SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

LEO BONGIORNO and NANCY BONGIORNO,

Plaintiffs,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 3/5/09

SUNNYLANE OF BETHPAGE REDEVELOPMENT COMPANY OWNERS CORP. II AND FAIRFIELD PROPERTIES SERVICES LP, ISLAND OWN LANDSCAPE & STONE DESIGN, INC.,

INDEX NO.:6360/07

Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Notice of Cross Motion.....2
Affirmation in Opposition.....3
Reply Affirmation.....4

The motion by defendant/third party defendant Island Own Landscape and Stone Design, Inc. ("Island Own") for an order, pursuant to CPLR 3212, dismissing all claims by plaintiffs, co-defendants and third party plaintiffs is **granted** as to plaintiffs' complaint but **denied** as to Island Own co-defendants' cross claims and the third party plaintiffs' complaint.

The cross motion by defendants and third party plaintiffs Sunnylane of Bethpage Redevelopment Owners Corp. ("Sunnylane") and Fairfield Property Services, LP ("Fairfield") for a conditional order, pursuant to CPLR 3212, against Island Own on the issues of common law indemnity and contractual indemnity is **denied** for the reasons set forth herein. The plaintiffs commenced this action for

damages due to injuries allegedly sustained by Leo Bongiorno (the "plaintiff") when the plaintiff fell on ice and/or snow on a walkway near the plaintiffs' cooperative located in the Sunnylane co-op complex at 256 Sunset Court. The incident happened on February 16, 2007 in Bethpage, N.Y. at approximately 10:30 AM. Co plaintiff Nancy Bongiorno has a derivative action herein.

Sunnylane owns the co-op complex where the plaintiffs resided at the time of the incident. Fairfield was the managing agent for Sunnylane. Island Own does landscaping work and also does snow removal. Island Own had a snow removal contract with Sunnylane (see Exhibit I, pgs. 41, 52; Exhibit L both annexed to Island Own's motion).

According to Martin Flanigan, a co-owner of Island Own, Island Own would go to Sunnylane if there was two inches or more of snow or if Island Own got a call from Sunnylane (see Exhibit K, pg. 17-18 annexed to Island Own's motion; the following page numbers refer to that exhibit). Flanigan stated his firm would remove/shovel/plow snow from roadways, sidewalks, walkways and apply Ice Melt to sidewalks and walkways. Flanigan stated he received a verbal request from the Sunnylane property manager to clear the roadways, sidewalks, etc. since the storm at issue was an ice storm (pgs. 68, 69). Flanigan stated Island Own removed as much ice as it could and applied Ice Melt (pgs. 39, 69) and reapplied ice melt on February 15, 2007 (p. 39). Flanigan stated he, Flanigan, walked around the Sunnylane complex with the president of the Sunnylane board of directors, Gene Kelly, on February 15, 2007. Allegedly Kelly told Flanigan Island Own did all it could do and neither Kelly nor the property manager asked Island Own to return (see Exhibit K, pg. 44 annexed to Island Own's motion). Island Own contends its contract with Sunnylane was a limited one (and an alleged non-snow

removal verbal one) and it, island Own, is not responsible to plaintiffs for the plaintiff's injury.

Plaintiff's affidavit (see Exhibit B annexed to plaintiffs' affirmation in opposition) indicated that there was no ice melt or sand on the sidewalk where he fell. Plaintiffs indicated the area was never touched (Exhibit B, ¶ 4). Plaintiffs also note the affidavit of non-party Marie Compitello, plaintiff's daughter (see Exhibit C annexed to plaintiffs' affirmation in opposition), who stated she inspected the area where the plaintiff fell one day after the incident and she observed no salt or sand on the sidewalk, no shoveling or chopping of ice was done. Ms. Compitello concluded no steps had been taken to reduce/remove the ice.

A landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury (*Macey v Truman*, 70 NY2d 918; *Hayes v Riverbend Housing Co., Inc.*, 40 AD3d 500).

To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of the injury to the plaintiff (*Comack v VBK Realty Associates, Ltd.*, 48 AD3d 611).

The limited contractual undertaking to provide snow removal services generally does not render a contractor liable in tort for personal injuries of third parties (*Javurek v Gardiner*, 287 AD2d 544, *lv to appeal den.* 98 NY2d 610).

Generally, a contract for the removal of snow and ice does not give rise to a duty on the part of the snow removal contractor to exercise reasonable care to prevent foreseeable harm to a plaintiff unless: 1) in failing to exercise reasonable care in the performance of its duties, the snow removal contractor launched a force

or instrument of harm, 2) the plaintiff detrimentally relied upon the continued performance of the snow removal contractor's duties, or 3) the snow removal contract has entirely displaced the property owner's duty to maintain the premises safely (*Roach v AVR Realty Co., LLC*, 41 AD3d 821).

The initial issue was the ice on which plaintiff fell formed as a result of the melting snow that had been piled–negligently–on either side of the walkway by Island Own employees? (*see Olivieri v GM Realty Co., LLC*, 37 AD3d 569). The testimony was the "event" was an ice storm, not a snow storm.

As to the offending ice patch, neither plaintiff nor Sunnylane or Fairfield show that the ice was caused by negligent snow removal. There is no solid effort to address the origin of the specific ice on which the plaintiff fell (*see Castro v Maple Run Condominium Ass'n*, 41 AD3d 412).

There is no evidence that plaintiff detrimentally relied on Island Own's performance of its contractual obligation since the plaintiff did not have any knowledge of the snow removal contract (*see Castro v Maple Run Condominium Ass'n, supra*). Plaintiff knew only that Island Own did landscaping at Sunnylane (see Exhibit A, pg. 124 annexed to Island Own's motion).

Plaintiff stated the snow removal crew (of Island Own) did not do or treat the area where fell (see Exhibit A, pg. 93 annexed to Island Own's motion).

Also, a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party (*Vignapiano v Herbert Construction Co.*, 46 AD3d 544).

The contract between Island Own and Sunnylane obligated Island Own to provide snow plowing, snow removal and/or ice removal services at Sunnylane. It was not a comprehensive or exclusive agreement whereby Island Own was

obligated to maintain the entire premises. Island Own had to provide snow removal services on an as-needed basis or when the snowfall exceeded a 2" depth. This snow removal contract in no way displaced Sunnylane's (and Fairfield's?) general duty and obligation, as owner, to keep the premises in a safe condition.

The Court notes Sunnylane had a maintenance man (see pgs. 24, 25, Exhibit I annexed to Island Own's motion). Sunnylane also hired other contractors (plumbers, roofers, etc.) (see Exhibit I, pg. 27 annexed to Island Own's motion). Clearly, its contract with Island Own was not an exclusive one but a limited one.

Since Island Own did not displace Sunnylane's general duty, as an owner, to keep the premises in a safe condition, Island Own owed no such duty of care to plaintiff (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136).

Island Own has demonstrated that the snow removal services it performed herein did not launch a force or instrument of harm by creating or exacerbating the condition which allegedly caused the incident.

Here, Island Own sustained its burden of demonstrating its entitlement to dismissing the plaintiffs' complaint. Island Own's contract to perform snow/ice removal services at the Sunnylane complex was not an exclusive and comprehensive agreement which entirely displaced Sunnylane and Fairfield's duty to maintain the premises safely (*Linarello v Colin Service Systems, Inc.*, 31 AD3d 396).

Next, the court considers Sunnylane/Fairfield's cross motion. Island Own contends it should be deemed "untimely" and, as such, not worthy of consideration.

A party's cross motion for summary judgment could be considered by the court where the timely motion for summary judgment was made on nearly the

identical grounds (*Ellman v Village of Rhinebeck*, 41 AD3d 635; *Grande v Peteroy*, 39 AD3d 590; *see also Biskelman v Herrill Bowling Corp.*, 49 AD3d 578). Here, Sunnylane/Fairfield's cross motion made after Island Own's timely motion will be permitted and considered since it discusses similar grounds–Island Own's liability for plaintiff's injury–set forth in Island Own's motion.

As noted Flanigan (of Island Own) stated he and Gene Kelly, president of Sunnylane's board of directors, inspected the job done by Island Own in clearing away the ice (see Exhibit K, p. 44 annexed to Island Own's motion). Kelly indicated he, Kelly, never watched any of Island Own's work as to the February 14-15, 2007 storm (see Exhibit K, pg. 60).

Ilene Von Felde, a property manager with Fairfield, did not recall if she inspected the work of Island Own during the February 14-16, 2007 storm (see Exhibit J, pgs. 63, 65 annexed to Island Own's motion).

However, a negligent failure to discover a condition that should have been discovered can be no less of a breach of due care than a failure to respond to the actual notice of such a condition (*Blake v City of Albany*, 48 NY2d 875).

One who undertakes to perform inspections becomes subject to a duty to perform such inspection in a non negligent manner (*West Side Corp. v PPG Industries*, 225 AD2d 459).

Here, there is an issue of fact as to whether defendants' employees properly performed inspection of the icy sidewalk.

The fact that the plaintiff may have been comparatively negligent does not negate the liability of the landlord who has a duty to keep the premises safe (*Powers v St. Bernadette's Roman Catholic Church*, 309 AD2d 1219).

The credibility of the witnesses, the reconciliation of conflicting statements,

a determination of which should be accepted and which should be rejected, the truthfulness and accuracy of testimony, whether contradictory or not, are issues for the trier of fact (*Lelekakis v Kamamis*, 41 AD3d 662).

Thus, Flanigan's testimony, and the apparently contradictory testimony of Kelly are for the trier of fact to fully evaluate.

While the extent of a landlord's duty to maintain property varies, generally it is one of reasonable inspection (*see Hayes v Riverbend Housing Co., Inc., supra*; *see also Zuckerman v State,* 209 AD2d 510).

A property owner and its management company could not be liable for personal injuries sustained during a slip and fall on snow and ice absent any evidence that either side made any efforts to remove the snow and ice (*Calogerakos v City of New York*, 22 AD3d 407).

As to Sunnyland/Fairfield's ultimate liability, the owner or lessee of property owes no duty to pedestrians to remove ice and snow that naturally accumulates, but, if it undertakes to do so, it can be held liable in negligence where its acts create or increase hazard inherent in ice and snow (*see Jiuz v City of New York*, 244 AD2d 298). Plaintiff and his daughter stated nothing appeared to have been done in the area where plaintiff fell.

If, in fact, an injury can be attributable solely to the negligent performance or non-performance of an act solely within the province of the snow removal contractor, then the contractor may be held liable for indemnification to an owner (*see Murphy v M.B. Real Estate Development Corp.*, 280 AD2d 457).

A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, the party cannot be indemnified (*Cava Construction Co., Inc. v Gealtec Remodeling*

Corp., 58 AD3d 660).

If the plaintiffs are successful against Sunnylane/Fairfield on their cause of action to recover damages for negligent failure to maintain the walkway, Island Own could be required to indemnify Sunnyland since there are questions of fact as to whether the ice which allegedly caused the plaintiff's incident was formed or removed due to the failure to Island One to sand and/or salt the driveway (*see Cochrane v Warwick Associates, Inc.*, 282 AD2d 567).

The indemnification provision in the contract is enforceable as a matter of law if Sunnylane is found to be free of any negligence as to plaintiffs' claim (*see Itri Brick and Concrete Corp. v Aetna Casualty and Surety Co.*, 89 NY2d 786). Here, Sunnyland has failed to establish as a matter of law at this point that it was free from such negligence and that Island Own was solely responsible for the incident. Any award of summary judgment on the contractual indemnification provision in the contract would be premature (*see Brown v Two Exchange Plaza Partners*, 76 NY2d 172).

The predicate of common law indemnity is vicarious liability without actual fault on the part of the indemnitee; therefore a party who itself actually participated to some degree in the wrongdoing cannot receive the benefit of the concept of common law indemnity (*see Broyhill Furniture Industries, Inc. v Hudson Furniture Galleries, LLC*,61 AD3d 554).

Here, there are questions of fact as to whether Sunnylane was free from negligence with regard to the incident; conditional summary judgment on Sunnylane's request for contractual indemnification is not warranted.

The failure to remove all of the ice and snow is not negligence (*Kennedy v C & C New Main Street Corp.*, 269 AD2d 499), and liability will not result unless

it is shown that the property owner made the sidewalk more hazardous in attempting to remove the ice and snow (*Velez v City of New York*, 257 AD2d 570).

A property owner and its management company could not be liable for personal injuries sustained by a slip and fall or snow and ice absent evidence that either made any effort to remove the snow and ice (*see Calogerakos v City of New York, supra*).

Here, there are many issues of fact as to which, if any, of the parties are responsible for the incident. This precludes Sunnylane/Fairfield's request as to partial summary judgment. It also precludes Island Own's request to dismiss cross claims by Island Own's co-defendants, Sunnylane and Fairfield as well as Sunnyland's and Fairfield's third-party complaint.

This Constitutes the Order of the Court.

Dated: 5/21/05

ENTER:

J.S.C.