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AMENDED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:
HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

GOLDIE DIAMOND,

Plaintiffs,

-against-

NORTH FORK BANCORPORATION, INC. and ROBERT H. WITCOMB LANDSCAPE GARDENING, INC. and TEMCO BUILDING MAINTENANCE, INC.,

Defendant(s).

ORIGINAL RETURN DATE: 02/14/08
SUBMISSION DATE: 04/25/08
Index No.: 010226/06

AMENDED SHORT FORM ORDER

MOTION SEQUENCE #2

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2,3
Reply.....	4,5

Defendant, Robert H. Witcomb Landscape Gardening, Inc. ("Witcomb"), moves for summary judgment dismissing the complaint and any cross claims against it. Plaintiff and co-defendant, North Fork Bancorporation ("North Fork" or "the bank"), oppose the motion.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing

papers (*Id.*; *Alvarez v. Prospect Hosp.*, *supra*).

This action was brought by plaintiff to recover damages sustained as a result of an alleged slip and fall on ice on the sidewalk while entering the premises owned by North Fork at 115 Main Street, East Rockaway, New York, which occurred on or about November 25, 2005, around 10-10:30 a.m. Witcomb provides landscaping and sprinkler system services to North Fork.

Where, as here, defendant moves for summary judgment in a slip and fall type action based, *inter alia*, upon defendant's lack of actual or constructive notice of the alleged dangerous condition, "defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (citations omitted)" and that it did not create the condition. (*Beltram v. Metropolitan Life Ins. Co.*, 259 AD2d 456, 457 [2d Dept. 1999]).

Witcomb submits the deposition transcript of Thomas Witcomb, supervisor of Witcomb. Mr. Witcomb testified that Witcomb had a maintenance contract with North Fork for maintenance of the sprinklers, which entailed turning the system on and off, and the landscape of the properties (Ex. F, pp.6 and 7). Mr. Witcomb would visit the subject property a minimum of once a month (Id., p. 8). Before gaining access to the sprinkler system, he would need someone to let him into the building (Id., p. 9). The sprinkler system was on a timer (Id.). On the date of the accident, the system had not yet been winterized as it was scheduled to be done the week after Thanksgiving (Id., pp. 10 and 11). Mr. Witcomb further testified that he was not requested to turn off the system any earlier and that the system was set to go on during the night and to go off before six a.m. every other day (Id., pp. 12 and 13). On the date of accident, Mr. Witcomb received a call from North Fork around 11:30 a.m. advising that there was an icing condition on the sidewalk (Id., pp. 13 and 14). In response, Mr. Witcomb immediately went to North Fork, arriving around 12:25 (Id, p. 14). He noticed patches of thin ice on the sidewalk and applied ice melt (calcium chloride) and went into the bank to shut the valve off that controlled the sprinkler system (Id., pp. 15 and 16). Mr. Witcomb further testified that he received no reports of malfunctions of the sprinkler system prior to the accident nor had he received any complaints regarding icing conditions at the bank (Id., pp. 20 and 35). Based upon Mr. Witcomb's testimony at his deposition, defendant Witcomb submits that there is no evidence that defendant either created or had notice of the icy condition.

Defendant Witcomb also submits that the contract between it and North Fork does not subject it to any tort liability in favor of plaintiff. "In general, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see Church v. Callanan Indus.*, 99 N.Y.2d 104, 752 N.Y.S.2d 254, 782 N.E.2d 50; *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120, 773 N.E.2d 485). However, under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract (citations omitted). There are three circumstances under which a party who enters into a contract to render services may be potentially liable in tort to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, 'launch[es] a force or instrument of harm ;' (2) where the plaintiff detrimentally relies upon the continued performance of the contracting party's duties; and (3) where the contracting party has entirely

displaced the other party's duty to maintain the premises safely (citations omitted)." (*Huttie v. Central Parking Corp.*, 40 AD3d 704,705, 706 [2d Dept. 2007]).

Plaintiff argues that Witcomb had total control of the sprinkler system and an obligation to shut it down before the temperatures dipped below freezing and that its failure to do so created the defective condition. Defendant Witcomb submits that its contract with North Fork is limited in scope and that it is the bank that recommends the sprinkling time. Moreover, North Fork did not call upon Witcomb to turnoff or winterize the system before the end of November. North Fork contends that it is Witcomb's failure to shut off the system that caused the condition and that such inaction triggers the indemnification clause in the contract. Witcomb's argument that the indemnification clause is only triggered by a breach of contract fails. The indemnification clause in the contract specifically states: "arising out of or related to a breach of this Agreement, or any action or inaction on the part of Contractor." (Ex. G). North Fork has raised an issue of fact precluding the awarding of summary judgment against it.

The court finds that Witcomb has "met its initial burden of establishing that it owed no duty to plaintiff as a matter of law, and plainitff[] failed to raise a triable issue of fact." *Cooper v. Time Warner Entertainment-Advance/Newhouse Partnership,* 16 AD3d 1037, 1038 [4th Dept. 2005]).

Contrary to plaintiff's contentions, the exceptions recognized by the Court of Appeals are not applicable to the facts of this case. *Id.* Even if Witcomb's alleged inaction would obligate it to North Fork, "no cognizable duty would inure to plaintiff." *Seymour v. David W. Maps, Inc.*, 22 AD3rd 1012, 1013 [3d Dept. 2005]).

Accordingly, defendant's motion to dismiss the complaint against it is granted. The cross-claim interposed by North Fork is to be treated as a third-party complaint, and the caption shall be amended to reflect same, as well as the deletion of Temco Building Maintenance, Inc. who was granted summary judgment dismissing the complaint against it by order dated January 9, 2008 (Palmieri, J.).

"GOLDIE DIAMOND,

Plaintiff,

-against-

NORTH FORK BANCORPORATION, INC.,

Defendant.

NORTH FORK BANCORPORATION, INC.,

Third-Party Plaintiff,

-against-

ROBERT H. WITCOMB LANDSCAPE GARDENING, INC.,

Third-Party Defendant."

Defendant North Fork is directed to serve and file its third-party complaint under the above caption and to pay the filing fee in the amount of $210.00 to the Clerk of the County of Nassau within twenty (20) days of the date hereof.

This decision constitutes the order of the court.

Dated: 6-19-08

HON THOMAS P. PHELAN

J.S.C.

ENTERED

JUN 25 2008

NASSAU COUNTY

COUNTY CLERK'S OFFICE

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