

**Scarcella v Kimco Realty Corp.**

2007 NY Slip Op 33885(U)

November 9, 2007

Supreme Court, Nassau County

Docket Number: 4763-04/

Judge: F. Dana Winslow

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**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:  
HON. F. DANA WINSLOW,**

**Justice**

\_\_\_\_\_  
**GAIL SCARCELLA and SALVATORE E.  
SCARCELLA,**

**TRIAL/IAS, PART 9  
NASSAU COUNTY**

**Plaintiffs,**

**-against-**

**INDEX NO.: 14763/2004**

**KIMCO REALTY CORPORATION and SCENIC  
ISLE LANDSCAPING,**

**Defendants.**

**MOTION SEQ. NO.: 001, 002, 003  
MOTION DATE: 09/06/07**

\_\_\_\_\_  
**KIMCO REALTY CORPORATION s/h/a KIMCO  
REALTY CORPORATION,**

**Third-Party Plaintiff,**

**-against-**

**MEADOWBROOK PARKING AREA CONTRACTORS,**

**Third-Party Defendant.**

\_\_\_\_\_  
**SCENIC ISLE LANDSCAPING,**

**Second Third-Party Plaintiff,**

**-against-**

**MEADOWBROOK PARKING AREA CONTRACTORS,**

**Second Third-Party Defendant.**

**The following papers having been read on this motion (numbered 1-8):**

**Motion Sequence 001**

**Notice of Motion (Scenic Isle Landscaping).....1**

**Motion Sequence 002**

|  |   |
|--|---|
| Notice of Cross-Motion (Kimco).....          | 2 |
| Affirmation in Opposition (Scarcella).....   | 3 |
| Affirmation in Opposition (Meadowbrook)..... | 4 |
| Reply Affirmation (Kimco).....               | 5 |

**Motion Sequence 003**

|  |   |
|--|---|
| Notice of Motion (Meadowbrook Parking).....  | 6 |
| Affirmation in Opposition (Kimco).....       | 7 |
| Reply Affirmation (Meadowbrook Parking)..... | 8 |

Motion by defendant/second third-party plaintiff Scenic Isle Landscaping (“Scenic”) for summary judgment dismissing plaintiff’s complaint against it, in its entirety, and further dismissing all cross-claims against Scenic is **granted**.

Cross-motion by defendant/third-party plaintiff Kimco Realty Corporation s/h/a Kimco Realty Corporation (“Kimco”) for summary judgment dismissing the complaint and all cross-claims against it is **granted**. Kimco’s further request, in the alternative, for conditional summary judgment over and against third-party defendant Meadowbrook Parking Area Contractors (“Meadowbrook”) on contractual indemnity grounds is **denied** as moot, but is discussed below.

Motion by third-party defendant/second third-party defendant Meadowbrook for summary judgment dismissing the third-party complaint by Kimco and the second/third-party complaint by Scenic is **granted**.

These three actions arose out of an accident in which plaintiff Gail Scarcella stepped on a rock and fell in the parking lot of the Meadowbrook Commons Shopping Center in Freeport on June 12, 2003 at approximately 12:00 noon. Trees in planters are located in the parking lot, and the planters are filled to capacity with rocks. Plaintiffs allege that this arrangement allows for the rocks to spill out of the planters and onto the asphalt parking lot, and thereby a dangerous slipping hazard is created.

Mrs. Scarcella testified that she frequented the subject shopping center approximately three times a week for fifteen years (Scarcella transcript, p 97), and that she always noticed rocks in the parking lot (Scarcella transcript, p. 27, 87, 97, 113). She was alone at the time of her fall, and she did not report the fall to anyone. Her husband testified that there are always rocks scattered around the parking lot at this shopping center, and that he saw children,

teenagers, and adult patrons, kicking the rocks or causing the rocks to spill out of the planters (Scarcella affidavit, pars. 8-9).

In its answer Kimco does not deny that it is the owner of the premises known as the Meadowbrook Commons Shopping Center. Kimco's property manager at the time of Mrs. Scarcella's fall, testified that he was not aware of complaints or any prior accidents related to the condition of the parking lot or rocks from the planters (Shallo transcript, p.12), nor was he aware of rocks coming out of the planters (Shallo transcript, p.19).

Kimco contracted with Meadowbrook for "Parking Lot Sweeping /Maintenance" and there is evidence in the record that once a day, seven days a week, employees from Meadowbrook swept/vacuumed the shopping center parking lot. A vacuum truck was used in the early morning hours, and hand-picking took place in the areas unreachable by the truck. Meadowbrook's log shows that the lot was swept/vacuumed by Meadowbrook employees at approximately 1:15 AM on the day of plaintiff Gail Scarcella's fall.

Scenic provided landscaping services for the subject shopping center, in accordance with an agreement with Kimco, since 2000. Scenic's services included cutting the grass, trimming the bushes and trees, and maintaining the flowers. Scenic was further responsible for keeping the planters free of weeds, and making sure that the trees inside the planters were well fed and healthy.

This action was commenced in October, 2004. At this time both defendants and the third-party defendant move for summary judgment, *inter alia*, dismissing the complaint. Plaintiffs do not oppose the motions by Scenic and Meadowbrook.

Summary judgment is the procedural equivalent of a trial [*SJ Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324(1986)]. Once the movant makes its *prima facie* showing, the burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial [*Alvarez*]. On a motion for summary judgment the court should refrain from making credibility determinations [*Ferrante v American Lung Assn.*, 90 NY2d 623, 631(1997); *SJ Capelin Associates, Inc.*], and must view the evidence in the light most favorable to the non-moving party [*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 (2007)]. Summary judgment will not be defeated, however, by mere conclusions or unsubstantiated allegations [*Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)].

A landowner has a duty to maintain its premises in a reasonably safe condition [see *Basso v Miller*, 40 NY2d 233, 241(1976)]. Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question for the trier of fact [*Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997)]. However certain defects, as a matter of law, may be deemed too trivial to be actionable [*Shohet v. Shaaya*, 43AD3d 816 (2<sup>nd</sup> Dept. 2007); *Joseph v Villages at Huntington Home Owners Assn, Inc.*, 39 AD3d 481 (2<sup>nd</sup> Dept. 2007); *Zalkin v City of New York*, 36 AD3d 801 (2<sup>nd</sup> Dept. 2007); *Outlaw v. Citibank*, 35 AD3d 564; *Taussig v Luxury Cars of Smithtown, Inc.*, 31 AD3d 533 (2<sup>nd</sup> Dept 2006); *Cicero v Selden Associates*, 295 AD2d 391 (2<sup>nd</sup> Dept. 2002); *Hargrove v Baltic Estates*, 278 AD2d 278 (2<sup>nd</sup> Dept. 2000)]. In determining whether a defect on property is trivial, so as to preclude imposition of liability against owner, the court must examine all facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury. A property owner may not be held liable in damages for trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his or her toes or trip [*Zalkin*, 36 AD3d 481].

Moreover, liability for unsafe conditions on property generally extends only to conditions that are not open, obvious and readily observable, such as might constitute a “trap for the unwary.” [*Alonso v. New York City Transit Authority*, 298 AD2d 311 (1<sup>st</sup> Dept. 2002); *Costello v. Grand Central Plaza Inc.*, 268 AD2d 722 (3<sup>rd</sup> Dept. 2000)]. Where there is evidence that the dangerous condition was seen by the injured party, or could have been avoided, liability is not imposed [*Costello*, 268 AD2d at 723 (loose gravel in parking lot)].

In this case, the Court finds that the alleged defect is not in the nature of a substantial hazard for which a property owner may be held liable. Notwithstanding the conclusory assertion of plaintiff’s purported expert to the effect that scattered loose gravel, approximately ½ to 1 inch in size, creates a “treacherous” slipping hazard, most courts have found similar conditions to be too trivial to be actionable. See *Clouse v. Columbia Presbyterian Hosp.* 35 A.D.3d 209 (1<sup>st</sup> Dept. 2006) (sandy condition of ramp); *Smith v. Sports Physical Therapy of N.Y.*, 6 A.D.3d 605, 774 N.Y.S.2d 789 (2<sup>nd</sup> Dept. 2004) (sand on the subject stair); *Moriello v. Stormville Airport Antique Show & Flea Market, Inc.*, 271 AD2d 66 (2<sup>nd</sup> Dept. 2000) (rocks on unpaved roadway). The alleged defect did not have the characteristics of a trap or snare, particularly under the circumstances: namely, that the accident occurred in on a clear, bright, spring day at noon, in a shopping center that plaintiff regularly frequented for fifteen years, and where she had always observed rocks in the parking lot (Scarcella transcript, p. 11, 12, 97). Further, plaintiff testified that on the day in question, she saw loose rocks on the ground in front of her and continued to walk in that direction (Scarcella transcript, p. 26-27). As in *Costello* [268 AD2d 722], the rocks were a readily observable condition that plaintiff could have avoided. Under the circumstances, the Court finds that plaintiff was not exposed to an

unreasonable risk of injury. See *Moriello*, 271 AD2d 66. The record reflects no triable issue of fact with respect to the existence of a hazardous condition.

Kimco alternatively sought an order granting conditional summary judgment against Meadowbrook, based upon the indemnification clause in its contract with Meadowbrook. Insofar as the claim against Kimco is dismissed, the Court is not obligated to address this issue, except to say that it is moot. The Court shall do so, however, in order to avoid any misunderstanding regarding the effect of the indemnification provision.

The right to contractual indemnification depends on the specific language of the contract [*Lesisz v Salvation Army*, 40 AD3d 1050, 1051 (2<sup>nd</sup> Dept. 2007); *Kader v City of New York*, 16 AD3d 461 (2<sup>nd</sup> Dept. 2005)]. In this case the clause at issue requires Meadowbrook to:

defend, indemnify and hold Kimco Realty Corporation, its Directors, Officers, Employees, Agents and Representatives harmless from and against any and all claims, loss (including attorney fees, witness fees and all court cost), damages, expense and liability resulting from injury and/or death of any person or damage to or loss of any property arising out of any negligent or wrongful act, error, omission or breach of this agreement

Exhibit A to Contract at par. 6).

Here, the limited service contract between Kimco and Meadowbrook provided for sweeping/vacuuming of the subject parking lot only once a day, and Kimco was aware of no complaints about rocks in the parking lot. Meadowbrook's log shows that the lot was swept/vacuumed at approximately 1AM on the date of plaintiff's fall. On this record, there is no evidence that Meadowbrook engaged in any conduct which caused or contributed to plaintiff's accident [see *Bernstein v Starret City, Inc.*, 303 AD2d 530 (2<sup>nd</sup> Dept. 2003)]. In the absence of a showing of "negligent or wrongful act, error, omission or breach of this agreement" by Meadowbrook, the contractual indemnification provision does not take effect. For this reason, Kimco's alternative request for conditional summary judgment against Meadowbrook for contractual indemnification would have been denied.

Scenic seeks summary judgment dismissing plaintiff's claims and all cross-claims against it, and Meadowbrook seeks summary judgment dismissing both third-party actions against it. While both Scenic and Meadowbrook have contractual obligations to Kimco, a contractual obligation standing alone is generally insufficient to give rise to tort liability in favor of a non-contracting third party such as plaintiff [*Church v Callanan Industries, Inc.*, 99 NY2d 104, 111 (2002)]. Exceptions to this general rule exist under three circumstances; (1) where the contracting party exacerbates a dangerous condition or launches a force or

instrument of harm; (2) where the plaintiff detrimentally relies upon the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely [*Church; Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002); *Huttie v Central Parking Corp.*, 40 AD3d 704 (2<sup>nd</sup> Dept. 2007)].

Here, the record clearly does not support any of the three exceptions with respect to either Scenic or Meadowbrook, and plaintiff does not oppose their motions. The opposition by Kimco is supported only by speculation. Accordingly, the motions by Scenic and Meadowbrook for summary judgment dismissing the claims against them are **granted**.

This Constitutes the Order of the Court.

Dated: 11/9/07

ENTER:

*[Handwritten signature]*  
J.S.C.

**ENTERED**

NOV 29 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE