

**Buroker v Country View Estate Condominium
Assn., Inc.**

2007 NY Slip Op 31635(U)

June 7, 2007

Supreme Court, Suffolk County

Docket Number: 0014857/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-21-07
ADJ. DATE 3-21-07
Mot. Seq. # 001 - MG
002 - MD

-----X
MARION BUROKER and RICHARD BUROKER, :
 :
 Plaintiffs, :
 :
 - against - :
 :
 COUNTRY VIEW ESTATE CONDOMINIUM :
 ASSOCIATION, INC., SCRO & SCRO :
 PROPERTIES, INC. and SOUND VIEW :
 PROPERTY MANAGEMENT, INC. And P.A.P. :
 LANDSCAPE & DESIGN, INC., :
 Defendants. :

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-----X
COUNTRY VIEW ESTATES AT MIDDLE :
 ISLAND CONDOMINIUM, s/h/a COUNTRY :
 VIEW ESTATE CONDOMINIUM :
 ASSOCIATION, INC. and SOUND VIEW :
 PROPERTY MANAGEMENT, INC., :
 :
 Third-Party Plaintiffs, :
 :
 - against - :
 :
 P.A.P. LANDSCAPE & DESIGN, INC.. :
 :
 Third-Party Defendant. :
-----X

MORENUS, CONWAY, GOREN, et al.
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Upon the following papers numbered 1 to 47 read on these motions for summary judgment ; Notice of Motion/
Order to Show Cause and supporting papers 1 - 17; 18 - 35 ; Notice of Cross Motion and supporting papers ; Answering
Affidavits and supporting papers 36 - 43 ; Replying Affidavits and supporting papers 44 - 45; 46 - 47 ; Other copy of reply
affirmation of P.A.P. Landscape & Design, Inc., ~~and after hearing counsel in support and opposed to the motion~~ it is,

ORDERED that for the purposes of this determination the motion by P.A.P. Landscape & Design,
Inc. (#001) for summary judgment dismissing the complaint against it and the motion by Country View
Estate Condominium Association, Inc. and Sound View Property Management, Inc. (#002) for summary
judgment dismissing the complaint against them are consolidated; and it is further

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ORDERED that the motion (#001) by P.A.P. Landscape & Design, Inc. for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (#002) by Country View Estate Condominium Association, Inc. and Sound View Property Management, Inc. for summary judgment dismissing the complaint and all cross claims against them is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Marion Buroker (“plaintiff”) on February 1, 2003 at approximately 7:00 a.m. when she slipped and fell in a sidewalk in a condominium complex in Middle Island, New York, which was owned and defendants Country View Estates at Middle Island Condominium, s/h/a Country View Estate Condominium Association, Inc. (“Country View”) and managed by Sound View Property Management, Inc. (“Sound View”). Prior to the accident, Country View entered into a snow removal contract with P.A.P. Landscape & Design, Inc. (“P.A.P. Landscape”). Plaintiff was involved in an unrelated motor vehicle accident in 2000.

Plaintiffs allege in their verified complaint that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition which caused plaintiff to fall and sustain permanent serious physical injury. Country View and Sound View commenced a third-party action against P.A.P. Landscape for contribution and/or indemnification.

P.A.P. Landscape now moves for summary judgment dismissing the complaint and all cross claims against it on the ground that it neither owed a duty of care to plaintiff stemming from its service contract with Country View nor created a dangerous icy condition which caused plaintiff to slip and fall. In support, P.A.P. Landscape submits, *inter alia*, the pleadings, the deposition testimony dated April 12, 2005 given by plaintiff, the deposition testimony given by plaintiff Richard Buroker, Sound View’s representative, Peter Elliott, and P.A.P. Landscape’s representative, Peter Poten as well as the contract between Country View and P.A.P. Landscape.

At her examination before trial, plaintiff testified to the effect that she slipped and fell on ice on the sidewalk in front of her home. She also testified that it had snowed on Friday, the day before the accident. She did not remember whether she saw ice on the sidewalk or the walkway on the Friday evening, although she observed that the walkway was covered with snow and was in a slippery condition. On the day of the accident, when she got out of her front door, she did not see any ice on the ground. After she slipped and fell, she first saw the ice, which was clear.

At his deposition, plaintiff Richard Buroker testified to the effect that he is plaintiff’s husband and witnessed the accident. At the time of the accident, he was employed by Kings Park School District as a maintenance personnel, and his job duties included snow and ice removal. When he left his house for work at 3:00 p.m. on Friday, the day before the accident, the weather was cold and wintry and there was no snow or ice on the ground. He testified that, although the last snow event was on the Wednesday of that week and a few inches of snow had accumulated, it melted at the time when he left for work on the Friday. At that time, he did not see any of snow or ice anywhere on the sidewalk or walkway in front of his home. He did not see anybody performing snow or ice removal in front of his home “between that Wednesday when that snow occurred and Friday *** when he left for work.” On the Friday night, it snowed between 9:30 p.m. and 12:00 a.m. and it had accumulated approximately two inches. In the

morning of the day of the accident, he observed that the snow “appeared to be fresh snow,” which covered the entire sidewalk and walkway, and he “could not see any portion of [them].” He did not “observe ice anywhere either on the sidewalk or the walkway” before the accident. On the day of the accident at 7:00 a.m., when he was walking on the walkway five or six feet behind plaintiff, he saw her slip and fall. Mr. Buroker testified that, although “there was nothing to indicate to [him] that there was ice under the snow” until plaintiff fell, he “saw [ice] because when she fell she moved all the snow away and there was ice.” It was “regular” and “clear ice.”

At his deposition, Peter Elliott testified to the effect that he is a managing agent of Sound View and that one of his job duties is to take care of the day-to-day problems that arise on the residential properties including Country View. During the winter 2002/2003, he regularly visits Country View once or twice a week and “take[s] a look to see that everything is okay.” He had no recollection of whether he inspected the premises prior to the subject accident after P.A.P. Landscape performed snow removal operations on January 27, 2003.

At his deposition, Peter Poten testified to the effect that he is the president of P.A.P. Landscape and that P.A.P. Landscape was hired by Country View to provide snow plowing and snow removal. Under the terms of the contract, if the snow accumulation exceeded two inches, P.A.P. Landscape would automatically go out and plow the snow and, “under two inches,” he would go out only “upon request.” He also testified that, “without approval from either board or management company, [he is] not allowed to apply sand or ice melt.” Mr. Poten testified that his company invoice indicates that P.A.P. Landscape performed snow removal operations and applied eight 40-pound bags of ice melt on the sidewalk and walkway on January 27, 2003 prior to the accident, but he had no recollection of the details.

Pursuant to the contract between Country View and P.A.P. Landscape, P.A.P. Landscape was obligated to plow snow on “all roadways and unoccupied parking spaces, including sidewalks.” The contract states that “Sidewalks will be shoveled for snowfalls under 2 inches. Upon request” and “Sand and Ice Melt will be available upon request” (paragraphs 3 and 4).

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. In general, contractual obligations will not create a duty toward a third party unless (1) the third party has reasonably relied, to his or her detriment, on the continued performance of the contracting party’s duties under the contract; (2) the contract is so comprehensive and exclusive that it completely displaces the other contracting party’s duty toward the third party; or (3) the contracting party has launched a force or instrument of harm, thereby creating or exacerbating a dangerous condition (*see, Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Karac v City of Elmira*, 14 AD3d 842, 788 NYS2d 456 [2005]).

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff’s injuries, it may be held liable in tort (*Espinal v Melville Snow Contrs.*, *supra*; *Figuroa v Lazarus Burman Assocs.*, 269 AD2d 215, 703 NYS2d 113 [2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, P.A.P. Landscape was required to establish that it did not perform any snow removal operations related to the condition which caused plaintiff’s injury or, alternatively, that if it did perform

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such operations. those operations did not create or exacerbate a dangerous condition (*Prenderville v International Serv. Sys.*, 10 AD3d 334, 781 NYS2d 110 [2004]).

Here, the evidence on the record reflects that P.A.P. Landscape indeed performed snow removal operations and applied the ice melt five days before the date of the subject accident. Plaintiff Richard Buroker testified that, on the day before the accident, there was no snow or ice on the sidewalk or walkway. Both plaintiff and plaintiff Richard Buroker testified that they first saw ice on which plaintiff slipped after the accident and that the ice was regular and clear. Moreover, under the contract between Country View and P.A.P. Landscape, P.A.P. Landscape was obligated only to shovel and/or plow snow, indicating that it was under no obligation to treat and/or remove any icy condition. 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 (*see, Espinal v Melville Snow Contrs.*, *supra*; *Katz v Pathmark Stores*, 19 AD3d 371, 796 NYS2d 176 [2005]). Furthermore, the contract expressly provides for Country View's retention of the right to direct P.A.P. Landscape to shovel snowfalls under 2 inches from sidewalks "upon request" and apply sand and ice melt "upon request." This reservation of authority provides an adequate basis for the imposition of primary tort liability against Country View for the condition of the property and defeats its implied indemnity claim as a matter of law (*see, Salisbury v Wal-Mart Stores*, 255 AD2d 95, 690 NYS2d 156 [1999]). P.A.P. Landscape has established its prima facie entitlement to judgment as a matter of law.

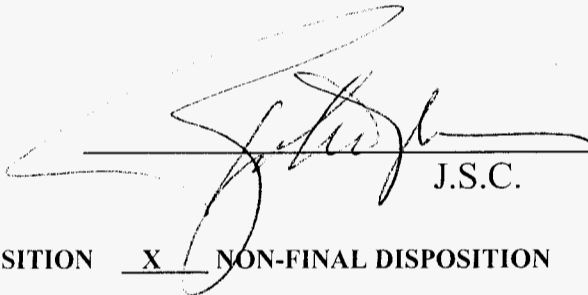
In opposition, plaintiffs allege that P.A.P. Landscape failed to prove that it "did not exacerbate or launch a force of harm" and that its snow removal service "did not amount to the displacement of *** Sound View's alleged duty to maintain the premises safely." Plaintiffs offered no proof to support their allegation, except for the deposition testimony of Sound View's representative, Peter Elliott, and portions of the deposition testimony of P.A.P. Landscape's representative, Peter Poten. Plaintiffs have failed to prove that the terms of the snow removal contract were comprehensive and exclusive and that, by merely clearing the snow, P.A.P. Landscape created or exacerbated a dangerous condition (*see, Espinal v Melville Snow Contrs.*, *supra*).

Country View and Sound View also opposed to P.A.P. Landscape's motion dismissing the complaint and all cross claims against it on the ground that they are entitled to common-law indemnification since P.A.P. Landscape "performed the snow removal services at Country View." P.A.P. Landscape may be liable to Country View for common-law indemnification even in the absence of a duty running to plaintiff, if her injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of P.A.P. Landscape (*see, Peycke v Newport Media Acquisition II*, 17 AD3d 338, 793 NYS2d 92 [2005]; *Baratta v Home Depot USA*, 303 AD2d 434, 756 NYS2d 605 [2003]). As noted, *supra*, however, there is no triable issue of fact as to whether P.A.P. Landscape created or exacerbated the dangerous icy conditions which caused plaintiff to slip and fall. Moreover, Country View has retention of the right to direct P.A.P. Landscape to apply sand and ice melt "upon request." Furthermore, Country View and Sound View offered no evidence demonstrating that there is a question of fact as to whether plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of P.A.P. Landscape. Accordingly, the motion by P.A.P. Landscape for summary judgment dismissing the complaint and all cross claims against it is granted. The action is severed and shall continue against the remaining defendants.

Country View and Sound View move for summary judgment in their favor dismissing the complaint and all cross claims against them on the ground that plaintiffs have failed to prove the negligence of defendants. The aforementioned defendants allege that plaintiffs made no complaints to them about the dangerous icy condition which caused plaintiff to fall and, thus, have failed to establish actual or constructive notice. Moreover, they allege that they performed their duty as the owner or the manager of the premises by "contacting [P.A.P. Landscape] to provide snow and/or ice removal services" and that "the job of snow and/or ice removal fell to [P.A.P. Landscape]." Furthermore, they allege that, around the time of the accident, there was no significant snowfall "that should have led the defendants herein to take any remedial action." In support, Country View and Sound View submit virtually identical evidence submitted in the motion by P.A.P. Landscape, except for the deposition testimony dated December 13, 2005 given by plaintiff and the affidavit of meteorologist William Sherman, referring to "weather data provided by the National Weather Service," demonstrating 0.4 inches and 0.5 inches of snow or ice on January 27, 2003 and January 29, 2003 respectively, 0.02 inches of rain or melted snow on January 31, 2003 and no snow or precipitation on January 30, 2003 and February 1, 2003.

Here, plaintiff testified, at her deposition dated December 13, 2005, to the effect that she observed accumulations of snow on the walkway and sidewalk on the Friday night before the accident and that there was no "salt or sand" on the walkway and the sidewalk area at the time of the accident. She also testified that the entire sidewalk area where she fell was covered by ice. Plaintiff Richard Buroker testified that it snowed on the Friday night before the accident and approximately two inches of snow had accumulated on the ground. Under these circumstances, there are several questions of fact as to whether there was significant snowfall that led Country View and Sound View to take any remedial action and whether they performed their duty as the owner or the manager of the premises, including inspecting the premises and providing snow removal service prior to the accident. Therefore, the motion by Country View and Sound View is denied.

Dated: JUN 07 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION