STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
DOCKET NO. CV-09-520
JAW - CUM- 4/1/2010

MARCELA BENNETT,
Personal Representative of the
ESTATE OF WAINO RAY,

Plaintiff

ORDER

v.

L.P. MURRAY & SONS, INC.;
MAINE LIFE CARE RETIREMENT
COMMUNITY d/b/a/ PIPER SHORES,
and LIFE CARE SERVICES LLC.

Defendants.

DECISION AND ORDER

This matter comes before the court on a motion to dismiss by Defendant L.P. Murray & Sons, Inc. in accordance with M. R. Civ. P. 12(b)(6).

FACTUAL BACKGROUND

This lawsuit, brought by the personal representative of decedent Waino Ray ("Plaintiff"), arises from a slip and fall that occurred on February 2, 2008 at a retirement community located in Scarborough, Maine. The retirement community is owned by Defendant Maine Life Care Retirement Community d/b/a/ Piper Shores and managed by Defendant Life Care Services, LLC (collectively referred to as "Piper Shores"). At all material times Ray was a resident at Piper Shores. Defendant L.P. Murray & Sons, Inc. ("Murray") is a business engaged in sanding and snow removal. Murray contracted with Piper Shores to provide the retirement community's sanding and snow removal.

The facts and allegations in the complaint state the following:

On the evening of February 1, 2008, Murray sanded Piper Shores walkways, but did not sand again on the morning of February 2, 2008, despite being aware that freezing rain and snow would make the area icy and slippery for the residents of Piper Shores. At approximately 9:00 am Ray fell on an unsanded icy walkway outside the entrance to the main building and struck his head. Ray was aided by friends and employees of Piper Shores, but refused transport to the hospital. After resting in the main reception Ray returned to his apartment and was subsequently witnessed to have an altered mental state. Emergency services were then requested to transport him to the hospital. At the hospital Ray was unresponsive and diagnosed with a subdural hematoma with midline shift that was fatal without surgical options. Ray died on February 4, 2008 from his head injury.

Plaintiff has sued the Defendants for negligence and wrongful death. Plaintiff alleges that by failing to properly sand Piper Shores Defendant Murray breached its duty to protect the residents from falling on ice or snow and to maintain the premises in a safe and reasonable condition, thus causing Ray's injuries. Plaintiff also alleges that Defendant Piper Shores was negligent as it failed to ensure that the walkways were properly sanded prior to the time they would be used by the elderly residents of Piper Shores. The Plaintiff has also brought a wrongful death claim based on the Defendants alleged negligence.

Murray does not dispute that Plaintiff is entitled to bring a claim for negligence against Piper Shores. However, Murray argues that since it contracted its services to Piper Shores only, it did not owe a duty of care to the Plaintiff. Therefore, Murray contends, the Plaintiff has no basis for a negligence claim as to Murray.

PROCEDURAL HISTORY

On or about September 21, 2009, the Plaintiff filed a complaint for negligence and wrongful death. After being served, Defendant Piper Shores filed an answer on October 28, 2009, and Defendant Murray filed an answer on November 3, 2009. On or about November 30, 2009, Murray filed a motion to dismiss with an incorporated memorandum of law. On December 2, 2009, the Plaintiff filed an opposition to the motion to dismiss. On December 9, 2009, Murray filed a reply to Plaintiff's opposition.[1]

DISCUSSION

I. Standard of Review.

"A motion to dismiss "tests the legal sufficiency of the complaint." *Livonia v. Town of Rome*, 1998 ME 39, ¶ 5, 707 A.2d 83, 85. In determining whether a motion to dismiss should be granted, the court considers "the allegations in the complaint in relation to any cause of action that may reasonably be inferred from the complaint." *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830, 832. The facts alleged are treated as admitted and are viewed "in the light most favorable to the plaintiff." *Id.* The court should dismiss a claim only "when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he [or she] might prove in support of his [or her] claim." *Id.* (quoting *Johanson v. Dunnington*, 2001 ME 169, ¶ 5, 785 A.2d 1244, 1246).

[1] Although not pertinent to the pending motion before the court, subsequent to the motion to dismiss filings, Defendant Piper Shores filed a cross claim against Defendant Murray for contribution, indemnity, and negligence. Defendant Murray answered the cross-claims on January 19, 2010.

II. Negligence

Murray has moved to dismiss, arguing that the Plaintiff has failed to plead facts that could establish that Murray owed a duty to the Plaintiff, thus the negligence claim cannot stand.

To sustain a claim for negligence "a plaintiff must establish a prima facie case showing duty, breach, causation, and damages." *Alexander v. Mitchell*, 2007 ME 108, ¶ 14, 930 A.2d 1016, 1020; *see also Dunham v. HTH Corp.*, 2005 ME 53, ¶ 8, 870 A.2d 577, 579. A party has a duty of care when he or she "is under an obligation for the benefit of a particular plaintiff." *Quadrino v. Bar Harbor Banking & Trust Co.*, 588 A.2d 303, 304 (Me. 1991). Whether a duty of care exists is a legal question. *Pelletier v. Fort Kent Golf Club*, 662 A.2d 220, 222 (Me. 1995). "A defendant is entitled to judgment as a matter of law on a negligence claim if that defendant owes no duty to the plaintiff." *Budzko v. One City Ctr. Assocs. Ltd. Partn.*, 2001 ME 37, ¶ 10, 767 A.2d 310, 313.

The court must now determine whether the Plaintiff has adequately plead facts that Murray owed a duty of care to Ray and the other residents of Piper Shores. *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830, 832 (noting that when ruling on a motion to dismiss a court must determine whether "*any cause of action* [] may reasonably be inferred from the complaint") (emphasis added). Murray did not owe Ray a duty as a possessor of land. *See Alexander v. Mitchell*, 2007 ME 108, ¶ 25, 930 A. 2d 1016, 1023 (citing *Denman*, 1998 ME 12, ¶¶ 5, 7, 704 A.2d at 413-14). It is not disputed that Murray did not own the walkway in question. Murray's only relation to the property was through the contract with Piper Shores to provide its snow removal and sanding. Murray did not occupy or manifest an intent to control the property simply by agreeing to these contract

services. *See id.*[2] Therefore, the court finds, as a matter of law, that Murray did not owe a duty to Ray under a premises liability theory.

However, despite being unable to sustain a negligence claim on the basis of premises liability, the court concludes that, when viewing the facts in a light most favorable to the Plaintiff as required at this stage in the proceedings, the Plaintiff has adequately plead a claim that Ray was an intended beneficiary of the contract between Piper Shores and Murray.

The Law Court has stated that for a plaintiff to prevail on an intended beneficiary theory he or she must show that the property owner intended that he or she receive an enforceable benefit under the contract. *Denman v. Peoples Heritage Bank, Inc.*, 1998 ME 12, ¶ 9, 704 A.2d 411, 414-15. "It is not enough that [the plaintiff] benefited or could have benefited from the performance of the contract. The intent must be clear and definite, whether it is expressed in the contract itself or in the circumstances surrounding its execution." *Id.* (internal citations and quotations omitted).

At this stage in the proceedings, notably without having the benefit of the contract between Piper Shores and Murray to examine in accordance with M.R. Civ. P. 12(b)(6),[3] the court cannot say as a matter of law that the Plaintiff as a resident of the retirement community was not an intended beneficiary of the contract between Piper Shores and

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[2] For example, in *Alexander*, the Law Court cited to *Denman* in its holding that the defendant plowing contractor did not owe a duty to the plaintiff simply because he was under a contract to clear the road, nor was there "a duty based on a failure to affirmatively act because [the plowing contractor] did not create the dangerous situation . . .; rather the danger was created by the natural accumulation of ice and snow." *Alexander*, 2007 ME 108, n.13, 930 A. 2d at 1024 (citing *Denman*, 1998 ME 12, ¶¶ 5, 7, 704 A.2d at 413-14).

[3] M.R. Civ. P. 12(b) states that if, on a motion to dismiss, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Murray. When viewing the allegations in the complaint[4] the court concludes that the Plaintiff has adequately plead a negligence cause of action based on an intended beneficiary theory. *See Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830, 832. More evidence is needed to determine whether the contract between the defendants, or circumstances surrounding its execution, indicate a clear intention to create in the Plaintiff enforceable rights.

The court need not address Murray's motion to dismiss in relation to the wrongful death claim as that claim is contingent upon a finding of negligence. *See* 18-A M.R.S.A. § 2-804.

CONCLUSION

As the standard for a motion to dismiss mandates that all facts must be viewed in a light most favorable to the Plaintiff, the court concludes that the Plaintiff has adequately plead a negligence cause of action as to Defendant Murray. As such, Murray's motion to dismiss is DENIED.

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[4] The court is able to infer a negligence cause of action from the complaint based on the following statements:

- ¶ 6: Piper Shores "had a contract with Defendant L.P. Murray to provide services including sanding and salting the walkways around the buildings of the Piper Shores facility used by the elderly residents to prevent the walkways from becoming slippery from ice and snow."
- ¶ 11: "In accordance with its contract for sanding and salting, Defendant L.P. Murray provided sanding services during the evening hours of February 1, 2008, but did not sand again during the morning hours of February 2, 2008 including up to 9:00 am, despite being aware that rain would make the icy walkways more slippery and that residents of Piper Shores would be using the walkways to: get from building to building; walk their dog or for recreational purposes."
- ¶ 20: "Defendant L.P. Murray had a duty to properly sand the premises of Piper Shores to protect the residents from falling on ice or snow and Defendants Piper Shores and Life Care Services had a duty to maintain the premises in a safe and reasonable manner for the use of the residents of Piper Shores."

(*See also* Complaint ¶¶ 23-25.)

The clerk shall incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: April 1, 2010

Joyce A. Wheeler, Justice

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