IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

REGINALD SPENCE,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. N10C-11-074 MJB**
	)	
	)	
LAYAOU LANDSCAPING, INC. a Delaware Corporation, MID-DEL HYDROSEEDING LLC, a Delaware Limited Liability Company	)	
	)	
	)	
Defendants.	)	

Submitted: October 1, 2013
Decided: October 31, 2013

Upon Defendant Mid-Del Hydroseeding, LLC's Motion for Summary Judgment
GRANTED.
Upon Defendant Layaou Landscaping, Inc.'s Motion for Summary Judgment
DENIED.

OPINION

Pilar G. Kraman, Esq., Young Conaway Stargatt & Taylor, LLP, *Attorney for Plaintiff Reginald Spence*, Wilmington, DE, 1000 North King Street, Wilmington, DE 19801

Richard D. Abrams, Esq., Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, *Attorney for Defendant Mid-Del Hydroseeding LLC*, 1220 North Market Street, Suite 3000, Wilmington, DE

David L. Baumberger, Esq., Chrissinger & Baumberger, *Attorney for Defendant Layaou Landscaping Inc*., Three Mill Road, Suite 301, Wilmington, DE 19806

BRADY, J.

I. INTRODUCTION

This lawsuit involves a negligence action brought by Reginald Spence ("Plaintiff") against Defendants Layaou Landscaping, Inc. ("Layaou") and Mid-Del Hydroseeding, LLC ("Mid-Del") (together "Defendants"), for alleged injuries Plaintiff sustained to his neck and back when he slipped and fell on December 21, 2009. Before the Court are two Motions for Summary Judgment, filed, respectively, by Layaou and Mid-Del. Layaou moved for summary judgment on June 10, 2013,[1] and Mid-Del moved for the same on July 12, 2013.[2] The Court heard oral argument from all parties on August 8, 2013, and deferred ruling on both Motions for Summary Judgment.[3] At a subsequent pre-trial conference, on October 1, 2013, the Court heard additional argument from all parties. This is the Court's decision. Layaou's Motion for Summary Judgment is **DENIED**, and Mid-Del's Motion for Summary Judgment is **GRANTED**.

II. BACKGROUND

A. Plaintiff's Fall

On the wintry morning of December 21, 2009, Plaintiff—a Delaware Transit Corporation ("DTC") employee at DTC's Georgetown, Delaware facility—drove to work. When he arrived, he observed that the front employee parking lot surface was "fair" and that "you could partially see blacktop and [there were] parts where you couldn't see [blacktop]."[4] Plaintiff parked in the DTC front employee parking lot around 9:00 a.m.[5] As he exited his car, Plaintiff's right foot came out from under him, causing him to fall and hit

[1]Def. Layaou Inc.'s Mot. for Sum. J. (June 10, 2013) (hereinafter "Layaou Mot.").
[2]Def. Mid-Del Hydroseeding, LLC's Mot. for Sum. J. (July 12, 2013) (hereinafter "Mid-Del Mot.").
[3]Super. Ct. Proceeding Worksheet (Aug. 9, 2013).
[4]Pl.'s Opposition to Mid-Del Mot., at ¶1 (Aug. 1, 2013).
[5]*Id*.

the pavement, despite the fact that Plaintiff was wearing military boots with treaded soles.[6] Plaintiff states that he fell because he stepped onto something slippery, specifically packed snow or ice on the pavement.[7]

B. 2007 and 2010 Contracts

In January 2007, Layaou and DTC entered into a three-year contract ("2007 Contract") for snow removal at DTC's Georgetown facility. The project manager for the 2007 Contract was Charles Simpson ("Simpson").[8] The 2007 Contract was operative at the time of Plaintiff's fall. The scope provision of the 2007 Contract that defines the areas for which Layaou must remove snow, as well as spread sand and salt, provides as follows:

> Work shall include, but not be limited to, snow removal, sanding and salting of all parking areas, entrances, driveways, sidewalks and entrances (pedestrian and vehicular) to DTC's bus maintenance facility located adjacent to the DelDOT Operations Building and parking lot, located at 534 North Bedford Street, Georgetown, DE, 19947. Areas to be cleared of snow include the entrance drive from Bedford Street, the front employee parking lot, and the entire parking area located to the north, east and west of the DTC Maintenance Building, including the areas around the bus wash and the entire fuel island (See attached picture).[9]

Layaou thereafter subcontracted its snow removal responsibilities under the 2007 Contract to Mid-Del ("Mid-Del Contract") sometime in 2008 and, as Mid-Del concedes, Mid-Del thereby "assumed Layaou's duties" under the 2007 Contract.[10]

In January 2010, DTC entered into another three-year contract with Layaou ("2010 Contract") that contained a slightly revised, but similar, scope provision, which provides as follows (substitutions underlined and new language bolded):

---

[6]*Id*. at ¶¶1-2.
[7]Plaintiff testified that he is unsure whether he slipped on ice or packed snow. Pl. Ex. 2 at 65, ln. 117 (Aug. 1, 2013).
[8]Simpson died in May 2009, at which point another project manager took over.
[9]Pl. Ex. 3, at 1 (Snow Removal Georgetown Operations Facility November 2006).
[10]Mid-Del Mot., at 2.

> Work shall include, but not be limited to, snow removal, sanding and salting of all parking areas, entrances, driveways, sidewalks and entrances (pedestrian and vehicular) to DTC's bus maintenance facility located adjacent to the DelDOT Operations Building and parking lot, located at 545 South Bedford Street **extended**, Georgetown, DE, 19947. Areas to be cleared of snow include the entrance drive from Bedford Street, **The DMV access road leading to DTC Paratransit bus lot entrance**, the front employee parking lot, and the entire parking area located to the north, east and west of the DTC Maintenance Building, including the areas around the bus wash and the entire fuel island (See attached picture).[11]

Although both the 2007 and 2010 Contracts state "See attached picture," no party has been able to produce any picture or drawing that can be identified as associated with the respective documents.

C. Yancey's Inconsistent, Sworn Testimony

Joseph Yancey, Jr., ("Yancey") is the Facilities Coordinator for DTC's Georgetown, Rehoboth, and Dover locations. On October 4, 2012, at Plaintiff's request, Yancey signed an affidavit in which Yancey swore that "[r]egardless of whether DelDOT plowed the [DTC] employee parking lot on occasions, Layaou Landscaping, Inc. has the ultimate responsibility under the [2007 and 2010] [C]ontract[s] and should have plowed, as necessary and applied sand and salt per the [2007 and 2010] Contract[s]."[12] Yancey was later deposed on April 18, 2013. At the deposition, Yancey indicated that he was initially hesitant to sign the affidavit because "it can be interpreted two different ways," without identifying the differing interpretations.[13] Almost immediately after acknowledging that the affidavit could be read two ways, when asked at his deposition "who is responsible for salting and sanding the areas where the [DTC] employees park," Yancey responded "Layaou."[14] Additionally,

[11]Pl. Ex. 5, at 1 (Snow Removal Georgetown Operations Facility November 2006).
[12]Pl. Ex. 6, at 1.
[13]*Id*. at 72-73.
[14]*Id*. at 74.

Yancey was shown an aerial photograph of the Georgetown facility[15] and testified that Plaintiff fell beyond the area for which Layaou, and derivatively Mid-Del, was responsible for snow removal.[16] However, Yancey was relying on someone directing him to where Plaintiff fell, stating "I don' know where exactly he fell. But if he fell outside of those lines, then that's not our responsibility . . . ."[17] Finally, Yancey explained that DTC's Georgetown property is shared between DTC and the Delaware Department of Transportation ("DelDOT"), and therefore "[m]aintenance of some portions of the facility were the responsibility of [DTC] and others were the responsibility of DelDOT."[18]

Thus, Yancey (at all times under oath) (1) first swore in his affidavit that Layaou, and by extension Mid-Del, had "the ultimate responsibility" to keep DTC's employee parking lot, where Plaintiff fell, free of snow under the 2007 Contract;[19] (2) then initially stated during his deposition that Layaou is responsible for salting and sanding the areas where DTC employees, including Plaintiff, park;[20] and (3) then later in his deposition testified that Plaintiff fell outside the area for which Layaou and Mid-Del was responsible.[21] Yancey's sworn testimony is extremely inconsistent.

D. Fred Layaou's Testimony

Fred Layaou ("Fred"), the Vice President of Layaou, was deposed on August 16, 2012.[22] At his deposition, Fred testified that during the first year of the 2007 Contract, Layaou plowed the front employee parking lot where Plaintiff fell.[23] Fred explained that

[15]Pl. Ex. 7, at 28-29.
[16]*Id*. at 82.
[17]*Id*.
[18]Layaou's Mot. at 2 (citing Ex. E, Yancey's deposition, at 28-29, 31-33, 37, 39-45).
[19]Pl. Ex. 6, at 1.
[20]Pl. Ex. 7, at 74.
[21]*Id*. at 82.
[22]Pl. Ex. 4.
[23]*Id*. at 18-20.

when the front employee lot was plowed, DelDOT employees, who share the facility with DTC, would "run [them] out of there,"[24] stating "we were stopped [from plowing the front employee lot] because of [the DelDOT] union."[25] Fred testified that Simpson, the project manager for the 2007 Contract, instructed Layaou to stop plowing the front employee lot because it was DelDOT's responsibility, and, as a result, Fred informed Mid-Del to not plow that area.[26] Plaintiff disputes whether Simpson gave this instruction, stating (1) Fred relies on "hearsay evidence from Simpson" who is now deceased,[27] and (2) Yancey, who replaced Simpson, "could not testify to . . . what Simpson may or may not have advised the Defendants because he was not involved in the negotiations for the 2007 Contract, nor did Simpson discuss with Yancey the terms of the 2007 Contract or any modifications thereto."[28] Fred was also asked at the deposition to mark on a satellite image Layaou's area of responsibility under the 2007 Contract.[29] Fred excluded the entire front employee parking lot from the area of responsibility.[30]

E. Pre-Trial Conference

As stated above, at a pre-trial conference on October 1, 2013, this Court heard additional argument from all parties. At the conference, all parties agreed that Mid-Del has never plowed the front employee lot where Plaintiff fell and that Fred instructed Mid-Del to not plow that area. Layaou indicated that Mid-Del assumed Layaou's responsibilities under the 2007 Contract after Layaou was "run out" by the DelDOT union members. Additionally, Mid-Del and Layaou repeatedly argued that if this Court finds there are issues of fact that

[24] *Id*. at 19.
[25] *Id*. at 38.
[26] *Id*. at 115-17.
[27] Pl.'s Opposition to Layaou's Mot., at 2.
[28] *Id*. at 3.
[29] *Id*. at 37-39; 46-47.
[30] Layaou Mot. Ex. C.

must be determined regarding the scope of the 2007 Contract, this Court, rather than a jury, should resolve those issues.

III. PARTIES CONTENTIONS

A. Layaou

In moving for summary judgment, Layaou contends it cannot be held liable for Plaintiff's injuries because Layaou did not owe a duty of care to Plaintiff. Layaou asserts, correctly, that "it is the scope of the undertaking, as defined in the contract, which gives shape to an independent contractor's duty in tort."[31] Thus, Layaou argues that any duty owed to Plaintiff is strictly through its contract with DTC, the 2007 Contract. Layaou contends that Plaintiff fell outside the area for which it was responsible to keep free of snow under the 2007 Contract, citing testimony from Yancey.[32] Layaou also relies on the alleged instruction given to Fred by Simpson, in which Simpson told Fred, on behalf of Layaou, now to plow the front employee parking lot. According to Layaou, because Plaintiff was injured in an area outside the scope of the 2007 Contract, it therefore owed no duty of care to Plaintiff and cannot be liable.[33] Accordingly, without owing a duty Layaou argues, summary judgment is appropriate.[34]

B. Mid-Del

Because Mid-Del was subcontracted by Layaou and assumed Layaou's duties under the 2007 Contract, Mid-Del reiterates the arguments made by Layaou, stating that any duty owed to Plaintiff by Layaou was strictly through the 2007 Contract,[35] and because Plaintiff

