To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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JOHN STEVEN SHANAHAN and JANE SHANAHAN,
Plaintiffs,

DECISION AND ORDER
Index No.:52694/2018
Seq# 2

-against-

JIM HAYWOOD REAL ESTATE SERVICES, LLC and GRIFFIN'S LANDSCAPING CORP.,
Defendants.

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The following papers were received and considered in connection with the plaintiff's motion for a default judgment:

Notice of Motion/Affirmation/Exhibits A-J
Affirmation in Opposition
Reply Affirmation

Upon the foregoing papers it is ordered that this motion is granted.

Procedural and Factual Background

The plaintiffs, John Steven Shanahan ("Shanahan") and Jane Shanahan commenced this action by filing a summons and complaint on February 26, 2018, seeking damages for alleged personal injuries sustained by Shanahan on March 1, 2015, when he alleges that he slipped and fell on a patch of ice in the parking lot of his condo complex, next to the building located at 52 Fair Street, Cold Spring, New York. Shanahan's wife, Jane Shanahan brings a consortium claim.

At the time of the alleged incident, the defendant, Jim Haywood Real Estate Services, LLC ("Haywood"), was the property manager for the condominium and had a

contract with Griffin's Landscaping Corp. ("Griffin's"), to conduct snow plowing at the end of each snowfall. The plaintiffs allege that Haywood and Griffin's negligently shoveled the snow and ice in the parking lot where Shanahan fell and as a result, Shanahan sustained fractures to his hip. Griffin's served and filed an answer to the complaint, but Haywood defaulted in answering and the plaintiffs previously moved for default judgment against Haywood, which motion this Court granted by Decision and Order, dated June 17, 2019.

Now before the Court is the defendant's motion for summary judgment seeking to dismiss the action against it, arguing that it fully performed its contractual obligations; that it did not have actual or constructive notice of the alleged icy condition and did not create the condition; and that it did not owe a duty of care to the plaintiffs.

In support of the motion, Griffin's relies upon, among other things, the contract for snow plowing, the deposition of the plaintiffs and Glenn J. Griffin, the owner of Griffin's, photos of the accident location, an attorney's affirmation and copies of the pleadings.

The plaintiffs oppose the motion, arguing that Griffin's motion should be denied because it did not meet its burden and material issues of fact exist. Griffin's submitted a reply to the plaintiffs' opposition, arguing that it had no obligation to the plaintiffs and that Haywood performed snow removal after Griffin's work was completed and would patrol for ice and hazardous conditions, and would salt and sand the lot. Therefore, Haywood's duty to the plaintiffs was not displaced by Griffin's and the plaintiffs could not have detrimentally relied upon Griffin's.

Discussion

"[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," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof in admissible form, establishing the existence of a material issue of fact (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" (*see Foster v Herbert Slepoy Corp*, 76 AD3d 210, 214).

"Before a defendant may be held liable for negligence, it must be shown that the defendant owed a duty to the plaintiff" (*Ramo v. Serrano*, 301 AD2d 640, 641 [2d Dept 2003]). "Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party" (*Abramowitz v Home Depot USA, Inc.*, 79 AD3d 675, 676 [2d Dept 2010]). "However, 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 where (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Id.*; *see also Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]).

In this case, the property is managed by Haywood, which company hired Griffin's to perform snow plowing and snow removal services at the location, pursuant to an agreement. Since there is no contract between Griffin's and Shanahan, Griffin's may only be found to owe a duty of care to Shanahan if one of the above three exceptions exists.

Griffin's contends that neither the plaintiffs' complaint nor the bill of particulars alleges that Griffin's launched a force or instrument of harm; or that Shanahan relied to his detriment on the services of Griffin's; or that Griffin's entirely displaced Haywood's duty to maintain the premises. The Court concurs with this contention.

Further, the Court finds that the *Espinal* exceptions do not apply in this case. While Shanahan argues that Griffin's snow removal activities created a dangerous, slippery, icy, and unsafe condition, there is no evidence to support this. The mere clearing or plowing of the snow "cannot be said to have created or exacerbated a dangerous condition" (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 142 [2002]). Additionally,"a claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them" (*Berger v NYCO Plumbing & Heating Corp.*, 127 AD3d 676, 677 [2d Dept 2015]).

With regard to detrimental reliance, "[t]he nexus for a tort relationship between the defendant's contractual obligation and the injured noncontracting plaintiff's reliance and injury must be direct and demonstrable, not incidental or merely collateral" (*see Palka v Servicemaster Management Services Corp.*, 83 NY2d 579, 587 [1994]). Here, the plaintiffs testified that they had no dealings with the snow-plowing services and there is no evidence that they had any knowledge of an agreement between Haywood and Griffin's. Therefore, they did not detrimentally rely upon Griffin's proper performance of its contractual duties (*see Foster v Herbert Slepoy Corp.*, 76 AD3d 210 [2d Dept 2010]).

With regard to the third exception, Haywood's contract with Griffin's was not a comprehensive and exclusive agreement, which entirely displaced the owner's duty to

maintain the premises in a safe condition. Although, Griffin's was primarily responsible for plowing the snow and ice, Griffin's also testified that Haywood patrolled the property for ice and hazardous conditions and salted and sanded the lot. Therefore, the Court finds that Griffin's did not owe a duty of care to the plaintiffs and is not liable for negligence against that defendant.

Accordingly, it is

ORDERED that the motion for summary judgment is granted; and it is further

ORDERED that the causes of action against Griffin's Landscaping Corp., is dismissed.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
December 24, 2020

HON. SAM D. WALKER, J.S.C.