| **Ferro v Quail Run Condo 1** |
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| 2018 NY Slip Op 30863(U) |
| May 3, 2018 |
| Supreme Court, Suffolk County |
| Docket Number: 15-1624 |
| Judge: Denise F. Molia |
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[* 1]

SHORT FORM ORDER

INDEX No. 15-1624
CAL. No. 17-01514OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

***PRESENT:***

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 9-15-17 (002)
MOTION DATE 9-29-17 (003)
MOTION DATE 11-17-17 (004)
ADJ. DATE 11-17-17
Mot. Seq. # 002 - MD
# 003 - MG
# 004 - MG

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MARIA FERRO,

Plaintiff,

- against -

QUAIL RUN CONDO 1 and FIFTH AVENUE PAVING, FAIRFIELD PROPERTIES and QUAIL RUN HOMEOWNERS' ASSOCIATION, INC.,

Defendants.

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Upon the following papers read on these motions for summary judgment ; Notice of Motion and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 20; 21 - 35 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (seq. 002) by defendant Quail Run Condo 1, the cross motion (seq. 003) by defendants Fairfield Properties and Quail Run Homeowners' Association, Inc., and the cross motion (seq. 004) by defendant Fifth Avenue Paving, are consolidated for purposes of this determination; and it is

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***ORDERED*** that the motion by defendant Quail Run Condo 1 for summary judgment dismissing the complaint against it is denied; and it is

***ORDERED*** that the cross motion by defendants Fairfield Properties and Quail Run Homeowners' Association, Inc., for summary judgment dismissing the complaint and all cross claims against them is granted; and it is further

***ORDERED*** that the motion by defendant Fifth Avenue Paving for summary judgment dismissing the complaint and all cross claims against it is granted.

This action was commenced by plaintiff Maria Ferro to recover damages for injuries she allegedly sustained on January 25, 2015, when she slipped and fell on an icy sidewalk. The sidewalk in question is owned by defendant Quail Run Condo 1 and located near the condominium owned by plaintiff, known as 16 Sun Hollow Court, Deer Park, New York.

Defendant Quail Run Condo 1 (Quail Run) now moves for summary judgment in its favor, arguing that it had no actual or constructive notice of the alleged icy condition or, in the alternative, that it is entitled to indemnification from defendant Fifth Avenue Paving. In support of its motion, it submits copies of the pleadings, transcripts of the parties' deposition testimony, a copy of a snow removal contract, certified climatological records, various photographs, and snow removal invoices.

Defendants Fairfield Properties (Fairfield) and Quail Run Homeowners' Association, Inc. (the Homeowners' Association) also move for summary judgment, arguing that neither owed any duty to plaintiff, as they did not own the subject premises or have any responsibility for snow removal. In support of their motion, they submit, among other things, an affidavit of Jean Prokopchuk, and a copy of an executed stipulation of discontinuance.

Further, defendant Fifth Avenue Paving (Fifth Avenue) moves for summary judgment, arguing that it did not cause the alleged condition, and that, as a third-party contractor, it owed no duty to plaintiff. In support, it submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, a copy of an "automatic snow service contract" between Fifth Avenue and Quail Run, and certified climatological records.

Plaintiff testified that at approximately 9:00 a.m. on the date in question, she was walking on a common sidewalk leading from her condominium unit to the parking lot. She indicated she was looking straight ahead when her right foot slipped on ice, her left foot slid off the sidewalk, and she fell to the ground. She stated that no precipitation had fallen within the previous 24 hours, but the grass had snow on it. She indicated that at between 8:00 p.m. and 9:00 p.m. on the previous evening, she noticed a patch of ice covering approximately half of one of the sidewalk's concrete flags, but that the remainder of the sidewalk was clear. She testified that the ice was possibly "black ice," that she discussed the ice with her family, but that she lodged no formal complaints with the condominium complex. Upon questioning, plaintiff denied seeing any salt or sand on the ground in the area, and stated that the "condo maintenance crew" was responsible for ice removal.

David Niederman testified that he has been employed as a property manager by Fairfield for 22 years. He explained that his responsibilities include the day-to-day operations of eight different properties, including those of the subject premises. He stated that neither the Homeowners' Association, nor Fairfield had any responsibility for maintenance or snow removal in the area of plaintiff's alleged incident. Instead, he indicated that Quail Run was responsible for "most" of the outdoor maintenance, including snow and ice removal from the sidewalks. He testified that Quail Run has a contract with Fifth Avenue, which provides snow and ice removal services, but that Quail Run retained overall responsibility for that removal, and kept small stores of rock salt for its own use, on premises. Mr. Niederman stated that the contract between Quail Run and Fifth Avenue provides Fifth Avenue will automatically begin snow and ice removal at Quail Run whenever snow accumulates to a depth of two inches or more. He further stated he and Quail Run's nine board members were responsible for inspecting the premises for snow and ice. He indicated that his general practice following a snow event was to "drive through the property and check it out to make sure everything was taken care of." Mr. Niederman further testified that if he noticed an accumulation of ice, or if a homeowner lodged a complaint of icy conditions, he would contact Fifth Avenue, which would respond and remedy the condition. He indicated he is not aware of any complaints made in January of 2015. As to Fifth Avenue's practices, Mr. Niederman testified that it would return to the subject premises the day after a snow event to do a "follow-up," but that it would not return again, unless called upon by Quail Run.

Thomas Bravata testified that he has been employed by Fifth Avenue as a manager for approximately six years, including at the time of plaintiff's alleged injury. He stated his job responsibilities include coordinating workers, ensuring snow removal crews are directed to their proper locations, and invoicing. Mr. Bravata described Fifth Avenue as a paving and concrete company that also performs snow removal services in winter months for approximately 10 clients.

As to its relationship to Quail Run, Mr. Bravata testified that Fifth Avenue had a snow removal contract with it, and kept a Bobcat, snow blowers, and rock salt stored at the premises. He explained the contract required that Fifth Avenue automatically respond to the premises to perform snow removal services when snowfall reached two inches. However, Mr. Bravata indicated that when the snow reached approximately 1 or 1 ½ inches, he would begin to deploy Fifth Avenue's workers to the subject premises. The first group of workers would use a Bobcat and a pickup truck to clear snow from Quail Run's roadways and parking lots. Once snowfall had ceased, a second group would be dispatched to clear all walkways with snowblowers and shovels, then apply rock salt. Mr. Bravata indicated that each time snow removal work was performed at Quail Run, Fifth Avenue generated an invoice.

Upon being shown a Fifth Avenue invoice detailing snow removal work undertaken on January 24 and January 25, 2015, Mr. Bravata testified five workers were present on those dates, "one man in a machine . . . [o]ne man in a pickup truck and three shovelers." He further testified that the work continued for 5 ½ hours. However, he stated he was unable to discern from the invoice whether the workers responded to Quail Run once on each of those two days, or if their work simply continued past midnight. Upon questioning as to Fifth Avenue's duties regarding melting and re-freezing snow, Mr. Bravata indicated the contract provided it "will not be responsible for claims arising out of refrozen ice or snow after snow plowing and treating surfaces are completed." Mr. Bravata stated that in the event of a

re-freezing condition, Fifth Avenue would generally receive a call from Quail Run requesting additional applications of salt.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

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]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). A real property owner "will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" (***Cuillo v Fairfield Prop. Servs., L.P.***, 112 AD3d 777, 778, 977 NYS2d 353 [2d Dept 2013]). A defendant has constructive notice of a hazardous condition on property "when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it." (***Mavis v Rexcorp Realty, LLC***, 143 AD3d 678, 678-679, 39 NYS3d 190 [2d Dept 2016]). To meet the initial burden on the issue of lack of constructive notice, a defendant "is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (*id.* at 679). Yet, while "a landowner owes a duty of care to keep his or her property in a reasonably safe condition, he [or she] will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter" (***Sherman v New York State Thruway Auth.***, 27 NY3d 1019, 1020-1021, 32 NYS3d 568 [2016], quoting ***Solazzo v New York City Tr. Auth.***, 6 NY3d 734, 735, 810 NYS2d 121 [2005] [internal quotation marks omitted]).

