SHORT FORM ORDER

INDEX No. 04-18515
CAL. No. 07-01114-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 7-30-07
ADJ. DATE 9-17-07
Mot. Seq. # 001 - MD
002 - XMD

AUDREY MCCLEAN, Plaintiff, - against - WAKEFERN FOODS CORP. a/s/o SHOPRITE and HIGH PERFORMANCE SWEEPERS, INC., Defendants.	MALLILO & GROSSMAN Attorneys for Plaintiff 1957 Flatbush Avenue Brooklyn, New York 11234 MAZZARA & SMALL, P.C. Attys for Deft High Performance Sweepers 800 Veterans Memorial Highway, Suite LL5 Hauppauge, New York 11788 CRAIG P. CURCIO, ESQ. Atty for Deft Wakefern Foods One Edgewater Drive Middletown, New York 10940

Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers 10 - 17 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ___; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the unopposed motion by High Performance Sweepers, Inc. for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the unopposed cross motion by Wakefern Food Corp. a/s/o Shoprite for summary judgment dismissing the complaint and all cross claims against it is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Audrey McLean, on December 6, 2002 at approximately 7:30 p.m. when, while attempting to get out of her vehicle, she slipped and fell in a parking lot owned by defendant Wakefern Food Corp. a/s/o Shoprite ("Shoprite"). Prior to the accident, Shoprite entered into a snow removal contract with defendant High Performance Sweepers, Inc. ("High Performance"). Plaintiff alleges in her verified complaint that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition which caused her to fall and sustain permanent serious physical injury.

High Performance 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 Shoprite nor created a dangerous icy condition which caused plaintiff to slip and fall. In support, High Performance submits, *inter alia*, the pleadings, the deposition testimony given by plaintiff, High Performance representative, Frank Irace, and Shoprite's representative, Carl Caixeiro as well as the contract between Shoprite and High Performance.

At her examination before trial, plaintiff testified to the effect that, on December 6, 2002 at approximately 7:30 p.m. when she arrived at the subject parking lot of Shoprite, she observed that the parking lot had been plowed and that there were piles of snow at the side of the building and the corner of the parking lot. The accident happened when she was getting out of her vehicle. She put her foot down, while exiting the vehicle, and took her bag up in her right hand. While she had "begun to swing the door shut," she "was about to" go back and slipped and fell on a patch of ice. She observed a "whole block of dirty ice" approximately 12 inches in length and 24 inches in width at the location after she fell.

At his deposition, Frank Irace testified to the effect that he is the owner of High Performance and that High Performance was hired by Shoprite to provide snow plowing. High Performance entered into a snow removal contract with Shoprite for the period from November 1, 2002 to April 1, 2003. He testified that it had snowed five to eight inches from December 5, 2002 to December 6, 2002. High Performance performed snow removal operations – plowing and sanding – on the parking lot "through the night" of December 5 until "approximately 2:00 to 3:00 a.m." on December 6. When he left the parking lot, the condition was in "good shape." On December 6 at approximately 6:00 to 7:00 p.m., he went back to Shoprite to "make sure [that] everybody is happy [and that] the snow is not against the fence, not blocking drains, [and not] knock[ing] on the door" and noticed that it "look[ed] great."

Pursuant to the contract between High Performance and Shoprite, High Performance was obligated to plow snow on "all shopping center roads and parking lots anytime when snow levels exceed one (1) inch. The contractor will sand the same areas when snow levels don't exceed one (1) inch or if icy conditions exist." The contract states that "the snow removal contractor will be compensated for equipment used in the performance of this contract at the rate of 1-4 inches $1,600 [and] 5-8 inches $1,700."

At his deposition, Carl Caixeiro testified to the effect that, at the time of the accident, he was employed by Shoprite as a store manager for the subject location and that one of his job duties is to take care of the day-to-day operations of the entire store. He testified that snow plowing responsibilities would be handled at the corporate level and that, on behalf of Shoprite, Ron Patengo, who was in charge of maintenance and construction for the company, signed the snow removal contract between High Performance and Shoprite. Mr. Caixeiro testified that High Performance would "come on their own depending on the snowfall or the amount expected" and that "[he] would call, though, if [he] felt the job wasn't satisfactory or if [he] wanted them to come back." Mr. Caixeiro also testified that, prior to the subject accident, the manager and the assistant manager were responsible to check on the snow plowing job and that he had no recollection whether any assistant manager was working on the day of the accident. He also had no recollection whether it was snowing on December 5, 2002 or December 6,

2002 and whether High Performance performed snow removal services on the dates.

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*; ***Figueroa 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, High Performance 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 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, under the contract between High Performance and Shoprite, High Performance was obligated only to plow snow and apply sand, indicating that it was under no obligation to cart and remove piles of snow. High Performance's limited contractual undertaking to provide snow removal services is not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see*, ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2006]; ***Katz v Pathmark Stores***, 19 AD3d 371, 796 NYS2d 176 [2005]). Nevertheless, the evidence on the record reflects that it had snowed five to eight inches from December 5, 2002 to December 6, 2002, that High Performance performed snow removal operations on the subject parking lot from December 5 until December 6 at approximately 2:00 to 3:00 a.m., and that, when Mr. Irace came back to the parking lot on December 6 at approximately 6:00 to 7:00 p.m. prior to the accident, he found that the condition of the parking lot was "great." Plaintiff testified to the effect that there were accumulations of "dirty ice" approximately 12 inches in length and 24 inches in width at the location that she fell. Under these circumstances, there are questions of fact as to whether High Performance properly plowed snow and applied sand and whether High Performance exacerbated the icy condition of the subject property by the improper application of sand, where plaintiff fell (*see,* ***Prenderville v International Serv. Sys.***, *id.*; ***Beckham v Board of Educ. of City of New York***, 267 AD2d 189, 699 NYS2d 300 [1999]). Thus, High Performance failed to meet its initial burden on the motion.

Shoprite cross-moves for summary judgment dismissing the complaint and all cross claims against it on the ground that plaintiff has failed to prove its negligence. Shoprite alleges that it neither created the alleged dangerous condition nor had actual or constructive notice of the condition. In support, Shoprite submits almost identical evidence submitted in the motion by High Performance,

without the deposition testimony of High Performance representative, Frank Irace.

Here, Mr. Caixeiro testified to the effect that he and other assistant managers were responsible to check on the snow plowing operations and that he had no recollection whether it was snowing on December 5, 2002 or December 6, 2002 and whether High Performance performed snow removal services on the dates. Plaintiff testified that, on the day of the accident, she observed that the subject parking lot had been plowed and that there were piles of snow at the corner of the parking lot. She also observed accumulations of "dirty ice" at the location that she fell after the accident. Under these circumstances, there are questions of fact as to whether a dangerous condition existed on the subject parking lot so as to create liability on the part of Shoprite and whether it exercised reasonable care (*see*, ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). Thus, Shoprite failed to establish its entitlement to judgment as a matter of law.

Accordingly, the motion by High Performance and the cross motion by Shoprite for summary judgment are denied.

Dated: NOV 13 2007

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**