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SHORT FORM ORDER

INDEX No. 06-7352
CAL. No. 07-01069-XMG

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7-10-07
ADJ. DATE 8-14-07
Mot. Seq. # 001 - MD
002 - XMD

JOANNE WAGNER, Plaintiff, - against - 347 ASSOCIATES, LLC. and TRITEC ASSET MANAGEMENT, INC., Defendants.	BARBERA & McELHONE, P.C. Attorneys for Plaintiff 428 Route 25A, P.O. Box 5595 Miller Place, New York 11764
	JOHN P. HUMPHREYS, ESQ. Atty for Defts 347 Associates & Tritec 3 Huntington Quadrangle, Suite 102S P.O. Box 9028 Melville, New York 11747
347 ASSOCIATES, LLC., Third-Party Plaintiff, - against - CENTRAL OUTDOOR SERVICES, Third-Party Defendant.	MAZZARA & SMALL, P.C. Attys for 3rd Pty Deft Central Outdoor Serv. 800 Veterans Memorial Highway, Suite LL5 Hauppauge, New York 11788

Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 16 ; Answering Affidavits and supporting papers 17 -19 ; Replying Affidavits and supporting papers 20 - 21; 22 - 23 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion for summary judgment by 347 Associates, LLC. and Tritec Asset Management, Inc. dismissing all claims and cross-claims against them is denied.

ORDERED that the cross motion for summary judgment by third-party defendant Central Outdoor Services dismissing the third-party complaint against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Joanne Wagner on January 15, 2004 at approximately 7:30 a.m. when she slipped and fell on snow in the parking lot of 6 Technology Drive in East Setauket, New York, which was owned by defendant 347 Associates, LLC. ("347 Associates") and managed by defendant Tritec Asset Management, Inc. ("Tritec Management"). The premises contain Stony Brook OB/GYN where plaintiff was employed. Prior to

the accident. Tritec Management entered into a snow removal contract with Central Outdoor Services ("Central Outdoor").

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 plaintiff to fall and sustain permanent serious physical injury. 347 Associates commenced a third-party action against Central Outdoor for common-law indemnification.

Defendants 347 Associates and Tritec Management ("defendants") move for summary judgment in their favor dismissing the complaint and all cross claims against them on the ground that plaintiff has failed to prove the negligence of defendants. Defendants allege that plaintiff's accident occurred while a snow storm was still in progress and that they did not have a reasonably adequate opportunity to remedy the alleged dangerous condition. In the alternative, defendants seek summary judgment for common-law indemnification against Central Outdoor. In support, defendants submit, *inter alia*, the pleadings, the deposition testimony given by plaintiff, Tritec Management's representative, Richard Broskett, Central Outdoor's representative, Christopher Flobeck, the contract between Central Outdoor and Tritec Management as well as the climatological report.

At her examination before trial, plaintiff testified to the effect that she is employed by Stony Brook OB-GYN and, in the morning of January 15, 2004, she slipped and fell in a parking lot in front of her office building. On the night before the accident, it had been snowing and she had no recollection when it had started snowing. When she got up in the morning of the accident, she "had not noticed whether it was [snowing] or not." She observed that, when she left for work that morning, approximately two to three inches of snow had accumulated over the night. When she arrived into the subject parking lot at approximately 7:30 a.m., the entire parking lot was "covered" by snow and it appeared that any portion of the parking lot had not been plowed. After parking her vehicle, she exited the vehicle, carrying a cup of coffee and the pocket book. She looked down at the pavement and saw "undisturbed white snow." After she shut the door, she took two or three steps, looking "straight ahead" and slipped on snow. At the time, it was not snowing.

At his deposition, Richard Broskett testified to the effect that he is a senior vice president of Tritec Management and Tritec Management is responsible for managing the operation of the property owned by 347 Associates, such as "a budget, keeping monthly records of income and disbursements, paying all bills *** going through contracts for different services" including snowplowing.

At his deposition, Christopher Flobeck testified to the effect that he is the owner of Central Outdoor Services ("Central Outdoor") and Central Outdoor was hired by 347 Associates to provide landscaping and snow plowing. Central Outdoor entered into a snow removal contract with Tritec Management on behalf of 347 Associates for the period from November 1, 2003 to April 30, 2004. Mr. Flobeck testified that "the contract basically call for [him to] respond automatically when there is an event." Tritec Management can get additional snow removal services from Central Outdoor "above and beyond" the contract simply by calling Mr. Flobeck. While he had no recollection what the weather was like on January 14, 2004 or January 15, 2004, he testified that the service invoice on January 15, 2004 indicated that it had "snowed a lot, eight to ten inches" and that Central Outdoor performed snow removal operations including five hours of plowing of the subject parking lot, 10 man-hours of

shoveling of the sidewalk, sanding and salting. Nevertheless, he also testified that any invoice or bills did not show what time of the day the snow removal services were performed.

Pursuant to the contract between Central Outdoor and Tritec Management, Central Outdoor was obligated to "monitor the weather 24 hours daily" and plow snow "automatically after two inches of snowfall." The contract states that "[s]now will be plowed by 7 a.m. unless snow falls after 4 a.m. Parking lots and exits will be plowed; salt and sand will be spread after each snowfall with truck sanders. Any precipitation that freezes will be automatically controlled."

The climatological report from nearby areas shows that the precipitation had ended at 3:00 a.m. on the day of the accident, except for traces. Accumulations of 0.02 inches of snow were reported at 3:00 a.m. on the day of the accident. The report also shows that, on the day before the accident, there was another accumulations of 0.02 inches of snow.

While, to prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendants created the condition which caused the accident or that the defendants had actual or constructive notice of the condition (*see,* ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [1995]), the defendants, as the movants in this case, are required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (*see*, ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358, 671 NYS2c 494 [1998]). Liability can be predicated only upon failure of the defendants to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.*** 84 NY2d 967, 622 NYS2d 493 [1994]). A party in control of real property may be held liable for a hazardous condition created on its premises because of the accumulation of snow or ice if it had a reasonably sufficient time from the cessation of the precipitation to remedy the condition (*see*, ***Ronconi v Denzel Assoc.***, 20 AD3d 559, 799 NYS2d 271 [2005]; ***Hassanein v Long Is. R.R. Corp.***, 307 AD2d 954, 763 NYS2d 480 [2003]). Moreover, the issue of actual or constructive notice is irrelevant where defendant had a duty to conduct reasonable inspections of the premises and failed to do so (*see*, ***Weller v Colleges of the Senecas***, 217 AD2d 280, 635 NYS2d 990 [1995]; ***Watson v New York***, 184 AD2d 690, 585 NYS2d 100 [1992]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see*, ***Moons v Wade Lupe Constr. Co.,*** 24 AD3d 1005, 805 NYS2d 204 [2005]; ***Fasano v Green-Wood Cemetery***, 21AD3d 446, 799 NYS2d 827 [2005]).

Here, defendants failed to establish their entitlement to judgment as a matter of law. The climatological report shows that the precipitation had ended at 3:00 a.m. on the day of the accident, except for traces. Plaintiff also testified that approximately two to three inches of snow had accumulated over the night and that, at the time of the accident, it was not snowing. Moreover, there are several questions of fact as to whether a dangerous condition existed on the subject parking lot so as to create liability on the part of defendants, whether defendants exercised reasonable care under the circumstances (*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]; ***Cornell v City of Albany***, 199 AD2d 756, 605 NYS2d 464 [1993]), and whether the "undisturbed white snow" was a proximate cause of the accident (see, ***Hickey v Manhattan & Bronx Surface Tr. Operating Auth.***, 163 AD2d 262, 558 NYS2d 543 [1990]).

In the alternative, defendants seek summary judgment for common-law indemnification against Central Outdoor. Central Outdoor may be liable to defendants for common-law indemnification even in the absence of a duty running to plaintiff, if plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of Central Outdoor (*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*, there remain triable issues of fact as to whether there existed dangerous snow conditions in the parking lot and whether snow accumulated over the night was the proximate cause of plaintiff's fall. Since defendants retained control over certain aspects of safely maintaining the parking lot, 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 Central Outdoor (*see, **Franklin v Omni Sagamore Hotel***, 5 AD3d 348, 772 NYS2d 534 [2004]; ***Mitchell v Fiorini Landscape***, 284 AD2d 313, 726 NYS2d 673 [2001]). These questions of fact preclude the granting of defendants' request for summary judgment for common-law indemnification against Central Outdoor.

Central Outdoor cross-moves for summary judgment dismissing the third-party complaint by 347 Associates and all cross claims against it on the ground that plaintiff's accident occurred while a snow storm was still in progress; that it neither owed a duty of care to plaintiff stemming from its service contract with Tritec Management nor created a dangerous condition which caused plaintiff to slip and fall; and that the snow condition was open and obvious and plaintiff voluntarily chose to walk on snow. In support, Central Outdoor submit only an affirmation of one of its attorneys which attempts to adopt arguments submitted in the motion by defendants.

Pursuant to CPLR 3212 (b), a motion for summary judgment "shall be supported by *** a copy of the pleadings." Central Outdoor failed to submit the pleadings, without which it is not possible to determine whether summary judgment is warranted. In any event, even assuming that all of the papers submitted on the motion by defendants were referred and incorporated, the cross motion by Central Outdoor is denied, as discussed below (*infra*).

Here, Central Outdoor failed to establish its entitlement to judgment as a matter of law. Even in the absence of a duty owed to plaintiff, Central Outdoor may be liable to defendants for common-law indemnification if plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of Central Outdoor (*see*, ***Peycke v Newport Media Acquisition II***, *supra*; ***Baratta v Home Depot USA***, *supra*). Under the snow removal contract with Tritec Management, Central Outdoor was obligated to "monitor the weather 24 hours daily" and plow snow "automatically after two inches of snowfall." While Mr. Flobeck testified that the invoice indicated that, on the day of the accident, it had "snowed a lot, eight to ten inches" and that Central Outdoor performed snow removal operations including five hours of plowing of the subject parking lot and sanding/salting, he also testified that any invoice or bills did not show what time of the day the snow removal services were performed. Moreover, the climatological report shows that the precipitation had ended at 3:00 a.m. on the day of the accident, except for traces. Under the circumstances, there are several questions of fact as to whether Central Outdoor performed snow removal operations prior to the accident and whether plaintiff's injuries are attributable solely to the nonperformance or negligent performance of an act that was solely within the province of Central Outdoor. Moreover, the fact that the snow in the area where plaintiff fell was open and obvious does

not preclude a finding of liability, but rather raises an issue of fact regarding comparative negligence (*see*, ***Sewitch v LaFrese***, 41 AD3d 695, 839 NYS2d 114 [2007]).

Accordingly, the motion by 347 Associates and Tritec Management dismissing the complaint and the cross motion by Central Outdoor for summary judgment dismissing the third-party complaint are denied.

Dated: NOV 30 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION