SHORT FORM ORDER

INDEX No. 05-20827
CAL. No. 08-00343-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-1-08
ADJ. DATE 7-10-08
Mot. Seq. # 002 - MD
003 - XMD

ALBA CASCARELLI, Plaintiff, - against - TRAMMELL CROW RESIDENTIAL SERVICES, TRAMMELL CROW SERVICES, INC., TCR BROOKHAVEN LIMITED PARTNERSHIP, TCR NORTHEAST APARTMENTS, INC. and SIPALA LANDSCAPE SERVICES, INC., Defendants.	BAMUNDO, ZWAL & SCHERMERHORN, L.L.P. Attorneys for Plaintiff 111 John Street New York, New York 10038 ALTREUTER BERLIN, ESQ. Attorney for Defendants Trammell Crow, TCR Brookhaven Limited & TCR Northeast Apartments Market Arcade Complex, 617 Main Street Buffalo, New York 14203 TONETTI & AMBROSINO Attorneys for Defendant Sipala Landscape Services 548 West Jericho Turnpike Smithtown, New York 11787

Upon the following papers numbered 1 to 52 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 - 33 ; Answering Affidavits and supporting papers 34 - 38; 39 - 45; 46 - 48 ; Replying Affidavits and supporting papers 49 - 50; 51 - 52 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Sipala Landscaping Service, Inc. for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the cross motion by defendants Trammell Crow Residential Service Residential Services, Trammell Crow Services, Inc., TCR Brookhaven Limited Partnership, and TCR Northeast Apartments, Inc. for summary judgment is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Alba Cascarelli as a result of a slip and fall accident that occurred on April 10, 2003 at premises known as the Alexan Brookhaven Community. Located in Bellport, New York, the premises is owned by defendant TCR

Brookhaven Limited and managed by MidAtlantic Northeast RS, Inc., s/h/a Trammell Crow Services. According to an affidavit from Scott Woodward, Risk Management Director of Trammell Crow Residential, defendant Trammell Crow Services, Inc. is a Trammell Crow Company entity, with no affiliation with Trammell Crow Residential, and defendant TCR Northeast Apartments, Inc., is the general partner of TCR Brookhaven Limited Partnership. The aforementioned defendants hereinafter will be collectively referred to as the "the Trammell defendants". At the time of the subject accident, there was an agreement between defendant Sipala Landscape Services, Inc. (hereinafter "Sipala") and the Trammell defendants whereby Sipala would perform certain maintenance work and services for the Alexan Brookhaven Community. Plaintiff, a resident at the premises, allegedly slipped and fell on an accumulation of ice as she was walking her dog on a street known as Wysteria Circle. By her bill of particulars, plaintiff alleges that defendants failed to maintain the premises in a reasonably safe and proper condition, and allowed an icy condition to exist on the roadway.

Sipala now moves for summary judgment dismissing all claims against it on the ground that it cannot be held liable either to plaintiff or the Trammell defendants, as it owed no duty to plaintiff and cannot be held liable in contribution to the Trammell defendants. Sipala also argues that there are no facts to support the allegation that its plowing of the subject premises three days prior to the subject accident or failure to apply salt and sand caused or contributed to the alleged hazardous condition. As to the Trammell defendants' contention that Sipala breached their contract by failing to purchase insurance, Sipala argues that it did purchase insurance for the Trammell defendants and, therefore, fulfilled its obligation under the contract. In support, Sipala submits, inter alia, a copy of the pleadings, transcripts of plaintiff's and Sipala's deposition testimony, an incident report, a copy of the additional insured endorsement, and an affidavit of Michael Sipala. In the affidavit, Mr. Sipala states that according to the company's snow and ice removal report, three inches of wet snow was plowed at Alexan Brookhaven on April 7, 2003. He further states in that the work done by Sipala on that day was done in a workmanlike manner and that no complaints were received regarding the work.

The Trammell defendants cross move for summary judgment dismissing plaintiff's complaint, arguing that they had no notice of any dangerous condition on the subject premises. The Trammell defendants also move for summary judgment against Sipala on the basis that the contract between the parties obliges defendant Sipala to indemnify the owners of the property for claims arising out of its snow removal services. In support of their motion, defendants submit, inter alia, a copy of the pleadings, a transcript of the parties' deposition testimony, the agreement between defendant Sipala and Trammell Crow Residential Services, and a certified report of the National Climatic Data Center in Islip, New York for April 2003.

In opposition to the motions, plaintiff contends that Sipala's summary judgment motion should be denied, because Sipala has not satisfied its prima facie burden of establishing that its snow removal efforts did not create or exacerbate the condition of the subject premises. In support, plaintiff submits a snow and ice removal report prepared by Sipala, a transcript of plaintiff's deposition testimony, and a copy of a certified report of the National Climatic Center in Islip. In opposition to the Trammell defendants' cross motion for summary judgment, plaintiff argues that there is an issue of fact regarding whether Sipala entirely displaced the Trammell defendant's duty to maintain its premises in a reasonably safe condition. Plaintiff also argues that the Trammell defendants did not satisfy their prima facie

burden of demonstrating that they lacked constructive notice of the condition on its premises. In support, plaintiff submits, inter alia, the agreement between the defendants, a transcript of the parties' deposition testimony and a copy of a certified report of the National Climatic Center in Islip.

In opposition to the Trammell defendants cross motion for summary judgment, Sipala argues that the Trammell defendants were excluded from coverage by the insurance company, because they failed to provide reasonably prompt notice of the claim. In support of its argument that an issue of fact exists as to whether it breached its insurance obligation, Sipala submits a letter from a claims representative employed at the insurance company stating that Trammell Crow Northeast was in breach of the policy conditions and notice provisions set forth within the policy and coverage is denied.

At her examination before trial, plaintiff testified that she left her apartment to go walk her dog at approximately 7:30 a.m the day of the accident. She testified that she believes it snowed a day or two before the accident. She testified that she does not know what the temperature at the time of the accident, but knows it was cold outside. She testified that as she was walking in the parking lot, she observed some areas were clear and other areas had ice and slush. Plaintiff further testified that the entire parking lot area was icy and that she slipped on a large patch of ice.

Michael Sipala testified that in the winter of 2002-2003, Sipala had an agreement with Trammell Crow Residential Services to perform snow plowing services at the Alexan Brookhaven Community. He testified that its services included sanding and salting ice patches. He testified that based on a review of internal records, his son, Michael Sipala III among other employees performed snow removal services on April 7, 2003 at the subject premises. He testified that the records indicate that they did not apply sand and salt to the parking lot on that date. He further testified that in general, the decision whether to apply sand and salt was determined by Sipala employees based on temperature, weather and road conditions.

Susan Herbert, who was employed by Trammel Crow Residential Services as an assistant property manager for the Alexan Brookhaven Community, testified that her duties included collecting rents, taking maintenance requests, and overseeing daily operations. She testified that she never heard of any complaints regarding Sipala's services prior to the subject accident. She further testified that she never had a problem with Sipala's snow removal services.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

Fundamental to recovery in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). To establish a prima facie case of liability in a slip and fall accident involving snow and ice, a plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*see* ***Zabbia v Westwood, LLC***, 795 NYS2d 319 [2005]; ***Tsivitis v Sivan Associates, LLC***, 292 AD2d 594, 741 NYS2d 545 [2002]). Furthermore, a plaintiff seeking to hold a snow removal contractor liable must show that by virtue of a defendant's snow removal contract, defendant displaced the duty of the landowner to safely maintain the premises (***Espinal v Melville Snow Contractors, Inc.***, 283 AD2d 546, 724 NYS2d 893 [2001]) and assumed a duty to plaintiff to exercise reasonable care to prevent all foreseeable harm to the plaintiff such that the plaintiff detrimentally relied on the defendant's performance of the defendant's duties under the snow removal contract (*see* ***Palka v Servicemaster Management Services***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Pavlovich v Wade Associates, Inc.***, 274 AD2d 383, 710 NYS2d 615 [2000]), or that the defendant's actions "advanced to such a point as to have launched a force or instrument of harm" (***Pavlovich v Wade Associates, Inc.***, *supra*).

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (***Espinal v Melville Snow Contrs.***, *supra*; ***Figueroa v Lazarus Burman Assocs.***, 269 AD2d 215, 703 NYS2d 113 [2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, the contractor is required to establish that it did not perform any snow removal operations related to the condition which caused plaintiff's injury or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (***Prenderville v International Serv. Sys.***, 10 AD3d 334, 781 NYS2d 110 [2004]).

Here, the contract between the Trammel defendants and Sipala does not specify any obligation with respect to removal of snow and ice. The contract is ambiguous and the terms outlining what work Sipala was to perform is vague. As it is a question of law whether or not a contract is ambiguous (***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (*see* ***Chimart Assoc. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]). If a contract is ambiguous, and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (***Amusement Bus. Underwriters v American Intl. Group***, 66 NY2d 878, 880, 498 NYS2d 760 [1985]). Here, Sipala failed to meet its burden in its application for summary judgment dismissing plaintiff's claim as there are issues of fact as to its contractual obligation. Moreover, Sipala's affidavit and deposition testimony fails to show prima facie that its snow removal activities at the site of the subject accident did not create or exacerbate the icy condition at the subject premises (*see* ***Keese v Imperial Gardens Assoc., LLC*** 36 AD3d 666, 828 NYS2d 204 [2007]; ***Dugan v Crown Broadway, LLC***, 33 AD3d 656, 821 NYS2d 896 [2006]). Mr. Sipala could not testify as to what snow removal work was actually performed at the subject premises on April 7, 2003 or why salt and sand were not applied to the surface on that date. As to Sipala's application for summary judgment dismissing the purported cross claims asserted against it by the Trammell defendants, the Trammell defendant's answer

does not contain any cross claims. Therefore, Sipala's application for summary judgment dismissing any cross claims against it is denied.

To prove a prima facie case of negligence in a slip and fall case against a defendant landowner, a plaintiff is required to show that the defendant created the condition which caused the accident or had actual or constructive notice of such condition on its property (*see* ***Scoppettone v ADJ Holding Corp.***, 41 AD3d 693, 839 NYS2d 116 [2007]; ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (*see* ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2004]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]).

Here, the Trammell defendants submitted climatological data demonstrating that the average temperature during the period after the snowfall and plaintiff's accident was above-freezing. The Trammell defendants also point to the testimony of Ms. Herbert, who testified that there were no complaints regarding how defendant Sipala performed its services prior to the accident. However, there was no testimony regarding the condition of the subject premises in the days before the accident, nor was there any testimony regarding inspection of the subject premises during the same time period. Therefore, the Trammell defendants failed to make a prima facie showing that they lacked constructive notice of the alleged icy condition in the roadway (*see* ***Musso v Macray Movers***, 33 AD3d 594 [2006]; ***South v K-Mart Corp.***, 24 AD3d 748 [2005]).

The branch of the Trammell defendants' motion for summary judgment against Sipala for contractual indemnification is denied as no cross claim for indemnification was asserted in the pleading.

Accordingly, the motion by defendant Sipala and the cross-motion by defendant Trammell for summary judgment are denied

Dated: September 29, 2008

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION