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SHORT FORM ORDER

INDEX No. 09-7390
CAL. No. 12-00956OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-9-12 (#003)
MOTION DATE 10-10-12 (#004)
ADJ. DATE 1-10-13
Mot. Seq. # 003 - MG
004 - MG; CASEDISP

NANCY HARMS and MICHAEL HARMS, Plaintiffs, - against - SNUG HARBOR SQUARE VENTURE, US MAINTENANCE, INC. and J. TREZZA ASSOCIATES, INC., Defendants.	ASHER & ASSOCIATES, P.C. Attorney for Plaintiffs 111 John Street, Suite 1200 New York, New York 10038 BELLO & LARKIN Attorney for Defendant US Maintenance 150 Motor Parkway, Suite 405 Hauppauge, New York 11788 JOSEPH C. TONETTI, P.C. Attorney for Defendant J. Trezza Associates 548 West Jericho Turnpike Smithtown, New York 11787

Upon the following papers numbered 1 to 33 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14, 15 - 27; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 28 - 29; Replying Affidavits and supporting papers 32 - 33; Other co-defendant's affirmation in partial opposition 30 - 31; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by defendant US Maintenance, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint and all cross claims against it or, in the alternative, granting summary judgment in its favor against the defendant J. Trezza Associates, Inc. is granted to the extent that the complaint and all cross claims against it are dismissed, and is otherwise denied as academic, and it is further

ORDERED that this motion by the defendant J. Trezza Associates, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff Nancy Harms (Harms) as a result of a slip and fall on ice on the sidewalk/apron adjacent to the entrance of the Stop & Shop supermarket located at 351 Merrick Road, Amityville, New York (the premises). The incident occurred on December 20, 2008, at approximately 7:40 a.m., as Harms was entering the supermarket, where she was employed as a cashier.

It is undisputed that the defendant Snug Harbor Square Venture (Owner) is the owner of the shopping center in which the supermarket is located, and that the nonparty Stop & Shop leased the premises from Owner. By order dated March 27, 2012, the undersigned granted Owner's motion for summary judgment and dismissed the complaint against it. It is also undisputed that, pursuant to a contract with Stop & Shop, the defendant US Maintenance, Inc. (USM) was hired to perform snow removal at the premises, and that USM entered into a subcontract with the defendant J. Trezza Associates, Inc. (Trezza) to actually perform those services.

USM now moves for summary judgment on the ground that it owes no duty to Harms "as there is no legal relationship nor contractual privity between them." In support of its motion, USM submits, among other things, the pleadings, the depositions of the parties, its contract with Stop & Shop, its subcontract with Trezza, and Trezza's invoice for its snow removal work. The Court notes that Harm's deposition and that of Trezza's sole shareholder are certified but unsigned, and that USM has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). However, the Court may consider the unsigned deposition transcripts submitted in support of the motion as the parties have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

At her deposition, Harms testified that she was scheduled to work on Saturday, December 20, 2008 as a cashier for the Stop & Shop located on Merrick Road, Amityville, New York. She was scheduled to begin work at 8:00 a.m. that day. She pulled into the parking lot and exited her vehicle. It had snowed the night before, but she did not know if the parking lot had been plowed. However, she indicated that "[w]hen I got out of my car, the snow was a fluffy type of snow." Harms further testified that she approached the west entrance to the supermarket, stepped on the "apron," lost her footing and fell to the ground. In describing the condition of the area that caused her to fall, she stated that "[i]t was icy. It was white, but when I put my foot on it, I slid so it was icy hard snow." She indicated that she did not know whether the manager of the Stop & Shop was responsible to have the area cleared of snow, or "who's responsible for us to walk into a safe environment." Harms further testified that she did not know anything about how Stop & Shop cleared snow from its parking lot.

Matthew T. Robinson (Robinson) was deposed on December 2, 2011. He testified that he is employed as the category manager in strategic sourcing for USM, that USM is a facilities management company, and that his duties include hiring subcontractors to provide services to USM's customers. He stated that the contract between Stop & Shop and USM was effective from October 19, 2007 to May 31, 2009, that the contract covers the premises, and that the contract provided for snow removal services only.

He indicated that snow removal services included snow plowing, snow shoveling, and ice control applications. Robinson further testified that USM had entered into a subcontract with Trezza to perform snow removal at the premises.

At his deposition[1], James Trezza testified that he is Trezza's sole shareholder, and that Trezza entered into the subject subcontract and an amendment to the subcontract with USM. Depending on the weather conditions, his company would get a telephone call from USM or would otherwise go to the premises to do its work. Stop & Shop would not call for snow removal. However, Trezza was required to have the manager at the supermarket sign a voucher either approving or declining the application of a salt sand mixture when conditions were icy. James Trezza further testified that the invoice submitted to USM for the subject snowstorm indicates that his company plowed the premises on December 19, 2008, and "sand salted" on December 20, 2008. He stated that the invoice indicated to him that this was a late night storm, and that Trezza plowed at night and sanded in the morning. He avowed that "if it was late and we plowed it, we wouldn't sand it because it (*sic*) just going to refreeze. We would resand it when it is ice." He acknowledged that the contract with USM requires Trezza to monitor ice conditions, that Stop & Shop employees sometimes shovel the sidewalk area at the premises, and that Trezza was obligated to send out its crews once one inch of snow had accumulated on the ground. James Trezza further testified that the subcontract required Trezza to apply ice control unless the Stop & Shop manager declined it, that USM made most of the decisions whether to apply salt sand, and that sometimes the supermarket managers would tell the crews not to salt sand the premises.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Fox v Marshall***, 88 AD3d 131, 928 NYS2d 317 [2d Dept 2011]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]; ***Elliot v Long Island Home, LTD***, 12 AD3d 481, 784 NYS2d 615 [2d Dept 2004]). Once a defendant's duty is established, it is the function of a jury to determine whether and to what extent a particular duty was breached. However, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 728 NYS2d 731 [2001]; ***Waters v New York City Hous. Auth.***, 69 NY2d 225, 513 NYS2d 356 [1987]).

Ordinarily, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third-party (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. That is, tort liability for injuries to a third person

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[1] Trezza not only does not object to the submission of this deposition in USM's motion, it submits the same unsigned copy in its motion. The Court will consider the unsigned transcript as it has been adopted by the party deponent (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; ***Wojtas v Fifth Ave. Coach Corp.***, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]).

may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.***, *supra*, quoting ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk (***Church v Callanan Indus.***, *supra*); (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, *supra*); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

It is well settled that "[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" (***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 1103, 915 NYS2d 103 [2d Dept 2010], ***Wheaton v East End Commons Assoc., LLC***, 50 AD3d 675, 677, 854 NYS2d 528 [2d Dept 2008]). The terms of the USM's contract limited its snow removal obligations, including ice control measures to accumulations of one inch or more. With accumulations less than one inch, the contract obligated USM to perform "salt/sand or surface clearing only upon request of the Store Manager or his/her authorized designee." Where, as here, "the express terms of the contract provide that a contractor is obligated to plow only when snow accumulation exceeds a certain level, the Court of Appeals has held that such 'contractual undertaking is not the type of comprehensive and exclusive property maintenance obligation' that would entirely displace...a property [owner's] duty to 'maintain the premises safely' (citations omitted)" (***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]).

Here, USM has established its prima facie entitlement to judgment as a matter of law by coming forward with proof that the plaintiff was not a party to the contract between Stop & Shop and USM, and therefore she was owed no duty of care (*see* ***Henriquez v Inserra Supermarkets, Inc.***, *id.*; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]; ***Wheaton v East End Commons Assoc., LLC***, *supra*), that its conduct did not create or exacerbate a dangerous condition on the premises, and that plaintiff did not rely upon its performance of its snow removal obligations (*see* ***Schultz v Bridgeport & Port Jefferson Steamboat Co.***, 68 AD3d 970, 891 NYS2d 146 [2d Dept 2009]; ***Wheaton v East End Commons Assoc.***, *supra*; ***Castro v Maple Run Condominium Assn.***, 41 AD3d 412, 837 NYS2d 729 [2d Dept 2007]). In addition, the plaintiff's testimony establishes that she did not reasonably or detrimentally rely upon USM's performance of its contract.

In opposition to the motion, plaintiff failed to raise a triable issue of fact as to whether any of the exceptions apply so as to hold USM liable in tort to the plaintiffs (*see* ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; ***Espinal v Melville Snow Contrs.***, *supra*). The plaintiff failed to submit any admissible evidence further addressing the detrimental reliance exception and has not presented any evidence that USM by removing snow in accordance with its contract, "launched a force or instrument of harm which created or exacerbated the allegedly hazardous condition" (***Wheaton v East End Commons Assoc., LLC***, *supra*; *see* ***Foster v Herbert Slepoy Corp.***, *supra*). Accordingly, USM's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Turning to Trezza's motion, the Court notes that, with some additions, the same pleadings, documents and depositions have been submitted in support of the motion. In addition, the plaintiffs' submitted one affirmation in opposition to both motions herein. A review of Trezza's submission reveals that the issues raised in this motion are essentially identical to those raised in USM's motion. A review of the subcontract and amendment reveals that Trezza was obligated to "begin plowing when one (1) inch of snow has accumulated at the location, and continue plowing every one (1) inch thereafter ..." In addition, under paragraph 5 (b) of the amendment, Trezza was required to "monitor your locations to determine when ice control operations need to commence. [Trezza is] required to check with onsite management before any snow clearing operations begin" (emphasis in original).

Here, for the reasons stated above, Trezza has established its prima facie entitlement to summary judgment herein, and the plaintiffs have failed to raise a triable issue of fact as to whether any exceptions apply to hold Trezza liable in tort to the plaintiffs. Accordingly, Trezza's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Dated: March 27, 2013

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION