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SHORT FORM ORDER

INDEX No. 04-22512
CAL. No. 07-00758-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 8-24-07
ADJ. DATE 11-7-07
Mot. Seq. # 007 - MG

SUSAN MONTANO,

Plaintiff,

- against -

QUAIL RUN CONDOMINIUM I, QUAIL RUN CONDOMINIUM IV, QUAIL RUN HOME OWNERS ASSOCIATION, INC., FAIRCHILD PROPERTIES and R. VARELLO LANDSCAPING, INC.,

Defendants.

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QUAIL RUN CONDOMINIUM I, QUAIL RUN CONDOMINIUM IV, QUAIL RUN HOME OWNERS ASSOCIATION, INC. and FAIRFIELD PROPERTIES,

Third-Party Plaintiff,

- against -

R. VARELLO LANDSCAPE CONSTRUCTION, INC.,

Third-Party Defendant.

Upon the following papers numbered 1 to 11 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 6 - 11; Replying Affidavits and supporting papers ___; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#007) by defendant/third-party defendant, R. Varello Landscape Construction, Inc. for summary judgment dismissing the complaint and cross claims is granted.

Plaintiff, Susan Montano, commenced the instant action against all defendants to recover damages for injuries allegedly sustained on February 20, 2003, when she slipped and fell on ice on the sidewalk at her residence at the Quail Run Condominiums IV, located at 42 Summerfield Court, Deer Park, New York. Plaintiff alleges that as she was leaving her condominium to go to work at approximately 7:45 a.m., she slipped on black ice immediately adjacent to the walkway and curb leading to the parking area. There is no dispute that a heavy snowstorm occurred three days prior to the fall. The record reveals that defendant/third-party defendant, R. Varello Landscape Construction, Inc. ("Varello") provided snow removal services on February 17, 2003.

Defendant Varello moves to dismiss plaintiff's complaint, arguing it owed no duty to plaintiff; it did not create the alleged hazardous condition that caused plaintiff to slip and fall; and it had no actual or constructive notice of the alleged hazardous condition. In addition, Varello contends that it did no work on the walkways on the date of the fall and was not responsible for shoveling the walkways since no request was made.

Varello submits, *inter alia*, a copy of the contract between Varello and defendant, Quail Run Condominiums (hereinafter "Quail Run"), the owner of the premises; a copy of an invoice from Varello to Quail Run; copies of the examination before trial transcripts of the plaintiff, Robert Varello, Dennis Legaspi, and David Niederman. The contract dated November 18, 2002, provided that Varello would provide grounds maintenance and snow removal services for a period of one year to Quail Run Condominium Section 4 for the 2002-2003 season. Included in the snow removal services were automatic dispatch of a snow plow upon the occurrence of snowfall from two to eight inches. The contract further specified that snow would be removed from all roadways, entrances and parking stalls. Removal of more than eight inches of snow would be an additional charge. However, the contract did not provide for automatic sidewalk or walkway snow clearance. Additional charges for other heavy machinery, additional men to shovel walkways and sidewalks, snow blowers and ice melt would accrue at the request of the homeowner's association. An invoice dated February 17, 2003 reveals that Quail Run paid additional charges for the removal of twelve additional inches of snow, additional man hours, bobcat usage and snow blower usage.

Plaintiff testified to the effect that it had snowed heavily three days prior to her fall. As she left her condominium on the date of the accident she noticed ice and snow on the walkway but didn't see any ice melt. She was looking straight ahead to the parking lot at the time of her fall. She slipped on the curb and fell to the ground, injuring her left ankle and left lower leg. After the fall, she noticed that the area where she fell was a large patch of black ice. She stated that she was unaware of who actually was responsible for clearing the snow outside her condominium.

At his examination before trial, Robert Varello testified to the effect that he is President of Varello. He recalls dealing mainly with Mr. David Neiderman, the managing agent from defendant Fairfield Properties, the property management company. If there was less than two inches of snow on the ground, he waited for a call from Neiderman. He has no records of what service was rendered on the date of the accident. He recalls that on February 17, 2003, his crew plowed only the roadways and

parking areas. He was told by Neiderman not to remove snow from the sidewalks of section four since there was a superintendent there who performed this service. He also did not routinely spread sand or salt unless a request was made by Neiderman.

Dennis Legaspi testified to the effect that he was a superintendent of Quail Run Condominiums IV at the time of plaintiff's fall. He performed duties such as carpentry, and sprinkler system repairs. He also performed snow removal of the walkways in the early mornings and spread ice melt thereafter, but did not keep records or report this work to the property manager. He purchased ice melt with the company credit card and used it as needed at the building. He received no complaints of ice on the walkways prior to plaintiff's fall. He routinely inspected the walkways around his building for ice and if he observed ice he applied the ice melt to the area. He recalls the storm of February 17, 2003 and that Varello's employees did a good job clearing the snow. If he noticed that the snow plows sprayed snow onto the walkways after plowing, he would go back and clear the snow.

Mr. David Neiderman testified to the effect that he is employed by Fairfield Properties Service, LLP as a property manager. He oversees day to day operations of approximately eight properties, including the condominiums at Quail Run. He managed Condo Four, the complex in which the plaintiff lives, at the time of the subject fall. He received no complaints regarding snow or ice at the area where plaintiff fell. He stated that it was the duty of the superintendent for Condo Four to remove snow and ice from the sidewalks. Sanding, salting and snow removal from walkways by Varello must be first approved by the Condo Board as an additional expense.

In opposition, Quail Run contends that an issue of fact is raised by Mr. Legaspi's testimony wherein he states that at times he would clear the snow which was sprayed by Varello's snow plow onto the sidewalks. Thus, black ice could have been formed by the snow left on the sidewalks after they had been cleared by Legaspi. In addition, plaintiff claims that Varello created a dangerous condition by negligently clearing snow three days prior to the accident.

The threshold question in any negligence action is whether defendant owed plaintiff a duty of care. Ordinarily a breach of a contractual obligation will not be sufficient in and of itself to impose a duty owed to third parties, which would result in tort liability (***Church v Callanan Indus., Inc.,*** 99 NY2d 104, 752 NYS2d 254 [2002]). Only three sets of circumstances create exceptions to this general rule. First, tort liability may ensue if the promissory to the contract, through his affirmative actions, creates or exacerbates a dangerous condition. Second, if a plaintiff reasonably relies upon defendant's continuing performance of a contractual obligation to her detriment, tort liability might be imposed. Third, liability could be imposed if a comprehensive maintenance contract is such that the contracting party entirely assumes the duty of another to maintain the premises safely (***Church v Callanan Indus., Inc.***, *supra*; ***Espinal v Melville Snow Contrs., Inc.,*** 98 NY2d 136, 746 NYS2d 120 [2002]).

However, the courts have repeatedly held that contracts for snow removal such as the one at issue in this case do not create a duty to third persons when the limited snow removal obligation does not amount to a comprehensive and exclusive property maintenance obligation which totally displaced a property owner's duty to maintain the premises (***Espinal v Melville Snow Contrs., Inc.,*** *supra*; ***Eidlisz v Vill. of Kiryas Joel***, 302 AD2d 558; 755 NYS2d 422 [2003]; ***Gordon v Talleyrand Crescent Dev. Corp.***, 304 AD2d 712, 757 NYS2d 794 [2003], *subsequent appeal* 304 AD2d 711). Here, although

Varello assumed a duty to plow the parking lot, roadways and parking stalls owned by Quail Run when the accumulation reached two inches, this limited obligation, which did not include any shoveling, sanding or clearing of sidewalks or inspecting thereof, does not amount to the kind of comprehensive and exclusive maintenance agreement which would result in liability.

In any event, Neiderman stated that it was the superintendent's responsibility to clear snow from the walkways unless Varello was contacted for that purpose. Furthermore, there is no evidence presented by plaintiff that she detrimentally relied in any way on Varello's contractual obligation to plow. Finally, there is no evidence presented that any affirmative acts by Varello created or exacerbated a dangerous condition. Indeed, the uncontradicted evidence is that Varello did not plow on the day of or the day before plaintiff's accident. Contrary to plaintiff's assertions, Varello was not hired to clear the sidewalks. Therefore, it cannot be said that any affirmative actions of Varello created or exacerbated the condition which allegedly caused plaintiff's injuries.

Accordingly, Varello's motion for summary judgment is granted and the complaint and any cross claims as asserted against Varello are dismissed.

Dated: DEC 18 2007

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**