

**Schmidt v 1998 Hawkins Ave., LLC**

2008 NY Slip Op 31832(U)

June 27, 2008

Supreme Court, Suffolk County

Docket Number: 0025010/2004

Judge: Thomas F. Whelan

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INDEX No. 04-25010  
CAL. No. 07-02210-OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 11-27-07 (001)  
MOTION DATE 2-27-08 (002)  
ADJ. DATE 4-11-08  
Mot. Seq. # 001 - MG  
# 002 - MG; CASEDISP

-----X	
CAROL SCHMIDT and ROBERT SCHMIDT,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
1998 HAWKINS AVENUE, LLC. and SOUND	:
VIEW PROPERTY MANAGEMENT, INC. and	:
ISLAND MOBILE, P.C., INC.,	:
	:
Defendants.	:
-----X	
1998 HAWKINS AVENUE, LLC. and SOUND	:
VIEW PROPERTY MANAGEMENT, INC.,	:
	:
Third-Party Plaintiffs,	:
	:
- against -	:
	:
ISLAND MOBILE, P.C., INC.,	:
	:
Third-Party Defendant.	:
-----X	

Upon the following papers numbered 1 to 16 read on this motion (#001) by defendant Island Mobile for summary judgment and the separate motion (#002) by defendants Hawkins and Soundview for the same relief in their favor; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3 ; 4 - 6; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 7 - 8; 9 - 10; 11 - 12; 13 - 14;; Replying Affidavits and supporting papers 15 - 16;; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (#001) by defendant/third-party defendant, Island Mobile, P.C., Inc., for summary judgment dismissing all claims interposed in this personal injury action against it considered under CPLR 3212 and is granted; and it is further,

**ORDERED** that the separate motion (#002) by defendants/third-party plaintiffs, 1998 Hawkins Avenue, LLC and Soundview Property Management, Inc., for summary judgment dismissing all claims interposed against it in this personal injury action is considered under CPLR 3212 and is granted

The plaintiffs commenced this action to recover damages for the personal injuries sustained by plaintiff, Carol Schmidt (hereinafter "plaintiff") in a fall in the parking lot of commercial premises owned by defendant/third-party plaintiff 1998 Hawkins Avenue (hereinafter "Hawkins"). By their amended complaint and bill of particulars, the plaintiffs attribute the injured plaintiff's fall and resulting injuries to a slippery snow and/or ice condition that was made more hazardous due to the improper construction and design of the parking lot. The plaintiffs further allege that the defendants created the icy condition of the parking lot and that they are chargeable with constructive notice thereof since such conditions were "ongoing and recurring".

The subject premises were managed by defendant/third-party defendant, Sound View Property Management, Inc (hereinafter "Sound View"). In its capacity as property manager, Sound View hired defendant/third party defendant, Island Mobile, P.C., Inc. (hereinafter "Island Mobile") to perform snow removal and sanding activities in the parking lot situated on the subject premises.

The plaintiff's fall occurred shortly after 8:30 a.m. on Monday, January 21, 2002. A snow event preceded her fall, as it snowed on both Saturday, January 19, 2002 and Sunday, January 20, 2002. Defendant Island Mobile serviced the premises on Sunday, January 20, 2002 and performed snow removal activities including the salting and sanding of the parking lot. A principal of Island Mobile checked the parking lot at 4:00 p.m on Sunday and observed bare blacktop and no icy conditions.

The plaintiff testified at her deposition that she observed no ice on the surface of the parking lot when she arrived for work on the morning of January 21, 2002 and parked her car in a marked stall. After exiting same, she observed no ice on the surface of the blacktop where she planted her feet. However, the plaintiff slipped and fell to the ground as she turned to proceed towards the building. In her deposition testimony, the plaintiff attributed her fall to black ice because she couldn't see it but her clothes were wet and the ground looked like blacktop. At no time prior to her fall did the plaintiff complain to the defendants about the design, construction or slope of the parking lot or about slippery conditions due to accumulations of ice or snow.

Two non-party co-workers of the plaintiff were also deposed. They testified that they assisted the plaintiff after her fall. During the course of rendering such assistance, each witness observed the existence of black ice on the hill or incline where the plaintiff parked her car and in other areas of the parking lot. One of these witnesses testified that she had observed similar icing conditions on the hill

of the parking lot where the plaintiff parked her car on several previous occasions while the other testified that it was often icy on the hill of the parking lot during the winter months. However, neither of these witnesses complained to the defendants about the condition of the parking lot prior to the plaintiff's fall.

The defendants now move for summary judgment. The plaintiffs oppose both motions on the grounds that material questions of fact exist regarding whether the defendants caused or created the icing condition in the parking lot on which the plaintiff fell or had actual or constructive notice of said condition. For the reasons set forth below, the motion(#001) by Island Mobile is granted as is the separate motion (#002) by defendants, Hawkins and Soundview.

It is well established that a snow removal contractor's contractual obligation to winterize sidewalks and parking lots, standing alone, will not give rise to tort liability to an injured plaintiff unless: (1) in failing to exercise reasonable care in the performance of its duties, the snow removal contractor launched a force or instrument of harm; or (2) the plaintiff detrimentally relied on the continued performance of the contractor's duties; or (3) the snow removal contractor, by its entry into such an expansive and comprehensive contract, has entirely displaced the duty of the owner and/or possessor of the subject premises to maintain them in a safe condition (*see Espinal v Melville Snow Contractors*, 98 NY2d 136, 746 NYS2d 120 [2002]). The moving papers submitted by Island Mobile on its motion for summary judgment were sufficient to establish, prima facie, that it launched no force or instrument of harm in the performance of its snow removal duties which caused or contributed to the plaintiff's fall; that the plaintiff did not detrimentally rely upon Island Mobile's performance of its contractual duties; and that its snow removal was not of such a comprehensive nature that it displaced the obligations of the other defendants to maintain the parking lot in a reasonably safe condition (*see Wheaton v East End Commons Assoc.*, 50 AD3d 675, 854 NYS2d 528 [2<sup>nd</sup> Dept. 2008]; *McConologue v Summer St. Stamford Corp.*, 16 AD3d 468, 792 NYS2d 101 [2<sup>nd</sup> Dept. 2005]). The plaintiffs' opposing papers failed to demonstrate by proof in admissible form that genuine questions of fact exist regarding liability on the part of Island Mobile to the plaintiffs. Island Mobile is thus entitled to an award of summary judgment dismissing the plaintiff's amended complaint.

Island Mobile is further entitled to summary judgment dismissing the third-party complaint. The moving papers established, prima facie, that the claims of the third-party plaintiffs which sound in contribution are without merit. The record is devoid any evidence to tending to establish that Island Mobile owed Soundview a duty independent of Island Mobile's contractual obligations or that it owed a duty to the plaintiff and breached same (*see Wheaton v East End Commons Assoc.*, 50 AD3d 675, *supra*; *Barratta v Home Depot*, 303 AD2d 434, 756 NYS2d 605 [2<sup>nd</sup> Dept. 2003]). Island Mobile is also entitled to summary judgment dismissing so much of the third-party complaint that sounds in common-law indemnity in as much as there was no proof that the plaintiff's injuries were attributable to the non-performance of an act that was solely in the province of Island Mobile (*see Peycke v New Prot. Media Acquisition II, Inc.*, 17AD3d 338, 793 NYS2d 92 [2<sup>nd</sup> Dept. 2005]; *Barratta v Home Depot*, 303 AD2d 434, *supra*). Contrary to the assertions of counsel for the third-party plaintiffs, the third-party complaint cannot be read as asserting cognizable claims for "breach of contract" and/or "contractual

indemnification”. Accordingly, Island Mobile’s motion for summary judgment dismissing all claims interposed in this action against it is granted.

The separate motion (#002) by defendants, Hawkins and Soundview, for summary judgment dismissing all claims interposed in this action against them is also granted. It is well settled that a plaintiff in a slip and fall case must demonstrate that a defendant in control of the subject property either created the dangerous condition at issue or had actual or constructive notice of it (*see Goldman v Waldbaum, Inc.*, 248 AD2d 436, 669 NYS2d 669 [2<sup>nd</sup> Dept. 1998], *lv app den* 92 NY2d 805, 677 NYS2d 780 [1998]). A defendant who has actual knowledge of a recurring dangerous condition may be charged with constructive notice of each specific re-occurrence of such condition (*see Sewitch v LaFrese*, 41 AD3d 695, 839 NYS2d 114 [2<sup>nd</sup> Dept. 2007]; *Brown v Linden Plaza Hous. Co. Inc.*, 36 AD3d 742, 829 NYS2d 571 [2<sup>nd</sup> Dept. 2007]; *Fielding v Rachlin Mgt. Corp.*, 309 AD2d 894, 766 NYS2d 381 [2<sup>nd</sup> Dept. 2003]; *Fruend v Ross-Rodney Hous. Corp.*, 292 AD2d 341, 738 NYS2d 612 [2<sup>nd</sup> Dept. 2002]; *Osorio v Wendell Terrace Owners Corp.*, 276 AD2d 540, 714 NYS2d 116 [2<sup>nd</sup> Dept. 2000]). Liability in such cases will, however, attach only where the plaintiff demonstrates by specific factual references that the defendant had actual knowledge of the allegedly recurring condition (*see Perlongo v Park City 3 & 4 Apartments, Inc.*, 31 AD3d 409, 818 NYS2d 158 [2<sup>nd</sup> Dept. 2006]; *Green v City of New York*, 34 AD3d 528, 825 NYS2d 227 [2<sup>nd</sup> Dept. 2006]).

Here, the moving papers submitted by defendants Hawkins and Soundview were sufficient to establish, prima facie, that they neither created the icing condition nor had actual notice thereof prior to the plaintiff’s fall. The moving papers also established, prima facie, that the parking lot was not improperly designed or constructed by the moving defendants so as to render them liable to the plaintiffs for the damages sued upon without prior notice of said condition. It was thus incumbent upon the plaintiffs to establish by proof in admissible form that genuine questions of fact exist regarding liability on the part of the moving defendants.

Review of the plaintiffs’ submissions reveal that no such questions of fact were raised. The plaintiffs’ opposing papers failed to include due proof tending to establish that the icing condition was caused or exacerbated the moving defendants’ negligent design or construction of the parking lot (*see Regan v Hartsdale Tenants Corp.*, 27 AD3d 716, 813 NYS2d 153 [2<sup>nd</sup> Dept. 2006]; *Richardson v Campenelli*, 297 AD2d 794, 748 NYS2d 31 [2<sup>nd</sup> Dept. 2002]). Nor did the plaintiffs’ submissions include proof that the defendants had actual or constructive notice of the icing condition which allegedly caused the plaintiff’s fall (*see Christal v Ramapo Cirque Homeowners Assoc.*, \_\_\_ AD3d \_\_\_, 857 NYS2d 729 [2<sup>nd</sup> Dept. 2008]; *Murphy v 136 Northern Blvd, Assoc.*, 304 AD2d 540, 757 NYS2d 582 [2<sup>nd</sup> Dept. 2003]).

Although the plaintiffs contend that the moving defendants are chargeable with constructive notice of the “ongoing” and “recurring” icing condition in the area of the parking lot where the plaintiff fell due to the defendants’ possession of actual knowledge of said condition, these contentions are not

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supported by the evidence adduced on the instant motion.

The deposition testimony of the two non-party, co-workers of the plaintiff failed to demonstrate that a question of fact exists on the issue of the defendants' liability under the recurring condition doctrine. While such testimony was sufficiently time and site specific to establish that the area of the parking lot whereat the plaintiff fell repeatedly iced over in winter months, said testimony failed to establish that the defendants had actual notice of said condition. Both of said witnesses testified unequivocally that they did not notify the defendants about the purportedly recurring, defective condition in the area of the parking lot where the plaintiff's fall occurred. The plaintiff also testified that she never notified the defendants about the allegedly recurring condition of the parking lot. Since there was no evidence that the defendants otherwise acquired actual notice of the recurring condition, the plaintiff failed to raise a question of fact regarding whether the moving defendants had actual knowledge of such condition (*see Green v City of New York*, 34 AD3d 528, *supra*; *see also Arrufat v City New York*, 45 AD3d 710, 846 NYS2d 296 [2<sup>nd</sup> Dept. 2007]; *cf. Sewitch v LaFrese*, 41 AD3d 695, 839 NYS2d 114 [2<sup>nd</sup> Dept. 2007]; *Brown v Linden Plaza Housing Co. Inc.*, 36 AD3d 742, *supra*]; *Osorio v Wendell Terrace Owners Corp.*, 276 AD2d 540, 714 NYS2d 116 [2<sup>nd</sup> Dept. 2000]). The motion (#002) by defendants, Hawkins and Soundview, for summary judgment dismissing all claims interposed herein against them is thus granted.

Accordingly, the motions are granted as noted herein. This constitutes the Order and decision of the Court.

DATED: 6/27/08



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THOMAS F. WHELAN, J.S.C.