SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MARGARET SPELLMAN and DONALD SPELLMAN,

Plaintiffs

-against-

AAA MAINTENANCE, LLC, SIMON PROPERTY GROUP, INC. and WALT WHITMAN MALL, LLC,

Defendants

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 2785/10
Motion Seq. Nos: 01 & 02

DECISION AND ORDER

Papers Read on this Motion:

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The defendants, Simon Property Group, Inc. and Walt Whitman Mall, LLC., in motion sequence number one move for an Order, pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiffs, Margaret Spellman and Donald Spellman's complaint as well as any cross claims asserted against them.

In a separate motion sequence number two, defendant AAA Maintenance, LLC., move for an Order, pursuant to CPLR §3212, granting it summary judgment dismissing the plaintiffs' complaint and all cross claims asserted against it is.

This action for personal injuries arises from plaintiff Margaret Spellman's claim that she allegedly slipped and fell on ice while in the parking lot of the Walt Whitman Mall in Huntington Station, New York on December 21, 2009 at approximately 1:30 p.m. Plaintiffs bring this action for

negligence against the property owner, Simon Property Group, Inc. ("Simon"), the property manager, Walt Whitman Mall (the "Mall") and the snow removal contractor, AAA Maintenance, LLC ("AAA"). Plaintiffs allege that the defendants were negligent in their ownership, operation, maintenance and control of the subject premises in that they allowed the parking lot to become and remain in a dangerous and unsafe condition by being covered in ice and/or snow. Plaintiffs also claim that the parking lot was slippery and extremely dangerous to walk upon and there was a failure on the part of the defendants to properly clear the area and to remedy this condition. The plaintiffs also allege actual notice in that the defendants created the subject condition and constructive notice in that the condition existed for a long enough period of time for it to be remedied.

On the day of her accident, Donald Spellman drove Margaret Spellman to the Walt Whitman Mall. When the Spellmans arrived at the Mall, Donald dropped Margaret off in front of the main entrance, and then he parked the car before joining her inside the Mall.

Margaret Spellman testified at her sworn examination before trial that it had snowed the day before, but that the roads were clear. Donald stated that when he and his wife arrived at the Mall, it was cold and there was no precipitation. He explained that there had been a two-day snowstorm just prior to the day of the accident, which resulted in approximately 23 inches of snow. Donald stated that the parking lot of the Mall had been plowed, and that the roadway where he dropped his wife off was "fine" and "clear" (Donald Spellman Tr., pp. 9-12). He stated that this was the same area of the roadway where he later picked up his wife.

Margaret testified that after spending approximately an hour in the Mall, she and her husband exited through the same doors where they had entered. She waited outside while Donald went to get the car. Upon seeing her husband pull up in the car, plaintiff proceeded into the roadway to walk around the rear of the car toward the passenger side. When plaintiff got to the passenger side of the car, her

feet suddenly slipped out from under her and she fell. As to what caused her to fall, plaintiff testified, in pertinent part, as follows:

Q: Did you see what it was that was underneath your feet?

A: Only when I was laying down I could feel the snow because I was laying in the snow.

Q: Did you see the snow prior to falling?

A: No.

Q: Were you looking to where you were going?

A: I was looking to the car.

Q: Do you know whether or not your foot stepped in the snow?

A: When I stepped and slipped, I knew I was slipping on something, but it was too late.

Q: So you don't know what it was that you slipped on?

A: Yes. I slipped on ice.

Q: When did you see ice?

A: I didn't see it. I laid in it.
(Margaret Spellman Tr., pp. 63-64).

Plaintiff claimed that she did not see the ice and the snow as she lay on it, she "just felt it" (*Id.* at 67). Donald stated that to his knowledge there was no precipitation while they were in the Mall. He testified that he found his wife lying on the ground on some snow and ice. He stated that he had not observed this combination of snow and ice at any time prior to Margaret's fall.

Pursuant to its snow removal contract with the Mall, in effect at the time of plaintiff's accident, AAA was required to remove snow and spread salt when requested by a Walt Whitman representative on an as-needed basis and/or when the snowfall resulted in accumulations of two or more inches. The contract also contained indemnity and insurance procurement provisions which state, in pertinent part as follows:

13. **Indemnity**. (a) To the fullest extent permitted by applicable law, Contractor shall, at Contractor's sole cost and expense, defend, indemnify and hold harmless, Owner, Owner's Managing Agent, Simon Property Group, Inc., and their representative officers...from and against any and all claims, liabilities, obligations, losses, penalties, actions, suits, damages, expenses ... or costs of any kind and nature whatsoever ("Claims") from property damage, bodily injury and death brought by third parties in any way relating to or resulting, in whole or in part, from Contractor's performance or alleged failure to perform the services under or in connection with this Agreement.

(b) The indemnity set forth herein will apply regardless of the active or passive negligence or joint, concurrent, or comparative negligence of any of the Owner parties, and regardless of whether liability without fault or strict liability is imposed or sought to be imposed upon any of the Owner Parties, except to the proportional extent that a final judgment of a court or competent jurisdiction establishes that under the comparative negligence principles of the state where the Shopping Center is located that a Claim was proximately caused by the sole negligence or intentional wrongdoing of an Owner Party, provided, however, that in such event the indemnity will remain valid for all other Owner Parties.

14. **Insurance**. Contractor shall...obtain and maintain the following policies of insurance, naming the Owner Parties as "additional insured"...which shall provide the Owner Parties are additional insureds with respect to liability arising out of Contractor's ongoing and completed operations providing that no such insurance may be cancelled, non-renewed or material changed without at least thirty (30) days written notice to Owner by certified mail.

The manager of AAA, Anthony Farina, testified that AAA performed snow removal work at the Mall a couple of days prior to the accident. AAA arrived at the Mall on December 19, 2009 at 4:00 p.m. and spread salt until 5:00 p.m. He testified that AAA was also instructed to come back to the Mall at 11:00 p.m. and that they continued plowing and salting around the Mall until approximately 4:00 p.m. the following day, December 20, 2009. Farina stated that either the Mall manager or the Mall director instructed him regarding where to pile the snow. He explained that after the work was completed, "we're always told to go home" (Farina Tr., p. 28). He also stated that "[u]sually the manager of the Mall would come out and inspect the area and tell us we're good to go, it's clean (*Id.* at 21). He stated that it was priority that the roadway be clean and that all snow is pushed off and the roadway sanded before leaving the job (*Id.* at 32).

The Mall manager, Deborah Weber, testified that on the day of the accident, she and Michael Murphy, the Director of Operations, worked hand in hand in overseeing snow removal. At her deposition, she stated "I think I can make it a very clear statement. The operations director and I – would have direct supervision over snow removal, but it is everyone's responsibility on the property to look after the general safety of the property" (Weber Tr., p. 11). She testified that either she or the operations director "needs to request that the service provider, in this case, AAA, come to the property, by Simon Property standard, at 2 inches of snowfall or greater" (*Id.* at 16). She also testified that even though the contract provides that AAA come and perform snow removal when the snow is two inches or more, it was customary for AAA to be called first by them before reporting to work (*Id.* at 16, 22). She stated "We decide when their presence is required" (*Id.* at 16). She testified that after the defendant's work was finished, it was her regular practice to go out and inspect whether the work was done to her safety standards (*Id.* at 61-62). If she found a cause for concern during said inspection, she would ask AAA to come back and remediate whatever was concerning her (*Id.* at 51).

Weber explained at her deposition that the Mall had retained a separate company to perform snow and ice removal that had accumulated on sidewalks around the Mall (*Id.* at 30, 64).

Upon the instant motions, the owner and the property manager as well as the snow removal contractor, seek summary judgment dismissal of the plaintiffs' complaint.

Dealing first with AAA, it is noted that a contractor may be held liable for injuries to a third party where, in undertaking to render services, the contractor entirely displaces the duty of the property owner to maintain the premises in a safe condition, the injured party relies on the contractor's continued performance under the agreement, or the contractor negligently creates or exacerbates a dangerous condition thereby in effect launching a force or instrument of harm (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141–142 [2002]; *Foster v Herbert Slepoy Corp.*,

76 AD3d 210 [2d Dept 2010]; *Lehman v North Greenwich Landscaping, LLC*, 65 AD3d 1291 [2d Dept 2009], *affd* 16 NY3d 747 [2011]).

A party moving for summary judgment must demonstrate its *prima facie* entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The evidence here is clear that plaintiff never noticed or complained of a dangerous condition in the area prior to the day of the accident. Accordingly, any claim by the plaintiff that she detrimentally relied upon AAA's continued performance to keep the area free from snow and ice fails (*Huttie v Central Parking Corp.*, 40 AD3d 704, 706 [2d Dept 2007]).

Furthermore, having performed the duties required of it under the contract, and submitted proof, including the testimony of Donald Spellman, that the parking lot of the Mall had been plowed and that the roadway where he dropped his wife off as "fine" and "clear," AAA has demonstrated that it did not create the condition that caused the alleged accident, did not exacerbate or worsen an existing condition, and did not launch a force or instrument of harm. Further, by submitting the testimony of Farina and Weber who stated that it was usual practice to have AAA's plowing and salting work inspected before releasing them from the snow removal assignment and that AAA would not have been permitted to leave the Mall unless the Mall manager or director of operations first determined that the job was complete, AAA has established that it did not launch a force or instrument of harm for which it can be held liable to the plaintiff, a non-contracting third party.

Furthermore, the evidence is clear that AAA's contract did not create the kind of "comprehensive and exclusive" property maintenance obligation, which would entirely displace the Mall and/or the owner, Simon's obligation to maintain the premises safely. Indeed AAA undertook to provide snow removal services at the Mall on an as-needed basis and when called by a Mall representative and/or when there was a snow accumulation of two inches. Taken together with the testimonial evidence that the Mall representatives would inspect the area and dismiss

AAA when the work was satisfactory, and, in particular, Weber stated that she and the operations director had "direct supervision over snow removal," this Court finds that AAA has demonstrated that the injured plaintiff was not a party to the snow and ice removal contract, and it did not owe a duty to her, thereby demonstrating its *prima facie* entitlement to judgment as a matter of law (*Espinal v Melville Snow Contrs.*, supra at 141–142; *Foster v Herbert Slepoy Corp.*, supra; *Lehman v North Greenwich Landscaping, LLC*, supra at 1292).

Similarly, defendants Simon and the Mall have also established their *prima facie* entitlement to judgment as a matter of law. A property owner will be held liable for a slip and fall involving snow and ice on its property only when it creates the dangerous condition that causes the accident, or has actual or constructive notice thereof (*Mignogna v 7–Eleven, Inc.*, 76 AD3d 1054 [2d Dept 2010]; *Medina v La Fiura Dev. Corp.*, 69 AD3d 686 [2d Dept 2010]). Here, there is no indication on the evidence submitted as to when or how the ice/snow/slush at issue came into existence. To the contrary, the record establishes that AAA performed salting and snow removal services on the roadways in the Mall in a satisfactory manner just two days prior to the accident. The Mall did not receive any complaints about the condition of the roadway prior to the happening of this incident and/or any indication that there was ice at the location of the plaintiff's accident prior to the happening of her accident. Thus, Simon and the Mall have established that they kept the premises in a reasonably safe condition and that they did not create or have actual notice of the alleged dangerous condition.

Defendants Simon and the Mall have also demonstrated the absence of any constructive notice of the alleged dangerous condition. To provide constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendants' employees to discover and remedy it (*Medina v La Fiura Dev. Corp.*, supra; *Kaehler–Hendrix v Johnson Controls, Inc.*, 58 AD3d 604, 606 [2d Dept 2009]). There is no testimony as to when this condition of ice and/or snow on the roadway came into existence. To

the contrary, Donald Spellman testified the roadway where he dropped off his wife was "fine" and "clear." In light of the evidence submitted herein, including the testimony of the plaintiffs themselves that attest to the fact that the roadways and parking lot were well plowed, this Court finds that the defendants Simon and the Mall have demonstrated their entitlement to judgment as a matter of law.

In opposition, the plaintiffs fail to present any admissible evidence raising a triable issue of fact.

Initially, in opposing summary judgment, the plaintiffs rely solely upon the affirmation of their attorney, who is obviously without personal knowledge of the facts. This did not supply the evidentiary showing necessary to successfully resist the motion (CPLR §3212[b]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 229, n 4 [1978]; *Columbia Ribbon & Carton Mfg. Co. v A-1-A Corp*, 42 NY2d 496 [1977]).

Furthermore, counsel for the plaintiffs puts forth three photographs asserting that they depict snow at the subject location. However, these photographs have no evidentiary weight as they do not depict the location where the plaintiff fell and more importantly, when plaintiff was asked at her deposition to identify the location where she fell in two of the photographs submitted by the plaintiff in opposition, she stated that she could not do so.

In addition, this Court declines to consider the affidavit of plaintiffs' consulting meteorologist, George Wright, submitted in opposition to the defendants motions. Having failed to disclose this expert during pretrial disclosure, instead serving his affidavit after the filing of the Note of Issue and certificate of readiness attesting to the completion of discovery (*Colon v Chelsea Piers Mgt, Inc.*, 50 AD3d 616, 617 [2d Dept 2008]; *Safrin v DST Russian & Turkish Bath, Inc.*, 16 AD3d 656, 657 [2d Dept 2005]), this Court is precluded from considering the expert affidavit in opposition to the defendants' motions.

Moreover, in his affirmation in opposition, counsel for the plaintiff attempts to create baseless issues of fact by taking the testimony of the parties out of context. For example, counsel for the plaintiff argues that Donald Spellman never testified that he walked in the exact same area where his wife fell as a result of snow and ice on the roadway. This, however, is simply irrelevant because Donald Spellman testified that when he dropped his wife off in front of the Mall, he observed that the roadway was "fine" and "clear," and that when he returned to pick her up, just prior to the accident, he again did not observe snow and ice at that location.

Based on the plaintiffs failure to raise a triable issue of fact as to whether AAA's alleged negligence created or exacerbated the hazard which was a proximate cause of the injuries allegedly sustained so as to establish AAA's duty to the injured plaintiff, or to offer proof that AAA had displaced Simon and/or the Mall's responsibility with respect to the safety of the parking lot, and based upon the plaintiffs failure to submit any evidence to substantiate their theory that Simon and/or the Mall created the dangerous condition that caused the accident or had actual or constructive notice thereof. As such, it is hereby

ORDERED, that defendant motions are ***granted*** and this Court herewith awards summary judgment dismissal of the plaintiffs' complaint to all of the defendants.

AAA's applications to dismiss the cross claims asserted by Simon and the Mall for common law indemnity and contribution is also ***granted***.

Here, since there is no evidence that AAA was guilty of any negligence that contributed to the happening of plaintiffs' accident, the cross claims for common law indemnification and contribution are dismissed as a matter of law (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681 [2d Dept 2005] *quoting Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Furthermore, any claim predicated upon contractual indemnification is also dismissed because pursuant to the clear language of the contract, *supra*, AAA's duty to indemnify is conditioned upon proof that the injury is related to or resulted from its performance or alleged

failure to perform the services under or in connection with the contract. In the absence of any evidence to this effect. As such, it is further

ORDERED, that Simon and the Mall's cross claim based upon contractual indemnification is also dismissed.

The parties remaining contentions have been considered by this Court and do not warrant discussion.

All applications not specifically addressed are herewith ***denied***.

Plaintiffs' complaint is herewith dismissed in its entirety.

This constitutes the Decision and Order of the Court.

DATED: May 15, 2012
Mineola, N.Y. 11501

ENTER: _____
HON. MICHELE M. WOODARD
J.S.C.

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