Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Frances Moore and Scott Moore,	Index No.: 40348/2009
Plaintiffs,	Attorneys [See Rider Annexed]
-against-	Motion Sequence No.: 001; MG Motion Date: 9/11/11
The Great Atlantic & Pacific Tea Company, Inc. d/b/a Waldbaums, J. Ratto Landscaping Ltd., Selden Plaza and SP Real Estate Holdings, LLC,	Submitted: 8/22/12
	Motion Sequence No.: 002; MD Motion Date: 10/6/11
Defendants.	Submitted: 8/22/12

Upon the following papers numbered 1 to 37 read upon these motions for summary judgment: Notice of Motion/Order to Show Cause and supporting papers, 1 - 14; 15 - 28; Answering Affidavits and supporting papers, 29 - 33; Replying Affidavits and supporting papers, 34 - 35; 36 - 37; it is

ORDERED that these motions are consolidated for the purposes of determination; and it is further

ORDERED that the motion by defendant J. Ratto Landscaping Ltd. for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that the motion by defendant Selden Plaza LLC for summary judgment dismissing the complaint against it is denied.

Plaintiffs seek to recover damages for personal injuries sustained by Frances Moore and derivatively by her husband Scott Moore in a slip and fall incident which occurred in a shopping center parking lot located in Selden, New York. Plaintiffs allege in their complaint, as amplified by the bill of particulars, that the defendants Great Atlantic & Pacific Tea Company, Inc. d/b/a Waldbaums, J. Ratto Landscaping LTD, Selden Plaza LLC and SP Real Estate Holdings LLC are

liable for the accident based on their negligent possession and control of the subject parking lot. Specifically, they argue that the defendants were negligent in, *inter alia*, allowing an unsafe and inherently dangerous condition to exist on the premises; failing to take proper precaution and safeguards; failing to properly maintain and/or repair the premises; failing to properly salt and/or sand the area; failing to discover the inherent dangerous condition of the premises; failing to warn of the dangerous condition of the premises; and failing to properly light, lamp and/or illuminate the areas in question.

By stipulation of discontinuance dated May 2010 this action was discontinued without prejudice against defendant SP Real Estate Holdings, LLC. By stipulation of discontinuance dated October 8, 2010, this action was discontinued with prejudice against defendant Great Atlantic & Pacific Tea Company, Inc. d/b/a Waldbaums.

Defendant J. Ratto Landscaping (hereinafter J. Ratto) now moves for summary judgment dismissing the complaint as asserted against it on the grounds that it did not owe the plaintiff a duty of care. By separate motion defendant Selden Plaza, LLC (hereinafter Selden Plaza) moves for summary judgment dismissing the complaint and all cross-claims asserted against it on the grounds that the plaintiff cannot establish a *prima facie* case of negligence as against it where it had neither actual nor constructive notice of the icy condition that purportedly caused the accident.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320 [1986]; ***Winegrad v New York Univ. Med. Ctr***, 64 NY2d 851 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr***, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

Plaintiff testified at her deposition that the accident occurred at approximately 4 p.m. on January 11, 2009 at the shopping center known as Selden Plaza. According to plaintiff, when she first entered the parking lot she observed snow all over and did not observe any evidence of snow removal. There were piles of snow in the parking lot in various locations. At that time, the temperature was very cold and no new precipitation was falling. She believed it last snowed the day before, but she was unsure of whether it had snowed or rained earlier that same day. The accident occurred after she parked and as soon as she attempted to get out of her vehicle. She placed her left foot on the ground, slipped and fell on ice. When she got up, there was snow in her hair, on the back of her head and on her pants. She went into a Waldbaum's store and made a written report of the incident with the manager. The manager also accompanied plaintiff to the location of the accident. Upon returning to the location, the injured plaintiff observed that the area was "messy," and looked as though it had not been plowed, sanded or salted. She testified that there was black ice and that

it was wet, snowy and slushy. Plaintiff was not aware of any prior complaints having been made about the condition of the parking lot in the area of her accident.

Charles Edward Gundel testified that at the time of the incident he was employed by Waldbaums in Selden Plaza as an assistant store manager. His duties did not include any responsibility with respect to the parking lot. Gundel testified that Waldbaum's employees would maintain the sidewalk immediately in front of the store free of hazards, including clearing snow that was present in the area and putting down sand and salt, but that they did not maintain the parking lot. Gundel testified that the plaintiff reported to him on the date of the accident that she slipped and fell on ice. Gundel did not recall if there had been precipitation on the date of the incident. He went to observe the location where she alleged she fell and observed an icy condition in the area. He did not recall how large of an area the icy condition encompassed, if there was salt or sand on top of the ice, if there were mounds of snow present nearby or if the ice appeared to be white or dirty. From what he recalled it was dusk and starting to get dark at the time he observed the condition, but there were lights in the parking lot. Gundel did not know who maintained the lights in the parking lot or who maintained the parking lot. He did not know if anyone on behalf of Waldbaum's surveyed or inspected the parking lot for snowy or icy conditions. Gundel was not aware of any customers, employees or vendors who previously complained about the icy condition of the parking lot.

Andrew Murphy testified that he is employed in maintenance by Selden Realty and was primarily assigned to maintain Selden Plaza. His duties include, among other things, maintaining the parking lot and performing snow removal and sanding. Murphy testified that his regular hours are 7 a.m. to 3:30 p.m., Monday through Friday, plus three hours on Sundays. He is also on call 24-hours-a-day. Murphy testified that upon arriving at Selden Plaza each morning, he does an inspection to see if there are any problems that need to be addressed. He also receives assignments from his supervisor based on complaints or requests made by tenants of the shopping center. Murphy testified that it is part of his responsibilities to clear the snow and ice and to put down sand and salt in the parking lot, and that this responsibility included the location of the plaintiff's accident. Selden Realty provides him with equipment to perform his snow removal duties, including a pick up truck with a plow, a two-and-a-half yard sander, a snow blower, shovels, salt, sand and spreaders. He is also responsible for maintaining this equipment and ensuring there is a supply of sand and salt. He testified that during the winter when sand and snow were present, sanding and salting the parking lot was part of the daily routine, and that in the event of a snow fall, he and his co-worker would likely be at the shopping center all day. They would stay until the precipitation ended and the parking lot was clear. There was no minimum accumulation of snowfall that would trigger their snow clearing efforts. They would put the sander to use after they were done plowing and on any occasions that the parking lot was icy.

Murphy testified that, if necessary, they would also hire out snow removal services from another company. In the winter of 2008/2009, J. Ratto was the contractor that would provide such additional services. He did not recall on how many occasions he called J. Ratto to provide services. J. Ratto did not ever come on their own, but Murphy would call them in when he needed them to perform snow removal services. According to Murphy, he would generally call J. Ratto when six inches of snow or more had accumulated in a given day to remove the snow and to spread sand and

salt. Murphy was always present during the times that J. Ratto came to perform snow removal services and would make sure that the work was completed properly. After J. Ratto left, Murphy and his co-worker would spot clean any remaining snow or ice with their own equipment. J. Ratto would bill Selden Plaza based on the number of hours it took them to perform their work.

Murphy testified that he took care of any ice or snow that was in the parking lot on a daily basis, but did not have an independent recollection of having cleared the parking lot on the date of the accident or the date prior to the accident. He has no independent recollection of being at the shopping center on the date of the incident and did not know if he hired J. Ratto to perform work on such date. Murphy testified that any complaints regarding snow or ice in the parking lot of the shopping center would go to Selden Realty's main office. He was not aware of and did not recall receiving any complaints regarding icy conditions in the location of the plaintiff's accident.

John W. Ratto testified that he is the president of J. Ratto, a landscape and design business that engages in snow plowing activities in the winter months. J. Ratto entered a snow plow services contract with Selden Realty. Such contract provided rates for hourly use of specified equipment and operators. The contract did not provide that J. Ratto would automatically send equipment to a location based on snow fall, and he never went automatically to Selden Plaza to perform snow removal services. Rather, Murphy would call and say what equipment he needed and when he needed it. When J. Ratto arrived, the driver would check in with Murphy, and Murphy would ultimately dismiss the driver when he felt the work was completed. Murphy would tell them, among other things, how much sand and salt to apply and where to apply the sand and salt in the parking lot. Shortly after completing services at Selden Plaza, J. Ratto would prepare an invoice based on the type of equipment and number of hours spent at the location. Invoices prepared by J. Ratto with respect to service at Selden Plaza included a January 2, 2009 invoice for 8.5 hours of work including plowing, applying salt and sand. It also included a January 13, 2009 invoice for service performed on January 11, 2009 which included 2 hours of light plowing and spreading salt and sand.

The evidence submitted established J. Ratto's *prima facie* entitlement to summary judgment dismissing the complaint as asserted against it. As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties (***Knox v Sodexho Am., LLC***, 93 AD3d 642, 939 NYS2d 557, 558 [2d Dept 2012]; *see* ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 915 NYS2d 103 [2d Dept 2010]). However, the Court of Appeals has recognized that exceptions to this rule apply: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely (***Knox v Sodexho Am., LLC***, *supra* at 93 AD3d 642; *see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140 [2002]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*).

Here, J. Ratto established a *prima facie* entitlement to judgment as a matter of law by demonstrating that the injured plaintiff was not a party to its snow removal contract and that it therefore owed her no duty of care (*see* ***Knox v Sodexho Am., LLC***, *supra*). Contrary to the

plaintiffs' contention, J. Ratto was not required to affirmatively demonstrate that the three exceptions to the general rule did not apply in order to establish its *prima facie* entitlement to judgment as a matter of law since the plaintiffs did not allege facts in their complaint or bill of particulars which would establish the possible applicability of any of these exceptions (*see* ***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; ***Abramowitz v Home Depot USA, Inc.***, 79 AD3d 675, 912 NYS2d 639 [2d Dept 2010]. In any event, the evidence submitted is sufficient to demonstrate that these three exceptions are inapplicable. In this regard, the record is devoid of any indication or allegation that the injured plaintiff detrimentally relied on J. Ratto's continued performance of its duties under its agreement with Selden Plaza. Indeed, the plaintiff admittedly had no knowledge of any relationship between J. Ratto and Selden Plaza (*see* ***Schultz v Bridgeport & Port Jefferson Steamboat Co.***, 68 AD3d 970, 891 NYS2d 146 [2d Dept 2009]). The evidence also clearly demonstrates that J. Ratto did not entirely displace Selden Plaza's duty to maintain the parking lot in a reasonably safe condition (*see* ***Rubistello v Bartolini Landscaping, Inc.***, 87 AD3d 1003, 929 NYS2d 298 [2d Dept 2011]; ***Lehman v North Greenwich Landscaping, LLC***, 16 NY3d 747, 942 NE2d 1046, 917 NYS2d 621 [2011]). Lastly, the evidence submitted was sufficient to demonstrate that the purported icy condition complained of was not the result of J. Ratto launching a force or instrument of harm. Although a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury (*see* ***Espinal v Melville Snow Contrs.***, *supra*), the evidence submitted indicates that J. Ratto did not perform snow removal services immediately prior to the accident. Indeed, according to the injured plaintiff's own testimony, she did not observe any snow removal equipment and the entire parking lot was messy and appeared to be unplowed. Notably, all services provided by J. Ratto, including sanding and salting, were performed solely at the request of Selden Plaza and under Selden Plaza's direct supervision.

In opposition to J.Ratto's *prima facie* showing of entitlement to summary judgment, the plaintiffs failed to submit evidence that was sufficient to raise a triable issue of fact (*see* ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; ***Abramowitz v Home Depot USA, Inc.***, *supra*). Accordingly, the motion by J. Ratto for summary judgment dismissing the complaint as asserted against it is granted.

The evidence submitted fails to establish Selden Plaza's *prima facie* entitlement to summary judgment in its favor. A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property when it created the alleged dangerous condition or had actual or constructive notice of it (*see* ***Cantwell v Fox Hill Community Assn., Inc.***, 87 AD3d 1106, 930 NYS2d 459 [2d Dept 2011]; *see also* ***Sarisohn v 341 Commack Rd., Inc.***, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 2011]). A defendant may be held liable for a dangerous condition on its premises caused by the accumulation of snow or ice upon a showing that it had actual or constructive notice of the condition, and that a reasonably sufficient time had lapsed since the cessation of the storm to take protective measures (***Sabatino v 425 Oser Ave., LLC***, 87 AD3d 1127, 1128, 930 NYS2d 598 [2d Dept 2011]; *see* ***Roofeh v 141 Great Neck Rd. Condo.***, 85 AD3d 893, 925 NYS2d 165 [2d Dept 2011]).

In this case, Selden Plaza failed to submit sufficient evidence to affirmatively establish that it neither created nor had actual or constructive notice of the alleged dangerous condition of the parking lot (*see* ***Stewart v Sherwil Holding Corp.***, 94 AD3d 977, 942 NYS2d 174 [2d Dept 2012]; *see also* ***Healy v Bartolomei***, 87 AD3d 1112, 929 NYS2d 866 [2d Dept 2011]; ***Sarisohn v 341 Commack Rd., Inc.***, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 2011]). Indeed, Selden Plaza offered no evidence on the issue of whether it created or had actual or constructive notice of the allegedly dangerous condition in the parking lot, or of whether a reasonably sufficient time had elapsed after the cessation of snowfall to enable it to take remedial measures (*see* ***Roofeh v 141 Great Neck Rd. Condo.***, *supra*). The only evidence offered by Selden Plaza in support of such a finding was the deposition of Murphy, who testified that he had no independent recollection of being at the shopping center or having cleared the parking lot on the date of the accident or the date prior to the accident (*see* ***Mignogna v 7-Eleven, Inc.***, 76 AD3d 1054, 908 NYS2d 258 [2d Dept 2010]). Accordingly, the motion by Selden Plaza for summary judgment is denied.

Dated: 9/6/2012

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

RIDER

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