SHORT FORM ORDER

INDEX No. 05-9729
CAL. No. 06-02818-OT

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3-15-07
ADJ. DATE 5-11-07
Mot. Seq. # 002 - MG
003 - XMD

JAMES W. FUORI and CAROL FUORI, Plaintiffs, - against - KIMCO REALTY CORP. and MIDDLE ISLAND MAINTENANCE CORP., Defendants.	SIBEN & FERBER Attorneys for Plaintiffs 1455 Veterans Memorial Highway Hauppauge, New York 11749 SMITH MAZURE DIRECTOR, et al. Attorneys for Defendant Middle Island 111 John Street, 20th Floor New York, New York 10038-3198 PEREZ, FUREY & VARVARO Attorneys for Defendant Kimco 333 Earle Ovington Blvd, P.O. Box 9372 Uniondale, New York 11553-3644

Upon the following papers numbered 1 to 44 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 26 ; Answering Affidavits and supporting papers 27 - 35 ; Replying Affidavits and supporting papers 36 - 44 ; Other _____ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion(#002) for summary judgment by Middle Island Maintenance Corp. dismissing all claims and cross-claims against it is granted.

ORDERED that the cross-motion(#003) for summary judgment by Kimco Realty Corp. dismissing all claims and cross-claims against it, or, in the alternative, granting Smithtown Venture conditional summary judgment over Middle Island maintenance on contractual indemnity grounds ,is denied.

This is an action for personal injuries allegedly sustained by plaintiff James Fuori on December 26, 2002 at approximately 7:30 a.m. when he slipped and fell on ice in the parking lot of a shopping center owned by Kimco Realty Corp. through its subsidiary Smithtown Venture, LLC., on Veterans Memorial Highway in Commack, New York. The premises contains a large Target store where plaintiff was employed.

Defendant Middle Island Maintenance Corp. ("Middle Island") now moves for summary judgment on the grounds, *inter alia*, they were not negligent in their plowing operations nor are they required to indemnify Kimco Realty Corp. ("Kimco"). Defendant Kimco Realty has cross-moved for summary judgment or, in the alternative, for an order requiring indemnification from Middle Island.

At an examination before trial on April 25, 2006, plaintiff James Fuori testified that the accident occurred as he was stepping out of his pick-up truck in the parking lot near the Target store where he worked. According to plaintiff, his right foot was on his vehicles's running board and his left foot was on the ground when he suddenly slipped and fell. Plaintiff did not see what caused him to fall until after the accident. At that time, he observed a patch of ice in the parking lot directly next to where he parked his vehicle. He testified that it had snowed very heavily the day before the accident, and all night into the early morning hours of December 26th. The parking lot, and sidewalks, however, had been plowed upon his arrival at work and he observed snow piled up in the parking lot. He testified he had previously fallen on the sidewalk abutting the Target store but had not made any complaints about ice conditions to anyone prior to his fall.

At an examination before trial on September 15, 2006, Joseph Santigate, property manager for the premises from 1999 until January 2004 testified on behalf of Smithtown Venture. He testified that on the date of the accident, a contract was in effect between Smithtown Venture and defendant Middle Island Maintenance wherein Middle Island agreed to perform all snow and ice removal services at that location. According to the contract, Middle Island would automatically come and plow the parking lot when it snowed one and a half inches, and that "salting and sanding will be done as needed and/or upon owner and store manager's request". The contract also provides that "application of salt/sand to entrances, main drives, traffic lanes and loading docks will be done automatically when accumulation is less than one and one half inch (1 1/2"). The night before plaintiff's accident, it had snowed at least six to eight inches and Middle Island plowed several times that evening. According to Santigate, Middle Island returned in the early morning hours of December 26th and would have already plowed once before some of the Target employees began to arrive at 6:00 a.m. According to the contract, Middle Island was "to make every effort, weather permitting to have the parking lot plowed and salted by 8:00 a.m. in preparation of employee and customer arrival." Defendant testified they never received any complaints about icy conditions in the parking lot prior to plaintiff's accident. The parking lot comprises an area of about five acres.

Phil Weber, owner and president of Middle Island Maintenance confirmed that there was a contract in effect on the date of plaintiff's accident between Middle Island and Smithtown Venture providing for automatic snow removal. According to Weber, Middle Island began their snow plowing operations between 6:00 p.m. and 9:00 p.m. on December 25th. This included sanding and salting the parking lot as well. It did not stop snowing until 5:00-6:00 a.m. on December 26th. Middle Island continued plowing the lot until 12:00 p.m. on December 26,2002. At this point, Weber testified, the plowing operations ceased because of the number of cars in the parking lot. Middle Island returned on the evening of December 26, 2002 and continued working until December 27, 2002. The "Snow Log" personally kept by Weber reveals that the temperatures dropped overnight from December 25th into December 26th and that on the morning of the 26th, "any slush below the snow" had turned to ice.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). However, a defendant in moving for summary judgment bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (***Altieri v Golub Corp.***, 292 AD2d 734, 741 NYS2d 126 [2002]) and the burden will only shift to the plaintiff after the defendant has demonstrated that it neither created the defective condition nor had actual or constructive notice of the defective condition (***Altieri v Golub Corp.***, *supra*; ***Portanova v Trump Taj Mahal Assocs***, 270 AD2d 757, 704 NYS2d 380 [2000]). But, where a plaintiff fails to submit any evidence that the condition alleged to have caused the injury was actually defective or dangerous, summary judgment must be granted in defendant's favor (***Przbyszewski v Wonder Works Constr., Inc.***, 303 AD2d 482, 755 NYS2d 435 [2003]).

Fundamental to a plaintiff's recovery in a negligence action, plaintiff must establish that defendant owed plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see*, ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). In order for a plaintiff to establish a prima facie case in a slip and fall accident involving snow and ice, plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*see*, ***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2005]; ***Tsivitis v Sivan Assocs, LLC***, 292 AD2d 594, 741 NYS2d 545 [2002]). An apparent and visible defect must exist for a significant amount of time prior to an accident to allow the defendant time to remedy the situation in order to constitute constructive notice (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bernard v Waldbaums, Inc.***, 232 AD2d 596, 648 NYS2d 700 [1996]). However, the fact that the defendant may have a general awareness that a defective condition may exist is not legally sufficient to constitute notice of the particular condition that caused the plaintiff's injuries (***Kennedy v Wegmans Food Markets,*** Inc., 90 NY2d 923, 664 NYS2d 259 [1997]; ***Gordon v American Museum of Natural History***, *supra*; ***Bernard v Waldbaum, Inc.***, *supra*).

Summary judgment dismissing the complaint against Middle Island is granted. Ordinarily, "a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries" (***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]; *see*, ***Church v Callanan Indus.***, *supra*; ***Port Chester Elec. Constr. Co. v Atlas***, 40 NY2d 652, 389 NYS2d 327 [1976]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Thus, tort liability for injuries to a third person may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.,*** 98 NY2d 136 at 140, 746 NYS2d 120, thereby creating an unreasonable risk of harm to others or increasing the existing risk (***Church v Callanan Indus.***, *supra*, at 111, 752 NYS2d 254); (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see*, ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, *supra*); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation

intended to displace the landowner's duty to safely maintain the property (*see*, ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

Middle Island's submissions in support of the motion establish prima facie that its contractual obligations ran only to the property owner, Kimco Realty, and not to any third parties. The written snow removal contract and the testimony of Phil Weber, owner of Middle Island, and of Joseph Santigate, property manager for Kimco Realty, show that Middle Island undertook only a limited maintenance obligation with respect to the subject parking lot (*see*, ***Espinal v Melville Snow Contrs.***, *supra*; ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2006]; ***Mahaney v Neuroscience Ctr.***, 28 AD3d 432, 814 NYS2d 175 [2006]). By the express terms of the contract, Middle Island would automatically come and plow the parking lot when it snowed one and a half inches, and that "salting and sanding will be done as needed and/or upon owner and store manager's request". The contract also provides that "application of salt/sand to entrances, main drives, traffic lanes and loading docks will be done automatically when accumulation is less than one and one half inch (1 1/2"). The snow removal contract did not constitute an exclusive and comprehensive agreement so as to displace the duty of the property owner to maintain the premises safely (*see*, ***Espinal v Melville Snow Contrs.***, *supra;* ***Mahaney v Neuroscience Center***, 28 AD3d 432 [2006]; ***Capestany v C&S Properties***, 17 AD3d 502 [2005]). Middle Island has also demonstrated prima facie that it did not create or exacerbate a dangerous condition in the parking lot (*see*, ***Espinal v Melville Snow Contrs.***, *supra*; ***Linarello v Colin Serv. Sys.***, *supra*). As the salt/sand spreader traveled down the traffic lanes, the sand and salt would often go under the cars parked in the marked parking stalls. Middle Island, however, was not responsible for ensuring that the sand/salt removed the ice under or between the parked cars. In its continuing efforts to plow, salt and sand the parking lot during a "storm in progress", Middle Island cannot be said to have created or exacerbated a dangerous condition. Further, there is no evidence raising a triable issue of fact as to whether Middle Island's alleged inadequate snow plow operations, "launched a force or instrument of harm." Furthermore, the submissions make clear that snow removal operations, salting and sanding were ongoing at the time plaintiff arrived at 7:30 a.m.

With respect to Kimco Realty, a defendant will only be held liable in a slip-and-fall accident involving snow and ice when it created the dangerous condition or had actual or constructive notice thereof (***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2005]). Landowners owe " a duty to exercise reasonable care maintaining their property under all the circumstances, including the likelihood of injury to others, the seriousness of potential injuries, the burden of avoiding the risk and forseeability of a potential plaintiff's presence on the property" (***Perrelli v Orlow***, 273 AD2d 533; 708 NYS2d 742 [2000]). Questions of forseeability are ordinarily questions of fact and summary judgment may only be granted when a single inference can be drawn from undisputed facts (***Id***). Further, a party in control of real property may be held liable for accidents occurring as a result of a hazardous condition created on the premises because of an accumulation of snow and ice only if an adequate period of time has passed following the cessation of a storm to allow the party to remedy the condition" (***Russo v 40 Garden Street Partners***, 6 AD3d 420, 420-421 [2004]) and only if the owner has notice of the defect, or, in the exercise of due care, should have had notice" (***Arcuri v Vitolo***, 196 AD2d 519; 601 NYS2d 173 [1993]); *see*, ***McCabe v Easter***, 128 AD2d 257, 258-259, 516 NYS2d 515 [1987]).

With regard to defendant Kimco Realty's motion for summary judgment, the defendant has not met its burden by showing that it did have actual or constructive notice of the alleged defective condition that plaintiff asserts was the cause of his injuries (***Gordon v American Museum of Natural History***; *supra*; ***Zabbia v Westwood, LLC***, *supra*). This burden cannot be satisfied merely by pointing out gaps in the plaintiff's case, as defendant has done here (***South v K-Mart Corp.***, 24 AD3d 748 ; 807 NYS2d 133 [2005]). Further, Joseph Santigate, property manager for the premises, could not remember whether he was present on the date of the incident and had no personal knowledge of the condition of the parking lot. He also testified he could not recall receiving any complaints about ice patches in the parking lot prior to the plaintiff's accident due to a major computer problem resulting in the loss of several years worth of data. Further, there is no evidence that any agent or employee of the landlord ever inspected the parking lot that day. Therefore, Kimco has failed to make a prima facie showing that it lacked constructive notice of the condition (*see*, ***Musso v Macray Movers***, 33 AD3d 594; 822 NYS2d 133 [2006] . Accordingly, defendant Kimco Realty's motion for summary judgment dismissing the plaintiff's complaint is denied.

Kimco has also opposed to Middle Island's motion dismissing the complaint and all cross claims against it on the ground that they are entitled to common-law indemnification since Middle Island performed the snow removal services. Middle Island may be liable to Country Kimco for common-law indemnification even in the absence of a duty running to plaintiff, if his injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of Middle Island (*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 Middle Island created or exacerbated the dangerous icy conditions which caused plaintiff to slip and fall. Moreover, Kimco 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 Middle Island. Accordingly, the motion for indemnification is denied.

The action is severed and shall continue against Kimco Realty.

Dated: JUN 14 2007

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**