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SHORT FORM ORDER

INDEX No. 10-44731
CAL. No. 13-00139OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 2-21-13
ADJ. DATE 3-28-13
Mot. Seq. # 001 - MG; CASEDISP
002 - XMG

MARION LYONS,

Plaintiff,

- against -

COVENTRY MANOR HOME OWNERS, INC., c/o ABM MANAGEMENT CORP., and CASALYN HYDRO CONTRACTING, INC.,

Defendants.

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Upon the following papers numbered 1 to 35 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 -20; 21-25; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 26-29, 30-31; Replying Affidavits and supporting papers 32-33, 34-35; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Casalyn Hydro Contracting, Inc. ("Casalyn") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims insofar as asserted against it, is granted; and it is further

ORDERED that the motion by defendant Coventry Manor Home Owners, Inc. C/o ABM Management Corp. ("Coventry") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims insofar as asserted against it, is granted;

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Marion Lyons, on February 11, 2010, at approximately 7:45 p.m., when she slipped and fell on ice and snow in front of her condominium unit located at 258 Juniper Court, Middle Island, New York. Plaintiff alleges that the defendants were negligent in the maintenance, management and control of the roadway in front of plaintiff's residence.

Defendant Casalyn now moves (Motion #001) for summary judgment dismissing the complaint and all cross-claims. In support of the motion, it submits, *inter alia*, its attorney's affirmation and reply affirmation, the deposition of Robert Pizziger as a witness for defendant Casalyn, the pleadings, the verified bill of particulars, the deposition of the plaintiff, the deposition of Gordon Rieckoff, as a witness on behalf of defendant Coventry, the affidavit of Carolyn Grant, sworn to November 19, 2012, the deposition of Barbara Lyon, as a nonparty witness, and certified weather data from the National Climatic Data Center. Defendant Coventry also moves (Motion #002) for summary judgment dismissing the complaint and all cross-claims. In support of the motion, it submits, *inter alia*, its attorney's affirmation and reply affirmation, the affidavit of Carolyn Grant, sworn to December 5, 2012, and incorporates by reference the exhibits attached to the motion by defendant Casalyn. In opposition to these motions, the plaintiff submits, *inter alia*, her attorney's affirmation, certified weather data from the National Climatic Data Center, and a portion of the Coventry Homeowners Association, Inc. Offering Plan.

Plaintiff Marion Lyons testified that she owns a townhouse in the Coventry Manor Complex and is a member of the Coventry Manor homeowners, Inc. It is her understanding that Coventry was responsible for maintaining the common areas of the property. She had an accident on February 11, 2010, at approximately 7:45 p.m., in the street in front of her condominium unit located at 258 Juniper Court. There was no precipitation on that day. The night before it snowed, and there was two feet of snow the day prior to the accident. She was with her daughter-in-law Barbara Lyons and her two children. Plaintiff had slept over at Barbara Lyons' house the night before the accident. The last time she had been at her townhouse was approximately 7:30 a.m. on February10th. She was in the front passenger seat of her daughter-in-law's vehicle. She did not observe any snow or ice as they drove into the development, including Juniper Court. Her daughter-in-law pulled up in front of the townhouse and parked, partially in front of her driveway and partially in front of her lawn. She got out of the car prior to the accident. She could not recall what she did next but stated that she started to slide. She did not recall if she attempted to walk. She slipped and fell forwards, and struck the ground with her hands, arms, knees and lower left leg in the roadway. She did not look down as she got out of the vehicle. Her daughter-in-law came to her aid and helped her up. She waited in the car while her daughter-in-law shoveled the driveway and walk to her front door. She said her fall was caused by black ice, which covered the roadway. She did not see any snow in the roadway. It was below freezing. She went to the hospital the next morning. She did not know if anyone in the development had made complaints about snow or ice on the day of her accident. She was responsible for clearing her driveway of snow. She did not know if any salt and/or sand had been put down on the roadway.

Barbara Lyons testified as a nonparty witness. On the evening of February 11, 2010, she drove the plaintiff, her mother-in-law, to her home at 258 Juniper Court. She did not have any difficulty driving on the roads in the complex, and did not observe any ice prior to dropping the plaintiff off at her home. She did not actually see the plaintiff fall, but after plaintiff fell she walked around her vehicle to

help the plaintiff up. She saw black ice where plaintiff fell.

Gordon Rieckoff testified as a witness on behalf of the defendant Coventry. Since 2005, he has worked for ABM Management dealing with Coventry. He is aware of the policies and procedures regarding removal of snow and ice at the Coventry development. There is a snow removal contractor who keeps an eye on the weather and comes in after the snow starts to fall. Sand and salt are applied at the end of every storm. The decision to use salt and sand could be made by himself or the contractor. The contractor would do it if he recognized a condition that required it. After the snow plowing, sanding and salting was completed on the date in question, he drove around the property and did not observe any black ice or, any other dangerous condition, which would have required additional salting and sanding. He did not receive any complaints about the snow plowing in December of 2009 or January or February 2010. He did not know why Coventry hired a new snow removal contractor at some point after the winter of 2010.