[31]*Brown v. F.W. Baird, LLC*, 2008 WL 324661, at *3 (Del. Feb. 7, 2008) (quoting *Thompson v. F.B. Cross & Sons, Inc*., 798 A.2d 1036, 1040 (Del. 2002)) (internal quotation marks omitted).
[32]Layaou Mot., at 2.
[33]*Id*.
[34]*Id*. at 4.
[35]Mid-Del Mot., at 1-2.

was injured in an area outside the scope of the 2007 Contract, Layaou owed no duty to Plaintiff, and therefore cannot be liable.[36] Therefore, Mid-Del argues, because Layaou owed no duty to Plaintiff through the 2007 Contract, Mid-Del, as a subcontractor that assumed Layaou's duties under the 2007 Contract, also did not owe a duty of care to Plaintiff, and therefore also cannot be liable.[37]

Mid-Del asserts two additional arguments not raised by Layaou. First, Mid-Del argues that "[i]n order to recover against Mid-Del, [Plaintiff] must show he was an intended third party beneficiary" under the Mid-Del Contract.[38] Mid-Del contends Plaintiff has failed to produce evidence that Mid-Del or Layaou intended the Mid-Del Contract to benefit Plaintiff or DTC employees in general. Therefore, according to Mid-Del, Plaintiff "does not have standing to bring a claim against Mid-Del."[39] Second, Mid-Del contends that the affidavit signed by Yancey—which indicated that "[r]egardless of whether DelDOT plowed the [DTC] employee parking lot on occasions, Layaou Landscaping, Inc. ha[d] the ultimate responsibility under the [2007] [C]ontract and should have plowed, as necessary and applied sand and salt per the Contract"[40]—should be rejected by this Court pursuant to the sham-affidavit standard set forth in *Jefferson v. Helgason*.[41]

C. Plaintiff

Plaintiff contends that "[w]hen viewed in Plaintiff's favor, the record is anything but certain as to whether a duty existed by virtue of the 2007 Contract, and whether Defendants

---

[36]*Id*. at 4.
[37]*See id*.
[38]*Id*. 3.
[39]*Id*.
[40]The "contract" to which Yancey refers is the 2010 Contract, not the 2007 Contract, which was controlling at the time of Plaintiff's fall in 2009. The 2010 and 2007 contracts, however, are almost identically worded, particularly with regard to the scope provisions. *See supra* n.9-11 (identifying the minimal differences between the scope provisions contained in the 2007 and 2010 Contracts).
[41]Mid-Del Mot. at 2 (citing *Jefferson v. Helgason*, 2012 WL 1660889, at *2 (Del. Super. Ct. Feb. 13, 2012)).

breached their duty to Plaintiff by failing to plow or treat the parking lot to prevent the accumulation of ice."[42] Plaintiff argues that under the 2007 Contract, "'*all* parking areas' were to be sanded and salted, and the areas to be plowed included 'the front employee parking lot.'"[43] Moreover, Plaintiff points out that Fred, the Vice President of Layaou, testified during his deposition that Layaou plowed the DTC employee lot during the first year of the 2007 Contract. Plaintiff argues this is "highly probative of the proper interpretation of the 2007 Contract's terms."[44]

Plaintiff also takes issue with Yancey's inconsistent testimony regarding whether Layaou, and by extension Mid-Del, was responsible for maintaining the area where Plaintiff fell.[45] Plaintiff contends the jury must decide which version of Yancey's testimony is more credible. Plaintiff disputes, though tenuously, that Simpson instructed Fred to not plow the front employee parking lot, stating (1) Fred relies on hearsay testimony from Simpson, who is now deceased,[46] and (2) Yancey, who replaced Simpson, cannot verify what discussions occurred between Simpson and Fred.[47]

Regarding Mid-Del's argument that Yancey's affidavit should be rejected under the sham affidavit doctrine, Plaintiff contends that doctrine is inapplicable here, because the doctrine only applies to *subsequent* sworn testimony, and Yancey's affidavit was executed *prior to* his deposition. Plaintiff also asserts that Mid-Del's third-party beneficiary argument is erroneous, because he is asserting a negligence cause of action, not a breach-of-contract claim.

---

[42]Pl.'s Opp. To Layaou's Mot., at 4
[43]*Id*. at 2 (emphasis added by Plaintiff).
[44]*Id*.
[45]*Compare* Pl. Ex. 7 at 82, ln. 3-23 (indicating that the area where Plaintiff fell was not within DTC's area of responsibility), *with* Pl. Ex. 6 (Yancey states that Layaou had the "ultimate responsibility" to plow the employee parking lot).
[46]Pl.'s Opposition to Layaou's Mot., at 2.
[47]*Id*. at 3.

IV. STANDARD OF REVIEW

This Court may grant summary judgment when "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 and that the moving party is entitled to a judgment as a matter of law."[48] A motion for summary judgment, however, should not be granted when material issues of fact are in dispute or if the record lacks the information necessary to determine the application of the law to the facts.[49] A dispute about a material fact is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[50] Thus, the issue is "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."[51] Additionally, the law in Delaware is clear that "where reasonable minds could differ as to the contract's meaning, a factual dispute results and the fact-finder must consider extrinsic evidence," and "[i]n those cases summary judgment is improper."[52]

Although the party moving for summary judgment initially bears the burden of demonstrating that the undisputed facts support his legal claims,[53] once the movant makes this showing, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[54] When considering a

[48]Super. Ct. Civ. R. 56(c).
[49]*Bernal v. Feliciano*, 2013 WL 1871756, at *2 (Del. Super. Ct. May 1, 2013) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 468 (Del. 1962)).
[50]*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986).
[51]*Id.*
[52]*GMG Capital Invest., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783 (Del. 2012).
[53]*Hughes ex rel. Hughes v. Christina Sch. Dist.*, 2008 WL 73710, at *2 (Del. Super. Ct. Jan. 7, 2008) (citing *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. Ct. 2005)).
[54]*Id.*

motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party.[55]

V. DISCUSSION

A. Mid-Del's Additional Arguments

As a threshold,[56] the Court considers the two arguments asserted by Mid-Del, but not Layaou: (1) that "[i]n order to recover against Mid-Del, [Plaintiff] must show he was an intended third party beneficiary" under the Mid-Del Contract; and (2) the affidavit signed by Yancey should be rejected by this Court pursuant to the sham-affidavit standard set forth in *Jefferson v. Helgason*.[57]

i. *Third Party Beneficiary*

Mid-Del's contention that Plaintiff lacks standing because he is not an intended third-party beneficiary to the Mid-Del Contract is misplaced. In the case *sub judice*, Plaintiff's suit against Layaou and Mid-Del arises from tort—specifically, negligence—not breach of contract. It is well established in Delaware that "it is the scope of the undertaking, as defined in the contract, which gives shape to the independent contractor's duty in tort."[58] Thus, Mid-Del, as an independent contractor, would have owed Plaintiff a duty of care if "the scope of [Mid-Del's] undertaking, as defined in the contract," included the area in which Plaintiff fell. Providing Mid-Del owed a duty, Plaintiff can maintain his negligence cause of action against Mid-Del outside of contract law, which does not require Plaintiff to

[55]*Joseph v. Jamesway Corp.*, 1997 WL 524126, at *1 (Del. Super. Ct. July 9, 1997) (citing *Billops v. Magness Const. Co*., 391 A.2d 196, 197 (Del. Super. Ct. 1978)).
[56]The Court considers Mid-Del's additional arguments as a threshold, because if Mid-Del's arguments are correct, this Court should (1) not consider Yancey's affidavit in determining whether a genuine issue of material fact exits, and (2) evaluate whether Plaintiff is an intended beneficiary under the Mid-Del Contract.
[57]Mid-Del Mot. at 2 (citing *Jefferson v. Helgason*, 2012 WL 1660889, at *2 (Del. Super. Ct. Feb. 13, 2012)).
[58]*Brown v. F.W. Baird, LLC*, 2008 WL 324661, at *3 (Del. Feb. 7, 2008) (quoting *Thompson v. F.B. Cross & Sons, Inc*., 798 A.2d 1036, 1040 (Del. 2002)) ("[I]t is the scope of the undertaking, as defined in the contract, which gives shape to the independent contractor's duty in tort.") (internal quotation marks omitted)

be an intended third-party beneficiary.[59] Therefore, because Plaintiff asserts a negligence claim, rather than a breach-of-contract claim, Plaintiff does not need to be an intended third-party beneficiary under the Mid-Del Contract to have standing.[60]

ii. *Sham Affidavit*

Mid-Del's argument that this Court should reject Yancey's affidavit under the sham affidavit doctrine, as recognized in *Jefferson*, is also misplaced. As explained by the *Jefferson* Court, "[t]he sham affidavit doctrine 'refers to the practice of striking or disregarding an affidavit that is submitted in opposition to a motion for summary judgment, in cases where the affidavit contradicts the affiant's *prior* sworn deposition testimony.'"[61] Furthermore, the Delaware Supreme Court has stated that

> [t]he core of the doctrine is that where a witness at a deposition has *previously responded* to unambiguous questions with clear answers that negate the existence of a genuine issue of material fact, that witness can not thereafter create a fact issue by submitting an affidavit which contradicts the earlier deposition testimony, without adequate explanation.[62]

Thus, the sham affidavit doctrine only applies when the affidavit is introduced after prior sworn testimony. In the present case, Yancey's affidavit was offered before Yancey was deposed, and therefore the affidavit contradicts the affiant's later, not prior, sworn deposition testimony. The purpose of the doctrine, which is to prevent a party, opposing a motion for summary judgment, from injecting contradictory testimony to create a genuine issue of material fact, would not be accomplished under the circumstances in this case.

---

[59] *Triple C Railcar Serv., Inc. v. City of Wilmington*, 630 A.2d 629, 632 (Del. 1993) (indicating that the plaintiff's tort claim was alternative and distinct from his breach-of-contract claim).
[60] *Data Mgmt. Internationale, Inc. v. Saraga*, 2007 WL 2142848, at *3 (Del. Super. Ct. July 25, 2007) ("[T]he same circumstances may give rise to both breach of contract and tort claims if the plaintiff asserts that the alleged contractual breach was accompanied by the breach of an *independent duty* imposed by law.") (emphasis added).
[61] *Jefferson v. Helgason*, 2012 WL 1660889, at *2 (Del. Super. Ct. Feb. 13, 2012) (emphasis added).
[62] *Cain v. Green Tweed & Co., Inc*., 832 A.2d 737, 740 (Del. 2003) (emphasis added) (citation omitted).

Yancey's affidavit will not be excluded, and will be considered by this Court in determining whether there is a genuine issue of material fact that precludes summary judgment.

B. Scope of 2007 Contract is Ambiguous

i. *Legal Standard*

"In order to prevail in a negligence action, a plaintiff must show, by a preponderance of the evidence, that a defendant's negligent act or omission breached a duty of care owed to plaintiff in a way that proximately caused the plaintiff injury."[63] Thus, liability depends on whether the defendant was "under a legal obligation—a duty—to protect the plaintiff from the risk of harm which caused his injuries."[64] Delaware courts have found that, "in appropriate situations, a trial court is authorized to grant judgment as a matter of law because no duty exists."[65] However, "[w]here reasonable minds could differ as to the contract's meaning, a factual dispute results and the fact-finder must consider admissible extrinsic evidence. In those cases, summary judgment is improper."[66] Therefore, if reasonable minds could differ regarding whether the scope of Layaou and Mid-Del's undertakings, as defined by contract, included the area in which Plaintiff fell, summary judgment should be denied.

ii. *Ambiguous Terms*

Delaware adheres to the "objective" theory of contracts, *i.e*. a contract's construction should be that which an objective, reasonable third party would understand.[67] This Court will construe a contract as a whole in order to give each provision and term effect, so as not

[63]*Brown v. F.W. Baird, LLC*, 2008 WL 324661, at *2 (Del. Feb. 7, 2008) (quoting *Duphily v. Del. Elec. Co-op., Inc*., 662 A.2d 821, 828 (Del. 1995)) (internal quotation marks omitted).
[64]*Id*. (quoting *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002)) (internal quotation marks omitted).
[65]*Id*. at *2 (quoting *Fritz*, 790 A.2d at 471) (internal quotation marks omitted). The question of duty "is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined only by the court." *Id*.
[66]*GMG Capital Invest., LLC v. Athenian Venture Partners I, L.P*., 36 A.3d 776, 783 (Del. 2012).
[67]*Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

to render any part of the contract mere surplusage.[68] Additionally, this Court will not construe a contract in a manner that renders a provision or term "meaningless or illusory."[69] When the contract is clear and unambiguous, this Court will give effect to the plain meaning of the contract's terms and provisions.[70] However, when multiple, different interpretations can reasonably be ascribed to a contract, this Court will find that the contract to be ambiguous.[71]

The pertinent portion of the 2007 Contract provides that Layaou is responsible for sanding and salting "all parking lots" and removing snow from, *inter alia*, "the front employee parking lot." The Court concludes this language is ambiguous, because DTC and DelDOT share the property, which leads to two reasonable interpretations. On one hand, it is reasonable to conclude that the scope of the 2007 Contract includes "all parking lots" without any limitation. However, it is also reasonable to conclude that "all parking lots" does not include those areas for which DelDOT is responsible. Likewise, reasonable minds could also disagree regarding the meaning of the 2007-Contract language "front employee parking lot." Because the "attached picture," referenced by the 2007 Contract, has not been presented, it is unclear what the contracting parties meant by "front employee parking lot," especially given that DTC and DelDOT share the facility where Plaintiff fell.

C. Extrinsic Evidence for Jury Consideration

As stated above, "where reasonable minds could differ as to the contract's meaning, a factual dispute results and the fact-finder must consider extrinsic evidence," and "[i]n

[68] *Id*.
[69] *Id*. at 1159-60.
[70] *Id*. at 1160.
[71] *Id*.

those cases summary judgment is improper."[72] In the present case, there is extrinsic evidence for the fact-finder, the jury, to consider in evaluating whether the contracting parties intended the scope of the 2007 Contract to include the area in which Plaintiff fell.

i. *Yancey's Inconsistent Testimony*

Based on the record before the Court, viewing the facts in the light most favorable to Plaintiff, there is a genuine issue of material fact regarding how Yancey's inconsistent sworn testimony should be considered. As discussed above, Yancey (at all times under oath) inconsistently testified that (1) Layaou, and thus Mid-Del, had "the ultimate responsibility" to keep DTC's employee parking lot free of snow under the 2007 Contract;[73] (2) Layaou, and thus Mid-Del, was responsible for salting and sanding the areas where DTC employees, including Plaintiff, park;[74] and (3) Plaintiff fell outside the area for which Layaou and Mid-Del were responsible.[75] According to Yancey's testimony, Layaou and Mid-Del had the ultimate responsibility under the 2007 Contract to maintain the DTC employee parking lot, but yet Plaintiff fell beyond the area of responsibility, even though Plaintiff fell in the DTC employee parking lot. Yancey's testimony is contradictory and non-cogent. Which aspect of Yancey's testimony is more credible is a factual issue for a jury, not this Court, to decide, and therefore summary judgment is inappropriate.[76]

ii. *Course of Performance*

As stated above, Fred, the Vice President of Layaou, testified at his deposition that Layaou plowed the front employee parking lot, where Plaintiff fell, during the first year of

[72] *GMG Capital Invest., LLC*, 36 A.3d at 783.
[73] Pl. Ex. 6, at 1.
[74] Pl. Ex. 7, at 74.
[75] *Id*. at 82.
[76] *GMG Capital Invest., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783 (Del. 2012) ("[W]here reasonable minds could differ as to the contract's meaning, a factual dispute results and the fact-finder must consider admissible extrinsic evidence. In those cases, summary judgment is improper.").

the 2007 Contract. Plaintiff contends the fact that Layaou plowed the employee parking lot during the operation of the 2007 Contract "is highly probative of the proper interpretation of the 2007 Contract's terms," specifically the scope provision.[77] Although Fred testified that Layaou was never responsible under the 2007 Contract for the front employee parking lot, when viewing the evidence in the light most favorable to Plaintiff, the fact that Layaou initially plowed the employee parking lot demonstrates that Layaou's course of performance, at least for one period, supports Plaintiff's interpretation of the 2007 Contract, while the record reflects that the subsequent course of conduct supports Defendants' contention.

iii. ***Layaou Contends it Was Instructed Not to Plow Where Plaintiff Fell***

According to Fred, Simpson, on behalf of DTC, instructed Layaou to not plow or maintain the front employee parking lot, stating it was DelDOT's responsibility.[78] Plaintiff disputes whether Simpson gave this instruction, stating (1) Layaou relies on "hearsay evidence from Simpson," who is now deceased;[79] and (2) Yancey, who took over for Simpson, "could not testify to . . . what Simpson may or may not have advised the Defendants because he was not involved in the negotiations for the 2007 Contract, nor did Simpson discuss with Yancey the terms of the 2007 Contract or any modifications thereto."[80] If Layaou was instructed by a DTC representative to not plow the DTC front employee parking lot, then the scope of Layaou's undertaking would not include where Plaintiff fell, and thus Layaou would not have owed a duty to Plaintiff.[81] Because Simpson is deceased, he cannot be questioned regarding whether he instructed Layaou to stop

[77]Pl.'s Opp. To Layaou's Mot., at 2.
[78]Pl. Ex. 4 at 115-16.
[79]Pl.'s Opposition to Layaou's Mot., at 2.
[80]*Id*. at 3.
[81]*See supra* Part V(A)(i).

plowing the front employee parking lot, as Fred claims. A jury, not this Court, should evaluate the credibility of Fred's account of Simpson's instruction that Layaou should not plow the lot where Plaintiff fell.[82]

D. Because All Parties Agree Mid-Del was Instructed Not to Plow Where Plaintiff Fell, Mid-Del Did Not Owe Plaintiff a Duty of Care

As stated above, at a pre-trial conference on October 1, 2013, all parties agreed that Mid-Del has never plowed the front employee lot where Plaintiff fell, because Fred instructed Mid-Del not to plow that area. Plaintiff concedes that he does not have any reason to (1) dispute that Mid-Del was so instructed by Fred or (2) believe that Mid-Del ever plowed where Plaintiff fell. As a result, because it is undisputed that Mid-Del was instructed not to plow where Plaintiff fell and never did so, the scope of Mid-Del's undertaking did not include that area.[83] As a result, Mid-Del did not owe a duty to Plaintiff to keep the front employee parking lot free of snow.[84] Without a duty owed, Plaintiff cannot maintain a negligence action against Mid-Del, and summary judgment is appropriate.

VI. CONCLUSION

For the reasons stated above, this Court concludes that a genuine issue of material fact exists regarding whether the area in which Plaintiff fell was within the scope of the 2007 Contract, and therefore summary judgment is inappropriate as to Layaou. The Court also concludes that, because all parties agree that Mid-Del was instructed to not plow where

---

[82]*See supra* note 67 and accompanying text (explaining that when a contract is ambiguous, a factual dispute exists that must be resolved by the fact-finder). Unlike Fred's instruction to Mid-Del to not plow the front employee parking lot, which all parties agree occurred, Plaintiff has not conceded that Simpson instructed Fred to stop plowing the lot. Thus, the basis for granting summary judgment to Mid-Del, *i.e*. the fact that Mid-Del's scope of undertaking did not include where Plaintiff fell, is not present regarding Layaou.

[83]The Court notes that Mid-Del represents that it assumed all of Layaou's duties under the 2007 Contract. However, Mid-Del's representation is premised on it not being responsible for the front employee parking lot, based on the Fred's instructing a Mid-Del representative that Mid-Del was not to plow that lot.

[84]*Brown v. F.W. Baird, LLC*, 2008 WL 324661, at *3 (Del. Feb. 7, 2008) (quoting *Thompson v. F.B. Cross & Sons, Inc*., 798 A.2d 1036, 1040 (Del. 2002)) (internal quotation marks omitted).

Plaintiff fell, and never plowed that area, Mid-Del did not undertake a duty to keep safe the area where Plaintiff fell. Accordingly, Layaou's Motion for Summary Judgment is **DENIED**, and Mid-Del's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge