DOCKET NO. NNH-CV-16-6060398-S

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| KIMBERLY TAHERIAN | : | SUPERIOR COURT |
| | : | J.D. NEW HAVEN |
| V. | : | AT NEW HAVEN |
| FINAST ACQUISITION, LLC, ET AL. | : | MAY 24, 2024 |

MEMORANDUM OF DECISION

In this indemnification action brought by crossclaim plaintiff Finast Acquisition, LLC ("Finast") against crossclaim defendant Shorehaven Landscape, LLC ("Shorehaven"), Finast alleges that under common law, crossclaim defendant Shorehaven is obligated to indemnify Finast for the amount of the settlement paid to the plaintiff Kimberly Taherian following a jury trial as well as attorney's fees and the costs of defending the action. The court heard evidence on July 18, 19 and 20, 2023, October 20, 2023, and November 17, 2023. Finast called witnesses Rafi Taherian, plaintiff Kimberly Taherian, meteorologist Bradford Field, property manager Ian Marsh, Ken Boegeman, a snow and ice remediation and management expert, and Bruce Ullerup, the owner of Shorehaven. Shorehaven called witnesses James Bria, a meteorologist, and Richard Arlington, a snow and ice removal expert. Both sides offered numerous exhibits. The parties submitted post-trial briefs on February 1, 2024 (#424 and #425) and replies on February 20, 2024 (#433 and #434). Having considered the testimony and evidence and submissions of counsel, the court makes the following findings and conclusions, and for the reasons set forth below, the court enters judgment in favor of the crossclaim defendant Shorehaven.

## I. PROCEDURAL HISTORY

The plaintiff Kimberly Taherian brought an action against Finast and Shorehaven seeking damages related to injuries she sustained on February 23, 2015 when she slipped and fell on

snow and ice in a parking lot located at 1057 Boston Post Road, Guilford, Connecticut. Plaintiff's claims against Finast and Shorehaven sounded in negligence based on their ownership, possession, and/or control of the premises. Finast filed a cross complaint against Shorehaven alleging common law indemnification. (# 119). The court (*Ozalis, J.*) entered an order bifurcating the crossclaim for common law indemnification from plaintiff's negligence claim. (# 183).

Prior to trial on plaintiff's negligence claim, plaintiff reached a settlement with Shorehaven and her claim against Shorehaven was withdrawn on October 16, 2019. (# 324). Following a trial on plaintiff's negligence claim against Finast, on October 25, 2019, the jury returned a verdict in favor of the plaintiff and awarded total damages in the amount of $3,242,737.52 against Finast. (# 327). Plaintiff moved for an award of costs in the amount of $24,170.40 (# 342), attorney's fees in the amount of $350, and interest owed pursuant to her Offer of Compromise in the amount of $434,967.19 as of February 1, 2020, and daily interest accruing at $710.74 (# 364.00). Plaintiff Taherian and Finast later settled the negligence claim in the amount of $3,600,000.00 and judgment entered on February 10, 2020. (P. Ex. 18, 20).

On June 11, 2021, Finast filed a motion for summary judgment (# 376) seeking judgment with regard to the special defenses of res judicata and collateral estoppel asserted by Shorehaven against Finast's crossclaim. The motion was granted and the court (*Graff, J.*) found that Finast was entitled to judgment as a matter of law as to Shorehaven's special defenses of res judicata and collateral estoppel. (Memorandum of Decision, # 376.50). The trial on the crossclaim was ultimately heard by the court as set forth above.

II. FINDINGS OF FACT

The court finds that the following facts have been established by a preponderance of the evidence.

On February 23, 2015, Finast was the owner of the CVS Pharmacy located at 1057 Boston Post Road, Guilford, Connecticut (the "premises"). New Market Realty, Inc. (New Market) was the property manager. On December 10, 2014, Finast entered into an agreement entitled "SNOW PLOW CONTRACT 2014 - 2015" with Shorehaven, a commercial landscaping and snow removal company, to perform snow removal duties for the 2014-2015 winter season. Although this written contract was unsigned, the parties agreed it was the contract they had entered into. The contract provided that Shorehaven perform certain duties at the premises for a flat-fee seasonal price of $7,000. Those duties included: "plowing all lots, shoveling all walks. Salting all roadways and calcium chloride on all concrete walkways/entrances to businesses." Further, the contract provided that "[i]n the event of 12 full saltings there will be a surcharge of $385.00 per application" and if there is "[o]ver 60" of snow in one season there will be a surcharge of $500.00 per storm for plowing." Ex. 30. The testimony established that one reason for salting was "to make sure that the liquid after the snow melts doesn't become frozen[.]" Tr. 10/20/23 at 23-24. The seasonal price of $7,000 was to be paid in four monthly installments of $1,750 from December 1, 2014 – March 1, 2015. According to the testimony of Bruce Ullerup, the owner of Shorehaven, and Ian Marsh, the representative of Finast, there was a verbal agreement that Shorehaven would go to the premises automatically to perform snow removal services once there was an inch or more of snow (the "snow trigger").

On February 21, 2015, at approximately 2:30 p.m., a winter storm began with snowfall at the premises in Guilford, Connecticut. Tr. 7/19/23 at 18. Approximately three inches of snow fell from 2:30 p.m. until approximately 11 p.m. when the snow transitioned to freezing rain or rain that instantly freezes on contact with ground surfaces. The freezing rain continued until approximately 2:00 a.m. at which point it transitioned back to snow. It snowed from 2:00 a.m. until approximately 8:55 a.m. on February 22, 2015 at which time the storm ended. In the absence of an official weather station in Guilford, Connecticut, the parties turned to experts as to the amount of snowfall. There was conflicting testimony from Finast's meteorology expert, Bradford Field, and Shorehaven's meteorology expert, James Bria, as to exactly how much snow fell on February 22, 2015. Mr. Bria estimated that a total of .9 inches fell and Mr. Field estimated that a total of 1.24 inches fell during that time frame. Both experts testified as to their method of making the calculation and both agreed that their respective totals were approximations. Mr. Bria testified that the storm ended at approximately 8:30 a.m. – 8:35 a.m., and Mr. Field testified that it was his opinion that the storm ended at approximately 8:55 a.m. – 9:00 a.m. Mr. Bria testified that it is possible to accumulate .1 inch to .3 inches of snow during a 20–30-minute period of time.

Mr. Ullerup of Shorehaven arrived at the premises sometime in the afternoon on February 21, 2015 to perform snow removal services, likely within a few hours of the start of the storm at 2:00 p.m. Ullerup left the premises at some point after midnight on February 22, 2015, after performing his snow removal work. He testified that there were vehicles in the parking lot of the premises, and he was unable to provide snow removal services around those vehicles. Shorehaven did not return to the premises at any point on February 22, 2015 or on February 23,

2015 to perform any snow and ice removal services. Further, pursuant to Shorehaven's general business practice, it did not notify Finast of its activities with regard to snow removal during the storm.

The day after the snow ended, February 23, 2015, plaintiff Kimberly Taherian was an invitee in the rear parking lot of the CVS Pharmacy. She testified that sometime between 3:00 p.m. and 4:00 p.m., she parked her car in the rear lot along the wall. Although she could not recall the exact spot, she parked in the area depicted in the photograph admitted as Exhibit 1, and there were cars parked on both sides of her vehicle. Although she did not recall exactly where she fell, she testified that she opened her car door to get out, slipped and fell and woke up on her back. While she stated that she couldn't say with 100 % certainty that she slipped on ice, she believed the snow and ice caused her to slip and fall, suffering severe injuries. Rafi Taherian, the plaintiff's husband, testified that later in the evening on February 23, 2015, he went to the premises to pick up his wife's vehicle and to take photographs. He stated that he observed patches of snow and ice in different locations in the parking lot and that there were patches of ice near where the plaintiff's vehicle was parked. Tr. 7/18/23 at 19, 57-58.

Shorehaven was required to perform snow removal services in the area where the plaintiff fell as depicted in Exhibit 1. Tr. 10/20/23 at 50, 56-58. Ullerup testified that Finast, through its property manager Ian Marsh, had the ability to make certain determinations regarding Shorehaven's snow removal work. Ullerup stated that he would have allowed any inspection of his work at the property and would listen to any directions from Marsh as to where to place snow piles. Tr. 10/20/23 at 61-63.

Ian Marsh was the managing member of Finast Acquisitions, which was a single purpose entity formed to acquire the property in Guilford, Connecticut. There were five members of the limited liability company. Marsh oversaw the day-to-day operations of Finast and traveled to Connecticut regularly to inspect the property. Marsh was also the sole proprietor and president of New Market Realty Advisors, the property manager. Finast paid New Market to be the property manager and that fee went directly to Marsh.

With regard to the snow removal contract, Marsh testified that there were no terms in the contract requiring Shorehaven to return to the property after all customers and vehicles had left, to monitor the ground conditions, or conduct daily inspections. Marsh had the opportunity to come to the property any time he wanted, but was not on the property on February 21, 22, or 23, 2015. Further, Marsh had the ability to make decisions for services required to maintain reasonably safe conditions at the property. He testified that it was Finast's obligation to render the premises reasonably safe. He stated that he visited the property every few weeks and observed the condition of the property as property manager. He recalled that he saw snow in the parking lot of the building during the winter of 2015. He inspected the gutters to see if they were leaking or had blockages and recalled observing snow piled up "all around the property sometimes adjacent to parking spaces and sometimes not." Tr. 7/19/23 at 148. While Marsh did not tell Shorehaven how to perform snow removal and ice remediation, relying on Shorehaven's experience and expertise, he agreed that if he did not like the way the conditions looked, he could speak with Shorehaven and his decision would be controlling.

Marsh testified at length concerning control of the property. On re-cross-examination Marsh testified as follows:

Q -- you just testified on a line of questioning talking about control of my client's snow removal services.
Correct?
A Correct.
Q And that he had control over those services.
Correct?
A Correct.
. . .
Q Okay.
A The control -- I think the -- control is a pretty big word. The control I'm talking about is actually doing the job, doing the work of moving snow and mitigating against ice.
Q Do you feel like you have any control whatsoever over anything to deal with the snow removal and ice –
A I could have had a conversation at some point that told him to put a big pile of snow in a certain place and he'd probably -- if he thought it was -- or I should have asked, say, I could have asked him to do that and if he thought it was prudent, he probably would have done it. So it was a collaborative thing at a given -- at a certain, you know, broad strokes kind of -- in a broad stroke's [sic] kind of way. But not the actual conduct of the –
Q Yeah.
A -- of the removal.
Q So -- so -- it's your -- your -- your understanding, your belief that you didn't have control over, you know, where they actually salted or how he pushed the snow. Correct?
A Correct.
Q Okay. But you said something interesting in your testimony. You said that if you saw something amidst [sic], you could talk to him about it. Correct?
A Yeah.
Q Okay. So in your testimony, initially you testified that you don't remember any -- seeing any snow mounds or snow piles probably, but then later on you testified that you did see it. Correct?
A In the photos. Yeah.
Q Yes. Well, also in your testimony. Remember I showed your testimony?
A Yeah. I think the same photos were shown then though. No?
Q Not my question though. Do you remember saying -- do you remember saying in the past that you actually did see snow piles piled up on the property against the walls of the building? I know it's been a long today [sic].
. . .
Q Okay. Does that refresh your recollection of whether you saw snow piled up around the property sometimes adjacent to the parking spaces, sometimes not?
A Yes.
Q Okay.
A Yeah. Meaning, from time to time I would have seen a snowbank or a snowplow.
. . .
Q Okay. Okay. Good. Okay. And I believe it was also your testimony that as the property manager or the owner of Finast, you get to make decisions about the property. Correct?
A Correct.

Q And if you wanted to -- one of your other contractor services provider to do something, you would have to follow what your decision was. Right?
A Again, in general terms, I'm not a tradesmen. I'm not a -- I don't do the actual work. So they would do it their appropriate way.
Q Right. But if you saw something that was wrong, you had the ability of telling him it was wrong. Correct?
A Correct.
Q And you had the ability to tell him to change it. Correct?
A Correct.
Q And you had the ability to say if you don't change it, you're fired. Correct?
A Correct.
Q And you had the ability, if you saw something regarding snow and ice at your property, you had the ability to tell my client, hey, I don't like that. Correct?
A Correct.
Q And you had the ability to tell him to change it.
Correct?
A Correct.
Q And if he didn't change it, you did have the opportunity, the right, to say get out of here. Right?
A Correct. Correct.
Q Okay. Okay. So now, going back to the initial question, wouldn't you say you do have some control over the snowplow and icing even though it might not be at the very finest level?
A Yes.

Tr. 7/19/23 at 146–150.

Both parties called expert witnesses who testified as to industry standards regarding snow and ice removal services. Finast called Kenneth Boegeman, a certified snow professional, and Shorehaven called Richard Arlington III, a snow and ice treatment expert. Both testified that the prevailing custom and practice in the snow and ice treatment industry is that vendors are responsible for inspecting their work and the property as necessary and a snow and ice removal contractor should make itself aware of changes in the weather conditions that have the potential to create thaw and refreeze conditions. Further, Arlington stated that if accumulation occurred after leaving the property, he would return to the property to provide additional treatment. Tr. 11/17/23 at 72-73, 83-84. Boegeman testified that Shorehaven did not adhere to industry

standards and failed to fulfill its duty to provide snow and ice removal services and to properly monitor and inspect the conditions at the property in several respects. First, Shorehaven could not have conducted snow and ice removal under the vehicles that were parked in the rear lot, and so would have to return overnight to clean up those areas. Second, Shorehaven would have been required to return to the premises to address any additional accumulation that occurred from the continuing snowfall on February 22, 2015. Third, the freezing rain that fell on February 22 had the potential to wash away the deicing chemicals, thus leaving the surface untreated as new snow fell and therefore Shorehaven should have monitored the property regarding the new conditions.

Both experts opined that the industry standard would have required Shorehaven to drag snow away from the building as opposed to pushing it toward the building, and lines of snow created by snowplows should also be removed. Finast argues that the photographs depict these shortcomings as they show snow pushed up toward the building and insufficient deicing materials evidenced by the ice on the ground near snow piles.

The experts differed as to whether any accumulation in the parking lot could have been caused by snow blowing off the roof which may have been captured against the back of the building. While Arlington thought that was a possibility, he could not state with certainty that it occurred, and Boegeman did not believe that the accumulation was caused by snow blowing off the roof.

## III. DISCUSSION

### A. Standard and Burden of Proof

The general burden of proof in civil actions is on the plaintiff (or crossclaim plaintiff), who must prove all the essential elements of the cause of action by a fair preponderance of the

evidence. See *Gulycz* v. *Stop & Shop Companies Inc.*, 29 Conn. App. 519, 523, 615 A.2d 1087, cert. denied, 224 Conn. 923, 618 A.2d 527 (1992). "The [fact-finding] function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of the circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties . . . ." (Internal quotation marks omitted.) *Cavolick* v. *DeSimone*, 88 Conn. App. 638, 646, 870 A.2d 1147, cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005).

The sole count in the cross complaint (#119) filed by Finast against Shorehaven alleges common law indemnification. In the cross complaint, Finast alleges that it contracted with Shorehaven for snow and ice removal of the premises where the plaintiff fell. Finast further alleges that if the plaintiff fell on snow and ice, then it was due to Shorehaven's negligence and not Finast's negligence. Finast alleges that Shorehaven was in exclusive control of the situation and that Finast did not know, nor should it have known, of Shorehaven's negligence.

In order to prevail on a common law indemnification claim, the following four elements must be established:

> "(1) the third party against whom indemnification is sought was negligent; (2) the third party's active negligence, rather than the defendant's own passive negligence, was the direct, immediate cause of the accident and the resulting harm; (3) the third party was in control of the situation to the exclusion of the defendant seeking reimbursement; and (4) the defendant did not know of the third party's negligence, had no reason to anticipate it, and reasonably could rely on the third party not to be negligent."

*Smith v. New Haven*, 258 Conn. 56, 66 (2001)(citing *Kaplan v. Merberg Wrecking Corp.*, 152 Conn. 405, 416 (1965)); *Valente v. Securitas Sec. Services, USA, Inc.*, 152 Conn. App. 196, 204 (2014). "Our Supreme Court has defined exclusive control of the situation, for the purpose of a common-law indemnification claim, as exclusive control over the dangerous condition that gives

rise to the accident." *Pellecchia v. Connecticut Light & Power Co.*, 139 Conn. App. 767, 775 (2012) (citation omitted).

Although the parties offered significant evidence as to whether Shorehaven was negligent in its snow and ice remediation and removal during the storm of February 21- February 22, 2015, and whether Shorehaven's active negligence, rather than Finast's own passive negligence, was the direct, immediate cause of the accident and the resulting harm, the court finds that the critical evidence as to whether Shorehaven had exclusive control over the dangerous condition is determinative.

The parties offered considerable evidence as to whether Shorehaven was negligent in failing to return to the property based on the continuing snowfall and the conditions created by the freezing rain, the transition back to snow, and thaw and refreeze. Finast claims that the testimony of the expert meteorologists established that more than one inch of snow fell in the morning hours of February 22, 2015 which would have triggered Shorehaven's duty to return a second time. Even assuming that more than one inch of snow fell, and that Shorehaven was negligent and that Shorehaven's negligence was the direct and immediate cause of the accident and resulting injuries, however, Finast has failed to prove the essential element that Shorehaven was "in control of the situation to the exclusion of the defendant seeking reimbursement." *Kaplan v. Merberg Wrecking Corp.*, supra, 152 Conn. 405, 416. The court finds the testimony of Ian Marsh persuasive on this issue. Marsh testified that he had the opportunity to inspect the property and to investigate conditions at the property. Tr. 7/19/23 at 152–154. Marsh's testimony establishes that he had some control of the situation as reflected by the testimony set forth above culminating in the following exchange:

Q: Okay. Okay. So now, going back to the initial question, wouldn't you say you do have some control over the snowplow and icing even though it might not be at the very finest level?

A. Yes.

Tr. 7/19/23 at 150.

Finast argues that the context of this answer limits its implications and relates to Marsh's ability to express dissatisfaction with Shorehaven's performance and the general rights that Marsh had as the property owner. Upon consideration of the entire line of questioning, the court finds that Marsh had more than just an ability to express dissatisfaction. Indeed, Marsh's description of the snow removal as a "collaborative thing . . . in a broad strokes kind of way" (Tr. 7/19/23 at 147) further supports the conclusion that Finast had "some control" and that Shorehaven's control was not exclusive. Additionally, the testimony of Bruce Ullerup also established that Marsh had the ability to make certain determinations regarding Shorehaven's snow removal work. Ullerup testified that he would have allowed any inspection of his work at the property and would listen to any directions from Marsh as to where to place snow piles. Tr. 10/20/23 at 61-63.

Finast argues that its opportunity to inspect or investigate a property or condition is not conclusive evidence as to whether Shorehaven had exclusive control of the situation. *McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc.*, 93 Conn. App. 486 (2006); *Jackson v. Costco Wholesale Corp.*, Superior Court, Judicial District of New Haven at Meriden, Docket No. CV156008167S, 2017 WL 14 7053737, at *8 (Dec. 19, 2017). Finast argues that Shorehaven had exclusive control at the time of the incident and that since Marsh was not at the premises during the winter storm, he could not have inspected the work of Shorehaven at that time and thus Shorehaven was in exclusive control of the dangerous condition. Even if exclusive

control is determined at the time of the incident, the court finds that Marsh and therefore Finast had "some control." Further, although Finast claims that Marsh's testimony that he had "some control" does not "absolve Shorehaven's exclusive control of the situation," the court finds that Marsh's ability to express dissatisfaction and to inspect and direct Shorehaven's work, and to fire Shorehaven compels the court's conclusion that Shorehaven did not have exclusive control of the dangerous condition.

Although the crossclaim plaintiff offered evidence of possession and control, it failed to prove, by a fair preponderance of the evidence, that the control was exclusive, that is, that Shorehaven had "exclusive control over the dangerous condition that [gave] rise to the accident." *Pellecchia v. Connecticut Light & Power Co.*, supra, 139 Conn. App. 767, 775. Since the evidence is insufficient on this element, the court need not address the remaining elements.

The plaintiff has the burden to prove, by a preponderance of the evidence, each of the elements of common law indemnification. The court finds that the crossclaim plaintiff has not proven its claim for indemnification and the court therefore finds in favor of the crossclaim defendant Shorehaven on the cross complaint and judgment shall therefore enter in favor of the crossclaim defendant Shorehaven.

It is so ordered this 24th day of May, 2024.

Jongbloed, J.