

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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ORTENSIA MARIE SPAGNOLI-SUMOWICZ and
ALEXANDER SUMOWICZ,

Plaintiffs,

-against-

ELONIS RESTAURANT, INC., and ELONA DINER,
LLC, BROWER INDUSTRIES INC. And WARREN L.
BROWER JR.,

Defendants.

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ELONIS RESTAURANT, INC., and ELONA DINER,
LLC,

Third-Party Plaintiffs,

-against-

BROWER INDUSTRIES INC. And WARREN L.
BROWER JR.,

Third-Party Defendants.
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Index No.: 18790/05

Motion Dated:
September 4, 2007

Cal. No.: 24 & 25

M#: 2

The following papers numbered 1 to 25 read on this motion by defendants Elonis Restaurant, Inc. and Elona Diner, LLC (#24) for summary judgment dismissing the complaint insofar as asserted against them, or in the alternative, for summary judgment on their cross claim against co-defendants Brower Industries, Inc. ("Brower") and Warren L. Brower, Jr. for common law indemnification; and separate motion by defendants/third party defendants Brower Industries, Inc. and Warren L. Brower, Jr. (#25) for summary judgment dismissing the complaint, the third party complaint and all cross claims asserted against them.

	<u>Papers Numbered</u>
2 Notices of Motion - Affidavits - Exhibits	1 - 8
Affirmations in Opposition - Exhibits	9 - 18
Replying Affirmations	19 - 25
Memorandum of Law of defendants/third party defendants	

Upon the foregoing papers it is ordered that these two motions for summary judgment are jointly decided as follows:

Plaintiff Ortensia Marie Spagnoli-Sumowicz allegedly sustained serious injuries on February 3, 2005 when she tripped and fell on black ice in the parking lot of the Landmark Diner, located at 1023 Northern Boulevard in Roslyn, New York. The business at the subject premises is owned by defendant Elonis Restaurant, Inc. and the land upon which the diner sits is owned by defendant Elona Diner, LLC. Defendant/third party defendant Brower Industries, Inc. was the snow removal contractor for the subject premises pursuant to an oral agreement. Defendant Warren L. Brower, Jr. is the President of Brower Industries, Inc. Plaintiff contends that her accident occurred as a result of the melting and re-freezing of a mound of snow. Plaintiff maintains that the ice on which she fell was next to a mound of snow. At the time of the incident, the weather was clear, but it had snowed several inches 10 days earlier. Plaintiff and her husband, derivatively, commenced the instant action to recover damages for negligence. The instant motions for summary judgment ensued.

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 demonstrate the absence of any material issues of fact. (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (Peerless Ins. Co. v Allied Bldg. Prods. Corp., 15 AD3d 373, 374 [2005].)

The court will first address the motion by the defendants/third party defendants. Generally, a contract for the removal of snow and ice will not give rise to a duty on the part of the snow removal contractor to exercise reasonable care to

prevent foreseeable harm to a third party unless (i) the contractor launches a force or instrument of harm, (ii) the plaintiff detrimentally relied upon the continued performance of the snow removal contractor's duties or (iii) the snow removal contract has entirely displaced the property owner's duty to maintain the premises in a safe condition. (Espinal v Melville Snow Contrs., Inc., 98 NY2d 136, 140 [2002]; Roach v AVR Realty Co., LLC, 41 AD3d 821, 823 [2007]; Castro v Maple Run Condominium Assn., 41 AD3d 412, 413 [2007].)

In the case at bar, the Brower defendants made a prima facie showing of their entitlement to judgment as a matter of law. The admissible evidence establishes that the contract herein did not entirely displace the duty of the owner to maintain the parking lot. Indeed, the admissible evidence indicates that Brower was not required to plow the parking lot until the snowfall accumulation reached two inches or more. Moreover, there is no admissible evidence that the Brower defendants launched a force or instrument of harm. The evidence indicates that Brower did not perform any snow removal work during the 10-day period between the last snowfall and the plaintiff's accident. (see Roach v AVR Realty Co., LLC, 41 AD3d at 823.) The argument by plaintiffs and defendants Elonis Restaurant, Inc. and Elona Diner, LLC that the Brower defendants caused the accident is based upon speculation which is insufficient to defeat the motion for summary judgment. (Powell v Cedar Manor Mut. Hous. Corp., ___ AD3d ___, 844 NYS2d 890 [2007].) There is also no evidence that the plaintiff detrimentally relied upon Brower's performance of its contractual duties.

With respect to the motion by defendants Elonis Restaurant, Inc. and Elona Diner, LLC, in a slip and fall case involving snow and ice, a property owner is not liable unless he or she created the defect, or had actual or constructive notice of its existence. (Gil v Manufacturers Hanover Trust Co., 39 AD3d 703, 704 [2007]; Carricato v Jefferson Valley Mall Ltd. Partnership., 299 AD2d 444, 444 [2002]; Voss v D & C Parking, 299 AD2d 346, 346 [2002].) Defendants Elonis Restaurant, Inc. and Elona Diner, LLC made a prima facie showing of their entitlement to summary judgment. In opposition, however, plaintiffs raise a triable issue of fact. In his annexed expert affidavit, Howard Altschule, a forensic meteorologist, opines, based upon his review of, inter alia, annexed records, that the ice patch at issue was the result of the melting and re-freezing of the snow mound next to the plaintiffs' vehicle. He further opines that any ice that was on the ground was present since at least 9:30 on the morning of the accident. Under these circumstances, the court finds that there are factual issues which warrant a trial.

To the extent defendants Elonis Restaurant, Inc. and Elona Diner, LLC assert a cross claim and third party claim for contribution, such claims are dismissed. The Brower defendants established that they did not owe a duty of reasonable care independent of their contractual obligations. (Mitchell v Fiorini Landscape, Inc., 284 AD2d 313, 314 [2001].)

To the extent the Brower defendants seek to dismiss the cross claims and third party claims sounding in common law indemnification, such application is denied. Even in the absence of a duty towards the plaintiff, the Brower defendants may be liable to defendants Elonis Restaurant, Inc. and Elona Diner, LLC if the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of Brower. (Mitchell v Fiorini Landscape, Inc., 284 AD2d at 314; Murphy v M.B. Real Estate Dev. Corp., 280 AD2d 457, 457-458 [2001].) In this case, the cause of the plaintiff's fall cannot be determined as a matter of law and, thus, there is an issue of fact as whether common law indemnification is appropriate.

Accordingly, the branch of the motion by defendants Elonis Restaurant, Inc. and Elona Diner, LLC for summary judgment dismissing the complaint insofar as asserted against them is denied.

The branch of the motion by defendants Elonis Restaurant, Inc. and Elona Diner, LLC for summary judgment on their cross claim for common law indemnification is denied.

The branch of the motion **by** defendants/third party defendants Brower Industries, Inc. and Warren L. Brower, Jr. for summary judgment dismissing the complaint insofar as asserted against them is granted, and the complaint against defendants Brower Industries, Inc. and Warren L. Brower, Jr. is dismissed.

The branch of the motion by defendants/third party defendants Brower Industries, Inc. and Warren L. Brower, Jr. for summary judgment dismissing the cross claims and third party complaint against them is denied.

Dated: December 10, 2007

AUGUSTUS C. AGATE, J.S.C.