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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 104243/2008

GUAIANA, BARA

VS

LANGDALE OWNERS

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 104243/08

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

SEP 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/31/11

HON. EILEEN A. RAKOWER

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

BARA GUAIANA,

Plaintiff,

Index No.
104243/08

- against -

Decision/
Order

LANGDALE OWNERS CORP., AM TRUST, DOUGLAS ELLMAN PROPERTY MANAGEMENT, & TROY RESTORATION, INC. d/b/a EMERALD LANDSCAPES,

Mot. Seq.: 002

Defendants.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when she slipped and fell on ice on an exterior stairway at the premises located at 82-44 Langdale Street in the County of Queens, State of New York on February 19, 2007. The ice is alleged to have formed from a leaky gutter on the premises, which is owned by defendant Langdale Owners Corp.("Langdale").

Langdale contracted with defendant Troy Restoration, Inc. d/b/a Emerald Landscapes ("Troy") to perform snow and ice removal for the "winter season of December 1, 2006 through April 31, 2007." The contract requires Troy to perform snow and ice removal of all parking lots, major walkways and paths, and all stoops and/or major entrances. Troy was also to sand and salt streets and/or walkways "only if needed," the determination to be made by the superintendent on a "per incident basis."

Troy now moves for summary judgment, dismissing the complaint and any and all cross-claims against it. Plaintiff does not opposes. Langdale, which cross-claimed

for indemnification against Troy, opposes. No other party submits papers.

Troy, in support of its motion, submits: the pleadings; the deposition transcript, and continued deposition transcript of plaintiff; the deposition transcript of Aslan Kerisly, Superintendent for the subject premises; the deposition transcript of Michael Goeller, President of Troy; plaintiff's bill of particulars; the snow removal contract; and Troy's work log. Troy asserts that the complaint must be dismissed because it owes no duty to plaintiff as a non-contracting third party.

Langdale, in opposition, submits an attorney's affirmation, wherein Langdale argues that, even if its cross claims for contractual indemnification are dismissed, its cross-claims for common-law indemnification remain. By way of reply, Troy claims that Langdale did not specifically cross-claim for common law indemnification.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Generally, no duty of care is owed to a non contracting third- party except in three limited circumstances. Those circumstances are: first, where one engaged affirmatively in discharging a contractual obligation launches a force or instrument of harm; second, where the plaintiff has suffered injury as a result of reasonable reliance upon defendant's continuing performance of a contractual obligation; and third, where the contracting party has entirely displaced the other party's duty to maintain the premises safely. (*Church v. Callanan Industries, Inc.*, 99 NY2d 104 [2002]).

Troy's work log shows that it sent "four guys" to perform snow and ice removal at the subject premises on February 15, 2007, four days before plaintiff's

accident. Although neither Troy nor Langdale have a record of what work was performed on that day, there are no allegations, or facts in the record, which show that Troy "launched a force or instrument of harm" when it performed its duties(see *H.R. Moch Co. v. Renssalaer Water Co., 247 N.Y. 160*[1928]). Nor is Troy alleged to have performed incomplete removal of snow and ice removal, or that such failure made the stairs "less safe," than they were before Troy began the removal. (*Church at 112*).

Mr. Kerisly, at his deposition, testifies that he inspects Troy's work before they leave, and that Troy has to stay on the premises until after the work is deemed satisfactory. In addition, Mr. Kerisly testifies that he personally inspects the staircases to see if there is snow or ice on them, "all day long." Thus, Troy has not "entirely displaced" Langland's duty to maintain the premises in a safe condition.

Troy has established that it owed no duty to plaintiff as a matter of law. Plaintiff does not oppose the motion. Where the movants have established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See, Access Capital v. DeCicco*, 302 AD2d 48, 53-54 [1st Dept. 2002]). Further, "the factual allegations of the moving papers, uncontradicted by plaintiff, are sufficient to entitle defendants to judgment dismissing the complaint as a matter of law." (*Tortorello v. Carlin*, 260 A.D.2d 201[1st Dept. 1999]) .

Reviewing the contract between Troy and Langland, there is no indemnification clause. Nor is there a requirement that Troy procure insurance naming Langland as an additional insured. Thus, the cross claims as against Troy must be dismissed.

Wherefore it is hereby

ORDERED that the motion seeking to dismiss plaintiff's complaint as against Troy Restoration, Inc is granted without opposition and the complaint is hereby severed and dismissed as against defendant Troy Restoration, Inc. and the Clerk is directed to enter judgment in favor of said defendant; and it is further;

ORDERED that the motion seeking dismissal of all cross-claims is granted,

and such cross claims Langdale Owners Corp asserted as against Troy Restoration, Inc. are dismissed; and it is further

ORDERED that the remainder of the action continues.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 31, 2011

EILEEN A. RAKOWER, J.S.C.