SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. GEORGE R. PECK
JUSTICE

----------X **TRIAL/IAS PART 20**

BARBARA STEVENS,

Plaintiff,

-against-

INDEX #600328-15
Mot. Seq. 001, 002, 003

Motion Date 1-24-17

SIMON PROPERTY GROUP, INC., SIMON PROPERTY GROUP, LP, SIMON PROPERTY GROUP ADMINISTRATIVE SERVICES PARTNERSHIP, LP, THE RETAIL PROPERTY TRUST and CROWN BUILDING MAINTENANCE COMPANY, INC., d/b/a ABLE BUILDING MAINTENANCE COMPANY, INC., and AAA MAINTENANCE, LLC,

Defendants.

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SIMON PROPERTY GROUP, INC., SIMON PROPERTY GROUP, LP SIMON PROPERTY GROUP ADMINISTRATIVE SERVICES PARTNERSHIP, LP and THE RETAIL PROPERTY TRUST,

Third-Party Plaintiffs,

-against-

AAA BUILDING MAINTENANCE, INC, d/b/a ABLE BUILDING MAINTENANCE,

Third-Party Defendant.

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Motions pursuant to CPLR §3212 by defendant, Simon Property Group, Inc., Simon Property Group, LP, Simon Property Group Administrative Services Partnership, LP, The Retail Property Trust (Simon), Crown Building Maintenance Company, Inc., d/b/a Able Building

Maintenance Company (Crown), and AAA Building Maintenance, Inc. d/b/a Able Building Maintenance (Able), to dismiss plaintiff's complaint are GRANTED.

This action arises from a slip and fall incident on February 6, 2014 in which plaintiff was injured when she fell while attempting to climb over a snow mound on her way from Nordstrom's to Bloomingdales. in the parking lot of Roosevelt Field Shopping Mall owned by defendant, Simon. The incident occurred as plaintiff attempted to go from Nordstrom's to Bloomingdales.

Pursuant to a contract with defendant, Simon, Crown and Able were retained to perform snow removal services in the parking lot.

Defendant, Able was the contractor performing snow removal for the parking lots at the Roosevelt Field Mall and would have been responsible for plowing the parking lot at issue located between the Nordstrom's and Bloomingdale's Department stores if there was snow. Defendant, Crown was the contractor hired to shovel the sidewalks at the Roosevelt Field Mall.

Deposition of Plaintiff Barbara Stevens:

Plaintiff testified that she went to the Roosevelt Field Mall on February 6, 2014 at approximately 5:30 p.m. At that time it was dusk and was cold, with no precipitation. There was snow on the side of the roads at that time, as it "was a very bad winter."

The plaintiff testified that she parked her car in a parking lot between Nordstom and Bloomingdale's and walked to the entrance of Nordstrom. At the time plaintiff was able to observe the blacktop pavement and further noted that as she stepped up onto the sidewalk and curb by the Nordstrom entrance the area was very clear of snow and had been shoveled.

Ms. Stevens stated that she went to the Roosevelt Field Mall to look for a particular type of lipstick. She remained in Nordstrom for approximately 1 ½ hours but did not find the lipstick she was looking for. So, around 7:00 p.m. she decided to leave Nordstrom from the same entrance that she had entered: it was her intention to walk to Bloomingdale's to continue looking for the lipstick.

Ms. Stevens testified that she was familiar with Bloomingdale's and the Roosevelt Field Mall in general, having been there, "dozens and dozens and dozens and dozens of times.

Ms. Stevens specifically testified as follows:

Q. Okay, So when you came out the exit doors of the Nordstrom's, was it your intention to turn your body to the left, to the right, walk straight or something else?

A. "Go straight ahead to get into Bloomingdale's.

The Plaintiff then testified that she made her way into the parking lot between Nordstrom and Bloomingdale's. Ms. Stevens testified that she knew of two entrances to the Bloomingdale's, one of which was to her left as she walked across the parking lot and one of which was to the right and around the side of the building. She decided not to use the entrance to her left because it entered into the men's department and she did not want to go there.

With respect to what her intentions were as she crossed the parking lot, plaintiff Barbara Stevens testified as follows:

A. "I was here. I decided to go straight ahead from A to B–the shortest distance between Nordstrom's and Bloomingdale's rather than–I wasn't going to walk around to go in the front entrance."

Plaintiff testified that as she walked towards Bloomingdale's she observed a mound of snow running parallels to the building line. She stated the mound was between 12-15 inches tall, although at another point she stated it could have been as high as 20 inches. She estimated the width of the mound to be between 24-30 inches wide.

Plaintiff testified that her fall occurred as she attempted to climb over the snow mound and head toward the front entrance to Bloomingdale's, which she never could see at any time up to the point where she fell.

As to exactly how she fell, plaintiff testified as follows:

Q. Did you see the mound of snow in front of you before you started to go up the mound of snow?

A. Yes.

Q. For what reason did you try to climb over the mound of snow?

A. I thought I could do it, and I didn't want to walk all the way to the front entrance because that was the quickest way, opposite Nordstrom's, to get into

Bloomingdales.

Plaintiff stated that she fell as soon as she got to the top of the snow mound. Plaintiff further testified that she was aware that she could have gone to Bloomingdale's from Nordstroms's by walking inside of the Mall, but cutting through the parking lot saved time.

With respect to the snow mound a tissue, she stated that she assumed that on the other side of the mound was the sidewalk adjacent to Bloomingdale's.

The plaintiff had no idea, however, whether the mound was on the curb line, in the parking lot, on the sidewalk, or some combination thereof. The plaintiff had no idea what was located underneath the snow mound. She also had no idea how long the mound had been at the location or when or how it was created.

Predicated on the contention that defendants Simon and Able maintained the premises in a reasonably safe condition and neither created or had actual or constructive knowledge of the alleged snow/ice condition, said defendants seek summary judgment dismissing the complaint.

Liability for a dangerous condition on real property is predicated on ownership, occupancy, control or special use of property *(Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849, 850 (2d Dept 2007]). Owners of property, onto which the public is invited, have a non-delegable duty to provide the public with reasonably safe premises (*Podlaski v Long Is. Paneling Ctr. of Centereach*, Inc., 58 AD3d 825, 825 [2d Dept 2009]).

A landowner has a duty to maintain its property in a reasonably safe condition, the scope of which depends upon the foreseeability of the potential harm (*Basso v Miller*, 40NY2d 233 [1976]). There is no duty, however, to protect against an open and obvious condition, which, as a matter of law, is not inherently dangerous (*Zhuo Zhen Chen v City of New York*, 106 AD3d 1081[2d Dept 2013]; *Clark v AMF Bowling Ctrs., Inc.*, 83 AD3d 761[2d Dept 2011]).

Here plaintiff testified that the mound was 12-15 inches tall; could be as high as 20 inches. This was an open and obvious condition. Moreover, it was not reasonably foreseeable that the plaintiff, who had alternative routes available, would choose to attempt to climb over the mound in sneakers. (*McKenzie v City of New York* 116 AD3d 526, 948 N.Y.S. 2d 32 [1st dept 2014]). Therefore, the defendants, Simon, Crown and Able are entitled to summary judgment dismissing plaintiff's complaint.

Plaintiff has failed to raise a factual issue regarding any of the exceptions to the general rule regarding the duty of an independent snow contractor to an injured plaintiff. Generally a snow remover's contractual obligation standing alone will not give rise to tort liability to an injured person unless (1) in failing to exercise reasonable care the snow removal contractor launched a force or instrument of harm; (2) the plaintiff detrimentally relied on the continued performance of the snow remover's contractual duties; or (3) the snow removal contractor has entirely displaced the property owner's duty to maintain the premises safety (*Palka v Servicemster Mgt. Servs. Corp.*, 83 NY2d 579, 589-590[1994]; *Lubell v Stonegate at Ardsley Home Owners Assn. Inc.*, 79 AD3d 1102, 1003 [2d Dept 2010]; *Crosthwaite v Acadia Trust Realty*, 62 AD3d 823, 824 [2d Dept 2009]).

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law offering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once such a showing has been made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff has failed to raise a factual issue sufficient to defeat the motion for summary judgment. The motions by Simon, Crown and Able, therefore, are GRANTED and the complaint dismissed. In view of the aforementioned ruling, all cross-motions are dismissed.

This shall constitute the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: March 17, 2017
Mineola, New York

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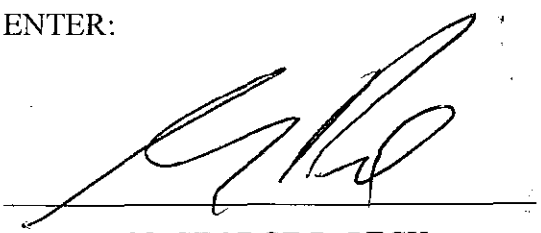

HON. GEORGE R. PECK
J.S.C.

ENTERED
MAR 22 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE