SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

JOSEPH RAGUSA,

Plaintiff(s),

-against-

GTI PROPERTY MANAGEMENT, LLC, SEA BREEZE PROPERTY OWNERS ASSOCIATION, INC., SURFSIDE VILLAGE HOMEOWNERS ASSOCIATION, INC., SEA BREEZE HOMEOWNERS ASSOCIATION, INC. and NORM'S LANDSCAPONG, LLC.

Defendant(s)

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 150461/2016
Motion No. 2,3

The following numbered 1 to 4 were fully submitted on 21st day of January 2020

Papers Numbered

Defendant Norm's Landscaping LLC's Motion for Summary Judgment, with Supporting Papers and Exhibits, dated, October 31, 2019..... 1

Defendant/Third Party Plaintiff Sea Breeze Home Owners Association and GTI Property Management, LLC's Cross-Motion to Strike the Answer of Norm's Landscaping, LLC and Exhibits, dated, November 27, 2019 2

Defendant Norm's Landscaping LLC's, Affirmation in Opposition, with Supporting Papers and Exhibits, dated, January 2, 2020.....3

Reply, January 17, 2020.....4

Defendant Norm's Landscaping, LLC., moves for an order pursuant to CPLR 3212 granting summary judgment and for the dismissal of the complaint and all

cross-claims brought against defendant Norm's Landscaping, LLC by plaintiff, Joseph Ragusa and defendants GTI Property Management, LLC and Sea Breeze Homeowners Association, LLC. As is set forth below, defendant Norm's Landscaping LLC, motion is granted and the complaint and all cross-claims against them are dismissed.

This is an action brought by plaintiff to recover damages for personal injuries he allegedly sustained on March 4, 2015 at approximately 4:30PM when he slipped and fell in the parking lot at 79 Surfside Plaza, Staten Island, New York 10307.

Plaintiff alleges that he slipped and fell due to snow and ice and described the snow conditions as a little dusting and light powder on the ground. Plaintiff claims defendants were negligent in their causing allowing and permitting unsafe conditions at 79 Surfside Plaza, Staten Island, New York.

One of the central threshold issues in this lawsuit surrounds the breach of duty that defendant Norm's Landscaping, LLC owed the plaintiff who claims injury. The court finds that defendant Norm's Landscaping, LLC owed no such duty to plaintiff herein.

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio*, 81 **NY2d** 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital*, 68 **NY2d** 320 [1986];

see *Schmitt v. Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v. City of New York*, 49 **NY2d** 557 [1980]).

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v. Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v. Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented ....This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' " [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 **NY2d** 395, 404 [1957]; *see also* *Rotuba Extruders v. Ceppos*, 46 **NY2d** 223 [1978]; *Andre v. Pomeroy*, 35 **NY2d** 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact (*see* *Ayotte v. Gervasio*, 81 **NY2d** 1062; *Khadka v. American Home Mortg. Servicing, Inc.*, 139 AD3d 808 [2016]). Summary judgment "should not be granted where the facts are in dispute, where

conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v. Jiacono*, 126 AD3d 927, 928 [2d Dept 2014]), citing *Scott v. Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v. Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018];*Chimbo v. Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v. Vargas*, 113 AD3d 579 [2d Dept 2014]).

"A finding of negligence may be based only upon the breach of a duty. If, in connection with the acts complained of, the defendant owes no duty, the action must fall" (*Darby v. Compagnie Nat'l. Air France*, 96 **NY2d** 343, 347 [2001]; *see Federico v. Defoe Corp.*, 138 AD3d 682 [2d Dept 2016]; *Abrams v. Bute*, 138 AD3d 179 [2d Dept 2016]). "An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition" (*Slavin v. Village of Sleepy Hollow*, 150 AD3d 924, 925 [2d Dept 2017], quoting *Farrar v. Teicholz*, 173 AD2d 674, 676 [2d Dept 1991]; *see Livingston v. Better Med. Health, P.C.*, 149 AD3d 1061 [2d Dept 2017]). Since a finding of negligence must be based on the breach of a duty, a threshold question in tort cases arises as to whether the alleged tortfeasor owed a duty of care to the injured plaintiff (*see* ***Espinal v. Melville Snow Contrs.*, 98 NY2d 136** [2002]).

Defendant Norm's Landscaping, LLC, moves for summary judgment dismissing plaintiff's complaint alleging that they were not liable to plaintiff herein. Norm's Landscaping, LLC, asserts they are entitled to summary judgment because

it has established that it did not have a contract with plaintiff, and that "plaintiff has not alleged in his pleadings that exceptions to the ***Espinal*** rule apply" (*see* ***Espinal*** *v.* ***Melville Snow*** *Contrs.*, **98 NY2d 136**; *Federico v. Defoe Corp.*,138 AD3d 682[2d Dept 2016]). Here, any duty Facility Source had with respect to the condition of the parking lot would have arisen from the contract with Sea Breeze Homeowners Association. While, generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third person (*see Church v. Callanan Indus.*, 99 **NY2d** 104 [2002]; *Randazzo v. Consolidated Edison of NY, Inc.*, —— AD3d ——, 2019 NY Slip Op. 08236 [2d Dept 2019]), there are three exceptions to this general rule, *i.e.*, (1) where a contracting party, in failing to exercise reasonable care in the performance of its 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 (*see Stiver v. Good & Fair Carting & Moving, Inc.*, 9 NY3d 253 [2007]; *Elia v. Parker Queens, LP*, 175 AD3d 1245 [2d Dept 2019]; *Reeves v. Welcome Parking, Ltd. Liab. Co.*, 175 AD3d 633 [2d Dept 2019]; *Espeleta v. Synergy Resources, Inc.*, 172 AD3d 1320 [2d Dept 2019]).

Facility Norm's Landscaping, LLC., contends that none of these exceptions have been established by plaintiff's, so they need not demonstrate that such exceptions do not apply to prove its prima facie entitlement to summary judgment,

citing *Foster v. Herbert Slepoy Corp.*, 76 AD3d 210 (2d Dept 2010). Norm's Landscaping, LLC., is correct, and has made out a prima facie case for summary judgment herein. However, while the prima facie entitlement to summary judgment is "governed by the allegations of liability made by the plaintiff in the pleadings" (*Murphy v. Brown, — AD3d —, 2019 NY Slip Op. 08851 [2d Dept 2019]*, *quoting Foster v. Herbert Slepoy Corp.*, 76 AD3d at 214; *see Hagan v. City of New York*, 166 AD3d 590 [2d Dept 2018]), this resulted in a mere shifting of the burden "to plaintiff to come forward with evidence sufficient to raise a triable issue of fact as to the applicability of one or more of the three ***Espinal*** exceptions" (*Foster v. Herbert Slepoy Corp.*, 76 AD3d at 214; *see Laronga v. Atlas-Suffolk Corp.*, 161 AD3d 893 [2d Dept 2018]).

In the case at bar, plaintiff has proffered no evidence whatsoever that it detrimentally relied upon the continued performance of Norm's Landscaping, LLC's duties, or even was aware of the existence of their services to Sea Breeze Homeowners Association, Inc. Additionally, plaintiff has failed to raise an issue of fact with regard to whether Norm's Landscaping LLC., launched "a force or instrument of harm."

Accordingly, defendant Norm's Landscaping, LLC's, motion for summary judgment is granted and the complaint and all cross-claims in this lawsuit is dismissed against them.

Since the court has dismissed the lawsuit against Norm's Landscaping, LLC., plaintiff's motion to strike Norm's Landscaping, LLC's answer over failure to appear for depositions is deemed irrelevant and the court need not address that motion.

This matter is adjourned to March 10, 2020, 9:30AM for a compliance conference for the remaining parties herein.

This constitutes the decision and order of the court.

Dated: January 27, 2020
Staten Island, New York

Orlando Marrazzo, Jr.,
Justice, Supreme Court