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SHORT FORM ORDER

INDEX No. 08-17229
CAL No. 12-00828OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 9-20-12 (#004)
MOTION DATE 9-21-12 (#005 & #006)
ADJ. DATE 11-27-12
Mot. Seq. # 004 - MG
005 - MG
006 - MG

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BARBARA OFFNER,

Plaintiff,

- against -

BRIAD LODGING GROUP HAUPPAUGE, LLC, RESIDENCE INN BY MARRIOTT, LLC, THE BRICTMAN GROUP, LTD., and R.B.R. SNOW CONTRACTORS INC., d/b/a RBR/MELVILLE SNOW, and J.R. ORGANICS, INC.,

Defendants.

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THE BRICKMAN GROUP, LTD., incorrectly sued herein as THE BRICTMAN GROUP, LTD.,

Third-Party Plaintiff,

- against -

RBR. SNOW CONTRACTORS INC., d/b/a RBR/MELVILLE SNOW,

Third-Party Defendant.

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RBR SNOW CONTRACTORS INC., d/b/a RBR/MELVILLE SNOW,

Second Third-Party Plaintiff,

- against -

J.R. ORGANICS, INC.,

Second Third-Party Defendant.

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BRIAD LODGING GROUP HAUPPAUGE, LLC,
RESIDENCE INN BY MARRIOTT, LLC,

Third Third-Party Plaintiffs,

- against -

RBR SNOW CONTRACTORS INC., d/b/a
RBR/MELVILLE SNOW, and J.R. ORGANICS,
INC.,

Third Third-Party Defendants.
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Upon the following papers numbered 1 to 107 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24, 25-48, 49-, 98-99 ; Replying Affidavits and supporting papers 100-101, 102-103, 104-105, 106-107 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (#004) by the defendant/third third-party defendant, J.R. Organics, Inc. (JR) for summary judgment dismissing the complaint and all third-party claims asserted against it is granted; and it is further

ORDERED that motion (#005) by the defendant/second third-party plaintiff, R.B.R. Snow Contractors, Inc.(RBR), for summary judgment dismissing plaintiff's complaint and all third-party claims asserted against it is granted; and it is further

ORDERED that motion (#006) by the defendant/third-party plaintiff, the Brickman Group, LTD.,incorrectly sued herein as the Brictman Group, (Brickman) for summary judgment dismissing the complaint and all third-party claims asserted against it is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on February 27, 2007 when she allegedly slipped and fell on snow and/or ice in the parking lot of the Residence Inn in Hauppauge, New York. The action was initially brought against Briad Lodging Group, Hauppauge, LLC (Briad), the property owner, and Residence Inn By Marriot, LLC (Residence Inn), the operator of the inn, with the other defendants being added as the action proceeded.

Defendant/third third-party defendant JR now moves (#004) for summary judgment dismissing the complaint and all cross claims asserted against it. In support of the motion JR submits, *inter alia*, its attorney's affirmation, the pleadings, copies of three snow removal contracts, copies of invoices, the depositions of the plaintiff, the depositions of Dominic Tinelli, Jr. (Briad/ Residence Inn), Ray Nobile (Brickman), Patrick Feehen (RBR), and John Lynch (JR).

Defendant/second third-party plaintiff RBR now moves (#005) for summary judgment dismissing the complaint and all cross claims asserted against it. In support of the motion RBR submits, *inter alia*, its attorney's affirmation, the pleadings, copies of three snow removal contracts, copies of invoices, the depositions of the plaintiff, the depositions of Dominic Tinelli, Jr. (Briad/ Residence Inn), Ray Nobile (Brickman), Patrick Feehen (RBR), and John Lynch (JR).

Defendant/third-party plaintiff Brickman now moves (#006) for summary judgment dismissing the complaint and all cross claims asserted against it. In support of the motion RBR submits, *inter alia*, its attorney's affirmation, the pleadings, copies of three snow removal contracts, copies of invoices, the depositions of the plaintiff, the depositions of Dominic Tinelli, Jr. (Briad/ Residence Inn), Ray Nobile (Brickman), Patrick Feehen (RBR), and John Lynch (JR).

In opposition to these motions, the plaintiff submits her attorney's affirmation, the bill of particulars and supplemental bill of particulars, the depositions of the plaintiff, and the depositions of Dominic Tinelli, Jr. (Briad/ Residence Inn) and John Lynch (JR).

In opposition to these motions the defendants, Briad and Residence Inn submit, *inter alia*, their attorney's affirmation, the pleadings, copies of three snow removal contracts, copies of invoices, the depositions of the plaintiff, the depositions of Dominic Tinelli, Jr. (Briad/ Residence Inn), Ray Nobile (Brickman), Patrick Feehen (RBR), and John Lynch (JR).

Plaintiff was deposed twice, on March 21, 2011, and on October 25, 2011, much of the latter involves medical questions, while a portion deals with the accident itself. Plaintiff testified that she lives in Texas and flew into New York on a business trip on February 26, 2007 for her work as a medical sales representative for BD Medical, specifically to attend some meetings at the VA Hospital in Northport, New York. She landed at LaGuardia Airport, rented a vehicle and drove to Hauppauge where she had a reservation at the Residence Inn. She was a frequent business traveler and recalled staying at this hotel the previous year. When she arrived at the hotel, with a co-worker at approximately 8:30-9:00 p.m., there were quite a few cars in the parking lot. She did not see any ice anywhere. The parking lot and roadways had been plowed. It appeared that salt had been applied and she could see the blacktop surface of the parking lot. After checking in, she returned to her vehicle and parked the car in the lot. As she walked through the parking lot she did not observe any ice. Her appointment at the VA Hospital the following day was at approximately 7:30-8:00 a.m. Upon departing her hotel the next morning (February 27, 2007) at approximately 7:00 a.m. for her meeting, the weather was clear and no precipitation was falling. She walked to her vehicle and did not observe any ice in the parking lot. She observed one-quarter to one-half of an inch of icy precipitation on her vehicle's windshield. The parking lot had been plowed or shoveled and there was salt or sand. Her meeting at the VA Hospital concluded at approximately 12:00-12:30 p.m., at which time she drove back to Hauppauge, stopping first at a restaurant. There was no precipitation during the ride. Plaintiff left the restaurant approximately forty-five minutes later. Upon arriving at the Residence Inn, the front lot was full and she proceeded to drive to the back parking lot. Plaintiff stated that she observed snow in the parking lot. However she testified that she did not know when it fell or how many hours it had been there. At her first deposition, she estimated that there was one to two inches of snow. At her second deposition plaintiff stated that there was "[m]aybe an inch if that." She further testified that what she saw "appeared to be fresh snow." When asked how she knew it was fresh snow, she replied "Because it had snowed the night before." Plaintiff chose a parking spot close to the back door of the hotel. She pulled into it and parked the vehicle. Upon opening her door, she observed snow on the ground but continued to exit the vehicle. She believes that she started to step with her right foot. Plaintiff testified that her feet flew out from under her. She did not see any ice before she fell. She alleged that she saw some ice where her feet had been. It was the width of her heel and about 12-14 inches long. The ice was clear, perhaps a little cloudy. She did not observe any ice at all that day anywhere else on the premises nor did not know how long the ice had been there. She did not fall to the ground but fell backwards into the

driver's well of her vehicle. After a few minutes she got up, returned to the hotel and entered her room. Upon entering the hotel she made no complaints to the staff about her fall or the ice or the condition of the parking lot. She did not ask the staff to put down ice or sand or show them where the accident occurred. She did state that she may have casually mentioned her accident to a staff member at the front desk. Later that same evening she returned to the VA Hospital. The parking lot had been cleared. She never observed the ice condition again. She checked out of the hotel the following day without mentioning her accident. She never actually saw anyone plowing snow during her stay at the hotel.

Dominic Tinelli, Jr testified on behalf of the defendants Briad and Residence Inn. He is employed by Marriot as General Manager and is in charge of the Residence Inn at 850 Veterans Highway, Hauppauge, New York. He has been a Marriot employee for 23 years. He had been assigned to the subject premises for nine months prior to his deposition. He stated that the Residence Inn continues to have a snow removal contract with defendant Brickman. The Residence Inn's manager on duty would be responsible for communicating with Brickman. When plowing is performed and vehicles are parked in the lot, Residence Inn does not have their guests move their cars so that the entire lot can be plowed. The plowing company then plows where it can. The plowing company is not expected to plow between parked cars. The Residence Inn staff does not remove snow from between parked cars. He had no knowledge about any complaints made about defendants Brickman, RBE and JR about conditions on the premises in February 2007. The property is staffed 24 hours a day, seven days a week and the staff are instructed to check for potential hazards and report them to the manager. He had no knowledge of any reports about ice in February of 2007.

Raymond Nobile was deposed on behalf of the defendant/third-party plaintiff Brickman. He is the Regional Manager for Brickman. His territory includes the Residence Inn By Marriot in Hauppauge. He identified the snow contract between Brickman and Marriot for Residence Inn for the 2006-2007 winter season. Brickman entered into a written contract with defendant RBR, subcontracting the snow removal services to RBR. There is no written document spelling out when Brickman must provide snow services. It was the decision of the customer when snow services should be provided. The Residence Inn was to call Brickman when it wanted snow services. There was no snow fall accumulation "trigger" for snow removal. Brickman did not contract to shovel snow between cars. The general manager of the Residence Inn would determine if salt or sand was needed. He had no knowledge of any complaints received from the Residence Inn to Brickman with regard to plowing done at the location from February 25, 2007 to February 27, 2007. If Brickman called RBR to perform snow services, Brickman would get a bill from RBR and Brickman would bill the Marriot. He identified Brickman's bill to Marriot for work at the subject premises in connection with the February 25, 2007 to February 26, 2007, snow event. The exhibit indicated that the bill was "paid" by Marriot for plowing and salting the roadways and parking lot. The fact that the bill was paid indicates that it accepted the work and it was done without complaint or dispute.

Patrick Feehan was deposed on behalf of defendant/second third-party plaintiff RBR. He is Director of Sales and Marketing for the company. His duties include soliciting work, marketing and hiring subcontractors. He identified the written contract RBR had with Brickman for snow management at the Residence Inn in Hauppauge. RBR subsequently subcontracted that work to the defendant JR. RBR would not dispatch a subcontractor to perform work unless contacted by Brickman. RBR would dispatch its subcontractors only after 2.1 inches of snow accumulation. The contract between RBR and Brickman was not made a part of the contract between RBR and JR. He was not aware of any complaints being made by

Brickman to RBR about the snow services provided at the Residence Inn during the period February 25, 2007 to February 27, 2007. He was not aware of any complaints being made by RBR to JR about the snow services provided at the Residence Inn during that period of time.

John Lynch was deposed on behalf of defendant/second third-party defendant JR Organics. He is the owner of the company. JR was hired by RBR to provide snow plowing services. JR would provide these services when requested by RBR's dispatcher. He identified the records regarding the snow plowing work done at the Residence Inn prior to plaintiff's accident. He never received any complaints from anyone regarding JR's services to the Residence Inn. With regard to the work done at the Residence Inn on February 26, 2007 he went there at 3:30 p.m. and left at 4:00 p.m. He returned at 8:30 p.m. until 9:00 p.m. In the afternoon, he plowed the entire parking lot, in the evening he plowed and salted the entire lot. JR was paid in full for the work done that day.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]).

Fundamental to recovery in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). To establish a prima facie case of liability in a slip and fall accident involving snow and ice, a plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*see* ***Zabbia v Westwood, LLC***, 795 NYS2d 319 [2d Dept 2005]; ***Tsivitis v Sivan Associates, LLC***, 292 AD2d 594, 741 NYS2d 545 [2d Dept 2002]). Furthermore, a plaintiff seeking to hold a snow removal contractor liable must show that by virtue of a defendant's snow removal contract, defendant displaced the duty of the landowner to safely maintain the premises (***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]) and assumed a duty to plaintiff to exercise reasonable care to prevent all foreseeable harm to the plaintiff such that the plaintiff detrimentally relied on the defendant's performance of the defendant's duties under the snow removal contract (*see* ***Palka v Servicemaster Management Services***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Pavlovich v Wade Associates, Inc.***, 274 AD2d 383, 710 NYS2d 615 [2d Dept 2000]), or that the defendant's actions "advanced to such a point as to have launched a force or instrument of harm" (***Pavlovich v Wade Associates, Inc.***, *supra*).

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (***Espinal v Melville Snow Contrs.***, *supra*; ***Figueroa v Lazarus Burman Assocs.***, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, the contractor is required to establish that it did not perform any snow removal

operations related to the condition which caused plaintiff's injury or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (***Prenderville v International Serv. Sys.***, 10 AD3d 334, 781 NYS2d 110 [1st Dept 2004]).

The moving defendants have made a prima facie showing of their entitlement to summary judgment. Here, under the contract between Brickman and Residence Inn, Brickman was obligated only to plow snow and apply salt and sand when requested. Brickman's limited contractual undertaking to provide snow removal services was not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see*, ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; ***Katz v Pathmark Stores***, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]). The record establishes that the sub-subcontractor who actually did the work, JR, completed its snow plowing and salting activities at the Residence Inn approximately 9:00 p.m. on February 26, 2007. Plaintiff testified that she arrived at the hotel sometime between 8:30 p.m. and 9:00 p.m. that same evening. She did not see ice anywhere. The roads and parking lots had been plowed. She could see the blacktop surface of the parking lot. After checking in, she went back to her car but did not observe ice anywhere. The next morning she observed one-quarter to one-half of an inch of ice on her vehicle's windshield. She also testified that it had snowed overnight. Brickman established that neither the manager of the Residence Inn, nor anyone else contacted Brickman to perform any services on February 27, 2007. Thus, none of the defendant's are responsible for the snow on the ground may have fallen between the time JR completed its work on the evening of February 26, 2007 and the afternoon of February 27, 2007. Therefore, no action of the moving defendants created or exacerbated the condition which allegedly caused the plaintiff's accident (*see* ***Espinal v Melville Snow Contrs.*** and ***Prenderville v International Serv. Sys.***, *supra).*

In response the plaintiff and the defendants Briad and Residence Inn failed to submit evidence in admissible form sufficient to create an issue of fact. It is speculated that defendant JR failed to plow the back part of the parking lot or that the ice on which plaintiff alleges to have slipped was caused by the melting and re-freezing of "snow burrs" left behind after the plowing. There is, however, no evidence in the record to support these claims. The speculative claim that a contractor caused or created an alleged icy condition through incomplete snow removal is insufficient to defeat the contractor's motion for summary judgement (***Crosthwaite v Acadia Realty Trust***, 62 AD3d 823, 879NYS2d 554 [2d Dept 2009]; ***Zabbia v Westwood, LLC***, *supra).*

In light of the foregoing, each of motions (#004, #005 and #006) for summary judgment dismissing plaintiff's complaint and all third-party claims asserted against the moving defendants are granted.

Dated: March 19 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION