SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 100837/2005**
COUNTY OF RICHMOND PART DCM 3 **Motion No.: 1 & 2**

LINDA FORST,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

9-31 GADSEN APARTMENT OWNERS CORP. and FIORELLO LANDSCAPING, INC.,

Defendants

9-31 GADSEN APARTMENT OWNERS CORP.,

Third-party Plaintiff

against

FIORELLO LANDSCAPING, INC.,

Third-party Defendant

The following items were considered in the review of this motion summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits	3, 4, 5
Replying Papers	6, 7, 8
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In motion number 1 the defendant, Fiorello Landscaping, Inc. [hereinafter "Fiorello"], seeks an order pursuant to CPLR § 3212 granting summary judgment and dismissing the plaintiff's complaint, the third-party plaintiff's complaint and all cross-claims against them. In motion number 2 the defendant, Gadsen Apartment Owners Corp. [hereinafter "Gadsen"], seeks an order granting

summary judgment and dismissing the plaintiff's complaint along with any and all cross-claims; or in the alternative, finding that the defendant, Fiorello, is to fully indemnify defendant Gadsen. The plaintiff opposes both motions while each defendant oppose their adversary's motion.

This action was commenced to recover for personal injuries sustained when the plaintiff allegedly slipped and fell in the parking lot owned by Gadsen on February 23, 2005 at approximately 8:30AM. The plaintiff was deposed and testified that as she was walking towards her car, which was parked in her spot numbered 76, she slipped and fell on black ice near the left front wheel of her car. She did not see the ice prior to the fall. Additionally, the plaintiff testified that she saw a truck with a snow plow at the site a few days before her accident and that the plow cleared her parking space after she left it.

Marlene Ginsburg, the property manager of the Gadsen Co-op, was deposed on behalf of Gadsen and testified that the individual co-op owners, who have assigned spaces like Ms. Forst, have the responsibility to shove one their cars out when it snows. She also testified that Fiorello was responsible for the snow removal in the parking lot whenever it snowed, and that they contracted for services that included the removal of snow from the driving aisle of the parking lot, the entranceway, and any open parking spaces where the plow could fit. Additionally, she stated that there had been no prior complaints regarding the icy conditions in the parking area and that she was personally not aware of any dangerous icy conditions.

On behalf of Fiorello, Mark Fiorello was deposed. He testified that his company was contracted to be responsible to remove snow at the parking lot. This included the removal of snow from the driving aisle, the entranceway, and any empty parking spaces, if the plow could fit. He could not recall when his company was last at the site prior to plaintiff's accident.

A defendant may be held liable for a slip-and-fall incident involving snow and ice on its property upon a showing that, among other things, the defendant had actual or constructive notice of the allegedly dangerous condition (*Salvanti v. Sunset Indus. Park Assoc.,* 27 A.D.3d 546[2d Dept 2006]). Thus, "[o]n a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law" (*Goldman v. Waldbaum, Inc*., 248 A.D.2d 436 [2d Dept 1998]). The Gadsen defendant made no such showing here. Although the plaintiff acknowledged in her deposition testimony that she did not see the ice on the parking lot before she fell, the defendant failed to submit any evidence showing that the allegedly dangerous condition existed for an insufficient length of time for them to have discovered and remedied it, as is its burden (*Pearson v. Parkside Ltd. Liab. Co.,* 27 A.D.3d 539 [2d Dept 2006]; *Strange v. Colgate Design Corp*. 6 A.D.3d 422 [2d Dept 2004]; *Corsaro v. Stop and Shop, Inc* 287 A.D.2d 678 [2d Dept 2001]). Therefore, Gadsen's motion for summary judgment against the plaintiff, numbered 2, is denied.

With respect to motion number 1, Fiorello argues that it did not displace or assume the general duty of the property owner to keep the premises in a safe condition and therefore may not be held liable to a third party for any injuries. (Citing to *Devalle-Stone v. Ultimate Services, Inc.* 33 AD3d 652 [2d Dept 2006].) Furthermore, Fiorello claims that both the plaintiff and Gadsen acknowledge that it is the responsibility of the tenants to clear snow from their own parking spaces. Here, the plaintiff testified that a snow removal truck cleared her parking space approximately two days prior.

In general, a snow-removal contractor's contractual obligation for snow removal, standing alone, will not give rise to tort liability to an injured plaintiff unless: (1) in failing to exercise reasonable care in the performance of its duties, it launched a force or instrument of harm, (2) the plaintiff detrimentally relied on the continued performance of the snow removal contractor's duties, or (3) the snow removal contractor has entirely displaced the property owner's duty to maintain the premises safely. (*Espinal v. Melville Snow Contrs.,* 98 N.Y.2d 136 [2002].) Although the plaintiff testified that she saw a snow removal truck approximately two days prior, it is well settled that this

type of testimony is insufficient to raise triable issue of fact precluding summary judgment on damages claimed against the snow removal contractor. (*Abbattista v. King's Grant Master Ass'n, Inc*. 39 A.D.3d 439 [2d Dept 2007].) Therefore, Fiorello's motion for summary judgment against the plaintiff is granted as the plaintiff cannot bring a direct claim against the third-party contractor hired to remove snow in the parking lot.

Gadsen's motion for indemnification is also denied as there are triable issues of fact with respect to the fault of both Gadsen and Fiorello. Although the plaintiff cannot bring a direct claim against Fiorello in tort, Gadsen may be able to bring a claim against Fiorello under contract theory, if it can be proven the company did indeed plow parking spot 76 and create the condition. However, granting an order of contractual or common-law indemnification at this time is premature. (*Anderson v. Jefferson-Utica Group, Inc.* 26 A.D.3d 760 [4th Dept 2006].)

Accordingly, it is hereby:

ORDERED, that motion number 1 is granted to the extent that summary judgment is granted in favor of defendant, Fiorello Landscaping Inc., as against the plaintiff and the main action is dismissed as against defendant, Fiorello Landscaping, Inc.; and it is further

ORDERED, the remaining relief of motion number 1, specifically dismissing the cross-claims and third-party action against third-party defendant, Fiorello Landscaping Inc. is denied; and it is further

ORDERED, that motion number 2 by defendant, Gadsen, is denied in its entirety; and it is further

ORDERED, that all parties return to DCM 3 at 9:30 AM on **September 24, 2007** for a pre-trial conference.

ENTER,

DATED: August 15, 2007

Joseph J. Maltese
Justice of the Supreme Court