[* 1]

SHORT FORM ORDER

INDEX No. 09-37845
CAL No. 12-00758OT

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

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 8-14-12 (#002)
MOTION DATE 9-11-12 (#003)
ADJ. DATE 11-13-13
Mot. Seq. # 002 - MG
003 - MD

----------X

THOMAS CALABRO,

Plaintiff,

- against -

THE HARBOUR AT BLUE POINT HOME OWNERS ASSOCIATION, INC., and PMBC CLEANING & MAINTENANCE, INC. d/b/a ALMIGHTY CLEANING and ALMIGHTY CLEANING, INC., and ALEXANDER WOLF & COMPANY, INC.,

Defendants.

----------X

ROSENBERG & GLUCK, LLP
Attorneys for Plaintiff
1176 Portion Road
Holtsville, New York 11742

RUTHERFORD & CHRISTIE, LLP
Attorneys for Defendants Harbour at Blue Point & Alexander Wolf & Co.
369 Lexington Avenue, 8th Floor
New York, New York 10007

BAXTER SMITH & SHAPIRO, P.C.
Attorneys for Defendant PMBC Cleaning
99 North Broadway
Hicksville, New York 11801

Upon the following papers numbered 1 to 78 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 39; 40 - 65 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 66 - 68 ; Replying Affidavits and supporting papers 69 - 76; 77 - 78 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendant PMBC Cleaning & Maintenance, Inc. and the motion (#003) by defendants The Harbour at Blue Point Home Owners Association, Inc. and Alexander Wolf & Company, Inc. are consolidated for purposes of this determination; and it is

ORDERED that the unopposed motion by defendants PMBC Cleaning & Maintenance, Inc. for summary judgment dismissing the complaint and the cross claim against it is granted; and it is

ORDERED that the motion by defendants The Harbour at Blue Point Home Owners Association, Inc. and Alexander Wolf & Company, Inc. for summary judgment dismissing the complaint against them is granted.

On the night of March 4, 2009, plaintiff Thomas Calabro allegedly slipped and fell on a patch of ice while walking in the parking lot of a townhouse community known as The Harbour at Blue Point. As relevant to the instant action, defendant The Harbour at Blue Point Home Owners Association, Inc. (hereinafter referred to as the Association) allegedly is obligated to maintain the common areas in the community, including the roadways and parking lots, and defendant Alexander Wolf & Company, Inc. allegedly manages the property on its behalf. Pursuant to a written contract with the Association, defendant PMBC Cleaning & Maintenance, Inc., doing business as Almighty Cleaning, Inc., allegedly performed snow and ice removal services at the townhouse community just days before plaintiff's slip-and-fall accident.

Thereafter, plaintiff, an owner and resident of the townhouse community, commenced this action to recover damages for personal injuries he allegedly sustained due to his slip-and-fall accident. By his complaint, plaintiff alleges defendants failed to properly remove snow and ice from the subject parking lot, and failed to properly place salt and/or sand on such parking lot. He alleges the parking lot "and parts thereof constituted a nuisance, a trap and a dangerous condition." Plaintiff further alleges his accident was due to defendants' negligence "in the ownership, operation, management, maintenance, inspection, control, supervision and/or repair of the aforesaid premises and parking lot."

PMBC Cleaning & Maintenance (hereinafter referred to as PMBC) now moves for summary judgment dismissing the complaint against it on the ground it may not be held liable to plaintiff for negligence, as it did not have a contractual relationship with him and it did not owe a duty of care to him under any of the three situations set forth by the Court of Appeals in ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 (2002). PMBC also argues it is entitled to judgment dismissing the cross claim against it for contribution and indemnification, as it did not breach the obligations owed to Alexander Wolf & Company under the terms of its snow removal contract and it did not owe a duty of care to plaintiff. The Association and Alexander Wolf & Company do not oppose the motion. Plaintiff also does not oppose the motion, stating that, "[b]ased on the evidence which has been developed during the course of discovery in this matter and based on the applicable case law in this Department, [he] cannot in good faith oppose" PMBC's motion.

The Association and Alexander Wolf & Company also move for summary judgment dismissing the complaint against them, arguing they had no notice of the alleged dangerous condition on the surface of the parking lot. In support of the motion, the Association and Alexander Wolf & Co. submit copies of the pleadings, transcripts of the parties' deposition testimony, and a transcript of the deposition testimony of nonparty witness Doreen Sanders. Plaintiff opposes the motion, arguing the Association's and Alexander Wolf & Company's submissions are insufficient to establish a prima facie case that they lacked notice of the condition that allegedly caused his fall.

As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Grover v Mastic Beach Prop. Owners***

Assn., 57 AD3d 729,869 NYS2d 593 [2d Dept 2008]; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2003]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Putnam v Stout***, 46 AD2d 812, 361 NYS2d 205 [2d Dept 1974], *affd* 38 NY2d 607, 381 NYS2d 848 [1976]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). Likewise, a property manager, to whom the owner has delegated responsibility for the property, owes a general duty to maintain it in a reasonably safe condition (***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]; *see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Urman v S & S, LLC***, 85 AD3d 897, 925 NYS2d 186 [2d Dept 2011]). Property owners and managers, however, are not insurers of the safety of people on the premises (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]).

To establish liability in a slip-and-fall action, a plaintiff must show that his or her injuries were caused by a dangerous or defective condition on the property, and that the defendant owner, possessor or person in control of such property created the condition or had actual or constructive notice of it (*see* ***Flores v BAJ Holding Corp.***, 94 AD3d 945, 942 NYS2d 202 [2d Dept 2012]; ***Cantwell v Fox Hill Community Assn., Inc.***, 87 AD3d 1106, 930 NYS2d 459 [2d Dept 2011]; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). To establish constructive notice, the dangerous or defective condition must haven been visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner or possessor to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646; ***Hayden v Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Britto v Great Atl. & Pac. Tea Co., Inc.***, 21 AD3d 436, 799 NYS2d 828 [2d Dept 2005]).

Thus, a defendant seeking judgment in his or her favor in a slip-and-fall action has the burden of submitting evidence sufficient to make a prima facie showing that he or she neither created the alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient period of time to discover and remedy it (*see* ***Feola v City of New York***, 102 AD3d 827, 958 NYS2d 258 [2d Dept 2013]; ***Baratta v Eden Roc NY, LLC***, 95 AD3d 802, 943 NYS2d 230 [2d Dept 2012]; ***Spinoccia v Fairfield Bellmore Ave., LLC***, 95 AD3d 993, 943 NYS2d 601 [2d Dept 2012]; ***Christal v Ramapo Cirque Homeowners Assn.***, 51 AD3d 846, 857 NYS2d 729 [2d Dept 2008]). Further, a defendant claiming a lack of constructive notice of the dangerous condition generally must offer proof showing when the area in question was last cleaned or inspected relative to the time of the subject accident to meet his or her initial burden on the issue of constructive notice (***Santos v 786 Flatbush Food Corp.***, 89 AD3d 828, 932 NYS2d 525 [2d Dept 2011]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 598-599, 869 NYS2d 222 [2d Dept 2008]; *see* ***Feola v City of New York***, 102 AD3d 827, 958 NYS2d 258; ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]; ***Goodyear v Putnam/Northern Westchester Bd. of Coop. Educ. Servs.***, 86 AD3d 551, 927 NYS2d 323 [2d Dept

2011]; ***Mei Xiao Guo v Quong Big Realty Corp.***, 81 AD3d 610, 916 NYS2d 155 [2d Dept 2011]). However, a general awareness that a dangerous condition may exist is legally insufficient to establish constructive notice of a dangerous condition (*see* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994).

The submissions of the Association and Alexander Wolf & Co. are sufficient to establish a prima facie case that they did not create or have actual or constructive notice of the ice condition that allegedly caused plaintiff to fall (*see* ***Sweeney v Doria***, 95 AD3d 1298, 944 NYS2d 893 [2d Dept 2012]; ***Spinoccia v Fairfield Bellmore Ave., LLC***, 95 AD3d 993, 943 NYS2d 601; ***Lillie v Wilmorite, Inc.***, 92 AD3d 1221, 938 NYS2d 396 [4th Dept 2012]; ***Gershfeld v Marine Park Funeral Hone, Inc.***, 62 AD3d 833, 879 NYS2d 549 [2d Dept 2009]; ***Aurilia v Empire Realty Assoc.***, 58 AD3d 773, 873 NYS2d 103 [2d Dept 2009]; ***Christal v Ramapo Cirque Homeowners Assn.***, 51 AD3d 846, 857 NYS2d 729; ***Goodwin v Knolls at Stony Brook Homeowners Assn.***, 251 AD2d 451, 674 NYS2d 411 [2d Dept 1998]). Here, it is undisputed that PMBC performed snow removal services on the subject property following a substantial snowfall that occurred on March 1 and March 2, 2009. Significantly, plaintiff testified at his deposition that he did not actually see the ice that alleged caused him to slip either before or after his fall. Rather, he testified only that he felt ice under his back when he was lying on the surface of the parking lot after his fall, and that the ice "was not very thick." Plaintiff further testified that he did not see any ice on the parking lot on the morning of March 4 or the next day, and that the outside temperature on the day of the accident was cold. In addition, nonparty witness Doreen Sanders, who was in the parking lot with plaintiff at the time of the accident, testified she saw "black ice" in the parking lot when she helped plaintiff stand up after his fall.

Having submitted evidence showing the "black ice" was not visible and apparent, the burden of proof shifted to plaintiff to raise a triable issue of fact as to whether the Association and Alexander & Wolf Co. had notice of the alleged dangerous condition (*see* ***Simon v PABR Assoc., LLC***, 61 AD3d 663, 877 NYS2d 356 [2d Dept 2009]; ***Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.***, 79 AD3d 518, 913 NYS2d 189 [1st Dept 2010]; ***Voss v D&C Parking***, 299 AD2d 346, 749 NYS2d 76 [2d Dept 2002]; *see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Plaintiff, who does not allege that defendants created the icy condition in the parking lot, failed to submit evidence showing a triable issue exists as to whether they had actual or constructive notice of such condition (*see* ***Christal v Ramapo Cirque Homeowners Assn.***, 51 AD3d 846, 857 NYS2d 729; ***Gjoni v 108 Rego Devs. Corp.***, 48 AD3d 514, 852 NYS2d 255 [2d Dept 2008]; ***Murphy v 136 N. Blvd. Assc.***, 304 AD2d 540, 757 NYS2d 582 [2d Dept 2003]).

The argument by plaintiff's counsel that the Association and Alexander Wolf & Co. did not meet their burden on the motion, because the deposition testimony given on their behalf fails to show the actions, if any, taken to inspect or treat the parking lot for ice and snow during the time between PMBC's performance of snow removal activities and plaintiff's accident, is rejected. A defendant in possession or control of property seeking summary judgment on the ground it lacked constructive notice of the icy condition that allegedly caused the plaintiff to slip and fall satisfies its burden on the motion with proof such condition was not visible and apparent (*see* ***Cantwell v Fox Hill Community Assn., Inc.***, 87 AD3d 1106, 930 NYS2d 459; ***Phillips v Henry B's, Inc.***, 85 AD3d 1665, 925 NYS2d 770 [4th Dept 2011]; ***Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.***, 79 AD3d 518, 913 NYS2d 189;

Simon v PABR Assoc., LLC, 61 AD3d 663, 877 NYS2d 356; ***Murphy v 136 N. Blvd. Assc.***, 304 AD2d 540, 757 NYS2d 582; ***Voss v D&C Parking***, 299 AD2d 346, 749 NYS2d 76; ***DeVivo v Sparago***, 287 AD2d 535, 731 NYS2d 501 [2d Dept 2001]). Here, both plaintiff and Doreen Sanders testified they did not see ice on the parking lot before plaintiff's fall. As the uncontrovered evidence in the record shows the icy condition that plaintiff allegedly slipped on was not visible and apparent, the Association and Alexander Wolf & Co. were not required to submit proof demonstrating when they cleaned or inspected the parking lot relative to plaintiff's fall. A general awareness that black ice may form is legally insufficient to find defendants had constructive notice of the alleged dangerous condition that caused plaintiff's accident (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646; ***Gershfeld v Marine Park Funeral Hone, Inc.***, 62 AD3d 833, 879 NYS2d 549; ***Carricato v Jefferson Val. Mall Ltd. Partnership***, 299 AD2d 444, 749 NYS2d 575 [2d Dept 2002]). Accordingly, the motion by the Association and Alexander Wolf & Co. for summary judgment dismissing the complaint against them is granted.

Finally, the unopposed motion by PMBC for an order granting summary judgment dismissing the complaint and the cross claims asserted against it is granted. PMBC's submissions in support of the motion demonstrate a prima facie case that it its contractual obligation to clear snow and ice from the subject premises ran only to the Association (*see* ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 915 NYS2d 103 [2d Dept 2010]; ***Hartono v Collins Lumber Corp.***, 252 AD2d 849, 675 NYS2d 699 [3d Dept 1998]; ***Phillips v Young Men's Christian Assn.***, 215 AD2d 825, 625 NYS2d 752 [3d Dept 1995]), that its conduct did not create or exacerbate a dangerous condition on the premises, and that plaintiff did not rely upon the performance of its snow removal activities (*see* ***Schultz v Bridgeport & Port Jefferson Steamboatt Co.***, 68 AD3d 970, 891 NYS2d 146 [2d Dept 2009]; ***Wheaton v East End Commons Assoc.***, 50 AD3d 675, 854 NYS2d 528 [2d Dept 2008]; ***Castro v Maple Run Condominium Assn.***, 41 AD3d 412, 837 NYS2d 729 [2d Dept 2007]). PMBC also established entitlement to judgment in its favor on the Association's and Alexander Wolf & Co.'s claims for contribution and indemnification (*see* ***Reimold v Walden Terrace, Inc.***, 85 AD3d 1144, 926 NYS2d 153 [2d Dept 2011]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 915 NYS2d 103; ***Schultz v Bridgeport & Port Jefferson Steamboatt Co.***, 68 AD3d 970, 891 NYS2d 146;***Keshavarvz v Murphy***, 242 AD2d 680, 662 NYS2d 795 [2d Dept 1997]).

Dated: MARCH 27, 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION