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SHORT FORM ORDER

INDEX No. 10-45467
CAL No. 13-00421OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-22-13
ADJ. DATE 8-27-13
Mot. Seq. # 001 -MG
002 -MG; CASEDISP

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GEORGE SCHATZBERG and HELGA SCHATZBERG,

Plaintiffs,

- against -

SILVER PONDS HOME OWNERS ASSOCIATION, INC. and SOUND GARDENS, INC.,

Defendants.

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Upon the reading and filing of the following papers 1-37 in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Sound Gardens, dated , April 22, 2013 and supporting papers 1-12, by defendant Silver Ponds, dated May2, 2013 _13-24; (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated June 11,2013, and supporting papers, 25-29, by Defendant Silver Ponds, dated May 2, 2013 30-31; (4) Reply Affirmations by the defendant Sound Gardens , dated July 16 and August 23, 2013, 32-33, 34-35, and by defendant Silver Ponds, dated August 23, 2013 36-37; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

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

ORDERED that the motion by defendant, Sound Gardens, Inc. ("Sound Gardens") for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that the motion by defendant, Silver Pond Homeowners Association, Inc. ("Silver Ponds"), for summary judgment dismissing the complaint and all cross claims asserted against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, George Schatzberg, on January 4, 2010, at approximately 1:00 p.m., when it is alleged that he slipped and fell on ice located on the walkway between his front door and his driveway at the plaintiffs' residence located at 219 Barn Swallow Court, Manorville, Town of Brookhaven, New York. Plaintiffs allege that the defendants were negligent in failing to clear and remove ice from the walkway which is owned by the plaintiffs. Plaintiff Helga Schatzberg seeks damages for loss of services.

Defendant Sound Gardens now moves for summary judgment dismissing the complaint and all cross-claims. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the verified bill of particulars, the transcripts of the depositions of George Schatzberg, Anna Lafata-Sohre as a witness for defendant Sound Garden, and John D. Williams, Jr., as a witness on behalf of defendant Silver Ponds, and a copy of the snow removal contract between the defendants. Defendant Silver Ponds also moves for summary judgment dismissing the complaint and all cross-claims. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcripts of the depositions of the George Schatzberg, Helga Schatzberg, Anna Lafata-Sohre and John D. Williams, Jr., and a copy of the snow removal contract between the defendants. In opposition to the motions, the plaintiffs submit their attorney's affirmation, certified weather data from the National Climatic Data Center, four photographs and a copy of the snow removal contract between the defendants.

Plaintiff George Schatzberg testified that he has lived , with his wife, at the townhouse located at 219 Barn Swallow Court, Manorville for about 14 years. His accident occurred on January 4, 2010, he thought around noontime. He walked out his front door to where the garage door is and fell on the walkway. He could not recall what the weather was like. He fell on ice. He believed there was some ice at the entrance door to the garage. He could not remember any details about the ice. He could not recall when the last snowfall was prior to the accident. He testified that his son would come when there was a lot of ice, because otherwise the ice would stay there. To his knowledge, the snow removal people don't deice. That was the policy ever since they had been there. He had never seen them put deicer down. His right foot slipped and he fell to the ground. He did not remember if he saw the ice he slipped on. He believed it was ice because his foot slipped. His wife asked a couple of men who were walking by to help him into the house. She called their son, and when he arrived he called an ambulance.

Plaintiff Helga Schatzberg testified that her husband's accident occurred January 4, 2010, at about 1:00 p.m. She did not see the accident. She first became aware of the accident when she saw him laying on the walkway. Her husband had gone out to smoke. She recalled seeing ice and some snow. She could not remember the ice her husband slipped on. There were patches of ice. She could not remember when the last snowfall had been prior to the accident, but she was sure there was ice. She thought the last snowfall was a day or two days before. She later recalled that it must have been shoveled the day before. She claimed that whoever shoveled did not do a good job. She never made any complaints about the snow removal. She did not think it was their responsibility to put down ice melt. They did not put down ice melt that day,

probably because they did not have it. Usually her son would bring it. In the fourteen years they lived there, they had always been the ones to put the ice melt down. Two men helped her husband into the house. She called their son, who then called for an ambulance.

John D. Williams, Jr., testified as a witness on behalf of defendant Silver Ponds. He was the secretary of the Silver Ponds Homeowners Association. He is familiar, to a limited degree, with the procedure defendant Silver Ponds has with regard to the snow removal contract. Upon the falling of two inches of snow, as determined by the weather station at Brookhaven National Laboratory, their contractor, defendant Sound Gardens, contacts Silver Ponds to discuss what snow removal action will be taken. He was shown and identified the snow removal contract that was in place at the time of the accident. Sound Gardens has the responsibility for snow removal on the streets of the Silver Ponds community. It is also responsible for removing the snow from the driveway of each home. In addition to this, Sound Gardens had the responsibility for clearing the walkway of each residence from the driveway up to the entrance of the house. The contract calls for this to be done by hand shoveling. They are not permitted to put down salt or sand on the walkway. It is the homeowner's responsibility. He based this conclusion on the fact that the contract states that ice melt is not to be used by Sound Gardens anywhere in the community. When the snow is shoveled, it is lifted up to the side, onto grass if it is available. Sound Gardens does have authority to sand and salt the roadways in the community, as needed or upon request. If the owner desires sand, salt, etc. on the walkway, they do it themselves. Usually a board member will canvass the community to make sure snow removal is done according to the contract. If not, they will contact the contractor. He is unaware of any other resident who had a slipped and fallen in their walkway or driveway prior to the date of the accident. He is very satisfied with the work Sound Gardens had done. The exterior maintenance of the residences is the responsibility of the homeowners. The common area is the responsibility of the homeowners association. Sound Gardens was not allowed to lay down sand and salt because of the damage it can do to home furnishings, carpeting and the like if it is tracked into the home.

Anna Lafata-Sohre testified as a witness for the defendant Sound Gardens. She is the owner of Sound Gardens. She handles the day to day operation of the business. Sound Gardens provided snow removal for Silver Ponds pursuant to a contract. A minimum of three snow plows were used, more were brought in, if necessary. The plows were used on the roadways and driveways. Walkways were shoveled by hand. With regard to the snowfall the day prior to the accident, they started at the Silver Ponds complex at 5:30 a.m. and were finished by 1:30 p.m. They shoveled the walkways to the left or right, depending on the unit. If ice was found under the snow, it would be reported to Silver Ponds. Salt and sand are never put down because it is not allowed by the contract. Salt and sand were for roadways only. It is the homeowners' responsibility to get ice off the walkway. Walkways are not shoveled until the snowfall has stopped. Linda Donatto from Silver Ponds management company would inspect the work after it was done. Sound Gardens has never received any complaints from her about the condition of the walkways after they were shoveled. No one from Silver Ponds has ever told them that any of the residents were displeased with the manner in which the walkways were shoveled. Salt, sand or deicers were never put on the driveways.

It is noted that the contract between Silver Ponds and Sound Gardens requires that, when shoveling units, snow is to be removed to the left and right of the walkways. The contract also states that ice melt will not be used anywhere on the property.

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 Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [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. Med. Ctr.***, *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, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

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***,18 AD3d 542, 795 NYS2d 19 [2005]; ***Tsivitis v Sivan Associates, LLC***, 292 AD2d 594, 741 NYS2d 545 [2002]).

Defendant Silver Ponds demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by demonstrating that it did not violate any duty that it had to plaintiffs. Plaintiffs' walkway and driveway are not part of the common areas of the Silver Pond community. Silver Ponds only obligation to the plaintiffs was to remove snow from the driveways and walkways. Putting down sand, salt or ice melt to prevent or control any ice on the walkway was the responsibility of the individual homeowner. This is confirmed by the testimony of Mr. Williams and the the plaintiffs. Almost 24 hours passed between the time Sound Gardens completed clearing all snow from the property and Mr. Schatzberg's accident. During this time period, neither of the plaintiffs took any steps to put down sand, salt or ice melt on the walkway nor did they make any complaint to Silver Ponds as to any problem they had with regard to the snow removal. In response, plaintiff's unsubstantiated theory that the ice resulted from piled snow that melted and then re-froze was speculative and, thus, insufficient to raise a triable issue of fact (*see* ***Smith v Hariri Realty Associates, Inc.***, 109 AD3d 897, 971 NYS2d 451 [2d Dept 2013]; ***Spinnoccia v Fairfield Bellmore Ave., LLC***, 95 AD3d 993, 943 NYS2d 601 [2d Dept 2012]; ***Zabbia v Westwood, LLC***, *supra).*

Under these circumstances, no liability can be imposed on Silver Ponds and their motion for summary judgment is granted.

Turning to the motion by Sound Gardens, "[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]). However, exceptions have been recognized and tort liability in favor of a non-contracting third-party may arise where the snow removal contractor has launched a force or instrument of harm in failing to exercise reasonable care in the performance of his duties, where there has been detrimental reliance by the injured non-contracting third-party on the contractor's continued performance of its snow removal duties, or where the snow removal contractor has entirely displaced the property owner's duty to maintain the premises in a reasonably safe manner (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*).

Sound Gardens has established its prima facie entitlement to judgment as a matter of law by coming forward with proof that the plaintiffs were not a party to the contract and, therefore, owed no duty of care (*see* ***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]; ***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*). The terms of the contract limited Sound Gardens' snow removal obligations to accumulations of two inches or more, and removing snow from walkways and driveways. Thus, 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'" (***Espinal v Melville Snow Contrs.***, *supra*; ***Henriquez v Inserra Supermarkets, Inc.***, *supra* at 901-902). Nor can there be an issue of plaintiffs detrimental reliance on Sound Gardens snow removal duties, since putting down sand, salt or ice melt to deal with any ice problem was the responsibility of the homeowner. Furthermore, Sound Gardens established that it completed its snow removal work on January 3, 2010. Normal procedure would have Linda Donatto from Silver Ponds management company would then inspect the work after it was done. It was also normal procedure that if shoveling of a walkway revealed ice underneath, that Silver Ponds would be notified. There is no indication that there were any problems with the snow removal that day.The plaintiffs had almost 24 hours to deal with any ice problem which may have developed, but they failed to do so. Finally, plaintiffs' speculative and conclusory allegations that Sound Gardens' snow removal operations created or increased a dangerous snow-related hazard are insufficient to impose liability (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Smith v Hariri Realty Associates, Inc.***, *supra).*

In light of the foregoing, defendant Sound Gardens' motion for summary judgment is granted

Dated: 12/6/13

Peter H. Mayer
PETER H. MAYER, J.S.C.

__X__ FINAL DISPOSITION **___ NON-FINAL DISPOSITION**