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SHORT FORM ORDER COPY

INDEX No. 04 - 19953

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 8-5-08
ADJ. DATE 11-6-08
Mot. Seq. #04 - MD

EILEEN SCHULTZ, Plaintiff, - against - THE BRIDGEPORT & PORT JEFFERSON STEAMBOAT COMPANY and S & S COMPLETE LANDSCAPING CORP., Defendants.	SIBEN & SIBEN, LLP Attorneys for Plaintiff 90 East Main Street Bay Shore, New York 11706 TISDALE & LENNON, LLC Attorneys for Defendant The Bridgeport & Port Jefferson Steamboat Company 11 W. 42nd Street, Suite 900 New York, New York 10036 O'CONNOR, O'CONNOR, HINTZ, et al. Attorneys for Deft S&S Complete Landscaping One Huntington Quadrangle, Suite 3C01 Melville, New York 11747-4415

Upon the following papers numbered 1 to 30 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 23 - 28 ; Replying Affidavits and supporting papers 29 - 30 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant S & S Complete Landscaping Corp. for summary judgment dismissing the complaint and all cross claims against it is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Eileen Schultz, on January 16, 2004 at approximately 12:00 p.m. when she slipped and fell in a parking lot at the Port Jefferson Ferry in Port Jefferson, New York, owned by defendant The Bridgeport & Port Jefferson Steamboat Co. ("Steamboat"). Prior to the accident, Steamboat entered into a snow removal contract with defendant S & S Complete Landscaping Corp. ("S & S Landscaping"). Plaintiff alleges in her verified complaint that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition which caused her to fall and sustain permanent serious physical injury.

S & S Landscaping now moves for summary judgment dismissing the complaint and all cross claims against it on the ground that it neither owed a duty of care to plaintiff stemming from its service

contract with Steamboat nor created a dangerous icy condition which caused plaintiff to slip and fall. S & S Landscaping alleges that the accident site was not within the scope of its contractual responsibilities. In support, S & S Landscaping submits, *inter alia*, the pleadings, the testimony given by plaintiff at the General Municipal Law § 50-h hearing, the deposition testimony given by plaintiff on November 29, 2006, James McGuire, Steamboat's representative, Donald Fromm, Steamboat's representative, Joseph Carney, Steamboat's representative and Robert Puckey, S & S Landscaping's representative as well as the contract between Steamboat and S & S Landscaping.

At the General Municipal Law § 50-h hearing, plaintiff testified to the effect that, on January 16, 2004 at approximately 12:00 p.m., she was dropping her grandson off at the Port Jefferson Ferry. She parked her car in the parking lot, and she and her grandson walked toward the ferry. After plaintiff kissed her grandson goodbye on his departure, she walked toward the walkway. Two or three feet thereafter, she slipped and fell in the parking lot. At the time of her fall, plaintiff was looking straight ahead. Before the accident, she observed "piles of snow" to her left and at the end of the walkway of her path, although she did not see anything on the ground in front of her. After the accident, plaintiff found "a thin coat of ice" in a rectangular shape, approximately 24 inches wide and 12 inches long.

At her examination before trial on November 29, 2006, plaintiff testified to the effect that, on the day of the accident, she fell in the blacktop parking lot which was separated from the walkway by a curb, and her upper body came to rest on the walkway. After her fall, she observed a "whitish gray" ice patch.

At her deposition on February 25, 2008, plaintiff testified to the effect that, at the time of the accident, she was approximately "a foot" away from the curb of the walkway that she was walking toward. Plaintiff testified that there was no "sand or salt visible on the ground in the area" where she fell.

At his deposition, James McGuire testified to the effect that he is the assistant port captain employed by Steamboat and that he was neither on duty on the day of the accident nor witnessed the subject accident. McGuire testified that the accident area would be cleaned by the dockhands if there was snow and ice, and Steamboat wants them to clean out "this entire curb and about a foot past." He also testified that the rest of the area would be cleaned out by the contractor.

At his deposition, Donald Fromm testified to the effect that he is the port captain and operations manager employed by Steamboat and is responsible for the general maintenance of the land areas. Mr. Fromm testified that, even if the dock persons ordinarily go with ice melt and spread it around throughout the day, it is not a normal practice for them to check for ice. He also testified that the sidewalk area "right close to the curb" would be cleaned by the dock persons because "the plows can[not] get close enough to do that."

At his deposition, Joseph Carney testified to the effect that he is the supervisor employed by Steamboat, and one of his responsibilities was snow removal. Mr. Carney testified that the dockhands would have blown snow in the accident area.

At his deposition, Robert Puckey testified to the effect that he is the president of S & S Landscaping and that S & S Landscaping was hired by Steamboat to provide snow plowing. S & S

Landscaping entered into a snow removal contract with Steamboat during the 2003-2004 winter. Mr. Puckey testified that he plowed snow for three and a half hours on January 15, 2004 and that he put down the sand/salt mixture in the parking lot on January 15 and January 16. He also testified that no one from Steamboat supervised and inspected S & S Landscaping's snow removal work when the work was done. Mr. Puckey testified that he could not plow one to two feet before the curb of the walkway without damaging the curve or the machine.

Pursuant to the contract between Steamboat and S & S Landscaping, S & S Landscaping was obligated to plow snow on parking lots when "2" of snow has fallen or within one hour of being contacted" by the representative of Steamboat. S & S Landscaping was also obligated to perform ice removal services through the use of salt/sand "on an as needed basis."

Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party. In general, contractual obligations will not create a duty toward a third party unless (1) the third party has reasonably relied, to his or her detriment, on the continued performance of the contracting party's duties under the contract; (2) the contract is so comprehensive and exclusive that it completely displaces the other contracting party's duty toward the third party; or (3) the contracting party has launched a force or instrument of harm, thereby creating or exacerbating a dangerous condition, see, Espinal v Melville Snow Contrs., 98 NY2d 136 [2002]; Karac v City of Elmira, 14 AD3d 842 [3d Dept 2005].

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort, see, Espinal v Melville Snow Contrs., supra; Figueroa v Lazarus Burman Assocs., 269 AD2d 215 [1st Dept 2000]. In order to make a prima facie showing of entitlement to judgment as a matter of law, S & S Landscaping was required to establish that it did not perform any snow removal operations related to the condition which caused plaintiff's injury or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition, see, Prenderville v International Serv. Sys., 10 AD3d 334 [1st Dept 2004].

Here, S & S Landscaping failed to establish its entitlement to judgment as a matter of law. S & S Landscaping has offered no evidence as to the objective measurements of the alleged accident site, except for photos and plaintiff's testimony. There are several questions of fact as to the distance between the accident site and the curb of the walkway and whether S & S Landscaping was not responsible for snow and ice removal in the area where the accident allegedly occurred. Moreover, the evidence on the record reflects that S & S Landscaping plowed snow on January 15, 2004 and put down the sand/salt mixture in the parking lot on January 15 and January 16. Plaintiff testified that she saw "a thin coat of ice" – approximately 24 inches wide and 12 inches long – and that there was no "sand or salt visible on the ground in the area" where she fell. Under these circumstances, there are also questions of fact as to whether S & S Landscaping properly applied the sand/salt mixture and whether S & S Landscaping exacerbated the icy condition of the subject property by the improper application of the mixture where plaintiff fell, see, Prenderville v International Serv. Sys., id.; Beckham v Board of Educ. of City of New York, 267 AD2d 189 [2d Dept 1999].

Accordingly, the motion by defendant S & S Complete Landscaping Corp. for summary judgment dismissing the complaint against it is denied.

Dated: Jan 15, 2009

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION