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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

DANIELLE MILLER,

Plaintiff,

- against -

409-423 WFP SHIRLEY, LLC, WILLIAM FLOYD PLAZA LLC, SOUND GARDENS, INC., and LOUIS LEFKOWITZ REALTY INC.,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 5199/11

Motion Sequence No. 003

AMENDED

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits .....
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The plaintiff moves pursuant to CPLR 2221 for leave to renew regarding the defendant's prior motion for summary judgment which was granted by the Court dismissing the action against the codefendant Sound Garden, Inc. The plaintiff points to the deposition testimony of a nonparty witness, a librarian who like the plaintiff worked near the accident site for some years. The plaintiff's attorney indicates this testimony taken on March 15, 2013, after Sound Garden, Inc.'s motion for summary judgment was submitted to the Court. The party this testimony resulted in new facts.

The defendant opposes this motion. The defense avers the plaintiff's motion for renewal and reargument must be denied because the plaintiff fails to provide reasonable

justification for presenting the allegations in their opposing papers to the defense motion for summary judgment. The defense contends the plaintiff's reliance upon the nonparty witness' testimony is insufficient to raise an issue of fact. The defense asserts that testimony is based solely upon speculation. The defense points out the plaintiff fails to attach signed transcripts to the support papers as required by CPLR 3116. The defense maintains the plaintiff fails to allege any facts sufficient to trigger any exception to the lack of a legal duty of care regarding the plaintiff and Sound Garden, Inc., the snow removal contractor hired by the codefendant Serota Properties LLC.

"A property owner will be held liable for damages sustained in a slip-and-fall accident "only when it created the dangerous condition which caused the accident or had actual or constructive notice thereof" (***Robinson v. Trade Link Am.***, 39 A.D.3d 616, 616–617, 833 N.Y.S.2d 243; ***see Zabbia v. Westwood, LLC***, 18 A.D.3d 542, 544, 795 N.Y.S.2d 319)" (***Spinoccia v. Fairfield Bellmore Ave., LLC***, 95 A.D.3d 993, 943 N.Y.S.2d 601 [2d Dept 2012]). Sound Garden, Inc. did not assume a duty of reasonable care to the plaintiff by virtue of its snow removal contract with Serota Properties LLC (***DeMartino v. Home Depot U.S.A., Inc.***, 37 A.D.3d 758, 831 N.Y.S.2d 236 [2d Dept 2007]; ***Riekers v. Gold Coast Plaza***, 255 A.D.2d 373, 679 N.Y.S.2d 709 [2d Dept 1998]).

The nonparty witness testified she pulled her vehicle into the subject parking lot on January 28, 2011, and saw the plaintiff on her back on a sheet of ice. The nonparty witness testified there was ice in the subject parking lot whenever it snowed, plowed in piles around poles and removed in certain locations.

Sound Garden, Inc. previously proffered deposition testimony from its owner

showing a large snow storm occurred in the early morning of January 27, 2011, and Sound Garden, Inc. sent two workers to plow the subject parking lot. The workers completely plowed the parking lot on January 27, 2011 between 4:30 A.M. until 7:30 A.M., when the snow stopped. That owner testified she sent work crews out to salt and sand any property which requested salt and sand that morning, but Serota Properties LLC never requested it as agreed in their contract, and Sound Garden, Inc. never returned to the subject parking lot before the January 28, 2011 accident, some 24 hours after the snow removal by Sound Garden, Inc.

The plaintiff fails to raise a triable issue of fact on this motion to renew (***see Castro v. Maple Run Condominium Ass'n***, 41 A.D.3d 412, 837 N.Y.S.2d 729 [2d Dept 2007]). The plaintiff contends the defendant created the icy condition, and points to the deposition of a nonparty witness to support that assertion. The plaintiff fails to show that Sound Garden, Inc. "launched a force or instrument of harm,"and thus created or exacerbated a hazardous condition, or that the plaintiff detrimentally relied on [Sound Garden, Inc.'s] continued performance of its contractual duties [citations omitted]" (***McConologue v. Summer Street Stamford Corp.***, 16 A.D.3d, supra at 469). The plaintiff's contention, the icy condition resulted from the defendant's negligent snow piling and removal efforts making a foreseeable risk of melting and re-freezing snow, is based on speculation and unsupported by the proof submitted by the plaintiff (***Silva-Carpanzano v. Schecter***, --- N.Y.S.2d ----, 2013 WL 1749521 2d Dept 2013]). The plaintiff proffered no proof that Sound Garden, Inc. either knew about any ice condition that occurred after the workers left the subject parking lot or had any obligation to constantly check the subject parking lot for

such a condition (***Perales v. First Columbia 1200 NSR, LLC***, 88 A.D.3d 1213, 932 N.Y.S.2d 211 [3 Dept.,2011]).

There is no proof submitted by the plaintiff to support a contention that the defendant had actual or constructive notice of the ice patch. Moreover, "a general awareness that a hazardous condition may be present is insufficient to establish notice [citation omitted]" (***Gershfeld v. Marine Park Funeral Home, Inc.***, 62 A.D.3d 833, 834, 879 N.Y.S.2d 549 [2d Dept 2009]). The defendant previously made a *prima facie* showing of entitlement to judgment as a matter of law by demonstrating that it neither created nor had actual or constructive notice of the icy condition alleged to have caused the plaintiff's fall. This Court determined the Sound Garden, Inc. cannot be held liable for the plaintiff's injuries since Sound Garden, Inc. did not assume a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff by virtue of its snow removal contract with Serota Properties LLC which reserved to itself the ability to determine whether salt or sand should be used on an "as need" basis upon request by Serota Properties LLC (***McConologue v. Summer Street Stamford Corp.***, 16 A.D.3d 468, 792 N.Y.S.2d 101 2d Dept 2005]).

Accordingly, the motion is denied.

So ordered.

Dated: **May 29, 2013**

ENTER:

J. S. C.

NON FINAL DISPOSITION