IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ROBIN L. CUPP, Plaintiff	:	NO. 07 – 02,744
vs.	:	
	:	CIVIL ACTION - LAW
CEDAR SHOPPING CENTER, INC. and HRI INCORPORATED, Defendants	:	
vs.	:	
LOYAL PLAZA ASSOCIATES, L.P., Additional Defendant	:	Motion for Summary Judgment

OPINION AND ORDER

Before the Court is a motion for summary judgment filed by Defendant HRI Incorporated (hereinafter "HRI") on July 10, 2008. Argument on the motion was heard August 29, 2008.

According to the Complaint, Plaintiff suffered injuries when she fell on ice in the parking lot of a shopping plaza owned by Defendant Cedar Shopping Center, Inc. (hereinafter "Cedar") which ice "was a result of the compiled snow melting throughout the day and refreezing as the temperature dropped in the afternoon." The parking lot was the subject of a contract to perform snow and ice removal by HRI. HRI then filed a cross-claim against Cedar, Cedar filed a cross-claim against HRI, HRI filed a third-party complaint against Loyal Plaza Associates, L.P. (hereinafter "Loyal Plaza")[1], and Loyal Plaza then filed a cross-claim against HRI. In the instant motion for summary judgment, HRI contends (1) it is entitled to judgment as a matter of law against Cedar and Loyal Plaza because the contract for snow and ice removal specifically provides that HRI will not be responsible for any accidents occurring as a result of melting snow and ice from stockpiled snow mounds which refroze after HRI has left the site, and (2) it is entitled to judgment as a matter of law against Plaintiff because it was not a "possessor of land" and thus had no duty to Plaintiff.

With respect to the first claim, that the referenced contract provision entitles HRI to judgment as a matter of law, the other defendants contend the motion is pre-mature as discovery may reveal that Plaintiff's fall was not the result of "the compiled snow melting throughout the day and refreezing as the temperature dropped in the afternoon", but, rather, other possible negligence of HRI in performing its snow-removal duties, and that for such other negligence HRI might be held responsible under another provision of the contract. The Court agrees that the possibility that the discovery process might reveal such other factual basis for a claim against HRI renders the instant motion premature.[2]

With respect to the second claim, that HRI was not a possessor of land and thus had no duty to Plaintiff, in applying the general rule that one who employs an independent contractor is not liable for the physical harm caused to another by an act or omission of the contractor, courts have noted that "an independent contractor is in possession of the necessary area occupied by the work contemplated under the contract, and his responsibility replaces that of the owner who is, during the performance of the work by the contractor, out of possession and without control over the work or the premises". Mentzer v. Ognibene, 597 A.2d 604, 610 (Pa. Super. 1991); Motter v. Meadows Ltd. Partnership, 680 A.2d 887 (Pa. Super. 1996). Anticipating HRI's argument that its crews had left the parking lot prior to the accident and thus the accident was not "during the performance of the contract", the Court notes the following statement of the Court in Mentzer:

> The foregoing principles are well-grounded in reason. They recognize that the owner who has entrusted the responsibility for the work to a qualified contractor justifiably depends upon the contractor's expertise. The owner relinquishes control to the contractor and should not be held liable for harm resulting from unforeseen risks arising from the ordinary negligence of the contractor.

Mentzer v. Ognibene, *supra* at 610. The Court believes that "during the performance of the contract" cannot, consistent with these principles, be read to mean literally only while the work is actually being performed, but rather, encompasses some period of time surrounding the

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[1] Cedar denied ownership of the shopping plaza and claimed that Loyal Plaza actually owned such.

[2] The Court notes that in addition to the allegation that Plaintiff slipped on ice which "was a result of the compiled snow melting throughout the day and refreezing", the Complaint also contains a more general allegation that Plaintiff's injuries were caused by the negligence of Defendants in various general ways, which allegation could properly be supplemented after discovery to include other theories.

actual work, that period depending upon the facts of each case.[3] Therefore, HRI's claim that it was not a possessor of the land and had no duty to Plaintiff is without merit and HRI is not entitled to judgment as a matter of law.

ORDER

AND NOW, this 19th day of September 2008, for the foregoing reasons, the motion for summary judgment is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

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Hon. Dudley N. Anderson

[3] This conclusion appears to be supported by dicta in Harvey v. Rouse Chamberlin, Ltd., 901 A.2d 523 (Pa. Super. 2006). There, a company which had been hired to remove snow from certain streets claimed it was not a possessor of the land. Although determining that the claim was moot, after finding that the company was an independent contractor the court noted the "well-established principle that "[a]n independent contractor is in *possession* of the necessary area occupied by the work contemplated under the contract… ." Harvey, *supra* at 527, n. 4 (quoting Motter v. Meadows Ltd Partnership, 680 A.2d 887, 890 (Pa. Super. 1996)(emphasis added and citation omitted)).