SHORT FORM ORDER

INDEX No. 13-29547
CAL. No. 17-00254OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 6-20-17 (002)
MOTION DATE 7-5-17 (003)
ADJ. DATE 8-23-17
Mot. Seq. # 002 - MG
003 - MG; CASEDISP

----------X

CATHERINE DRAGOTTA,

Plaintiff,

- against -

NORWICH GATE COMPANY, DE, LLC & HEATHERWOOD COMMUNITIES, LLC,

Defendants.

----------X

LAW OFFICE OF CARL MALTESE
Attorneys for Plaintiff
1050 West Jericho Turnpike, Suite B
Smithtown, New York 11787

MARGARET G. KLEIN & ASSOCIATES
Attorneys for Defendants/Third-Party Plaintiffs
Norwich Gate and Heatherwood Communities
200 Madison Avenue, 2nd Floor
New York, New York 10016

----------X

NORWICH GATE COMPANY, DE, LLC & HEATHERWOOD COMMUNITIES, LLC,

Third-Party Plaintiff,

- against -

LICARI LANDSCAPING INC.,

Third-Party Defendants.

----------X

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN
Attorneys for Third-Party Defendant Licari Landscaping
88 Pine Street, 2nd Floor
New York, New York 10005

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 - 30; 46 - 67 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 31 - 34; 35 - 41; 68 - 72 ; Replying Affidavits and supporting papers 42- 43; 73 - 78 ; Other 44 - 45 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the pending motions (002 and 003) are consolidated herein for disposition; and it is

ORDERED that the motion (002) by defendants Norwich Gate Company, DE, LLC, and Heatherwood Communities, LLC, for an order pursuant to Civil Practice Law and Rules (CPLR) §3212, granting summary judgment dismissing the complaint and any cross-claims asserted against them, is granted; and it is further

ORDERED that the motion (003) by third-party defendant Licari Landscaping, Inc., for an order pursuant to CPLR §3212, granting summary judgment dismissing the complaint and any cross-claims asserted against it, is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Catherine Dragotta on July 10, 2013, when she tripped and fell on the walkway in front of her apartment. At the time of her accident, plaintiff resided at a residential community in East Norwich owned by Norwich Gate Company, DE, LLC, and operated under the name Heatherwood Communities, LLC (collectively referred to as Norwich Gate). The landscaping services at the community were performed by third-party defendant Licari Landscaping Inc. By her bill of particulars, plaintiff alleges that the subject walkway was uneven and deteriorating, and that defendants were negligent, *inter alia*, in allowing or permitting a dangerous and defective condition to exist on the premises. A third-party action against Licari Landscaping seeks damages for breach of contract, contribution, and indemnification.

Norwich Gate now moves for summary judgment dismissing the complaint on the ground that the alleged dangerous condition which caused plaintiff to fall is not inherently dangerous, and that it had no actual or constructive notice of such defect. In support of its motion, Norwich Gate submits, *inter alia*, copies of the pleadings, the bill of particulars, the transcripts of the parties' deposition testimony, the expert affidavit of Stanley Fein, a certified building maintenance grounds and equipment professional, and photographs of the subject walkway. Plaintiff opposes the motion, arguing, *inter alia*, that Norwich Gate failed to establish a prima facie case of entitlement to summary judgment. Plaintiff's submission in opposition include her attorney's affirmation, the report prepared by Robert L. Schwartzberg, and photographs of the subject walkway.

Licari Landscaping also moves for summary judgment in its favor. In support of its motion, Licari Landscaping submits, *inter alia*, copies of the pleadings, the bill of particulars and photographs of the subject walkway. Licari Landscaping contends that there was no dangerous condition and that it owed no duty to plaintiff. As to Norwich Gate's motion, Licari Landscaping opposes its claims for indemnification.

At her depositions, plaintiff testified that on the day of the accident she was walking from the trash dumpster towards her premises, traversed across the lawn, tripped and fell forward onto the asphalt walkway approximately 20 feet in front of her premises. She stated that when she fell, she realized that the asphalt "ledge" of the walkway was approximately two inches higher than the grass, and that her fall was caused by the height differential. Plaintiff testified that she resided at her premises for approximately nine years, disposes of her trash daily, and never experienced any difficulties traversing the grass or walkway or

observed a height differential between the grass and the walkway. Plaintiff also testified that as she traversed the grass on the day of her accident, she was looking forward, her view of the subject area was unobstructed, but she did not observe the walkway. She testified that the photographs offered at her deposition accurately depicted the conditions of the grass and walkway entrance to her apartment which existed on the day of the accident. She testified she did not have any complaints about the condition of the walkway, grass or surrounding areas, and was not aware of any complaints concerning the subject area prior to the accident. Finally, she testified that she filed an accident report with Norwich Gate within a week of her accident.

At his deposition, Wes Maznio, the superintendent of the premises for Norwich Gate, testified that his duties included inspecting the grounds and maintaining the property. He testified the property has 348 residential units, each with a walkway from the front door to the roadway made of concrete or asphalt. Maznio stated that the walkways were about two inches thick and level with the ground or approximately "one half inch" above the ground. He testified that Licari Landscaping performed landscaping at the subject property and was responsible for trimming and edging the grass by the walkway. He further testified that another contractor was responsible for the repair or replacement of the walkway. Maznio testified that he did not observe plaintiff's accident, but was notified by a Norwich Gate employee that plaintiff tripped and fell on the walkway. He testified that on the same day, he inspected the walkway from the street to plaintiff's front door and back, took a photograph, and did not observe any uneven areas or anything wrong with the grass or asphalt walkway. Maznio testified that he observed a space between the grass and walkway that was probably created by a weedwacker, but was unsure whether it disturbed the ground. He testified that there were no complaints about the landscaper or of any damage to the walkway prior to the plaintiff's accident. Finally, he stated that prior to the accident the walkway had been replaced and that there had been no changes to the walkway after the accident.

At his deposition, John Licari testified that Licari Landscaping had a contract and indemnification agreement with Norwich Gate, and that he landscaped the subject property from March to December during the calendar year. He explained that Licari Landscaping was responsible for cutting the grass weekly, removing weeds, pruning trees, edging and trimming the grass from the walkway. He testified that the walkways were edged at the beginning of the season and a weedwacker was used for the remainder of the season. He stated that he received no complaints regarding the landscaping performed at the subject property prior to plaintiff's accident.

In his affidavit, Stanley H. Fein, an engineer, states he reviewed the pleadings, bill of particulars, plaintiff's testimony and photographs of the location of plaintiff's accident. He stated that on April 28, 2017, he inspected the grass and adjacent walkway in front of plaintiff's residence and observed that the condition of the grass and walkway had appeared to be in the same condition as in the photographs identified by plaintiff during her deposition. He stated that the walkway was "three inches thick" and that there was no difference in elevation between the walkway and the adjacent grass. Finally, he opines that there was no tripping hazard between the grass and the adjacent walkway area and that the walkway was built in accordance with acceptable engineering safety practice.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Upon the proponent establishing a prima facie showing of entitlement to a summary judgment, the burden shifts to the opponent to proffer evidence in admissible form sufficient to establish a material issue of fact requiring a trial; however, mere conclusions and unsubstantiated allegations are insufficient (***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In a negligence trip and fall case, a plaintiff is required to show that the property owner either created the condition which caused the accident or had actual or constructive notice of the condition (*see* ***Mucciariello v A & D Hylan Blvd., Assoc., LLC.***, 133 AD3d 772, 19 NYS3d 574 [2d Dept 2015]; ***Librandi v Stop & Shop Food Store, Inc.***, 7 AD3d 679, 776 NYS2d 846 [2d Dept 2004]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). In addition to notice, the plaintiff must demonstrate that the alleged dangerous condition was the proximate cause of his or her injury (*see* ***Dapp v Larson***, 240 AD2d 918, 659 NYS2d 47 [3d Dept 1997]). A property owner has a duty to maintain his or her property in a reasonable safe condition (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Russ v Fried***, 73 AD3d 1153, 901 NYS2d 703 [2d Dept 2010]). However, a property owner has no duty to protect or warn against an open and obvious condition which, as a matter of law is not inherently dangerous (*see* ***Capozzi v Huhne***, 14 AD3d 474, 788 NYS2d 152 [2d Dept 2005] or incidental to the nature of the property (***Commander v Strathmore Court Home Assoc.***, 151 AD3d 1014, 58 NYS2d 108 [2d Dept 2017]; ***Capasso v Village of Goshen***, 84 AD3d 998, 922 NYS2d 567 [2d Dept 2011] or by the reasonable use of plaintiff's senses (*see* ***DiGeorgio v Morrotta***, 47 AD3d 752, 850 NYS2d 556 [2d Dept 2008]; ***Errett v Great Neck Park Dist.***, 40 AD3d 1029, 837 NYS2d 701 [2d Dept 2007]).

In order to determine whether a defect, such as a particular height difference between the lawn and walkway, is trivial, a court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury (*see* ***Trincere v County of Suffolk***, *supra*). Moreover, a property owner may not be liable in damages held for trivial defects, "not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his [or her] toes, or trip," (***Outlaw v Citibank, N.A.***, 35 AD3d 564, 565, 826 NYS2d 642 [2d Dept 2006][internal quotation marks omitted]). However, there is no "minimal dimension test" that a hazardous or defective condition must be a certain minimum height or depth in order to be actionable (*see* ***Trincere v County of Suffolk***, *supra*). Thus, the issue is usually a question of fact for the jury unless the defendant's proof establishes, as a matter of law, that the defect is too trivial to be actionable and possesses none of the characteristics of a trap or snare (*see* ***Trincere v County of Suffolk***, *supra*, ***Hymanson v A.L.L. Assoc.***, 300 AD3d 358, 751 NYS2d 756 [2d Dept 2002]; ***Marinaccio v LeChambord Rest.***, 246 AD2d 514, 667 NYS2d 395 [2d Dept 1998]).

Here, Norwich Gate established its prima facie entitlement to summary judgment. Its submissions demonstrated that no dangerous or defective condition existed, as the height differential between the grass

and the walkway where plaintiff fell was so trivial it was not actionable as a matter of law (*see* ***Trincere v County of Suffolk***, *supra*; ***Melia v 50 Court Street Assoc.***, 153 AD3d 703, 60 NYS3d 331 [2d Dept 2017]; ***Copley v Town of Riverhead***, 70 AD3d 623, 895 NYS2d 452 [2d Dept 2010]).

In opposition, plaintiff failed to raise any material triable issues (*see* ***Zuckerman v City of New York***, *supra*). Plaintiff failed to demonstrate whether the alleged defect was a hazardous condition such that the defendants could have reasonably foreseen that it would cause an accident (*see* ***Capasso v Village of Goshen***, *supra*). In opposition, plaintiff submits a report of Robert Schwartzberg, a licensed engineer. In his report, he states that he met with plaintiff on September 12, 2013 to inspect the location of the accident. Schwartberg avers that he observed that the condition of the walkway was the same as depicted in the photograph identified by plaintiff during her deposition. He stated that upon his visual inspection, he observed that there was an "open" strip of barren earth, approximately four inches wide that was a depressed area adjacent to and interfaced with the "exposed" asphalt walkway, and the blades of grass concealed some portions of the edge of the asphalt walkway. He stated that when plaintiff's foot entered the strip of barren earth that was slightly depressed, the toe of her footwear contacted and caught on the raised exposed vertical edge of the asphalt walkway which in turn caused her to trip and fall. He stated that the overall height differential between the top of the barren earth and the walkway was approximately two and a half inches. He stated that the barren earth appeared to have been created by a weed wacker or similar edging device and opined that the open strip of barren earth and the adjacent walkway created an uneven surface that was unsafe and a foreseeable tripping hazard. Finally he stated that the asphalt walkway was highly irregular, uneven and that the edges were formed in a "free hand manner."

Contrary to plaintiff's contentions, the expert witness's affidavit did not establish that he possessed the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or his opinion rendered is reliable (*see* ***O'Boy v Motor Coach Indus., Inc.***, 39 AD3d 512, 834 NYS2d 231 [2d Dept 2007]). Schwartzberg states in his affidavit that he is a professional engineer but his credentials do not indicate whether he has knowledge or an understanding of the safety of sidewalks or walkways. The Court notes that his affidavit did not include a curriculum vitae. Even if his affidavit was considered, it is insufficient to meet plaintiff's burden as it improperly relied on evidence not in the record when making his findings and provides no evidentiary basis to create any factual issues of law (*see* ***Cassano v Hagstrom***, 5 NY2d 643, 187 NYS2d 1 [1959]; ***Wright v New York City Hous. Auth.***, 208 AD2d 327, 624 NYS2d 144 [2d Dept 1995]). Plaintiff testified that her view was unobstructed, and that the grass was lower than the walkway. Significantly, she did not testify as to the depressed condition of the "strip of barren earth" as a cause of her fall. Opinion evidence must be based on facts in the record or personally known to the witness (***Casssano v Hagstrom***, *supra*). Thus, his vague, speculative conclusions do not raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Trincere v County of Suffolk***, *supra*; ***Melia v 50 Court Street Assoc***, *supra*).

As to Licari Landscaping's motion for summary judgment, a right to indemnification arises out of a contract, express or implied, between the indemnitor and the indemnitee, and can be sustained only if the indemnitor breached some duty owed to the indemnitee (*see* ***Racquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; ***Charles v William Hird & Co., Inc.***, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]). In contrast, to establish a claim for contribution, it must be shown that two or more tortfeasors share

responsibility of an injury in violation of duties they respectively owed to the injured person (***Smith v Sapienza***, 52 NY2d 82, 87, 436 NYS2d 236 [1981], or that a duty of care independent of contractual obligations was owed (*see* ***Miranti v Brightwaters Racquet & Spa, Inc.***, 246 AD2d 518, 666 NYS2d 946 [2d Dept 1998]; ***Phillips v Young Mens's Christian Assn.***, 215 AD2d 825, 625 NYS2d 752 [3rd Dept 1995]). Here, Licari Landscaping established a prima facie case that it owed no duty of care to plaintiff (*see* ***Espinal v Melville Snow Constrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]), and thus it owed no duty of care to Norwich Gate independent of its contractual duties. It further showed that it fulfilled the landscaping obligations it owed under its agreement with Norwich Gate. As no issues of fact was raised by Norwich Gate in opposition to the motion, summary judgment dismissing the third-party complaint is granted.

Accordingly, the motions are granted.

Dated: **February 21, 2018**
Riverhead, NY

DAVID T. REILLY, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION