

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

-----X

PIXLEY DEVELOPMENT CORP.,

Index No: 811079/16

Plaintiff,

v.

ERIE INSURANCE COMPANY and
CANDY APPLE CAFÉ,

Defendants.

-----X

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION**

Jennifer A. Ehman, Esq.
HURWITZ & FINE, P.G.C.
Attorneys for Defendants,
ERIE INSURANCE COMPANY and
CANDY APPLE CAFÉ
1300 Liberty Building
Buffalo, New York 14202
(716) 849-8900

PRELIMINARY STATEMENT

Defendants, ERIE INSURANCE COMPANY (“Erie”) and CANDY APPLE CAFÉ (“Candy Apple”) (collectively, “Defendants”), submit this Memorandum of Law in opposition to Plaintiff, PIXLEY DEVELOPMENT CORP.’s (“Pixley”) motion for summary judgment, and in support of their cross-motion to dismiss Pixley’s Complaint against them in its entirety. Defendants incorporate the Affirmation of Jennifer A. Ehman, affirmed April 27, 2017 (“Ehman Aff.”), and the exhibits attached thereto, and the exhibits attached to the Affirmation of Brenna Gubala (“Gubala Aff.”).

At the onset, it must be highlighted that Pixley seeks no relief as to Candy Apple in its motion for summary judgment. The relief sought is solely as to Erie, Candy Apple’s insurer. Pixley claims additional insured status pursuant to the policy of insurance Erie issued to Candy Apple relative to a lawsuit commenced against Pixley by Jason Johnson seeking recovery for injuries he allegedly sustained as a result of a February 5, 2014 slip and fall in the parking lot of Pixley Plaza, located at 81 Buell Street, Akron, New York. Pixley also claims that “Erie owes coverage to Pixley based upon the indemnification provision in the agreement between Pixley and Candy Apple.”

Pixley is not entitled to additional insured status relative to this loss. The Erie policy is clear that coverage will only be afforded to Pixley for “liability arising out of the ownership, maintenance or use of that part of the premises leased” to Candy Apple. Candy Apple operated a restaurant in Pixley Plaza. The facts developed in the underlying action establish that Johnson was not injured on “that part of the premises leased” by Candy Apple or due to Candy Apple’s failure to maintain said area. Instead, he allegedly sustained injury in the parking lot, which was owned and maintained by Pixley, due to Pixley and its own contractor’s alleged failure to properly clear snow and ice from the lot. Where Pixley explicitly agreed to maintain the parking lot at

Pixley Plaza, and where Pixley was paid an additional fee to do so, Pixley should not now be permitted to shift responsibility for the claimed accident that occurred on its own area of the premises due to its own alleged acts or omissions.

Moreover, with regard to any claimed entitlement to coverage based upon the indemnification provision in the Lease, Erie was not a party to the Lease, and no claims can be asserted against Erie directly based upon same. To the extent that this claim is actually an attempt to obtain a ruling on the enforceability of the contractual indemnification provision in that Lease as to Candy Apple, we note that such relief would be duplicative of the cross-claims Pixley asserted against Candy Apple in the earlier filed underlying action, and Pixley has not, and cannot, establish the necessary requirement of negligence on the part of Candy Apple in order to trigger that provision.

Accordingly, based upon the foregoing, Pixley's motion for summary judgment as to Erie must be denied, and Erie's cross-motion to dismiss Pixley's Complaint in its entirety must be granted.

STATEMENT OF FACTS

A. Background

Jason Johnson ("Johnson") allegedly sustained injury on February 5, 2014, when he slipped and fell on ice in the parking lot at Pixley Plaza, located at 81 Buell Street, Akron, New York (the "premises"). (See Gubala Aff., Exhibit D).

As a result of injuries allegedly sustained, he commenced a lawsuit in Supreme Court, Erie County, captioned *Jason Johnson v. Pixley Development Corp. v. Candy Apple Café*, under index number 809681/2015 ("the Underlying Action").

Johnson testified at his deposition that on the day of the loss he had difficulty walking in the parking lot because four to five inches of snow were on the ground, and the back parking lot had not been plowed. (Ehman Aff. **Exhibit C**, pg. 33-34). The accident occurred in the parking lot, less than six feet from Johnson's parked truck, and not in the immediate vicinity of Candy Apple's rear door. (Id., pg. 45, lines 14-20). Johnson testified:

- Q. And how many steps did you take from the ramp of the trailer until you slipped?
- A. I don't know exactly. I'm six foot tall and I didn't hit the ramp so I would assume it would be five to six feet.
- Q. And when you say the ramp, the ramp of your truck?
- A. The ramp of my truck. I did not hit that so I would believe it would be that part.
- Q. And for clarification then would you have been walking at that point that you slipped were you walking on the surface of the back delivery area?
- A. Yes.
- Q. Were you on the ramp that goes up to the back door of Candy Apple?
- A. No.

(Ehman Aff., **Exhibit C**, pg. 46 line 12 to pg. 47 line 5).

Pixley's owner, John Lotz, testified at a deposition in the Underlying Action that Pixley retained J and C Landscaping ("J and C") to perform snow and ice removal at the premises. (Ehman Aff, **Exhibit E**, pg. 50). J and C's contract provided that it would clear snow from the premises every time one inch of snow accumulates, and would apply salt upon Pixley's request. (id. pg. 51-53).

Mr. Lotz testified that J and C was responsible for clearing snow and ice from the rear parking lot where Johnson allegedly fell:

- Q. Per the contract is J and C Landscaping required to plow both the front parking spot and the rear delivery area of 81 Buell Street?

A: Yes.

(Ehman Aff., **Exhibit E**, pg. 62, lines 9-14).

Mr. Lotz was shown the section of the Lease obligating Pixley to remove snow from the “common areas” of the premises. Mr. Lotz testified that the “common area” included the rear parking lot where deliveries were made to the stores:

Q. What is your idea of the common area at 81 Buell Street?

A. You're just talking about A?

Q. I'm actually asking you about Subsection B where it states Common Area Maintenance Charges and I asked you what is your understanding of the common area at 81 Buell Street?

A. That's the parking lot in the back, the whole parking area.

Q. So that would be the parking lot in the front?

A. And the back and all the way around.

Q. Just to be clear the parking lot in the front where customers park and also the delivery area in the back?

A. Yep.

(Ehman Aff., **Exhibit E**, pg. 73 lines 6-22).

Mr. Lotz later reiterated that J and C was responsible for clearing snow from the delivery area:

Q. I'm asking you in the back of the building where is the common area?

A. In the delivery area people go out and in in the back of the store.

Q. Who does the snow plowing and ice removal in the common areas in the back of the building?

A. J and C but they have the responsibility to keep it clear for their deliveries.

Q. So J and C has responsibilities to clear snow and ice in the delivery area, correct?

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.