SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ROBERT RAHEB,

Plaintiff(s),

-against-

GIL COURT HOMEOWNERS ASSOCIATION, INC. & PAUL BACANY, JR. and JACQUELINE BACANY, RUGGIERO'S LAWN & MAINTENANCE CO.,

Defendant(s).

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DCM PART 5

Present:
HON. JUDITH N. MCMAHON

DECISION and ORDER

Index No. 100462/2006
Motion Nos. 003, 004, 005, 006

The following papers numbered 1 to 7 were used on this motion this 15th day of January, 2008.

Notice of Motion [003][Paul and Jacqueline Bacany](Affirmation in Support)	**1**
Affirmation in Opposition [Plaintiff]	**2**
Notice of Cross Motion [004][Ruggiero's Law & Main. Co.](Affirmation in Support).....	**3**
Affirmation in Further Support [Ruggiero Lawn & Main. Co.]	**4**
Affirmation in Further Support/Partial Opposition [Ruggiero Lawn & Main. Co.]	**5**
Notice of Cross Motion [005][Plaintiff] (Affirmation in Support)	**6**
Notice of Cross Motion [006][Gil Court Homeowners](Affirmation in Support)	**7**

On January 25, 2005, the plaintiff, while working in his capacity as a New York City Sanitation Worker, allegedly slipped and fell on ice on the roadway adjacent to the property located at 19 Gil Court, Staten Island, New York. The plaintiff alleges that he slipped and fell on black ice that covered the roadway. On February 7, 2006, the plaintiff commenced this action against defendants Gil Court Homeowners Association Inc. [hereinafter Gil Court], as the homeowners association of the property and Paul Bacany, Jr., and Jacqueline Bacany [hereinafter collectively Bacany], as owners of the adjacent property. Defendant Gil Court thereafter commenced a third-party action against Ruggiero's Lawn and Maintenance Company [hereinafter Ruggiero] as the lawn care/snow removal company. Defendant Ruggiero was thereafter joined as a main defendant in the action. After issue was joined and

discovery was completed the defendants Bacany, Gil Court and Ruggiero all separately moved for summary judgment on the grounds that no notice of the alleged black ice was established. Plaintiff also moves for summary judgment against defendant Gil Court on the ground that it had constructive notice of the black ice because it was a recurring condition.

It is well settled that "an owner of real property has a duty to maintain the property in a reasonably safe condition" (*see* Basso v Miller, 40 NY2d 233, 241 [1976]). In order to establish a prima facie case of negligence for a dangerous snow and ice condition, plaintiff must prove that the defendant either created the condition, or had notice of the condition, and had a reasonable time to remedy the situation (Simmons v. Elmcrest Homeowners' Ass'n, 11 AD3d 447, 447 [2d Dept. 2004]; *see* Bergan v. Carlin, 297 AD2d 692, 693 [2d Dept. 2002]).

In support of their motions, both defendants Bacany and Gil Court have submitted evidence in admissible form that they did not create nor possess actual or constructive notice of the alleged condition (*see* Maguire v. Beyer, 31 AD3d 621, 622-623 [2d Dept 2006]). In opposition, the plaintiff has failed to raise a triable issue of fact. The Court notes that plaintiff safely traversed the area only minutes before the accident and never indicated that he noticed any ice (*see* Robinson v. Trade Link Am., 39 AD2d 616, 617 [2d Dept. 2007]). Further, the plaintiff has failed to present any evidence as to how the ice was created or how long it has been on the premises (id.).

Plaintiff's theory against the homeowner's association that when ice or snow had melted it remained on the roadway in the area of plaintiff's fall, and had done so in the past, is (1) not support by any evidence, (2) in complete divergence from the testimony of defendant

Gil Court, by representative Virginia Joseph, who testified that anytime water melted it went down the drain, and (3) is completely different from the theory against the adjacent homeowner. Moreover, plaintiff's theory that the defendant Bacany's possessed constructive notice of the alleged condition because water would run off their property and accumulate on the roadway is again, not supported by any evidence and only mere conjecture. It is well settled that mere speculation and/or general assertions regarding what caused the plaintiff's fall are insufficient to defeat a motion for summary judgment (Robinson v. Trade Link Am., 39 AD3d 616, 617 [2d Dept., 2007][finding that plaintiff's reports on general conditions in the area of plaintiff's fall and not to the exact origin of the specific ice that was the cause of the plaintiff's accident is insufficient to defeat a motion for summary judgment]; Maguire v. Beyer, 31 AD2d 621, 622 [2d Dept., 2006][supporting that mere speculation as to how an accident occurred, without any additional evidence or prior notice, is insufficient for plaintiff to meet his burden]).

Interestingly, this case is in contrast to those cited by the plaintiff considering that here the plaintiff did not present any evidence of a missing gutter or run-off water that could have accumulated and become black ice causing plaintiff's fall (Migli v. Davenport, 249 AD2d 932, 933 [2d Dept., 1998]). Therefore, summary judgment is appropriate.

Ruggiero Lawn & Maintenance Company

Generally, "breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor" (Church v. Callanan Indus., 99 N.Y.2d 104 [2002]). However, there are three circumstances where liability is imposed; first, where, in failing to exercise reasonable care in the performance of

its duties, the [contracting party] launched a force or instrument of harm; second, when the plaintiff detrimentally relied upon the continued performance of the [contracting party]; or lastly, where [the contracting party] has entirely displaced the property owner's duty to maintain the premises safely (Roach v. AVR Realty Co., LLC, 41 AD3d 821, 822 [2d Dept. 2007]; Espinal v. Melville Snow Contractors, 98 NY2d 136, 140 [2002]).

Here, defendant Ruggiero has met its burden establishing a prima facie entitlement to summary judgment (Alvarez v. Prospect Hosp., 68 NY2d, 320, 326 [1986]). Defendant Ruggiero has presented evidence that there was no contractual relationship between it and Gil Court. Ruggiero's snow removal services were utilized only on an as needed basis when called by the Gil Court representative Victoria Joseph. In addition, there is no evidence that defendant Ruggiero created or had any actual or constructive notice of the hazardous condition (Simmons v. Elmcrest Homeowners' Ass'n, 11 AD3d 447, 447 [2d Dept. 2004]). Further, the plaintiff does not oppose this motion for summary judgment and as such, summary judgment is appropriate.

Accordingly, it is

ORDERED that the defendant's Paul Bacany, Jr. and Jacqueline Bacany's motion for summary judgment is hereby granted, and it is further

ORDERED that the defendants Gil Court Homeowners Association, Inc.'s motion for summary judgment is hereby granted, and it is further

ORDERED that defendant Ruggiero's Lawn & Maintenance Company's motion for summary judgment is granted, and it is further

ORDERED that plaintiff, Robert Raheb's motion for summary judgment against defendant Gil Court Homeowners Association is hereby denied, and it is further,

ORDERED that the Clerk enter Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: February 8, 2008

E N T E R,

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Hon. Judith N. McMahon
Justice of the Supreme Court