SUPERIOR COURT OF NEW JERSEY
CAPE MAY-LAW DIVISION

Kim Walter,

Plaintiff

v.

City of Ocean City et als

Defendants

DOCKET NO.: CPM L 485-12

ORDER

THIS MATTER having come before the Court on motions filed Erin Thompson, Esquire, attorney for Defendant City of Ocean City and John Atkin, Esquire, attorney for Defendant Harleysville Insurance Company and First Night Ocean City, Inc. ; and the Court having heard argument and having considered the papers submitted; and for good cause shown;

IT IS ON THIS 7th day of March 2014, ORDERED that

1. The City of Ocean City's motion for summary judgment dismissing any and all claims against it is granted.
2. HIC's motion for summary judgment declaring it has not duty to cover and/or indemnify the City of Ocean City is denied.

FURTHER ORDERED that a copy of this Order be served on all counsel within seven (7) days.

J. Christopher Gibson, J.S.C.

Opposed

Memorandum of Decision is attached.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: Joseph C. Liguori, Esquire
Erin Thompson, Esquire
John Atkin, Esquire

CASE:
DOCKET NO. Walter v City of Ocean City et al
CPM L 485-12

NATURE OF APPLICATION: DEFENDANT THE CITY OF OCEAN CITY'S MOTION FOR SUMMARY JUDGMENT AND THIRD-PARTY DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

MEMORANDUM OF DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The Complaint in this matter was filed on July 5, 2012. The discovery end date was December 6, 2013. The discovery end date has been extended three times before. Arbitration is scheduled for December 19, 2013.

The instant matter arises from a slip and fall purported caused by snow and ice on the Ocean City Boardwalk occurring on December 31, 2010. Plaintiff was on the boardwalk to view the fireworks display, which was part of the first night celebration that is traditionally held each year.

Defendant the City of Ocean City moves for summary judgment dismissing any and all claims against it with prejudice. And Third-Party Defendant Harleysville Insurance Company cross-moves to dismiss any and

all claims against it with prejudice. The Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

I. SUMMARY JUDGMENT

R. 4:46-2(c), governing motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Id. (citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Id. (citations omitted).

In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as

that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

II. NEW JERSEY TORT CLAIMS ACT

Generally, claims against public entities are governed by the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:4-1, *et seq.* The TCA provides that:

> [a] public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> > (a) a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
> >
> > (b) a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

N.J.S.A. 59:4:2.

DEFENDANT CITY OF OCEAN CITY'S MOTION FOR SUMMARY JUDGMENT

Defendant the City of Ocean City (Ocean City) maintains it is entitled to summary judgment dismissing any and all claims against with prejudice.

I. COMMON LAW SNOW REMOVAL IMMUNITY

Ocean City maintains it is entitled to summary judgment pursuant to the doctrine of common law immunity for municipal snow removal activities.

Ocean City provides common law immunity shields a municipality for negligence from snow removal. Miehl v. Darpino, 53 N.J. 49 (1969). Ocean City directs that a municipality cannot be required to "broom sweep all of the traveled portion of the streets, driveways, and sidewalks where natural snow fall has been distributed by any removal of street snow." Id. Ocean City notes our Supreme Court has stated relief from fallen snow does not eliminate all danger of accident but the public benefit arising from snow removal far outweighs any detriment that may accompany such act. Id.

Ocean City states the Miehl decision was not abrogated or limited by the enactment of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:4-1, *et seq.* See Rochinsky v. State of N.J., Dept. of Transp., 110 N.J. 399 (1988); Farias v. Twp. of Westfield, 297 N.J. Super. 395 (App. Div. 1997)(holding a

municipality was immune under Miehl from liability for injuries sustained when the plaintiff fell on a patch of ice on a public sidewalk because the failure to properly salt and sand the sidewalk was not sufficiently distinguishable from snow removal); Lathers v. Twp. of West Windsor, 308 N.J. Super. 301 (App. Div. 1998)(holding common law snow removal immunity applied to claims for alleged negligence of employees in allowing snow piled adjacent to a sidewalk to melt and refreeze). OC admits common law snow removal immunity permits an action based on conduct so egregious that its insulation from liability would be inconsistent with public policy. Rochinsky v. State of N.J., Dept. of Transp., supra.

Ocean City provides the instant matter involves claims it negligently removed snow and ice from the Ocean City Boardwalk. Even assuming it was negligent in the removal of ice and snow, Ocean City argues it is not liable under common law immunity for snow removal.

As such, Ocean City requests the Court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

II. TORT CLAIMS ACT – DANGEROUS CONDITION

Ocean City maintains it is entitled to summary judgment dismissing any and all claims against it with prejudice under the TCA because the alleged failure to remove snow and ice did not create a dangerous condition.

Ocean City asserts immunity for public entities is the rule rather than the exception. Flehr v. City of Cape May, 159 N.J. 532, 539 (1999). Ocean

City indicates the TCA directs that a public entity may be liable for injuries caused by a condition of its property if: (1) the property was in a dangerous condition; (2) the injury was proximately caused by the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred; and (4) either a negligent or wrongful act or omission of the public entity created the condition or a public entity had actual or constructive notice of the dangerous condition for a sufficient time to protect against the dangerous condition. N.J.S.A. 59:4-2. Furthermore, liability will not attach unless the action or inaction of the public entity is palpably unreasonable. Id.

In order for a public entity to be liable for injuries, Ocean City provides the condition of the property must pose a substantial risk of injury. Wilson v. Jacobs, 334 N.J. Super. 640, 648 (2000). Ocean City states public entities are not liable for conditions that are minor, trivial, or insignificant. Pollyard v. Terry, 160 N.J. Super. 497, 509 aff'd, 75 N.J. 547 (1978).

Ocean City provides the Complaint claims it failed to remove ice and snow from the Ocean City Boardwalk thereby creating a dangerous condition. Ocean City provides its employees did clear the boardwalk the night before the accident. Ocean City states Plaintiff testified at deposition there was one big path plowed down the middle of the boardwalk and that noticed there were patches of ice but was unable to give an exact location as to where the accident occurred. Ocean City maintains Plaintiff has failed to produce any

facts supporting the conclusion the area at issue constituted a dangerous condition.

Ocean City states the purported existence of snow and ice on the Ocean City Boardwalk, by itself, is insufficient to constitute a dangerous condition under the TCA. Ocean City provides the cause of Plaintiff's fall was her own negligence. As such, Ocean City requests the Court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

III.TORT CLAIMS ACT – NOTICE

Ocean City maintains it is entitled to summary judgment dismissing any and all claims against it with prejudice under the TCA because it had neither actual nor constructive knowledge of the purported dangerous condition.

Even assuming there was a dangerous condition, Ocean City states that in order to establish liability under the TCA, Plaintiff must show it "had actual knowledge of the existence of the condition or knew or should have known of its dangerous character." N.J.S.A. 59:4-3(a). Ocean City provides Plaintiff must establish the condition existed for such a period of time and was of such an obvious nature that the public entity, through the exercise of due care, should have discovered the condition and its dangerous character. Norris v. Borough of Leonia, 160 N.J. 427, 447 (1999). Ocean City notes a history of similar incidents or complaints may serve to establish such notice. Carroll v. New Jersey Transit, 366 N.J. Super. 380, 389 (2004).

Ocean City asserts Plaintiff has failed to establish any actual or constructive notice on the part of the City of Ocean City. Ocean City notes its Public Works' Daily Attendance Logs, attached as its Exhibit H, show that it performed snow removal services on the boardwalk on both December 30, 2010 and December 31, 2010. Ocean City argues that even if a dangerous condition existed, it could not have had actual or constructive notice of such condition.

As such, Ocean City requests the Court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

IV. TORT CLAIMS ACT – EMPLOYEE LIABILITY

Ocean City maintains it is entitled to summary judgment dismissing any and all claims against it with prejudice under the TCA because its employees are not liable for Plaintiff's injuries.

Ocean City provides a public entity is not liable for injuries resulting from the act or omission of a public employee where the employee is not liable. N.J.S.A. 59:2-2. Ocean City states a public employee will not be liable for the failure to make an inspection or the negligent inspection of any property. N.J.S.A. 59:3-7.

Ocean City indicates its Public Works employees removed snow on the boardwalk in the days leading up to the events in question. OC notes Plaintiff admitted the area where she fell was plowed.

As such, Ocean City requests the Court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

V. TORT CLAIMS ACT – PALPABLY UNREASONABLE

Ocean City maintains it is entitled to summary judgment dismissing any and all claims against it with prejudice under the TCA because its conduct was not palpably unreasonable.

Ocean City provides a public entity is not liable under the TCA unless its actions or inactions were palpably unreasonable. Ocean City states the term palpably unreasonable implies behavior that is patently unacceptable under any circumstances and must be so obvious that no prudent person would approve of the public entity's course of action or inaction. Holloway v. State, 125 N.J. 386, 403-04 (1991). As previously outlined, Ocean City notes it had no actual or constructive notice of the dangerous condition at issue. And considering that its employees performed snow removal services on December 30, 2010 and December 31, 2010, Ocean City asserts it did not act in a palpably unreasonable matter.

As such, Ocean City requests the Court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

VI. TORT CLAIMS ACT – PAIN AND SUFFERING

Ocean City maintains it is entitled to partial summary judgment under the TCA barring Plaintiff from recovering damages for pain and suffering.

Ocean City notes the TCA provides no award for damages based on pain and suffering is permitted against public entities and public employees. N.J.S.A. 59:9-2(d). However, this bar does not apply in cases involving permanent loss of a bodily function or permanent disfigurement or dismemberment. Id.

Ocean City directs that in order to recover damages for pain and suffering, a claimant must meet the threshold requirement for permanent disfigurement or loss of a bodily function. Feinberg v. State DEP, 137 N.J. 126, 133 (1994)(citing Reale v. Twp. of Wayne, 132 N.J. Super. 126, 133 (1994)(L. Div. 1975)). Failure to meet this threshold will bar recovery for anguish, fear, anger, apprehension, and humiliation. Ayers v. Jackson Twp., 106 N.J. 557 (1987). Defendant asserts this threshold must be demonstrated with objective medical evidence. Brooks v. Odom, 150 N.J. 395, 402-03 (1997).

Ocean City provides subjective feelings of discomfort are not recoverable under the Act. Brooks, supra, at 403. And no matter how painful and debilitating, temporary injuries are not recoverable. Id. Ocean City states examples of injuries meeting this threshold are blindness, debilitating tremors, paralysis, and loss of taste or smell. See Gilhooley v. Cnty. Of Union, 164 N.J. 533, 541 (2000).

Ocean City indicates it is evident Plaintiff does not satisfy the threshold requirement under the TCA. Plaintiff did not sustain a loss of bodily function that is substantial. While Ocean City notes Plaintiff's wrist

fracture did require surgery, there is no permanent hardware in either wrist. Ocean City provides Plaintiff's complaints of achiness and lack of strength in both wrists have not restricted her from riding her bike or working full time. Furthermore, Ocean City directs that Dr. Cristini conducted an independent medical examination of Plaintiff and determined that no permanent orthopedic impairment or disability had resulted from her fracture of the distal radius.

As such, Ocean City requests the Court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

OPPOSITION

Plaintiff maintains common law immunity does not insulate OC in the instant matter.

Plaintiff indicates our Supreme Court, in Miehl v. Darpino, 53 N.J. 49 (1969), focused on public streets and highways. The Supreme Court noted municipalities could not be expected to plow, salt, and sand all the areas of all streets. Plaintiff provides this scenario is not at issue here. And Plaintiff directs the Court to Bligen v. Jersey City Housing Auth., 131 N.J. 124 (1993), where our Supreme Court stated snow removal immunity was limited to the concerns implicated in snow removal from public roadways.

Plaintiff provides Ocean City merely had to plow, salt and sand six blocks of the boardwalk in anticipation of the first night, which thousands of guests were invited to the boardwalk for. Plaintiff states the boardwalk was

unobstructed by vehicles and traffic and should not be considered an onerous area to clear given the nature of the events planned and the amount of people involved.

Plaintiff asserts it is undisputed Ocean City was responsible for the maintenance of the boardwalk and was responsible for the snow removal and salting/sanding of the area at issue. Plaintiff directs that the failure to properly sand/salt the area permitted ice to develop. Plaintiff provides the ice constitutes a dangerous condition pursuant to N.J.S.A. 59:5-2.

Plaintiff states Ocean City was aware there several feet of snow had accumulated on the boardwalk and that thousands of people were expected for first night events. Plaintiff provides Donald Pileggi testified he was aware of the possibility of ice developing and was instructed to perform snowing and salting in the area of 8th street to prevent ice on the boardwalk.

Plaintiff indicates OC's reliance on N.J.S.A. 39:3-2 and N.J.S.A. 59:39-7 is misplaced. Plaintiff provides the aforementioned sections pertain to inspections of private property. See, e.g., Chatham v. Hall, 128 N.J. 394 (1992). Plaintiff states those sections do not affect a public entity's liability for dangerous conditions or negligent acts or omissions regarding public property. Furthermore, Plaintiff asserts the case cited by OC, Kenney v. Scientific, Inc., 204 N.J. Super. 228 (L. Div. 1985), has to do with the disposal of hazardous waste at a landfill and is inapplicable to the instant matter.

Plaintiff asserts a jury could find Ocean City acted in a palpably unreasonable manner given the circumstances. Plaintiff directs that Ocean City was aware of the weather conditions and the danger ice posed. See Deposition of Joseph Lehman, 15:2-6. Plaintiff notes Ocean City was aware thousands of people were expected for the events on the boardwalk. See Deposition of Michael Walsh, 24-25. Plaintiff provides Ocean City failed to take any measures to prevent ice from developing on the boardwalk. Plaintiff provides the failure to properly salt and sand the area of the boardwalk between 8th Street and 14th Street, when thousands of people were expected for a large event, was palpably unreasonable conduct.

Finally, Plaintiff contends she has suffered permanent loss of function as well as permanent disfigurement. Plaintiff notes Dr. Brenkel opined that Plaintiff's injuries have caused multiple permanent limitations which result in limited range of motion, premature posttraumatic arthritis, and chronic aching pain, stiffness, and swelling. Furthermore, Plaintiff contends she has lost strength in both wrists and can no longer open jars or grip certain items. Plaintiff asserts the loss of strength in her hands cannot be deemed minor as it has affected her entire livelihood.

As such, Plaintiff requests the Court deny Ocean City's motion for summary judgment dismissing any and all claims against it with prejudice.

REPLY

Ocean City replies to Plaintiff's opposition that the testimony in this matter has demonstrated the area in the vicinity of Plaintiff's accident was plowed. OC states Plaintiff testified she was uncertain of the exact location where she fell but that the area where she fell was plowed.

Ocean City states Plaintiff's interpretation of common law immunity under Miehl is misguided. Ocean City reiterates that some snow and ice removal is better than none. Miehl v. Darpino, supra, 53 N.J. at 54. Ocean City provides the instant matter is analogous to Lathers v. Twp. of West Windsor, supra, 308 N.J. Super. 301 where the Appellate Division affirmed that common law immunity extended to the alleged negligence of employees in allowing snow piled adjacent to a sidewalk to melt and refreeze.

Ocean City reiterates prior complaints regarding the allegedly dangerous condition do not exist in this matter. Additionally, Ocean City states it performed snow removal activities just days before so it could not have had actual or constructive notice of a dangerous condition which arose in a single day.

Ocean City directs that the failure to properly salt and sand is included under common law immunity for snow removal activities. No matter how effective, or ineffective, its snow removal efforts were, Ocean City provides its conduct cannot be construed as so egregious as to bypass common

law immunity. Similarly, Ocean City directs that for the same reasons, its conduct cannot be considered palpably unreasonable under the TCA.

Lastly, Ocean City argues the probability of post traumatic arthritic changes such as aching pain, stiffness, soreness, swelling, and loss of strength is not sufficient to meet the pain and suffering threshold under the TCA. Ocean City asserts a healed fracture, without objective evidence of a substantial impairment, is not a permanent impairment. Ocean City notes Plaintiff continues to work full time as the Director of Client Services for Senior Helpers without any light duty restrictions. And Ocean City states scarring in and of itself is not a permanent injury unless it is so severe it results in pity or scorn.

As such, Ocean City requests the Court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

THIRD-PARTY DEFENDANT HARLEYSVILLE INSURANCE COMPANY'S CROSS-MOTION FOR SUMMARY JUDGMENT

Third-Party Defendant Harleysville Insurance Company (HIC) opposes Ocean City's motion for summary judgment and moves for summary judgment in its favor declaring it has no duty to cover and/or indemnify the City of Ocean City is denied.

HIC admits Ocean City is an additional insured on the policy HIC issued to First Night Ocean City, Inc. (First Night). HIC maintains that the plain terms of the policy provide coverage only for the acts or omissions of

First Night and only when such acts or omissions occur in the performance of First Night's operations.

HIC states Ocean City bears the burden of establishing that it is covered by the HIC Policy. See, e.g., Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996)(citing Tauriello v. Aetna Ins. Co., 14 N.J. Super. 530, 532 (1951)). HIC asserts the language of an insurance policy should be given its ordinary meaning. Nav-its v. Selective Ins. Co., 183 N.J. 110, 118 (2005). HIC directs that in the absence of ambiguity courts should not strain to interpret a policy to support the imposition of liability.

The HIC Policy contains Endorsement CG 2026 (07/04), which named Ocean City as an additional insured. Endorsement CG 2026 provides, in pertinent part, that:

> Who Is An Additional Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule [City of Ocean City], but only with respect to liability for "bodily injury", "property damage", or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions or the acts or omissions of those acting on your behalf:
> A. In the performance of ongoing operations; or
> B. In connection with your premises owned by or rented to you.

HIC clarifies the terms "you" and "your" are defined as referring to the named insured First Night.

HIC maintains Ocean City, as an additional insured, is entitled to coverage only for liability arising from bodily injury caused in whole or in part by First Night's acts or omissions or the acts or omissions of those acting

on First Night's behalf in the performance of ongoing operations or concerning the area rented by First Night. The HIC policy does not provide coverage to Ocean City for its own acts or omissions.

HIC indicates the instant suit concerns claims by Plaintiff seeking to impose liability on OC for its own independent negligence. Specifically, HIC provides Plaintiff seeks to impose liability based on Ocean City's failure to properly remove snow and ice from its property. HIC notes Plaintiff has voluntarily dismissed the negligence claims originally asserted against First Night.

HIC asserts OC's employees were not acting on behalf of First Night when they removed snow and ice from the boardwalk for two reasons. Primarily, First Night had no duty to remove snow and ice from the boardwalk. Second, First Night neither entered into any agreement with OC regarding snow and ice removal nor requested OC to perform snow and ice removal services in the relevant area.

HIC directs First Night had no duty to remove snow and ice from the boardwalk as a matter of law. Pote v. City of Atlantic City, 411 N.J. Super. 354 (App. Div.), cert. denied, 202 N.J. 43 (2010). HIC states First Night had no reason to know people would be travelling from Fourteenth Street, where no parking was advertised, to its events. And HIC directs the Court to the reasoning of the Appellate Division in Schafer v. Paragano Custom Building, Inc., Docket No. A-2512-08T3, 2010 N.J. Super. Unpub. LEXIS 356 (App. Div.

Feb. 24, 2010), cert. denied, 202 N.J. 45 (2010), where identical language was construed to limit coverage to liability caused by the acts or omissions of the primary insured and its agents.

HIC notes Ocean City provided in its interrogatory responses that "Ocean City employees did clear the Boardwalk at the request of First Night of Ocean City for the events of the evening." See Ocean City Interrogatory Responses, at *6. HIC states there is no evidence of any contract or agreement between First Night and Ocean City to perform snow removal services. HIC directs that Ocean City has not cited to, and in fact has not provided, any evidence to support this assertion.

HIC argues that even if Ocean City was acting on behalf of First Night when it removed snow and ice from the rental premises, it was not acting on behalf of First Night when it removed snow and ice from other parts of the boardwalk. HIC notes Plaintiff's accident occurred in the vicinity of Tenth Street. HIC maintains Ocean City cannot be deemed to have been acting on its behalf in the performance of ongoing operations or in connection with the rental premises.

Finally, HIC directs that Ocean City's reliance on the Certificate of Insurance as a basis for coverage is misplaced. HIC notes the Certificate of Insurance provides:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES

NOT AMEND, EXTEND, OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW

Therefore, HIC asserts the Certificate of Insurance, which is the only argument Ocean City presents in favor of its claim for coverage, is without merit.

OPPOSITION

Ocean City opposes HIC's cross-motion for summary judgment dismissing any and all claims against it with prejudice. Ocean City directs that all qualifying conditions have been met to trigger additional coverage for OC under the HIC Policy.

Ocean City notes nothing in the policy requires First Night to expressly or affirmatively request it to perform anything in furtherance of First Night's operations. Ocean City provides it was acting on First Night's behalf when it removed snow and ice from the boardwalk. Ocean City submits that payroll documentation shows it paid employees overtime in order to get the boardwalk clear in time for First Night events. Ocean City states much of First Night's activities take place on the boardwalk, including the fireworks display. Ocean City indicates that, regardless of whether Plaintiff or anyone else purchased tickets for the show, anyone could participate by watching the fireworks event put on by First Night. Indeed, Plaintiff testified the only reason she was on the boardwalk that night was to watch the fireworks.

Ocean City asserts First Night was using the boardwalk as part of its show. OC provides the boardwalk gave people access to the Music Pier where First Night activities were taking place. Ocean City states the large area the fireworks display encompassed made it reasonable to expect people to watch from many locations on the boardwalk. Ocean City argues that without clearing the boardwalk generally, as opposed to just in the vicinity of the Music Pier, no one would have been able to attend First Night events at all.

As such, Ocean City requests the Court deny HIC's motion for summary judgment dismissing any and all claims against it with prejudice.

DISCUSSION

I. THE CITY OF OCEAN CITY

The Court finds Ocean City is entitled to the relief requested pursuant to R. 4:46-2(c), Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), and Miehl v. Darpino, 53 N.J. 49 (1969).

The common law consistently recognized immunity for public entities from liability for injuries arising from snow-removal activities. Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 131 (1993). Such immunity was based primarily on the limitless liability that could be imposed on an entity, such as a state, county, or municipality that had the responsibility to clean up numerous streets and roadways. Id. The TCA did not abrogate common law immunity for snow removal activities. Rochinsky v. State of New Jersey Dep't of Transp. 110 N.J. 399 (1988).

In Amelchenko v. Freehold Borough, 42 N.J. 541 (1964), our Supreme Court held the State had a duty to use ordinary care to remove snow from a municipal parking lot within a reasonable time after a snow storm. Our Supreme Court stated "municipalities cannot be insurers of the public safety and the determination of priorities for snow removal 'is a matter of judgment committed under our system of government to the local authority and it should not be interfered with by the courts in a tort damage suit. Id. at 549.

There are limited exceptions to common law immunity from all weather related injuries. Courts should "assess the nature of the breach of duty by examining whether the municipality had used due care in light of the factual situation with which it was faced." Bligen v. Jersey City Hous. Auth., supra, 131 N.J. at 133 (citing Amelchenko, supra, at 551). In Bligen v. Jersey City Hous. Auth., supra, 131 N.J. at 134, our Supreme Court determined common law immunity did not apply based on the defendant's status as a public housing authority rather than a municipality. Therein, the Supreme Court noted the housing authority was not responsible for the removal of snow on a network of state and municipal roadways. Bligen, supra, at 134. Additionally, common law immunity may not where the conduct of the public entity amounted to a palpably unreasonable failure to warn of a dangerous condition unrelated to the snow removal activity). Rochinsky, supra, 110 N.J. at 415 n.7.

Unlike Bligen, the defendant herein is a municipality rather than a public housing authority. And while the accident occurred on a boardwalk rather than on a street or roadway, common law immunity for snow removal activities has been extended to surfaces other than roadways. See Farias v. Twp. Of Westfield, 297 N.J. Super. 395 (App. Div. 1997)(holding a municipality was immune under Miehl from liability for injuries sustained when the plaintiff fell on a patch of ice on a public sidewalk because the failure to properly salt and sand the sidewalk was not sufficiently distinguishable from snow removal); Lathers v. Twp. of West Windsor, 308 N.J. Super. 301 (App. Div. 1998)(holding common law snow removal immunity applied to claims for alleged negligence of employees in allowing snow piled adjacent to a sidewalk to melt and refreeze).

The Court notes the instant matter is distinguishable in that Plaintiff's injury occurred during her attendance of an event for which Ocean City expected people to attend, encouraged participation in, and had at least some involvement with. But the doctrine of immunity for snow removal activities recognizes that the imposition of liability for snow related injuries would require public entities to essentially "broom sweep" all areas traversed by the public. "The high cost of such an undertaking could make the expense of any extensive program of snow removal prohibitive and could result in no program or in an inadequate partial program." Miehl v. Darpino, 53 N.J. 49,

54 (1969). The factual underpinnings here do not fall into either of the narrow exceptions to immunity carved out by our Supreme Court.

Accordingly, Ocean City's motion for summary judgment dismissing any and all claims against it with prejudice is granted.

II. HARLEYSVILLE INSURANCE COMPANY

The Court finds HIC has not demonstrated it is entitled to the relief requested pursuant to R. 4:46-2(c) and the relevant policy language.

Pursuant to Endorsement CG 2026, which named Ocean City as an additional insured, Ocean City is entitled to coverage for liability arising out of the acts or omissions of First Night or the acts or omissions of those acting on First Night's behalf in the performance of First Night's ongoing operations or in connection with premises owned or rented by First Night.

In an unpublished opinion cited by HIC, the Appellate Division concluded the identical language in another of HIC's policies did not provide for coverage for a subcontractor involved in a construction accident. See Schafer v. Paragano Custom Building, Inc., Docket No. A-2512-08T3, 2010 N.J. Super. Unpub. LEXIS 356 (App. Div. Feb. 24, 2010), cert. denied, 202 N.J. 45 (2010). Therein, Paragano Custom Building, Inc. (Paragano) subcontracted a portion of the work on a residential renovation to K&D Builders and Carpenters, Inc. (K&D). K&D named Paragano as an

additional insured under its policy with HIC. The policy language was almost identical to the language at issue here.[1]

Paragano erected a scaffold during the course of the renovations. Kenneth J. Schafer, Sr., a principal of K&D, placed an A-frame ladder on top of the scaffold to reach the second floor window of the residence. While perched on the ladder, Schafer lost his balance and fell to his death. The Occupational Safety and Health Administration cited Paragano for improper construction of the scaffold and cited K&D for improperly placing a ladder on the scaffold.

The Appellate Division concluded the policy at issue did not cover Paragano for Paragano's own acts of negligence. Schafer v. Paragano Custom Building, Inc., supra, at *5. The Appellate Division stated:

> [t]he additional insured endorsement issued by [HIC] clearly states that Paragano is covered only as to liability caused by the acts or omissions of K&D Builders. It provides coverage for a claim asserted against Paragano for vicarious liability; it does not provide coverage for a claim against Paragano for its own direct negligence.

Id. at *6.

The Appellate Division's holding in Schafer is premised on the determination Paragano did not erect the scaffold at issue on behalf of K&D in the performance of K&D's ongoing operations. Herein, there is a factual issue as to whether Ocean City performed the snow removal services in

[1] The language at issue here includes additional language providing for the extension of coverage for acts or omissions by others acting on the primary insured's behalf "in connection with premises owned by [the primary insured].

question on behalf of First Night in the performance of its operations or in connection with its premises.

First Night draws large crowds to the Ocean City Boardwalk each year for its events at the Music Pier and to view the firework display. Due to the large number of attendees, Ocean City employees cleared an area extending beyond the immediate vicinity of the Music Pier. More extensive snow removal permitted better access to the Music Pier.

Furthermore, the fireworks display constituted one of First Night's operations. The fireworks display was visible beyond the immediate vicinity of the Music Pier. Clearing a sufficiently large area to permit attendees to safely view the fireworks display could be considered part of the same ongoing operations.

There is at least a factual issue as to whether Ocean City's snow removal activities were on behalf of First Night with regard to its premises or in the performance of ongoing operations. Accordingly, HIC's motion for summary judgment declaring it has not duty to cover and/or indemnify the City of Ocean City is denied.

CONCLUSION

The City of Ocean City' motion for summary judgment is opposed. The City of Ocean City has demonstrated it is entitled to the relief requested pursuant to R. 4:46-2(c), Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995),

and Miehl v. Darpino, 53 N.J. 49 (1969). The City of Ocean City's motion for summary judgment dismissing any and all claims against it is granted.

HIC's motion for summary judgment is opposed. HIC has not demonstrated it is entitled to the relief requested pursuant to R. 4:46-2(c) and the relevant policy language. HIC's motion for summary judgment declaring it has not duty to cover and/or indemnify the City of Ocean City is denied.

An appropriate form of Order has been executed. Conformed copies of that Order will accompany this Memorandum of Decision.

March 7, 2014

J. Christopher Gibson, J.S.C.