Robert Pizziger testified as a witness for defendant Casalyn. He is the president and owner of Casalyn. The company does work for residential and commercial properties, golf courses, condominiums, etc. A portion of the work involves snow removal. Coventry was one of their customers in 2010, pursuant to a written contract. Pursuant to the contract, Casalyn was to provide on-call plowing and/or sand/salt applications on the roadways of the complex, when requested by the owner, in situations where 2" of snow had accumulated or when freezing rain, black ice, refreezing or slush conditions occur. He recalled the blizzard of February 10-11, 2010. He testified that Casalyn removed snow from the Coventry roadways for more than one day. Casalyn plowed and spread salt and sand on the roadways more than one time, including Juniper Court. At no time did he observe black ice on any of the roadways. At the time he received no complaints with regard to the work done after the February 10-11 snowstorm and cleanup.

Both moving parties submitted an affidavit from Carolyn Grant. On the date of the accident, she resided at 259 Juniper Court, and she was the elected president of the Coventry Manor Homeowners Association. On February 11, 2010, she observed Casalyn make numerous runs plowing and spreading salt and sand on the roadways throughout the complex, including Juniper Court. That evening, between 6:00 p.m. and 7:00 p.m., she took her dog for a walk throughout the complex to conduct a visual inspection of the roadways. She did not observe any black ice and/or any other dangerous conditions on any of the roadways.

The 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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49

NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

A defendant will be held liable for a slip and fall involving snow and ice on its property only when it created the dangerous condition that caused the accident or had actual or constructive notice thereof (***Gushin v Whispering Hills Condominium I***, 96AD3d 721, 946 NYS2d 202 [2d Dept 2012]; ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]); ***Taylor v Rochdale Vil., Inc.***, 60 AD3d 930, 875 NYS2d 561 [2d Dept 2009]). To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Baines v G & D Ventures, Inc.***, *supra*). On a motion for summary judgment to dismiss the complaint, the defendant bears the burden of proving the absence of notice as a matter of law (*see* ***Baines v G & D Ventures, Inc.***, *supra*).

Here, Coventry established, prima facie, that it did not create the dangerous condition or have actual or constructive notice of the icy condition on the subject sidewalk. The deposition testimony of George Rieckoff established that he inspected the roadways after they had been plowed, sanded and salted, and saw no black ice or other dangerous conditions which might have required further work. The affidavits of Carolyn Grant set forth that she walked the roadways of the complex, including Juniper Court, where she lives next to the plaintiff, shortly before the accident. She observed no black ice or other dangerous condition on the roadways of the complex. In response, the plaintiff has failed to submit evidence sufficient to raise an issue of fact.

Accordingly, Coventry's motion for summary judgment dismissing the complaint and all cross claims against it is granted (***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]).

With regard to the motion by Casalyn, it is well settled that "[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" (***Gushin v Whispering Hills Condominium I***, *supra;* ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 1103, 915 NYS2d 103 [2d Dept 2010], ***Wheaton v East End Commons Assoc., LLC***, 50 AD3d 675, 677, 854 NYS2d 528 [2d Dept 2008]). The terms of the Casalyn's contract required Casalyn to provide on-call plowing and/or sand/salt applications on the roadways of the complex, when requested by the owner, in situations where 2" of snow had accumulated or when freezing rain, black ice, refreezing or slush conditions occurred. Where, as here, "the express terms of the contract provide that a contractor is obligated to plow only when snow accumulation exceeds a certain level, the Court of Appeals has held that such 'contractual undertaking is not the type of comprehensive and exclusive property maintenance obligation' that would entirely displace...a property [owner's] duty to 'maintain the premises safely' (citations omitted)" (***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]).

Here, Casalyn has established its prima facie entitlement to judgment as a matter of law by coming forward with proof that the plaintiff was not a party to the contract between Coventry and Casalyn, and therefore she was owed no duty of care (*see* ***Henriquez v Inserra Supermarkets, Inc.***, *id.*; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]; ***Wheaton v East End Commons Assoc., LLC***, *supra*); that its conduct did not create or exacerbate a dangerous condition on the premises, and that plaintiff did not rely upon its performance of its snow removal obligations (*see* ***Schultz v Bridgeport & Port Jefferson Steamboat Co.***, 68 AD3d 970, 891 NYS2d 146 [2d Dept 2009]; ***Wheaton v East End Commons Assoc.***, *supra*; ***Castro v Maple Run Condominium Assn.***, 41 AD3d 412, 837 NYS2d 729 [2d Dept 2007]).

In opposition to the motion, plaintiff failed to raise a triable issue of fact as to whether any of the exceptions apply so as to hold Casalyn liable in tort to the plaintiffs (*see* ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; ***Espinal v Melville Snow Contrs.***, *supra*). The plaintiff failed to submit any admissible evidence addressing the detrimental reliance exception and has not presented any evidence that Casalyn by removing snow and ice in accordance with its contract, "launched a force or instrument of harm which created or exacerbated the allegedly hazardous condition" (***Wheaton v East End Commons Assoc., LLC***, *supra*; *see* ***Foster v Herbert Slepoy Corp.***, *supra*).

In light of the foregoing, Casalyn's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Dated: 2/11/13

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION