Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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ROSALIE PIETRAS AS MOTHER AND NATURAL GUARDIAN OF MELANIE PIETRAS, AN INFANT,

Plaintiff(s),

-against-

BANK OF AMERICA, TOWN OF NORTH HEMPSTEAD, AMERICAN FINANCIAL REALTY TRUST, TEMCO BUILDING MAINTENANCE, INC. and L.I.S.R., INC.,

Defendant(s).

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TEMCO BUILDING MAINTENANCE, INC.,

Third-Party Plaintiff(s),

-against-

L.I.S.R., INC.,

Third-Party Defendant(s).

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Index No. 11519/05

Motion Submitted: 12/6/07
Motion Sequence: 001, 002, 003, 004, 005, 006

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXXXXX
Answering Papers.....XXX
Reply.....XXXXX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....XXX

Respective motions pursuant to CPLR § 3212 by defendants Town of North Hempstead, L.I.S.R., Inc. (L.I.S.R.), Temco Building Maintenance, Inc. (Temco), American Financial Realty Trust (AFRT) and Bank of America respectively for summary judgment dismissing the complaint as to each defendant are determined as hereinafter provided.

Motion by defendant Temco to strike the action from the trial court or other alternative relief is denied as moot in view of the decisions on the summary judgment motions decided herewith.

Plaintiff commenced this action to recover damages for personal injuries she sustained on January 26, 2005 when she slipped and fell as a result of the presence of an alleged icy condition at the end of a handicap ramp, where the ramp meets the roadway surface on Irma Avenue at its intersection with Main Street, in Port Washington, New York, adjacent to the Bank of America banking center located at 79 Main Street. More specifically, plaintiff alleges that she "slipped, tripped and fell on ice and an accumulation of snow on the sidewalk/handicap ramp at the subject location. At the time of the accident, defendant/third party plaintiff Temco had an oral agreement with non-party Trammel Crow Corporate Services, a property management company, to perform certain snow removal services at the location. In turn, defendant Temco contracted its snow removal obligation to defendant L.I.S.R.

There are now five motions before the court in which each of the defendants seek summary judgment pursuant to CPLR § 3212 dismissing the complaint. The motions are predicated on the following grounds:

Defendant Town of North Hempstead asserts that it did not own or control the situs of the accident. It neither received prior written notice of the alleged defective condition nor created such condition.

Defendant Temco, the snow removal contractor, and its subcontractor defendant L.I.S.R. maintain that they did not owe a duty of care to plaintiff and had neither actual nor constructive notice of the alleged condition. They maintain that, under the authority of ***Espinal v Melville Snow Contractors, Inc.***, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002), the complaint cannot be sustained.

Defendant AFRT maintains that it had no ownership interest in the subject premises as evidenced by the affidavit of a senior vice president of real estate transactions who attests that AFRT did not own, control, maintain, supervise or have any ownership interest in either the premises or the sidewalk located in front of 79 Main Street.

As lessee of the property, defendant Bank of America contends that it had no obligation, nor did it assume any, to undertake any snow or ice removal on the sidewalk adjacent to its premises.

Pursuant to Town Law § 65-a(1), prior written notice is a condition precedent to maintaining an action against a town arising from a sidewalk defect, and it must be pleaded and proved. (***Cenname v Town of Smithtown***, 303 A.D.2d 351, 352, 755 N.Y.S.2d 651 [2d Dept., 2003]). It is well settled that a municipality that has enacted a prior written notice statute may not be subjected to liability for personal injuries resulting from an improperly maintained sidewalk, unless it received actual written notice of the dangerous condition, its affirmative act of negligence proximately caused the accident, or a special use confers a special benefit to the municipality. (***Hampton v Town of North Hempstead***, 298 A.D.2d 556, 748 N.Y.S.2d 675 [2d Dept., 2002]). The defendant Town of North Hempstead has demonstrated *prima facie* entitlement to judgment as a matter of law by establishing that it neither owned nor controlled the situs of the accident; it did not remove snow and/or ice from the sidewalk at issue, moreover, and it never received prior written notice *vis a vis* a defect at the subject location. Plaintiff has failed to raise a triable issue of fact in response to defendant Town's motion. The complaint must, therefore, be dismissed as to said defendant.

In an action predicated on negligence, a threshold question arises as to whether or not the alleged tortfeasor owed a duty of care to the injured party. (***Espinal v Melville Snow Contrs., supra***). To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty, a breach of that duty and that the breach of such duty was the proximate cause of plaintiff's injury. Absent a duty of care to the person injured, a party cannot be held liable in negligence. (***Marasco v C.D.R. Electronics Security & Surveillance Systems Co.***, 1 A.D.3d 578, 580, 768 N.Y.S.2d 18 [2d Dept., 2003]).

In general, a contract for removal of snow and ice does not give rise to a duty on the part of the contractor to exercise reasonable care to prevent foreseeable harm to a plaintiff arising from the negligent performance of such duties unless: 1) the contract constitutes a comprehensive and exclusive property maintenance obligation that the contracting parties could have reasonably expected would entirely displace the landowner's duty to safely maintain the property; or 2) there is evidence that the injured party detrimentally relied on the contractor's continued performance of such duties; or 3) the contractor's failure to exercise due care in the performance of such duties had advanced to such a point as to have launched a force or instrument of harm. (***Roach v AVR Realty Co.***, 41 A.D.3d 821, 823, 839 N.Y.S.2d 173 [2d Dept., 2007]).

Here, both defendant Temco and defendant L.I.S.R. sustained their burden of demonstrating entitlement to summary judgment dismissing plaintiff's complaint insofar as asserted against each of them. Their contracts to perform snow removal services were not

exclusive and comprehensive agreements, which entirely displaced the property owner's obligation to maintain the premises safely. *(**Linarello v Colin Serv. Sys., Inc.***, 31 A.D.3d 396, 397, 817 N.Y.S.2d 660 [2d Dept., 2006]). Specifically, defendant Temco alleges that, pursuant to its oral agreement, it was responsible for plowing snow in the Bank of America's parking lot and adjacent sidewalks when it snowed two or more inches. If snow removal was required when it snowed less than two inches, property management company Trammel Crow would contact Temco which, in turn, would notify subcontractor L.I.S.R. The services provided by defendant Temco were a limited undertaking as were those provided by defendant L.I.S.R. Any claim that defendant Temco or defendant L.I.S.R. created the alleged icy condition which caused plaintiff's fall would, therefore, according to both defendants, be pure speculation. Neither defendant Temco nor defendant L.I.S.R. had the kind of comprehensive and exclusive property maintenance obligation that the contracting parties could have reasonably expected would displace the landowner's duty to safely maintain the premises. *(**Mitchell v Fiorini Landscape*, Inc.**, 284 A.D.2d 313, 314, 726 N.Y.S.2d 673 [2d Dept., 2001]). There is nothing in the record to suggest otherwise.

Although plaintiff claims that factual issues exist as to when and how the icy condition plaintiff fell on was formed; whether the ice was left from a prior snowstorm or formed from melting and refreezing; whether defendants took reasonable steps to remedy the condition and whether defendants had actual or constructive notice of the condition, the record is devoid of any evidence to show any manner in which defendants Temco and/or L.I.S.R. failed to exercise reasonable care in the performance of their duties. Snow removal was provided three days prior to the accident. Neither defendant had a continuing duty to monitor the area and determine whether additional removal was necessary. Moreover, there is no evidence that either defendant performed snow removal services at the subject location on the day of plaintiff's accident. Even assuming Temco/L.I.S.R. performed an additional salting operation that day, plaintiff has failed to offer a shred of evidence to substantiate a claim that it did so negligently. The mere assertion that an alleged tortfeasor acted in a negligent manner or exacerbated a hazardous condition will not suffice as a basis of liability.

Inasmuch as defendants Temco and L.I.S.R. owed no duty of care to plaintiff; and there is no evidence that either created or exacerbated any hazardous condition by their snow removal operations, and in the absence of any evidence that defendants launched a force of harm or displaced the general duty of the owner of the premises to keep the premises in safe condition, the complaint must be dismissed as to said defendants. *(**Grau v Taxter Park Associates***, 283 A.D.2d 551, 552, 724 N.Y.S.2d 497 (2d Dept., 2001), *lv to app den.* 96 N.Y.2d 721, 759 N.E.2d 372, 733 N.Y.S.2d 373 [2001]).

It is well settled that an owner or lessee of property is under no duty to pedestrians to remove ice and snow that naturally accumulates upon the sidewalk in the front of its premises unless a statute specifically imposes tort liability for failing to do so. *(**Klotz v City***

of New York, 9 A.D.3d 392, 393, 781 N.Y.S.2d 357 (2d Dept., 2004); ***(Archer v City of New York***, 300 A.D.2d 518, 752 N.Y.S.2d 698 [2d Dept., 2002]). In the absence of any such statute, liability will not result unless it is shown that the owner or tenant, by its snow removal, made the condition of the sidewalk more hazardous. ***(Caracciolo v Allstate Ins. Co.***, 40 A.D.3d 798, 799, 835 N.Y.S.2d 740 (2d Dept., 2007); ***Stewart v Yeshiva Nachlas Haleviym***, 186 A.D.2d 731, 589 N.Y.S.2d 792 [2d Dept., 1992]). A property owner may not be held liable for a snow and ice condition unless it created or had actual or constructive notice of the condition and a reasonably sufficient time after the conclusion of the snowfall to remedy it. ***(Olivieri v GM Realty Co., LLC***, 37 A.D.3d 569, 570, 830 N.Y.S.2d 284 [2d Dept., 2007]). To establish the existence of constructive notice, a plaintiff must show that the defect was visible and apparent and that the defect existed for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it. ***(Anthony v New York City Transit Authority***, 38 A.D.3d 484, 485, 832 N.Y.S.2d 63 (2d Dept., 2007), *lv to app den.* 9 N.Y.3d 808, 876 N.E.2d 513, 844 N.Y.S.2d 784 [2007]). A failure to remove all snow is not negligence and liability will not result unless it is shown that the defendant made the sidewalk more dangerous. (***Packes v Bally Total Fitness Corp.***, 278 A.D.2d 212, 716 N.Y.S.2d 910 [2d Dept., 2000]). While it is true that an abutting owner will be responsible for injuries occurring on a sidewalk, which it puts to special use (***D'Ambrosio v City of New York***, 55 N.Y.2d 454, 462, 435 N.E.2d 366, 450 N.Y.S.2d 149 (1982) such as a driveway (***Azzara v Revellese***, 146 A.D.2d 592, 536 N.Y.S.2d 519 (2d Dept., 1989), *app den.* 75 N.Y.2d 701, 551 N.E.2d 106, 551 N.Y.S.2d 905 (1989), the plaintiff must prove that the special use was a proximate cause of the accident. (***Blum v City of New York***, 267 A.D.2d 341, 342, 700 N.Y.S.2d 65 [2d Dept., 1999]). No allegation of special use exists here. Absent proof that the snow and ice removal activities of the defendant owner created or exacerbated the slippery condition, defendant cannot be held liable. ***(Williams v KJAEL Corp.***, 40 A.D.3d 985, 986, 837 N.Y.S.2d 205 [2d Dept., 2007]).

Moreover, inasmuch as defendant AFRT was not the owner of the property on the date of the accident, and did not control, maintain, repair, supervise or have an ownership interest in the property or sidewalk located in front of 79 Main Street, Port Washington, it owed no duty of care to plaintiff. The Master Lease (October 1, 2004) on which plaintiff relies is between an entity known as First States Investors 5200, LLC as landlord and Bank of America, N.A. as tenant. Plaintiff has failed to present evidence to the contrary. Although she refers to paragraph 5.5 of the Lease regarding the lessor's maintenance responsibilities, plaintiff has neglected to submit a complete copy of the Lease nor any evidence to show that defendant AFRT was the owner/lessor of the premises. In any event, under the circumstances extant, the complaint must be dismissed as to defendant AFRT.

Similarly, there is no basis to sustain the complaint against defendant Bank of America predicated on its alleged responsibility pursuant to paragraph 5.6 of the Master Lease (a complete copy of which has not been provided) to keep the leased premises in good

condition and repair. In the absence of any showing that defendant Bank of American owed plaintiff any statutory duty of care as of the date of her injuries, and in the absence of any showing that it created a dangerous or defective condition (through negligent snow removal) or caused such a condition by its special use of the sidewalk, liability may not be imposed against defendant Bank of America for plaintiff's injuries. ***(Klein v Chase Manhattan Bank***, 290 A.D.2d 420, 736 N.Y.S.2d 606 (2d Dept., 2002); ***Booth v City of New York***, 272 A.D.2d 357, 358, 707 N.Y.S.2d 488 [2d Dept., 2000]).

Accordingly, plaintiff having failed to raise a factual issue requiring trial on the issue of the liability of any of the defendants for plaintiff's injuries, their respective motions for summary judgment dismissing plaintiff's complaint, and any cross claims/counterclaims asserted against said defendants are granted. In order to defeat a motion for summary judgment, plaintiff is required to present a material issue of evidentiary fact comprised of more than just mere speculation or conjecture. ***(Cillo v Resjefal Corp.***, 16 A.D.3d 339, 340, 792 N.Y.S.2d 428 (1st Dept., 2005); ***Massaro v. Wellen Oil & Chemical, Inc.***, 304 A.D.2d 538, 756 N.Y.S.2d 887 [2d Dept., 2003]). Plaintiff has failed to meet this burden.

Motion pursuant to 22 NYCRR § 202.21(e) by defendant Temco to strike the matter from the trial calendar and other ancillary/alternate relief is denied as moot. The Complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: February 1, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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ENTERED

FEB 05 2008

COUNTY CLERKS OFFICE