SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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May 8, 2012

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Re: Betty Owens
v. Wilcox Landscaping, Inc., et al.
C.A. No. N10C-09-219 JAP

Dear Counsel:

The court heard oral argument on the motions for summary judgment in the above captioned case on March 21, 2012. The court took the matter under advisement and this is the court's ruling. For the reasons explained below, summary judgment is **DENIED** as to Emory Hill Real Estate Services, Inc ("Emory Hill"), Stoney Batter Medical Pavilion ("Stoney Batter"), and Wilcox

Landscaping Inc. ("Wilcox") and **GRANTED** as to Steve Pariag t/a Backyard Paradise Landscaping and Ponds ("Pariag").

Plaintiff, Betty Owens, was a mobile phlebotomist. On January 21, 2009 in the course of her employment she went to Stoney Batter Medical Pavilion. As she left the Pavilion she fell and alleges it was due to a wet or icy sidewalk. She further alleges injuries from the fall.

The circumstances around the cause of the fall are not clear.[1] During her deposition Plaintiff stated she fell because she slipped on ice.[2] Under cross examination Plaintiff muddied the waters about the cause of her fall. She referred to seeing wet concrete[3] and mentioned it was her boss who told her there was ice where she fell. Her boss was not present for the fall and visited the scene sometime after that fall without Plaintiff. The examiner attempted to clear up the confusion by asking:

> Q. "Okay. So you never actually saw the ice and snow that you slipped on; your boss said she saw the ice and snow that you slipped on?
>
> A. I seen – After I fell, okay, it was wet. And it was after I fell.[4]

No other attempt was made to clarify this point. Plaintiff also testified that there was salt on the sidewalk.[5]

Emory Hill contracted with Wilcox to remove snow and ice from the Pavilion. Wilcox in turn subcontracted the job to Pariag. The contract

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[1] Defendants argued the affidavits included by Plaintiff in her response to summary judgment were sham affidavits and should not be considered. The court has not relied on those affidavits in viewing the facts of this case and thus that issue is moot.

[2] Deposition of Betty Owens Oct. 25, 2011 at 20:23, 22:15.

[3] *See id.* at 60:16-17.

[4] *Id.* at 61:6-11.

[5] *Id.* at 22:1.

between Emory Hill and Wilcox granted discretion to Wilcox as to how and when snow removal was to take place.[6] Wilcox in turn subcontracted the job to Pariag. Pariag did not have the same discretion as Wilcox. Pariag was to provide services "as directed by [Wilcox]" and to clear and salt walkways, entrances, and exits, "if requested by [Wilcox]."[7] Wilcox directed Pariag to render services to the Pavilion on January 19 and 20, 2009, but not on the day of Plaintiff's fall. Prior to the fall Pariag last worked on the Pavilion on January 20, 2009 from 5:00-6:12 a.m., more than 24 hours before Ms. Owens fell.

A moving party is entitled to summary judgment when there is no genuine issue of material fact and it is entitled to judgment as a matter of law.[8] In deciding a motion for summary judgment, the court views the facts in the light most favorable to the non-moving party.[9] In order for summary judgment to be granted, not only must a moving party show the absence of any contention of material fact, but a moving party also must show that the only reasonable inferences that could be drawn from the facts are adverse to the non-moving party.[10] In this case Plaintiff must "establish[ ] that there was a dangerous or defective condition on the sidewalk that caused her to fall and

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[6] Defendant Pariag Motion for Summary Judgment, Ex. B ("[C]ustomer agrees to allow ***Wilcox Landscaping*** to exercise its' best judgment in deciding if snowplowing is necessary.") (emphasis in original).
[7] Defendant Pariag Motion for Summary Judgment, Ex. C at 1.
[8] Del. Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Snyder v. Baltimore Trust Co.*, 532 A.2d. 624, 625 (Del. Super. 1986).
[9] *Snyder*, 532 A.2d. at 625.
[10] *Watson v. Shellhorn & Hill, Inc.*, 221 A.2d 506, 508 (Del. 1966).

that [Defendants], in the exercise of reasonable care, should have known about the condition and corrected it."[11]

Emory Hill and Stoney Batter move for summary judgment arguing that Plaintiff can not prevail on her claims because she can not show "there was an unreasonably dangerous or defective condition on the sidewalk which caused her fall and" that Defendants acted unreasonably by not discovering the condition and correcting it.[12] Pariag adopts Emory Hill's argument and further asserts he did not owe a duty to Plaintiff because he was not directed to work on the Pavilion on the day of the fall. Wilcox adopts the arguments of Emory Hill and Pariag. Plaintiff responded that all Defendants owed a due to Plaintiff, there is a genuine issue of material fact as to the dangerous condition, and questions regarding reasonableness should be left to the jury to decide.

There is a genuine issue of material fact as to whether Plaintiff fell because of an unreasonably dangerous or defective condition. Based on the evidence in the current record is not clear whether Plaintiff fell because of ice, snow, slush, or wet concrete. It is also unclear as to whether Plaintiff's claim that she slipped on ice is based on her observations or that of her boss. Considering the evidence in the light most favorable to Plaintiff a reasonable jury could find that an unreasonably dangerous or defective condition existed.

The next question is whether there is evidence in the record that a reasonable trier of fact could find that one or more of the defendants knew, or

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[11] *Collier v. Acme Markets, Inc.*, 1995 WL 715862, *1, 670 A.2d 1337 (Del. 1995) (TABLE) (citing *Howard v. FoodFair Stores*, 201 A.2d 638, 640 (Del. 1964).

[12] Defendants'', Emory Hill Real Estate Services, Inc. and Stoney Batter Medical Pavilion, LLC, Motion for Summary Judgment, at ¶3.

should have known, of the dangerous condition. In *Robelen Paino Company v. Di Fonzo*[13] the defendant had put rock salt on the sidewalk.[14] The Delaware Supreme Court determined in that case the issue was whether the defendant could be charged with notice of the existence of the condition its action had created—slush from salt—and if in the meantime a reasonable person would have inspected and discovered it.[15] The court determined that was not a question that could be answered as a matter of law and was rightly to be decided by the jury.[16]

It is undisputed that Pariag applied calcium chloride on the sidewalk around the Pavilion in the days leading up to Plaintiff's fall. Accordingly determination of whether Defendant should have known about the condition through reasonable inspection is a question for the jury for some Defendants. Emory Hill and Stoney Batter oversaw the Pavilion and a reasonable jury could determine they should have had inspected the location given the weather and thus had notice of the arguably dangerous condition. Wilcox through its contract with Emory Hill accepted responsibility for determining what type of snow removal was necessary for the Pavilion. As such, a reasonable jury could determine they should have had inspected and had notice of the arguably dangerous condition. The claim against defendant Pariag is a different story, however. Pariag was only supposed to work at the Pavilion when directed by Wilcox. Pariag was not directed to perform work on the Pavilion after it

[13] 169 A.2d 240 (Del. 1961).
[14] *Id.* at 244.
[15] *Id.*
[16] *Id.*

completed its work on the morning of January 20, 2009. A reasonable jury could not determine that he could have been on notice of the arguably dangerous condition. Accordingly, summary judgment is **GRANTED** as to Pariag.

Defendants argued Plaintiff had a duty to act reasonably and a reasonable person takes extra precautions in wintery weather. In *Robelen* the defendant argued contributory negligence under similar reasoning. The court determined under the wintery circumstances whether the plaintiff "should have seen the condition which caused her fall was a question peculiarly for the decision of the jury."[17] Questions of whether Defendant and Plaintiff acted with reasonable care are factual determinations that should be made by the jury.

Based on the reasoning above, summary judgment is **DENIED** as to Emory Hill, Stoney Batter, and Wilcox and **GRANTED** as to Pariag.

IT IS SO ORDERED.

Very truly yours,

John A. Parkins, Jr.

oc: Prothonotary

[17] *Id.* at 245.