Management defendants, the service agreement

between Middle Island and the Management defendants, and photographs of the area where plaintiff allegedly fell.

Plaintiff opposes the motions by Middle Island and the Management defendants and the cross motion by King Kullen, arguing that issues of fact exist as to whether the accident was caused by a storm in progress. Plaintiff also argues that defendants failed to establish that they did not control the area where the accident occurred. In opposition, plaintiff submits, among other things, transcripts of the parties' deposition testimony, plaintiff's own affidavit, and certified climatological records.

King Kullen cross-moves for summary judgment on the ground that it cannot be held liable for the accident as there was a storm in progress and relies on the exhibits submitted by co-defendants in their motion. It also opposes the branch of the Management defendants' motion for summary judgment on their cross claims, arguing that a triable issue of fact exists as to the precise location of the accident and the scope of King Kullen's obligation under the lease with respect to snow and ice removal. Plaintiff opposes King Kullen's cross motion, arguing that triable issues of fact exist as to whether the accident was caused by a storm in progress and whether King Kullen had notice of the alleged dangerous condition.

At his examination before trial, plaintiff testified that he was walking from the parking lot towards the entrance of King Kullen on the day of the subject accident, and that he slipped and fell when he stepped on to the sidewalk. He testified that it was raining and sleeting and that there was a "covering" of ice on the sidewalk. When asked to estimate the depth of the covering, he testified that he could not estimate the depth, but that it was a little more than trace amounts. He testified that while he was on the ground, he observed snow that had been previously plowed onto the sidewalk and a thin layer of ice on the ground. He stated that some of the ice appeared dirty, but a lot of it was "fresh." He testified that he did not observe any salt on the ground before the accident, and that an employee of King Kullen applied salt after his accident.

In his affidavit, plaintiff states that he drove to the subject shopping center at about 10:00 a.m. on the day of the accident and that it was raining. He states that while he was sitting in his car talking on the phone for about 15 minutes, the rain turned into "frozen rain." He states that when he exited his vehicle to walk towards King Kullen, there was a mixture of rain and sleet with very little accumulation on the ground. He states that he had no difficulty walking across the parking lot, but that when he stepped over the curb onto the sidewalk, his right foot slipped and he fell. He states that while he was on the ground, he observed a "combination of hard dirty old ice on the bottom, then a little bit of freshly plowed ice or snow and a very slight crystal layer on top that appeared to be the frozen rain." He states that he does not know exactly the thickness of the ice, but approximates that it was "probably a quarter to a half inch in thickness."

At her examination before trial, Nordea Harrison, a non-party witness, testified that on the day of the accident, she was walking carefully in the parking lot because there was an ice storm and the ground was slippery. She testified that as she was driving her car in the parking lot, she observed plaintiff slip and fall on the sidewalk in front of King Kullen. She testified that she pulled her car over to assist

plaintiff and described the sidewalk as slippery and covered with black ice. She testified that there was no salt on the ground until the store manager came outside later and told an employee to spread salt on the ground.

At his examination before trial, Jose Pares, who is employed as store manager of the subject King Kullen store, testified that on the morning of the accident, he did not observe any snow or ice on the sidewalk by the entrance of the store. He testified that after he was informed that someone had fallen outside, he went outside and observed plaintiff on the sidewalk between King Kullen and Rite Aid. He testified that there was freezing rain falling, and that the sidewalk and parking lot was covered with ice. He testified that prior to the accident, he had told an employee, Jose Torres, to spread salt on the ground.

At his examination before trial, Jose Torres, who is employed as a general helper by King Kullen, testified that on the day of the subject accident, the store manager told him to apply salt on the sidewalk. He testified that when he went outside to apply salt, he observed that it was "raining ice." He testified that after he finished applying salt on the sidewalk, the store manager told him to spread salt in the area where plaintiff had fallen. He testified that he would not generally spread salt in that area because it belonged to Rite Aid.

At his examination before trial, Thomas Klei, who is employed as a supervisor for Middle Island, testified that Middle Island performs plowing, salting, and sanding at the subject property. He testified that it did not perform snow removal or salting of the sidewalk in front of King Kullen, which is responsible for its own snow removal. He testified that Middle Island does remove snow and ice from the sidewalk in front of the Rite-Aid store which is adjacent to King Kullen. When asked if he could tell where King Kullen's property ends and the Rite-Aid property begins, he stated that there is no specific point of reference for him to make that determination.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

As the proponents of the motion for summary judgment, defendants must establish, prima facie, that they neither created the snow and ice condition nor had actual or constructive notice of the condition (*see* ***Meyers v Big Six Towers, Inc.***, 85 AD3d 877, 877, 925 NYS2d 607 [2d Dept 2011]; ***Persaud v S & K Green Groceries, Inc.***, 72 AD3d 778, 779, 898 NYS2d 255 [2d Dept 2010]; ***Vasta v Home Depot***, 25 AD3d 690, 811 NYS2d 671 [2d Dept 2006]). Defendants' burden may be sustained by presenting

evidence that there was a storm in progress when plaintiff slipped and fell (*see* ***Smith v Christ's First Presbyt. Church of Hempstead***, 93 AD3d 839, 941 NYS2d 211 [2d Dept 2012]; ***Meyers v Big Six Towers, Inc.***, *supra*; ***Sfakianos v Big Six Towers, Inc.***, 46 AD3d 665, 846 NYS2d 584 [2d Dept 2007]). "Under the 'storm in progress rule,' a landowner 'generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter' " (***Weller v Paul***, 91 AD3d 945, 947, 938 NYS2d 152 [2d Dept 2012], quoting ***Mazzella v City of New York***, 72 AD3d 755, 756, 899 NYS2d 291 [2d Dept 2010]; *see also* ***Solazzo v New York City Tr. Auth.***, 6 NY3d 734, 735, 810 NYS2d 121[2005]; ***Sie v Maimonides Med. Ctr.***, 106 AD3d 900, 900, 965 NYS2d 562 [2d Dept 2013]; ***Barresi v Putnam Hosp. Ctr.***, 71 AD3d 811, 812, 897 NYS2d 182 [2d Dept 2010]).

The evidence submitted by Middle Island in support of its motion for summary judgment, including certified climatological data, an expert affidavit of a meteorologist, and transcripts of the parties' deposition testimony, demonstrated, prima facie, that a storm was in progress at the time of the subject accident (*see* ***Talamas v Metropolitan Transp. Auth.***, 120 AD3d 1333, 993 NYS2d 102 [2d Dept 2014]; ***Alers v La Bonne Vie Org***, 54 AD3d 698, 863 NYS2d 750 [2d Dept 2008]). The testimony of King Kullen's store manager and another employee, as well as the testimony of plaintiff and the non-party witness, demonstrate that there was freezing rain at the time of the subject accident. Moreover, the expert affidavit of Thomas Elise, a meteorologist, states that at the time of the accident, the weather was overcast with freezing rain and that "snow and sleet produced a trace to 0.1 inches of accumulation" which was "followed by a trace to less than 0.10 inches of ice accretion from the freezing rain." Thus, the burden shifted to plaintiff to raise a triable issue of fact as to whether his fall was caused by something other than precipitation from the storm in progress (*see* ***Meyers v Big Six Towers, Inc.***, *supra*). In order to do so, plaintiff was "required to raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location of the fall, which existed prior to the storm, as opposed to precipitation from the storm in progress, and that defendant had actual or constructive notice of the preexisting condition (*see* ***Burniston v Ranric Enters. Corp.***, 134 AD3d 973, 21 NYS3d 694 [2d Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff submits an expert affidavit of Alicia Wasula, a meteorologist, who concluded that the condition which caused plaintiff to slip and fall was likely a result of the "rapid melt and subsequent refreeze of the snow from the storm on January 2 and 3." It further states that the small amount of precipitation and frozen rain occurring at the time of the subject accident could not have been steady enough to have created a quarter inch to half inch depth of ice which plaintiff described in his affidavit. However, plaintiff's description of the depth of the ice contradicts his earlier testimony that he could not estimate the depth and that it was a little more than trace amounts. Thus, it appears to be an attempt to raise a feigned issue of fact in order to avoid the consequences of dismissal (*see* ***Kaplan v DePetro***, 51 AD3d 730, 858 NYS2d 304 [2d Dept 2008]; ***Makaron v Luna Park Hous. Corp.***, 25 AD3d 770 809 NYS2d 520 [2d Dept 2006]), and plaintiff's contention that he slipped and fell on old ice that was the product of a prior storm is speculative (*see* ***Talamas v Metropolitan Transp. Auth.***, 120 AD3d 1333, 993 NYS2d 102 [2d Dept 2014]; ***Small v Coney Is. Site 4A-1 Houses, Inc.***, 28 AD3d 741, 814 NYS2d 240 [2d Dept 2006]). Thus, the motion by Middle Island for summary judgment on the issue of liability is granted.

With regard to the branch of the Management defendants' motion for summary judgment on their cross claims against King Kullen for indemnification and for reasonable attorney's fees for defense of this action, a duty to indemnify may be created by the contractual relationship between the indemnitor and the indemnitee (*see* ***McDermott v City of New York***, 50 NY2d 211, 428 NYS2d 643 [1980]). Furthermore, the right to contractual indemnification depends upon the specific language of the contract (*see* ***Shaughnessy v Huntington Hosp. Assn.***, 147 AD3d 994, 47 NYS3d 121 [2d Dept 2017]). Here, the lease agreement between the Management defendants and King Kullen states that King Kullen shall "keep the sidewalks, curbs and ramps immediately adjacent to the Demised Premises reasonably free of snow, ice and debris." It further states that King Kullen "shall indemnify and save Landlord harmless from and against any and all claims, losses, suits, damages and expenses, including reasonable attorney's fees, of any kind or nature, whatsoever resulting from personal and bodily injury, death and property damage...occurring on the Demised Premises." While plaintiff and a non-party witness testified that the accident occurred in front of King Kullen, the store manager of King Kullen on the day of the accident testified that he observed plaintiff near a pillar which was between Rite Aid and King Kullen. Another employee of King Kullen testified that the area where plaintiff had fallen is not a part of King Kullen and is not an area where he would generally apply salt. Furthermore, while the Management defendants submit a blueprint of the subject property, it is unclear as to where King Kullen's property ends and where Rite Aid's property begins. In addition, the lease agreement, which states that King Kullen is responsible for keeping the sidewalks, curbs and ramps "immediately adjacent to the Demised Premises reasonably free of snow, ice and debris," is vague. Thus, as there is conflicting evidence as to where the subject accident occurred, the application by the Management defendants for summary judgment as to their cross claims against King Kullen is denied.

As to the branch of the Management defendants' motion for conditional summary judgment on their third-party claim against Middle Island, it is premature to grant such relief under these circumstances (*see* ***McAllister v Construction Consultants L.I., Inc.***, 83 AD3d 1013, 921 NYS2d 556 [2d Dept 2011]). Here, Middle Island is not an insurer, and its duty to defend is no broader than its duty to indemnify (*see* ***Brasch v Yonkers Constr. Co.***, 306 AD2d 508, 762 NYS2d 626 [2d Dept 2003]). While Klei, a supervisor for Middle Island, testified that it is responsible for clearing snow from the sidewalk of Rite Aid, this Court has determined that a triable issue of fact exists as to the location of the accident. Therefore, it is unclear whether King Kullen or Middle Island owed a duty to defend the Management defendants. Moreover, the indemnification provision at issue requires Middle Island to indemnify, protect, defend, save, and hold harmless the Management defendants against "any and all claims, actions, liabilities, damages, losses, costs and expenses including attorney's fees, arising out of or resulting from, directly or indirectly, the performance of services at the property by Contractor or Contractor's subcontractors, agents or employees." The Management defendants have not submitted sufficient evidence to establish that the accident arose from the performance of services by Middle Island. Thus, the application by the Management defendants for conditional summary judgment is denied.

Accordingly, the motion by Middle Island for summary judgment on the issue of liability is granted as it was determined that there was a storm in progress. In view of this determination, the application by the Management defendants and the cross motion by King Kullen for summary judgment

dismissing the complaint against them are also granted. The applications by the Management defendants for summary judgment in their favor as to the cross claim against King Kullen and for conditional summary judgment against Middle Island are denied.

Dated: June 9, 2017

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION