SHORT FORM ORDER

INDEX No. 15-612786
CAL. No. 18-00450OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice Supreme Court

MOTION DATE 5-8-18
ADJ. DATE 6-19-18
Mot. Seq. # 001 - MG; CASEDISP

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REGINAL AUGUSTE,

,Plaintiff,

- against -

MIDDLE ISLAND MAINTENANCE CORP.,

Defendant.

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Upon the following papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendant, dated April 9, 2018; Answering Affidavits and supporting papers by plaintiff, dated May 29, 2018; Replying Affidavits and supporting papers by defendant, dated June 18, 2018; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Middle Island Maintenance Corp. for summary judgment dismissing the complaint against it is granted.

This action was commenced by plaintiff Reginal Auguste to recover damages for injuries he allegedly sustained on February 22, 2014, when he slipped and fell on ice located at a premises known as 683 Old Country Road, Dix Hills, New York. Defendant Middle Island Maintenance Corp. was hired by nonparty LG Other, LLC to perform snow removal services at that premises.

Middle Island Maintenance Corp. (Middle Island) now moves for summary judgment in its favor dismissing the complaint against it, arguing that as a third-party snow removal contractor, it owed plaintiff no duty of care absent special circumstances. In support of its motion, Middle Island submits copies of the pleadings, transcripts of the parties' deposition testimony, a copy of a snow removal agreement, and copies of snow removal invoices.

Plaintiff testified that at approximately 11:30 a.m. on the date in question, he was in the parking lot of a shopping center in Dix Hills, New York. He stated that he visits this shopping center "[t]hree or four times a week," and that on the day of his accident the weather was clear and snow was piled around the perimeter of the parking lot. Plaintiff testified that he exited his vehicle, which was parked perpendicularly to the Pathmark grocery store he intended to enter, walked "[m]aybe seven steps" past the rear of his automobile, and fell to the "level" ground. He stated that while on the ground, he noticed that he had slipped on a patch of "black" ice approximately 10 inches in diameter.

Phil Weber testified that he is one of three shareholders of Middle Island. He stated that Middle Island had approximately eight employees at the time of plaintiff's alleged incident. Mr. Weber indicated that Middle Island had an annual snow removal contract with Lerner Properties (Lerner), also known as LG Other, LLC, a "real estate company" that owned the entire 450-parking-stall lot in question. He testified that while the contract was renewable yearly, Middle Island had been performing snow removal for Lerner Properties for approximately 30 years. Mr. Weber indicated that he determined how much equipment was required for each snowfall and dispatched workers to each location Middle Island serviced. He stated that while Middle Island, pursuant to its contract, was not required to respond to a site until two inches of snow had fallen, in general, Middle Island would arrive before that depth had been reached.

Shown certain invoices, Mr. Weber testified that from February 13, 2014 through February 14, 2014, Middle Island plowed "over 12 inches" of snowfall at the subject premises, then spread rock salt. He indicated that rock salt, and not the sand/salt blend specified in the contract, was spread at Lerner's request because sand would be carried on visitors shoes from the parking lot into the stores, requiring additional cleanup. Mr. Weber stated that by his estimation, approximately 12 cubic yards of salt was applied to the subject parking lot from February 13, 2014 through February 14, 2014, and that four additional cubic yards of salt were applied after a less-than-four-inch snowfall on February 18, 2014. Upon questioning, Mr. Weber testified that he then returned to the subject location "daily," driving through the parking lot, looking for any ice or incorrectly-placed snow mounds. He stated that had he seen any "black ice" in the lot, he would have arranged for the spreading of additional rock salt and generated another invoice. However, he testified that he observed no ice, and generated no additional invoices for the period leading up to the date of plaintiff's incident. Upon further questioning, Mr. Weber indicated that Middle Island was not authorized to remove snow from the subject premises and would require permission from Lerner to do so. He stated that Lerner has never asked that Middle Island remove snow from the subject premises, and that Middle Island has never received any complaints regarding the quality of its snow plowing at that location. He further stated that it was Lerner's responsibility to contact Middle Island in the event of additional snow or ice condition on the premises subsequent to Middle Island's departure. Finally, when shown the photograph marked by plaintiff, indicating the general location of his fall, Mr. Weber indicated that based upon his 30 years of experience, the "white" areas in the photograph depict salt pellets, and that no ice is present.

A party moving for summary judgment "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" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues

of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of New York & New Jersey***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). A real property owner "will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" (***Bader v Riv. Edge at Hastings Owners Corp.***, 159 AD3d 780, 780, 72 NYS3d 145 [2d Dept 2018], quoting ***Cuillo v Fairfield Prop. Servs., L.P.***, 112 AD3d 777, 778, 977 NYS2d 353 [2d Dept 2013]). "A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties" (***Yvars v Marble Hgts. of Westchester, Inc.***, 158 AD3d 850, 850-851, 73 NYS3d 246 [2d Dept 2018], quoting ***Baratta v Home Depot USA***, 303 AD2d 434, 434, 756 NYS2d 605 [2d Dept 2003]). However, there are "three situations in which 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 maintain the premises safely" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120 [2002] [internal quotation marks and citations omitted]).

Here, Middle Island established a prima facie case of entitlement to summary judgment in its favor as to plaintiff's complaint (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). Through Mr. Weber's deposition testimony, Middle Island demonstrated that plaintiff was not a party to its snow removal contract and, thus, as a third-party contractor, it owed no duty to plaintiff (*see* ***Reisert v Mayne Constr. of Long Is., Inc.***, 165 AD3d 854, 85 NYS3d 490 [2d Dept 2018]). As plaintiff "did not allege facts in their complaint or bill of particulars which would establish the possible applicability of any of the *Espinal* exceptions, [defendant] was not required to affirmatively demonstrate that these exceptions did not apply" (***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 811, 971 NYS2d 170 [2d Dept 2013]; *cf.* ***Yvars v Marble Hgts. of Westchester, Inc.***, *supra*). Having established its prima facie case, defendant shifted the burden to plaintiff to raise a triable issue of fact (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

Plaintiff failed to raise a triable issue (*see* ***Reisert v Mayne Constr. of Long Is., Inc.***, *supra*; ***Laronga v Atlas-Suffolk Corp.***, 164 AD3d 893, 83 NYS3d 193 [2d Dept 2018]; ***Castillo v Port Auth. of New York & New Jersey***, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]). In opposition to defendant's motion, plaintiff submits only his counsel's affirmation, wherein he argues that a snow plowing contractor "can be held liable to third parties in those situations where the placement of cleared snow creates the possibility that ice may form in the cleared areas," and that "defendant has failed to establish as a matter of law" that

"negligent snow removal of the parking lot was not the proximate cause of plaintiff's injury." The cases cited by plaintiff in support of these arguments are inapposite.

Here, plaintiff's "claim that the icy condition was caused by the thawing and refreezing of snow that [Middle Island] plowed . . . was speculative and, therefore, insufficient to raise a triable issue of fact" (***Cayetano v Port Auth. of New York & New Jersey***, 165 AD3d 1223, 1225, 2018 NY Slip Op 07285 [2d Dept 2018]). Plaintiff submitted no expert affidavits, no certified meteorological records, nor any other competent evidence to support his contention that the manner in which Middle Island plowed snow at the subject premises, four days prior to his accident, was a proximate cause thereof. As to plaintiff's second argument, he has not offered any evidence as to the manner in which defendant's snow removal was negligent. Further, it has been held that "by merely plowing the snow, as required by [its] contract, [a third-party contractor's] actions could not be said to have created or exacerbated a dangerous condition" (***Fung v Japan Airlines Co., Ltd.***, 9 NY3d 351, 361, 850 NYS2d 359 [2007] [internal quotation and citation omitted]; *see* ***Somekh v Val. Natl. Bank***, 151 AD3d 783, 57 NYS3d 487 [2d Dept 2017]). Thus, plaintiff has failed to demonstrate, prima facie, the applicability of any of the three ***Espinal*** exceptions.

Accordingly, the motion by Middle Island Maintenance Corp. for summary judgment dismissing the complaint against it is granted.

Dated: December 5, 2018

Martha L. Luft
A.J.S.C.
HON. MARTHA L. LUFT

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION