State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 31, 2020 530400

CANDANCESUE JUBIE,
Respondent,
v

EMERSON MANAGEMENT ENTERPRISES, LLC, et al.,
Defendants,
and

KENNETH J. UMHEY JR.,
Appellant.

MEMORANDUM AND ORDER

Calendar Date: November 19, 2020

Before: Garry, P.J., Egan Jr., Aarons and Pritzker, JJ.

Santacrose & Frary, Albany (Keith M. Frary of counsel), for appellant.

Zwiebel & Fairbanks, LLP, Kingston (Alan Zwiebel of counsel), for respondent.

Aarons, J.

Appeal from an order of the Supreme Court (Mott, J.), entered October 7, 2020 in Ulster County, which, among other things, denied defendant Kenneth J. Umhey Jr.'s motion for summary judgment dismissing the amended complaint against him.

Plaintiff commenced this action for personal injuries allegedly sustained after she slipped and fell on ice in a

parking lot of a resort in March 2017. Defendant Kenneth J. Umhey Jr. (hereinafter defendant) provided snow removal services for the resort pursuant to an oral contract. Following joinder of issue and discovery, defendant moved for summary judgment seeking dismissal of the amended complaint against him. Supreme Court, among other things, denied defendant's motion. Defendant appeals. We affirm.

Generally, a contract to provide snow or ice removal services will not give rise to tort liability in favor of a nonparty to that contract (see Espinal v Melville Snow Contrs., 98 NY2d 136, 140 [2002]). There are, however, three exceptions to this principle – the relevant one here being "where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm" (Vogle v North Country Prop. Mgt., LLC, 170 AD3d 1491, 1492 [2019] [internal quotation marks, brackets and citations omitted]; see Belmonte v Guilderland Assoc., LLC, 112 AD3d 1128, 1129 [2013]). Plaintiff alleged that defendant negligently plowed and piled snow, thereby creating a dangerous condition on the parking lot, and that defendant failed to remove the piles of snow to a place where they would not create a dangerous condition. In view of this, it was incumbent upon defendant to disprove these allegations as part of his summary judgment burden (see Vogle v North Country Prop. Mgt., LLC, 112 AD3d at 1492; Gushin v Whispering Hills Condominium I, 96 AD3d 721, 722 [2012]; compare Baker v Buckpitt, 99 AD3d 1097, 1099 [2012]).

In seeking summary judgment, defendant submitted, among other things, the pleadings, his deposition testimony and the deposition testimony of plaintiff. Defendant testified that, when clearing snow on the parking lot, he pushed the snow towards the edge of the lot by Route 28 and made piles there. Defendant also testified that there was a slope on the parking lot that ran downhill from Route 28. There were drains located in the middle of the parking lot in order to take off surface water from melting snow. Defendant stated that melted snow and ice would flow in the direction from Route 28 towards these drains. In the immediate days before plaintiff's accident, defendant performed snow removal services on the parking lot.

This included a "final cleanup," which involved removing the piles of snow from the parking lot. Meanwhile, plaintiff testified at her deposition that, on the day of her accident, she observed a "mountain" of snow on the parking spaces that faced Route 28. According to plaintiff, the parking lot looked wet and she observed ice on the pavement. Plaintiff further testified that she saw "crust in some areas, like it bubbled up a little bit." When she exited her car, plaintiff had to walk "very gingerly." Plaintiff, however, later slipped and landed on ice, which she described as opaque.

Viewing the evidence in the light most favorable to plaintiff, as we must, defendant's own submissions disclose a triable issue of fact as to whether he launched a force or instrument of harm. There was conflicting testimony as to whether there were piles of snow on the parking lot that melted and froze prior to the accident. Furthermore, to the extent that defendant attempted to clarify his prior testimony that the parking lot sloped downhill from the area by Route 28 by subsequently testifying that the lot sloped downhill towards Route 28, this presented a credibility issue for the trier of fact. As such, Supreme Court correctly denied defendant's motion (see Hannigan v Staples, Inc., 137 AD3d 1546, 1549 [2016]; Belmonte v Guilderland Assoc., LLC, 112 AD3d at 1129; Elsey v Clark Trading Corp., 57 AD3d 1330, 1332 [2008]; Torosian v Bigsbee Vil. Homeowners Assn., 46 AD3d 1314, 1316 [2007]). That said, because defendant did not satisfy his moving burden, it is unnecessary to address his arguments targeted at the proof submitted in plaintiff's opposition.

Garry, P.J., Egan Jr. and Pritzker, JJ., concur.

ORDERED that the order is affirmed, with costs.

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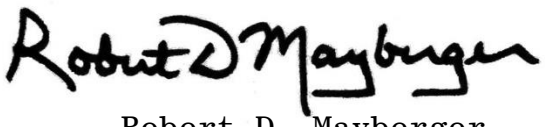

Robert D. Mayberger
Clerk of the Court