Quail Run failed to establish a prima facie case of entitlement to summary judgment in its favor. Namely, it has not eliminated all triable issues of material fact (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). As the owner of the real property where plaintiff allegedly fell, and the party responsible for maintenance of that area, Quail Run had the burden of establishing it had no notice of the alleged icy condition (*see* ***Bader v Riv. Edge at Hastings Owners Corp.***, *supra*). Given no evidence has been adduced that Quail Run created the dangerous condition or had actual notice of it, the Court's focus must be directed to the issue of constructive notice (*see* ***Mavis v Rexcorp Realty, LLC***, *supra*). Though not accompanied by an expert's affidavit, the certified climatological records plainly demonstrate that at the weather station closest to the incident location, approximately 0.68 inches of light snow, mist, and rain

fell between the early morning of January 24, 2015, and 6:53 p.m. that same day. The records further indicate no precipitation fell between 7:53 p.m. on January 24, 2015 and the time of plaintiff's alleged incident. Therefore, there are questions of fact outstanding, regarding why Fifth Avenue invoiced Quail Run for extensive snow removal services, despite the climatological records evidencing only a small amount of precipitation, well below the two inches of snow necessary to trigger Fifth Avenue's automatic attendance. Further questions of fact remain as to the length of time the alleged icy condition was present, or when the last inspection of the subject area was undertaken, both going to the issue of constructive notice (*see* ***Mavis v Rexcorp Realty, LLC***, *supra*). Accordingly, the motion by Quail Run for summary judgment dismissing the complaint against it is denied.

The Homeowners' Association, however, has established a prima facie case of entitlement to summary judgment. In her affidavit, Jean Prokopchuk states she is the president of the board of directors of the Homeowners' Association, and has been for 11 years. She indicates the Homeowners' Association is a not-for-profit organization that "is under no duty to maintain and/or repair any portion of the [subject] premises." More specifically, Ms. Prokopchuk avers that the Homeowners' Association "is not responsible for maintenance of the sidewalk at [the subject] location . . . is not responsible for snow and ice removal . . . [and] did not receive any written or oral complaints about" the subject location prior to plaintiff's alleged fall. Through the testimony of Ms. Prokopchuk, the Homeowners' Association demonstrated that it owed no duty to plaintiff and, therefore, cannot be held liable for her alleged injuries. Further, as evidenced by an executed stipulation of discontinuance dated September 16, 2015, plaintiff discontinued her action as against the Homeowners' Association without prejudice. Similarly, through the testimony of Mr. Niederman, Fairfield demonstrated that it had no responsibility for snow or ice removal at the subject premises. Plaintiff submits no opposition to their motion. Accordingly, the motion by Fairfield and the Homeowners' Association for summary judgment dismissing the complaint and cross claims against them is granted.

Finally, Fifth Avenue established a prima facie case of entitlement to summary judgment in its favor (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). "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" (***Baratta v Home Depot USA***, 303 AD2d 434, 434, 756 NYS2d 605 [2d Dept 2003]). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care– and thus be potentially liable in tort– to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120 [2002] [internal quotation marks and citations omitted]).

Fifth Avenue demonstrated that as a third-party contractor it owed no duty to plaintiff (*see* ***Trombetta v G.P. Landscape Design, Inc.***, ___AD3d___, 2018 NY Slip Op 02353 [2d Dept 2018]; ***Santos v Deanco Servs., Inc.***, 142 AD3d 137, 35 NYS3d 686 [2d Dept 2016]; *see generally* ***Espinal v Melville Snow Contrs.***, *supra*). In her amended verified complaint, plaintiff failed to allege any of the ***Espinal*** exceptions and, given her failure to interpose any opposition to defendants' motions for summary

judgment, has failed to raise a triable issue (*cf.* ***Castillo v Port Auth. of N.Y. & N.J.***, ___AD3d___, 2018 NY Slip Op 01593 [2d Dept 2018]). As to the cross claims asserted against Fifth Avenue by Quail Run, Fifth Avenue established, through the testimony of Mr. Bravata, that it received no complaints regarding the quality of its snow removal work. In any event, any passive omission on the part of Fifth Avenue would not have rendered the subject premises less safe than it had been prior to Fifth Avenue's work (*see* ***Trombetta v G.P. Landscape Design, Inc.***, *supra*). Accordingly, the motion by Fifth Avenue for summary judgment dismissing the complaint and the cross claims against it is granted.

Dated: 5-3-18

[redacted]
A.J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**