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SHORT FORM ORDER

COPY

INDEX No. 07-33293
CAL No. 11-02444OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 4-30-12
ADJ. DATE 5-25-12
Mot. Seq. # 003 - MG; CASEDISP

KATHLEEN LINN,

Plaintiff,

- against -

AVALONBAY COMMUNITIES, INC. and SIPALA LANDSCAPE SERVICES, INC.,

Defendants.

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (003) 1-11; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 12-13; 14-15; Replying Affidavits and supporting papers 16-17; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the defendant, Sipala Landscape Services, Inc., pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the complaint and cross claims asserted against it are dismissed.

In this negligence action, the plaintiff, Kathleen Linn, seeks damages for personal injuries which she alleged to have sustained on June 22, 2007, at Avalon Bay Condominiums, when she stepped into a sleeve containing the shut-off valve for a nearby fire hydrant. The plaintiff alleges that the sleeve was uncovered, dangerous, and a trap-like condition. Avalon Bay Condominiums is the owner and managing agent of Avalon Bay Communities, Inc. It is alleged that defendant Sipala Landscape Services, Inc. (Sipala) moved the cover that had been over the sleeve during its performance of landscaping operations. It is further alleged that defendant Avalon Bay Communities, Inc. (Avalon) had actual and constructive notice of the alleged defect. Sipala and Avalon have each asserted cross claims wherein they seek judgement over against each other for contribution and/or indemnification.

RST

Defendant Sipala Landscape Services, Inc. now seeks summary judgment dismissing the complaint and cross claims asserted against it on the bases that there is no evidence that it caused the lid to be removed and missing, that it did not observe the shut-off valve without its lid, that it did not do anything that caused or contributed to the plaintiff's accident, and that it had no duty to warn the plaintiff of a condition.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this motion, defendant Sipala has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' respective answers with cross claims, and plaintiff's verified bill of particulars; and the unsigned and uncertified transcripts of the examinations before trial of Gregory Moreyn on behalf of defendant Avalon dated September 22, 2009, and Kathleen Linn dated July 29, 2009, and the unsigned but certified transcripts of the examinations before trial of non-parties Jesus Morales dated July 16, 2010, and Saul Ibarra dated March 5, 2010, all of which have been objected to by the opposing parties, and are not considered as they are not in admissible form (*see*, CPLR 3116 ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]). Movant also submits the unsigned but certified transcript of Michael Sipala dated September 22, 2009 which is considered as adopted as accurate (*see*, ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); two photographs; and the contract dated October 10, 2003 entered into between Avalon and Sipala.

Kathleen Linn was residing at 1702 Avalon Pines Drive, Coram, New York on June 22, 2007. At approximately 8:15 p.m., in front of apartment 1417 Avalon Pines Drive, Coram, New York, the plaintiff allegedly sustained injury when she stepped on an alleged trap-like condition on the grassy median.

Michael Sipala testified at his deposition that he has been the president of Sipala Landscaping since 1980. His business provides landscape maintenance, construction, installation, and all forms of landscaping such as irrigation systems. He maintained five Avalon Bay Communities, including Avalon Pines. His landscape supervisor was Kevin Congdon in June 2007. He had four foremen, including

Saul Albera and Jesus Morales. He entered into an agreement with Avalon Bay pursuant to a proposal submitted to them. His company, Sipala, subcontracted Prestige Landscaping to do chemical application such as fertilization and weed control in 2007. A worksheet generated for June 18, 2007 for Avalon Pines indicted that Saul Albera performed work at the site. A second worksheet indicated that another crew performed maintenance at the site also. He testified that the lawn area around the hydrant would be maintained by Sipala. His contract with Avalon Pines did not include any work with regard to hydrant caps, replacing drain covers that might be missing or broken, and he does not keep an inventory or stock of drain covers. When Michael Sipala received a call from management at Avalon Pines to inspect the location of the accident after its occurrence, he went to the site with his digital camera and took some photographs. He observed a fire hydrant shut-off valve without its steel cap in place. The sleeve was about 4 to 6 inches in diameter and went about two feet into the ground. The valve was located at the bottom. He testified that the grass around the hydrant was properly maintained.

In his accompanying affidavit, Michael Sipala averred he and his employees were obligated to cut the various lawns, trim the edges, fertilize, remove leaves, apply insect control, and mulch. In June 2007, Sipala employees would have provided lawn cutting services. He stated that he is generally familiar with the sleeves which customarily have a cover, which he presumed is affixed to the sleeve. He never tried to remove a cover and never saw a cover removed intentionally or by accident. He continued that his employees were instructed to report to him or to Avalon's representative, any potential problem, including mole trails, grassy areas burning, irrigation problems, and safety hazards, which would include an open valve sleeve. Neither he nor his employees knew that there was a missing sleeve cover, and Sipala had no obligation, under the contract, to replace the lid, or to warn of its absence in that the hydrant and valve sleeve are not part of the irrigation system on those premises. He inspected the premises to ascertain that the grounds were well groomed.

As a general rule, liability for a dangerous or defective condition on property is predicated upon ownership, occupancy, control or special use of the property (***Arev v Feigenbaum***, 2011 NY Slip Op 31069U [Sup Ct, Queens County]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.*** 84 NY2d 967 [1994]). "A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (***Mei Ziao Guo v Quong Big Realty Corp.***, 81 AD3d 610, 916 NYS2d [2d Dept 2011]). It has been established that Sipala Landscaping was not the owner of the premises where the incident occurred, and did not have control over, or have special use of the premises *(see,* ***Arev v Feigenbaum***, 2011 NY Slip Op 31069U [Sup. Ct. Queens County 2011]).

As set forth in ***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d [2002], "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..... As a general rule, a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries. However, tort liability may arise where performance of contractual obligations has induced detrimental reliance on continued performance and the defendant's failure to perform those obligations 'positively or actively' works an injury upon the plaintiff." The court continued that a party

who enters into a contract to render services may be said to have assumed a duty of care and thus be potentially liable in tort-to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his 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 the other party's duty to safely maintain the premises. These principles are firmly rooted in New York case law, and have been generally recognized by other authorities.

In applying the foregoing to the instant action, the evidentiary submissions do not establish that Sipala Landscaping bears any liability in this action. It did not own or manage the hydrants or the subject cover, or the premises upon which those items were located. It has not been demonstrated that Sipala removed the subject cover. Sipala had no duty to inspect the premises, except to inspect to ascertain that its mowing and landscaping work was properly done. If a hole were noted, or a cover missing, it would have reported it to Avalon. It has been further established prima facie that at no time did Sipala employees cause the steel cover to dislodge or break, or become missing while fulfilling its contractual obligations, and that it exercised reasonable care in fulfilling its contractual obligations. It has not been demonstrated that Sipala exacerbated, caused, created, or launched the dangerous condition which allegedly caused the plaintiff's injuries. Thus, it has further been established prima facie that Sipala did not breach any duty to the plaintiff as an intended third-party beneficiary of the contract entered into between Sipala and Avalon.

On October 10, 2003, Avalon Bay Communities, as owner, and Sipala Landscape Services, as contractor, entered into a contract which provided in relevant part that Sipala would be liable to Avalon Bay for costs resulting from improperly work, liability to third-parties and all residents living at the property. It further provided that the contractor shall save and hold harmless from, and indemnify Avalon Bay and its manager against any and all claims, damages, liabilities, losses, causes of action, and costs and expenses arising out of injury or death of any person, resulting in part or in whole, from any acts, errors or omissions of the contractor. The landscape and snow removal contract provided that the contractor was required to note the location of all fire hydrants on a site map to ensure that they are kept clear. There is no provision for maintenance and care of the hydrants or covers associated thereto. Based upon the foregoing, it is further determined that in addition to establishing that it did not cause or create the condition complained of, Sipala has established prima facie that it had no contractual obligation to maintain the hydrants and covers over the sleeves, thus, it is not obligated to hold Avalon harmless from, or indemnify Avalon for the plaintiff's loss based upon a breach of duty to maintain the hydrants or cover over the sleeve.

It is determined that defendant Sipala Landscaping has established prima facie entitlement to summary judgment dismissing the complaint and cross claim asserted against it. In opposing this motion, both the plaintiff and defendant Avalon have submitted an attorney's affirmation, however, they have not submitted any evidence to raise a triable issue of fact to preclude summary judgment from being granted to defendant Sipala. Although the opposing parties argue that credibility issues are not to be determined on a motion for summary judgment, neither the plaintiff nor Avalon have submitted any affidavits or evidentiary proof to raise a credibility issue or factual issue. Counsels' arguments that Sipala caused or created the condition complained of is merely speculative and unsupported by any

evidentiary proof and thus, are afforded no probative value (***Lupinsky v Windham Construction Corp.***, 293 AD3d 317, 739 NYS2d 717 [1st Dept 2002]). While it is also argued that there is a factual issue concerning whether the cover was plastic or steel and that it could be removed, that argument does not establish either liability or proximate cause. The opposition papers are wholly conclusory and insufficient to create a genuine factual issue (***Gervasio v Di Napoli***, 134 AD2d 235, 520 NYS2d 430 [2d Dept 1987].

Dated: 10·10·12

Hon. Donna F. Mills
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION