SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KARLENE COLE,

Plaintiff,

Index No.: 50260/2019

-against-

DECISION & ORDER

GREENWAY PROPERTY SERVICES, INC.,

Motion Seq. #2

Defendant

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Hubert, J.S.C.

Plaintiff filed this action to recover for personal injuries she allegedly sustained on January 17, 2018, after she slipped and fell on a patch of ice on the sidewalk near a back entrance to Westchester Medical Center in Valhalla, New York. Plaintiff was on her way to work at the hospital at the time of the alleged accident. Plaintiff testified at her deposition that she got off the bus at approximately 2:00 p.m., walked a few steps, and fell on a patch of ice. She further testified that there was no snow falling at the time of her alleged accident, and there was a clear, shoveled path for pedestrians. The complaint alleges that Defendant was negligent in the operation, management, cleaning, repair, control, inspection and maintenance of the subject sidewalk, and allowing a black ice condition to exist.

On this motion--unopposed by Plaintiff--Defendant Greenway Property Services, Inc. ("Greenway") moves for summary judgment dismissing the complaint on the grounds that (1) Greenway did not have a duty to Plaintiff; and (2) it did not cause or create the allegedly dangerous condition, nor have prior notice of the allegedly dangerous condition.

The standard for granting summary judgment is well established. In order to make a *prima facie* showing of entitlement to judgment as a matter of law, the moving party must tender sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect*

Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). The parties' competing contentions must be viewed in a light most favorable to the non-moving party. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763, 27 N.Y.S.3d 468 (2016). If the moving party meets its burden, the burden shifts to the nonmoving party to establish, through admissible evidence, that there are disputed issues of material facts for trial. CPLR § 3212 (b); *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). The non-moving party must produce evidence in the record and may not rely on conclusory statements or contentions that are not credible. However, if the moving party fails to sustain its burden, the court need not address the adequacy or sufficiency of the opposing party's proof. *Grant v. 132 W. 125 Co., LLC*, 180 A.D.3d 1005, 120 N.Y.S.3d 345 (2d Dep't 2020).

In support of its motion, Greenway--a commercial landscape and property services contracting company--states that it entered into a Snow Removal Services Agreement with Westchester Medical Center in 2017, after a competitive bidding process, and the Agreement was in effect at the time of Plaintiff's alleged accident. According to Greenway's operations manager, the company was responsible only for snow removal and ancillary services, including clearing accessways, parking lots and walkways at Westchester Medical Center under the terms of the Agreement.

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120 (2002). Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party. Thus, a snow removal contractor makes "a prima facie showing of its entitlement to judgment as a matter of law by offering proof that the plaintiff was not a party to its snow

removal contract with the [property owner], and that it thus owed no duty of care to the plaintiff." *Diaz v. Port Auth. of N.Y. & N.J.*, 120 A.D.3d 611-12, 990 N.Y.S.2d 882 (2d Dep't 2014).

Here, Defendant demonstrated its *prima facie* entitlement to judgment as a matter of law dismissing the amended complaint by demonstrating that the injured plaintiff was not a party to the snow removal contract, and that it did not owe a duty to her.

In *Espinal v. Melville Snow Contractors*, *supra*, the Court of Appeals recognized three situations in which a party may assume a duty of care and therefore may be be liable in tort to a non-contracting third-party: (1) where the 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. *Espinal,* 98 N.Y.2d at 13-41; s*ee Marchetti v. Allstate Conveyor Seru., Inc.*, 67 A.D.3d 748, 888 N.Y.S.2d 597 (2d Dep't 2009).

Like the facts at issue here, the Plaintiff in *Espinal* slipped and fell due to icy conditions in her employer's parking lot and sued the company under contract to plow and remove snow from the premises. The plaintiff argued that the snow removal company had "launched a force or instrument of harm" by creating a dangerous icy condition or increasing the snow-related hazard which caused plaintiff to slip and fall. However, the plaintiff's complaint, bill of particulars and opposition papers to the summary judgment motion did not support those allegations. The Court of Appeals concluded that by "merely plowing the snow," the defendant could not be said to have created or exacerbated a dangerous condition. *Id. at 142*; *see also Fung v. Japan Airlines Co.*, 9 N.Y.3d 351, 361, 850 N.Y.S.2d 359 (2007).

Here, Plaintiff did not plead any specific facts in her complaint or bill of particulars to establish the applicability of any of the exceptions set forth in *Espinal v. Melville*. *See Bryan v. CLK-HP 225 Rabro, LLC*, 136 A.D.3d 955, 956, 26 N.Y.S.3d 207, 209 (2d Dep't 2016)(since plaintiff did not allege facts in the complaint or bill of particulars to establish applicability of any *Espinal* exceptions, the contractor was not required to affirmatively demonstrate that these exceptions did not apply in order to establish prima facie entitlement to judgment as a matter of law); *Leibovici v. Imperial Parking Mgmt. Corp.*, 139 A.D.3d 909, 910, 33 N.Y.S.3d 312, 314 (2d Dept. 2016)(same). The complaint and bill of particulars in this case set forth only conclusory contentions. "A snow removal contractor cannot be held liable for personal injuries 'on the ground that the snow removal contractor's passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition.'" Somekh v. Valley Natl. Bank, 151 A.D.3d 783, 57 N.Y.S.3d 487 (2d Dep't 2017), *quoting* Santos v Deanco Servs., Inc., 142 A.D.3d 137, 35 N.Y.S.3d 686 (2d Dep't 2016); *see also Arnone v. Morton's of Chicago/Great Neck, LLC*, 183 A.D.3d 862, 122 N.Y.S.3d 553 (2d Dep't 2020)(since plaintiff did not allege facts in his complaint or bill of particulars which would establish that the defendant contractor launched a force or instrument of harm by creating or exacerbating the alleged dangerous condition, defendant was not required to demonstrate that this exception did not apply in order to meet its prima facie burden).

Accordingly, for the foregoing reasons, Defendant's unopposed motion for summary judgment is granted, and the complaint is dismissed.

The foregoing constitutes the Decision & Order of this Court.

Dated: White Plains, New York
September 30, 2020

Hon. James W. Hubert
Supreme Court Justice