SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

RALPH CIAIO and MARJORIE CIAIO,

Plaintiff(s),

- against -

CAMBRIDGE COURT AT HICKSVILLE, LLC, CAMBRIDGE COURT AT HICKSVILLE REDEVELOPMENT COMPANY OWNERS CORP., TOTAL COMMUNITY MANAGEMENT CORP., and KIG LANDSCAPES, INC.,

Defendant(s).

TRIAL/IAS PART 6

INDEX NO. 6110/10

MOTION SEQUENCE NO. 2

MOTION SUBMISSION DATE: October 3, 2011

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**XX**
Reply Affirmation	**X**

Upon the foregoing papers, the defendant, Kig Landscapes, Inc., moves, pursuant to CPLR 3212, for an Order of this Court, granting it summary judgment dismissal of plaintiffs' complaint as well as any and all cross claims asserted against it. The motion is **granted**.

This action arises out of an incident in which the plaintiff, Ralph Ciaio, allegedly slipped and fell on ice at approximately 9:00 p.m. on February 16, 2010 on the roadway/street in front of an apartment located at 612 Nicole Court, Hicksville, New York, in the cooperative complex known as Cambridge Court at Hicksville.

As best as can be determined from the papers submitted herein, the facts are as follows: At approximately 9:00 p.m. on February 16, 2010, plaintiff was taking his dog for a walk at the senior citizen, co-op development where he lives. At his oral examination before trial, plaintiff testified that he had traversed the exact location of his accident earlier in the afternoon on the day of his accident but that he did not notice and was not aware of the subject condition upon which he fell. Plaintiff described the ice condition as a "round white patch of ice." He testified that he did not see the ice at any time before his accident occurred. He stated that he neither made any complaints of any ice conditions nor was he aware of anyone else who made any complaints regarding the subject condition prior to his accident.

It is noted at the outset that the defendant, Cambridge Court at Hicksville LLC is a non-entity.

Counsel for defendants Cambridge Court at Hicksville Redevelopment Owners Corp. ("Cambridge Court") and Total Community Management Corp. ("TCM") have affirmed that any reference to Cambridge Court at Hicksville, LLC should in fact be attributed to Cambridge Court at Hicksville Redevelopment Company Owners Corp. The named defendant Cambridge Court at Hicksville, LLC does not exist and is a non-entity.

Cambridge Court, is the owner of the subject premises. TCM is the management company for the subject premises. The property is a senior citizen, co-op development for persons over the age of 60 (Ralph Tr., p. 8-9; Scheu Tr., pp. 10).

Defendant, Kig Landscapes, Inc., also known as Keep It Green Landscapes, Inc. (hereinafter referred to as "Kig"), provided landscaping and snow services to Cambridge Court pursuant to a written contract (Scheu Tr., pp. 40-41, 75; Motion, Ex. V). Specifically, pursuant to it's contract with Cambridge Court, Kig agreed to perform 5 snow removals at the co-op complex with accumulations of 2" to 8". Kig agreed to salt and sand the roads and apply calcium chloride on the walks in the complex on an "as needed" basis for each storm. Apparently, this determination regarding the application of sand, salt or calcium chloride was to be approved by the Board of Directors of Cambridge Court and/or the on-site superintendent, Charles Scheu (Scheu Tr., p. 105-106; Michael Rothar [owner and president of Kig] Tr., p. 13). If unapproved, Kig also agreed to salt and sand the roadways at the premises upon request.

Charles Scheu, the manager of Cambridge Court, testified that pursuant to the agreement between Kig and Cambridge Court, he, as well as the other Board of Directors for Cambridge Court, would oversee, inspect and approve the work of the landscaper and snow removal contractor (Scheu Tr., pp. 102-105). He testified that his duties as manager of the cooperative development included making sure that the roadways of Nicole Court were plowed of snow, and that the walkways, sidewalks and roadways were sanded and treated if needed (*Id.* at p. 91). Scheu testified that the only time he would not inspect the work of the snow contractor was if he was not at the premises (*Id.* at p. 105). He testified that he and the Board of Directors for Cambridge Court would also (verbally) direct Kig Landscapes as to where to plow and pile the snow (*Id.* at p. 81). He testified that pursuant to his employment, he would also personally shovel or spread salt, sand or calcium chloride or ash on the grounds, sidewalks and roadways at Cambridge Court (*Id.* at pp. 60-61).

Scheu testified that on February 16, 2010, he observed Kig performing snow removal services to the sidewalks of the community (not the roadways) in the early afternoon (*Id.* at p. 78-79). He stated that after defendant's work was completed, he surveyed and inspected the premises and found the work to be satisfactorily completed (*Id.* at p. 180). Nonetheless, Scheu testified, he noticed ice on the road surfaces at Cambridge Court by his residence (near the clubhouse) at 8:00 p.m. on the date of plaintiff's accident. Scheu stated that he called Kig, specifically Michael Rothar, at approximately 8:00 p.m. before being informed of Ciaio's accident, leaving a voice message at that time, complaining about black ice on the road surfaces at Cambridge Court and requesting that the roads at the complex be salted and sanded. Scheu testified that Rothar got back to him almost immediately after the 8:00 p.m. call.

Thereafter, at approximately 9:00 p.m., plaintiff allegedly slipped and fell on ice in front of the apartment known as 612 Nicole Court in the cooperative complex.

Notably, while plaintiff testified at his deposition that his accident took place "in the street" on Nicole Court (Scheu Tr., p. 15), in his verified bill of particulars, he alleges at that the incident occurred on the black-top parking area in front of 612 Nicole Court (Motion, Ex. I [Verified Bill of Particulars, ¶3]).

As against Kig, plaintiff alleges that defendant, among other things, was negligent in its operation, maintenance and control of the accident area and areas abutting the accident area; in allowing a dangerous condition to re-occur and exist; and in failing to warn of the dangerous ice condition involved (*Id.* At ¶4).

Defendants, Cambridge Court and TCM, allege in their Verified Bill of Particulars[1] that Kig, among other things, was negligent in its snow removal services and breached its contractual obligations in failing to perform its duties in accordance with the contractual agreement (Ex. H, ¶3).

Upon the instant motion, Kig seeks summary judgment dismissing plaintiff's complaint as well as defendants', Cambridge Court and TCM's cross claims.

Defendant asserts three basis for summary judgment. First, it's contractual obligations to plow the Cambridge Court premises was not a comprehensive and exclusive property maintenance obligation that was intended to or in fact displaced the owner's non-delegable duty to maintain ingresses and egresses and keep the premises in a reasonably safe condition. Second, the plaintiff did not detrimentally rely on Kig's continued performance of it's contractual duties. Lastly, it did not launch force or an instrument of harm, so as to create or exacerbate a hazardous condition and therefore it's contractual obligation does not support it's liability in tort to the plaintiff.

Plaintiffs and the defendants Cambridge Court and TCM oppose Kig's motion. (Notably, defendants, Cambridge Court and TCM, incorporate by reference the arguments advanced by counsel for the plaintiffs in opposition to defendants' motion). By supporting their argument with the affidavits of a meteorologist and an engineer, plaintiffs argue that there remain issues of fact as to whether Kig left the premises in a more dangerous condition after plowing and piling up plowed snow, than before it ever plowed the snow at the Cambridge Court complex prior to Ciaio's accident. Plaintiffs contend that said failure to exercise reasonable care on the part of Kig concerning its snow plowing launched a force or instrument of harm and created an ice condition at the premises that was not present before Kig performed its snow plowing services (Plaintiff's Aff. In Opp., ¶87).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, supra). However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id*). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]) even if alleged by an expert (*Alvarez v Prospect Hospital*, supra; *Aghabi v. Sebro*, 256 AD2d 287 [2nd Dept. 1998]).

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[1] Defendants, Cambridge Court and TCM, served their Verified Bill of Particulars as part and parcel of their original third party action against Kig. Originally, defendants Cambridge Court and TCM commenced a third party action against Kig, pursuant to which Kig joined issue. Plaintiff then filed a Notice of Impleader together with a Supplementary Summons and Amended Verified Complaint. Defendants, Cambridge Court, TCM and Kig then joined issue therein.

Generally, a contractual obligation standing alone will not give rise to tort liability in favor of a third party (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, the Court of Appeals has identified three situations wherein the party who enters into a contract to render services may be held liable in tort to a third party: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] 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" (*Id.* at 140 [internal citations omitted] *quoting Moch Co. v. Rensselaer Water Co.*, 247 NY 160, 168 [1928]).

Notably, counsel for plaintiffs concedes that there are no triable issues of fact with respect to whether the plaintiff detrimentally relied on the contractor's continued performance of its obligation or whether the contractor assumed a comprehensive maintenance obligation (Aff. In Opp., ¶88).

Thus, at issue in this case is whether the first *Espinal* exception, to wit, whether the contractor's snow plowing services created or exacerbated a dangerous condition, renders Kig liable to the plaintiffs in tort.

A defendant who undertakes to render a service and then "negligently creates or exacerbates a dangerous condition may be liable for any resulting injury" (*Espinal v. Melville Snow Contrs.*, supra at 141–142). That is, in order to be held liable to the plaintiff, the defendant's actions had to have otherwise advanced to such a point as to launch a force or instrument of harm resulting in an independent duty to protect the plaintiff (*Weinberg v. Shinconic Ct.*, 193 AD2d 673 [2nd Dept. 1993]).

Here, defendant, Kig has established its prima facie entitlement to judgment as a matter of law. There is nothing in the record or any admissible evidence that the defendant launched a force or instrument of harm by creating or exacerbating the icy condition upon which plaintiff fell. In fact, there is nothing in the record or any admissible evidence establishing that the icy condition existed at all when the contractor finished it's snow removal services at Cambridge Court in the afternoon before the plaintiff's accident.

Although defendant Kig performed snow plowing services at the subject premises at some point in time prior to plaintiff's accident, merely plowing snow in accordance with the contract and leaving some residual snow or ice on the plowed area does not create a dangerous condition or constitute a launching of force or instrument of harm (*Espinal v. Melville Snow Contrs.*, supra at 142; *Foster v. Herbert Slepoy Corp.*, 76 AD3d 210 [2nd Dept. 2010]).

Additionally, while Kig was only under a limited duty, if any, to plow, salt and/or sand the premises, the failure to apply sand or salt in the first place, in and of itself does not establish that a contractor created a dangerous condition (*Castro v. Maple Run Condo Assn.*, 41 AD3d 412 [2nd Dept. 2007]).

Furthermore, it cannot be overlooked by this Court that the property manager, Charles Scheu was still on the premises at the time Kig completed its snow removal services and that he personally surveyed and inspected the premises pursuant to his employment, ultimately determining that the work appeared to be satisfactorily completed. Although Scheu testified that he experienced black ice near the clubhouse at 8:00 p.m. before plaintiff's fall, this testimony does not preclude defendant's judgment as a matter of law. The affirmative burden lies upon the plaintiff to prove that the defendant caused or created the dangerous condition resulting in the plaintiff's fall (*Zabbia v. Westwood, LLC,* 18 AD3d 542 [2nd Dept. 2005]). A general awareness of a dangerous condition is not sufficient to impose notice of same because the notice must be specific to the piece of ice involved (*Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972 [1994]; *Castro v Maple Run Condominium Assn.*, supra). Here, plaintiff does not allege to have fallen on "black ice." Rather, plaintiff has consistently testified that the ice condition that caused his fall was a round "white" patch

of ice. The "black ice" condition in front of the clubhouse referred to by Scheu is clearly not the same white ice condition located in front of 612 Nicole Court that plaintiff alleges caused his accident (*Stoddard v. G.E. Plastics Corp.*, 11 AD3d 862 [3rd Dept. 2004]).

Plaintiff's theory that the defendant caused or created a snow pile that was the source of the re-freezing condition is also unavailing in light of the testimony that Kig was directed by Cambridge Court as to where to plow the snow in the first place. Furthermore, the contract between Kig and Cambridge is silent as to re-freezing conditions and there is nothing in the record to suggest that Kig was responsible for any re-freezing conditions. A general awareness of a dangerous condition or that water can freeze or re-freeze is legally insufficient to constitute or create an inference of constructive notice of the particular condition that caused plaintiff's injury (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]). Additionally, there is nothing in the record that would establish how the white ice condition was created and speculation with regard to the creation or exacerbation of a snow or ice condition is insufficient to otherwise defeat a summary judgment (*Bonney v. City of New York*, 41 AD3d 404 [2nd Dept. 2007]; *Makaron v. Luna Park Hous. Corp.*, 25 AD3d 770 [2nd Dept. 2006]). Thus, plaintiffs' conclusory assertion in its Bill of Particulars that the icy condition was caused by negligent snow removal or by a re-freezing condition is insufficient to preclude defendant's entitlement to summary judgment (*Yannotti v Four Bros. Homes at Heartland Condominium I*, 24 AD3d 659, 660 [2nd Dept. 2005]).

As to defendants Cambridge Court and TCM's claims against Kig for contractual indemnification, in the absence of any contract that expressly requires such indemnification, the claims are herewith dismissed (*Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652 [1976]; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]).

Further, as there is no relationship between TCM and Kig, other than that TCM would serve as an intermediary between Cambridge Court and Kig, and in light of the fact that Cambridge Court retained sufficient responsibility over the snow removal process, including the right to direct and approve Kig's work, there is also no basis for common law indemnification by Kig on behalf of TCM (*Salisbury v. Wal-Mart Stores*, 255 AD2d 95 [3rd Dept. 1999]). Kig did not have obligations or responsibilities to TCM other than to provide invoices for the snow plow services rendered to Cambridge Court.

Therefore, this Court finds that Kig has established its entitlement to judgment as a matter of law. Thus, the burden shifts to the parties opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, supra).

In opposition, plaintiffs submit, *inter alia*, the affidavits of meteorologist Howard Altschule and engineer, Thomas R. Parisi, P.E. In addition to the fact that plaintiffs never served Kig with the aforementioned affidavits prior to Kig's filing of its motion for summary judgment in clear violation of CPLR 3101(d) and thereby unjustly prejudicing the defendant from defending this matter (*Safrin v DST Russian & Turkish Bath, Inc.*, 16 AD3d 656 [2nd Dept. 2005]), said expert affidavits nonetheless fall short of presenting a triable issue of fact.

Mr. Altschule's opinions are based upon nothing more than speculation and his opinions are vague, conclusory and factually unsupported. Initially, it is noted that Mr. Altschule never claims to have personally observed the subject ice condition. Further, not only does he merely address general conditions in the vicinity of 612 Nicole Court rather than the origin of the specific ice on which plaintiff fell, his opinions as to the purported cause of the ice condition are also entirely speculative and insufficient to defeat defendants' motion for summary judgment (*Castro v Maple Run Condominium Assn.*, supra; *Reagan v Hartsdale Tenants Corp.*, 27 AD3d 716, 718 [2nd Dept. 2006]).

The expert affidavit of Thomas R. Parisi, is equally insufficient and incompetent to raise triable issues of fact with respect to the creation of the dangerous ice condition upon which plaintiff fell. In his affidavit, Mr. Parisi opines that Kig was "negligent and careless...to have piled snow adjacent to the road surface of Nicole Court based on a pitch of the road measured between 1.3 and 1.4 degrees." Yet, not only does Mr. Parisi fail to reference any specific standard that is commonly accepted with respect to piling snow in the snow plowing business (*Milligan v Sharman,* 52 AD3d 1238 [4th Dept. 2008]), but his sworn statement that his inspection of the roadway took place over a year after the plaintiff's accident, and that his measurements of the roadway were at various locations in the proximal area of plaintiff's accident, renders his affidavit wholly insufficient to overcome Kig's motion for summary judgment (*Sarmiento v C & E Assoc.*, 40 AD3d 524 [1st Dept. 2007]).

Both experts' affidavits rely on evidence that is vague, conclusory and factually unsupported. Thus, they fail to establish any grounds for liability (*Mankowski v Two Park Co.*, 225 AD2d 673 [2nd Dept. 1996]). Accordingly, said affidavits will not be considered by this Court in opposition to defendant's motion for summary judgment (*Romano v Stanley*, 90 NY2d 444 [1997]).

Plaintiff's theory in opposing the instant motion for summary judgment – i.e., the snow removal contractor negligently created or exacerbated a snow related hazard by piling snow on the sides of the parking lot, rather than removing it, thereby permitting it to melt, trickle into depressed, uneven areas of the lot, and freeze – falls short of presenting a triable issue of fact. Plaintiffs have tendered no admissible proof, expert or otherwise, as to exactly how or when the specific white ice condition formed prior to plaintiff's accident. Therefore, their claim that defendant Kig caused or created the ice patch through incomplete snow removal efforts is based on conjecture and speculation, which is insufficient to defeat a motion for summary judgment (*Folkl v McCarey Landscaping, Inc.*, 66 AD3d 825 [2nd Dept. 2009]).

Therefore, this Court herewith **grants** defendant, Kig's motion for summary judgment dismissal of plaintiffs' complaint as asserted against it.

Additionally, it is noted that defendants, Cambridge Court and TCM fail to address the issues concerning their cross claims against Kig for contractual and common law indemnification, incorporating instead the arguments advanced by the plaintiffs. While this Court is not relieved, even in the face of an unopposed motion for summary judgment, of its obligation to ensure that the movant has demonstrated his or her entitlement to the relief requested (*Zecca v. Ricciardelli,* 293 AD2d 31 [2nd Dept. 2002]), here, where this Court has already determined that the defendant has met its prima facie entitlement to judgment as a matter of law, it's motion for summary judgment dismissal of defendants, Cambridge Court and TCM's indemnification claims is **granted**.

The motion is **granted** in its entirety.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

All applications not specifically addressed are **denied**.

SO ORDERED.

DATED: 10/28/2011

Ray S. Mahon
J.S.C.

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COUNTY CLERK'S OFFICE