To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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JOHN T. CARISSIMI,

Plaintiff,

-against -

JAMES McGLASSON, JOYCE McGLASSON, EDWARD SPADARO d/b/a YARD ESCAPES LANDSCAPING AND DESIGN,

Defendant.

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DECISION & ORDER

Index No. 1115-2010

Sequence No. 1-2

LUBELL, J.

The following papers were considered in connection with **Motion Sequences 1 and 2**, the respective motions for summary judgment by defendant Edward Spadaro d/b/a Yard Escapes Landscaping and Design, and defendants James McGlasson and Joyce McGlasson:

PAPERS	**NUMBERED**
Motion Sequence 1	
Motion/Affirmation/Exhibits A-K	1
Motion Sequence 2	
Motion/Affirmation/Exhibits A-F	2
Affidavit in Opposition/Exhibits A-F	3
Reply Affirmation	4
Reply Affirmation/Exhibits A-D	5

Plaintiff, a tenant at a three-family residence owned by defendants, James McGlasson and Joyce McGlasson, situated at 330 Horsepound Road, Carmel, New York, (the "Premises") brings this action for personal injuries sustained on January 30, 2009, when he slipped and fell on ice located on the driveway of the Premises.

Although the McGlassons do not reside at the Premises, they live directly across the street. During the subject winter, plaintiffs hired co-defendant Edward Spadaro d/b/a Yard Escapes Landscaping and Design ("Spadaro") to plow the driveway of the Premises. The verbal agreement between the McGlassons and Spadaro was that Spadaro would automatically come to plow the driveway and

lay salt and sand upon the accumulation of 3" inches of snow, and otherwise upon McGlassons' request. Since the McGlassons were often away during most of the winter, all in all, plowing, salting and sanding were left pretty much to Spadaro's discretion. All in all, the McGlassons found Spadaro to be "very diligent" and they never received any complaints from tenants about the condition of the driveway in the wintertime.

Moreover, at the time of accident, arrangements had been made with their adult daughter, Jamie McGlasson, to look after the Premises and to act as the "contact person" while they were away. All tenants, including plaintiff, were made aware of this and all were given Jamie's telephone number.

Jamie's duties included making sure that each tenant had a mixture of sand and salt and a shovel to remove ice and snow from the area surrounding their entryways and immediate walkways. She would also check her parent's answering machine to see if there were any tenant related messages there. The only Premises related communication received by Jamie from the time of her parents departure the day before the storm, was a call from plaintiff some two weeks after the accident advising that she should contact her parents about his fall and injury, which she promptly did.

Plaintiff testified at his deposition that freezing rain began the night before the incident and continued until about 10:30 a.m. to 11:30 a.m. the next day. Upon the cessation of the precipitation and becoming aware of the icy conditions, plaintiff salted his patio area, as was his custom, but did not notify or attempt to notify anyone of the icy conditions otherwise existing at the Premises, including the driveway.

"[A]t least one or two hours" after the cessation of the storm, between 12:30 and 1:30 p.m., plaintiff decided to go outside to collect his mail from the mailbox situated at the bottom of the 300 foot driveway and across the street. Although he knew that the McGlassons had hired Spadaro to perform snow and ice removal from the Premises, he had no reason to believe that Spadaro had yet arrived or that anyone had addressed any existing weather related conditions.

Having already salted the patio and walkway leading from his apartment to the driveway, he proceeded down the driveway and observed that it was was icy, but not completely so. However, approximately twenty feet from the road, his "feet flew out from underneath . . . and [he] banged [his] head on the ice . . . literally knock[ing] [his] glasses off [his] face." Undeterred, he picked himself up, proceeded to the mailbox and retrieved his mail

only to then realize that his glasses were no longer on his head.

Upon venturing back up the driveway, he walked over to the area where he had originally fallen to pick up his glasses, i.e., approximately 20 feet from the road, in the center of the driveway which at that point is on an incline. Reaching down for his glasses, he slipped and struck his arm on the pavement as he went to break his fall only to sustain a fractured wrist, among other injuries.

Plaintiff testified that he had not during that winter experienced any problems getting up and down the driveway or back and forth to the mailbox due to an accumulation of snow and/or ice. Nor had he complained to the McGlassons about the presence of ice and/or snow at the Premises at that or any other time.

> "[The] owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition" (Bolloli v. Waldbaum, Inc., 71 A.D.3d 618, 619, 896 N.Y.S.2d 400 [internal quotation marks omitted]). To permit a finding of constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time [for the defendant] to discover and remedy it" (Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774).

(Wolf v. Fairfield Inn, 77 A.D.3d 927 [2d Dept., 2010]).

Here, the Court is satisfied that the McGlassons have met their initial burden of establishing prima facie entitlement to summary judgment in their favor as a matter of law. Among other things, they have come forward with deposition testimony, materially outlined above, establishing that they were neither directly nor indirectly through their daughter or otherwise, put on actual notice of the alleged dangerous condition; nor, when measured from the time the ice existed to the time of plaintiff's fall, even as testified to by plaintiff, did they have sufficient time to remedy the condition after cessation of the precipitation (Ronconi v. Denzel Assoc., 20 AD3d 559, 560 [2d Dept 2005][evidence that precipitation ceased only one to two hours before the injury is not enough to constitute constructive notice]).

Finally, the Court finds that the McGlassons, as absentee owners, took reasonable steps to protect persons coming onto the Premises from the dangers of snow and ice accumulation by way of having their daughter care for the Premises in their absence, providing their tenants, including plaintiff, with a mixture of sand and ice and with a shovel (even if intended primarily for use at or near their personal entry way), and hiring co-defendant Spadaro on such terms and customs and usages as they did.

In response to this prima facie showing, the Court finds that plaintiffs have not come forward with sufficient evidence in admissible form establishing any material question of fact regarding same.

Spadaro's motion is also granted.

Here, the Court is satisfied that Spadaro has come forward with sufficient proof in admissible form establishing that he was not under the "type of comprehensive and exclusive maintenance contract with the [McGlassons] such that [his] duties would entirely displace those of the property owner to maintain the property in a safe condition" (Lenti v. Initial Cleaning Services, Inc., 52 AD3d 288, 290 [1st Dept 2008] citing Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 140-141 [2002]), and plaintiff has not come forward, in response, with a contrary showing such that a material issue of fact has been raised.

Based upon the foregoing and there being no merit to any other contention raised in response to defendants' motions for summary judgment, it is hereby

ORDERED, that this case be and is hereby dismissed in all respects.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
December 11, 2012

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HON. LEWIS J. LUBELL, J.S.C.

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