SHORT FORM ORDER

INDEX No. 05-14146
CAL. No. 08-00542-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 5-12-08 (003)
MOTION DATE 6-13-08 (004 & 005)
ADJ. DATE 9-10-08
Mot. Seq. # 003 - MG
004 - MG
005 - XMG

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JEAN PORDON,

Plaintiff,

- against -

HEALTH INSURANCE PLAN OF GREATER NEW YORK, K.A.M. MAINTENANCE CORP. and ISLAND MOBILE PRESSURE CLEANING INC. i/s/h/a ISLAND MOBILE P.C., INC.,

Defendants.

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HEALTH INSURANCE PLAN OF GREATER NEW YORK,

Third-Party Plaintiff,

- against -

K.A.M. MAINTENANCE CORP.,

Third-Party Defendant.

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K.A.M. MAINTENANCE CORP.,

Second Third-Party Plaintiff,

- against -

ISLAND MOBILE P.C., INC.,

Second Third-Party Defendant.

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Upon the following papers numbered 1 to __66__ read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 14 ; Notice of Cross-Motion and supporting papers (004) 15 - 30; (005) 31-49 ; Answering Affidavits and supporting papers 50-58; 59-60; 61-62; 63-64 ; Replying Affidavits and supporting papers 65-66; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the defendant/third-party defendant and second third-party plaintiff, K.A.M. Maintenance Corp, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff has failed to state a cause of action, is granted and the complaint is dismissed; and it is further

ORDERED that this cross-motion (004) by the by the defendant/third-party plaintiff, Health Insurance of New York, pursuant to CPLR 3212 dismissing the complaint and all cross claims asserted against it, is granted; and it is further

ORDERED that this cross-motion (005) by the defendant/second third-party defendant, Island Mobile Pressure Cleaning, Inc., pursuant to CPLR 3212 dismissing the complaint and the second third party complaint and all cross claims asserted against it, is granted.

The complaint of this action arises out of a slip and fall incident wherein the plaintiff, Jean Pordon, claims to have sustained injury consisting of a trimalleolar fracture/dislocation of the left ankle with an open reduction and internal fixation, at the premises located at 640 Hawkins Avenue, Ronkonkoma on January 3, 2005. The plaintiff alleges the defendants had actual and constructive notice of the dangerous and defective condition existing in the parking lot where the incident occurred; failed to correct the condition and failed to warn the plaintiff. Health Insurance Plan of Greater New York (hereinafter HIP) owned the premises where the incident occurred and commenced a third-party action against K.A.M. Maintenance Corp. (hereinafter KAM) for breach of contract, failure to provide insurance, contractual and common law indemnification, and contribution. KAM, in turn, commenced a second third-party action against Island Mobile, PC, Inc.(hereinafter Island Mobile) from whom it seeks indemnification and claims that Island Mobile breached it contract and duties in providing snow plowing and sanding services at the premises. In its third-party answer, KAM has asserted a cross-claim against HIP, the defendant/third party plaintiff, for indemnification and to be held harmless. In the second third-party answer, Island Mobile has asserted a cross-claim against defendant HIP for indemnification and/or contribution; and a counterclaim against the second third-party plaintiff, KAM for indemnification and/or contribution.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49

NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (003) KAM has submitted, inter alia, copies of the pleadings, answers and bill of particulars; an attorney's affirmation; and copies of the transcripts of the examinations before trial of Jean Pordon, HIP by Donald Ryan, and KAM by Kyle Mendelsohn and Island Mobile by Robert Kole.

In support of cross motion (004) HIP has submitted, inter alia, copies of pleadings and answers; an attorney's affirmation; plaintiff's bill of particulars; copies of the transcripts of the examinations before trial of Jean Pordon, Donald Ryan on behalf of HIP, Kyle Mendelsohn on behalf of KAM, and Robert Kole on behalf of Island Mobile; a copy of a maintenance agreement between KAM, HIP and Hawkins Realty Group; a copy of a contract running in effect until March 31, 2005, and various photographs.

In support of cross motion (005) Island Mobile has submitted, inter alia, an attorney's affirmation; copies of the pleadings and answers and bill of particulars; copies of the transcripts of the examinations before trial of Jean Pordon, Donald Ryan on behalf of HIP, Kyle Mendelsohn on behalf of KAM, and Robert Kole on behalf of Island Mobile; a copy of a maintenance agreement between KAM, HIP and Hawkins Realty Group; a copy of a contract running in effect until March 31, 2005.

The plaintiff, Jean Pordon, testified at her examination before trial that on January 3, 2005 at about 11:30 a.m. she was in the HIP parking lot in Lake Ronkonkoma for a doctor's appointment. She stated there were no handicapped parking spots where she usually parked so she had to park further down from the building by the sidewalk. It had snowed the day before but it was sunny out. About an hour later after she had finished her appointment, she returned to the parking lot to return to her car; she walked with her walker on the sidewalk, stepped off the curb, walked up to her car, put her walker into the driver's side rear of her car, and while she was still facing the car with the rear door opened, her foot went out from under her and she fell to the ground in a sitting position with her left foot under her. About five or ten minutes later someone came by to help her as a man had seen her fall. Her doctor came out and looked at her ankle and foot. She stated that in the parking area where she was there was a slight/moderate incline (enough to be annoying) which inclined up toward the building where she parked and she said there was sand all over. She also stated she told the lady who was helping her after she fell that she slipped on the sand. She testified she never noticed any ice or snow in the parking lot and only realized it was sandy after she fell. When asked if there was any accumulation of sand in the area where she fell, she stated that she did not know, and she did not remember if the sand that she saw was evenly spread around or if it was in greater concentrations in some areas.

Donald Ryan testified that he is employed by HIP of Greater New York as Director of Real Estate

Services and that HIP owned the premises where the within incident occurred. HIP, he stated, has a service contract with Queens Long Island Medical Group which occupies the premises and provides medical services for HIP patients. He testified that the premises consists of three buildings, each independently owned by HIP, Hawkins Realty Corp., and Hawkins Medical, with cross easements for access to the parking lot and grounds, and that all three contracted with KAM Maintenance for snow and ice services for the grounds. He stated some of the parking spots at 640 Hawkins Avenue, but not the handicapped parking spots, are on an incline. He stated that the Queens Long Island Medical Group had a maintenance person as an on-site handyman who performed general maintenance. He also testified that HIP had a project manager who reviewed the buildings, would see what the issues are for leaks, roofing, plumbing, electric, and determines what the capital budget planning has to be. He stated it would be the center administrator from the Queens Long Island Medical Group who was to oversee the snow or ice work done at the building. He also thought KAM subcontracted the work, but that HIP was not a party to that contract. He stated that since HIP purchased the property in 1986, that it did not resurface the parking field.

Kyle Mendelsohn testified at his deposition of January 12, 2008 that he previously testified on December 1, 2006 in this matter and that he is the president of KAM which is in the business of property management. He entered into an agreement for 622, 624, 640 and 650 Hawkins Avenue, Ronkonkoma in November 2004 to manage those properties, and that agreement was in effect in January, 2005. It was his understanding that pursuant to that contract, he was to hire subcontractors to preform the duties on the outside of the properties. He usually visited the premises about once a week at a minimum, drove through the parking areas, checked on the condition of things, and if he felt something was unsafe or hazardous, would have addressed it, and if was something which required work by a subcontractor, would hire someone to do it. Before January 3, 2005 no one complained about too much sand in the parking lot at 640 Hawkins Avenue and he knew of no one else falling due to too much sand in the parking lot. He never observed too much sand in the parking lot prior to the incident, and stated that tenants had his cell phone number to contact him if they needed something, twenty four hours a day, seven days a week. He testified that seasonal cleaning was done at the end of summer, fall at which time all leaves would be cleaned up in October and November, and winter wherein all sand would be cleaned out of the parking lot, all as determined by KAM. There was a company hired to clean up papers, litter or anything on the walkways and sidewalk areas. KAM hired Island Mobile Pressure Cleaning to do snowplowing, salting and sanding for ice in the parking lot at the four properties, and sanding was to be done whenever snowplowing was done. On other occasions, if there was ice in the parking lot, he would have Island Mobile salt and sand the parking lot. He did not, and he knew of no one, who complained to Island Mobile about too much sand in the parking lot.

Robert Kole testified on behalf of Island Mobile Pressure Cleaning, Inc. that he is the president of Island Mobile which has been in business since 1983, and is in the business of pressure cleaning, serving commercial customers, and a snowplowing business serving commercial establishments, for which he has thirteen subcontractors who were used for snow removal. He stated he has been working for the previous owners at the Hawkins Avenue property since 1991 on a continuous basis and personally did the plowing and sanding there. He entered into a contract with KAM, which was in effect in January 2005, and provided for sanding, salting, plowing and clearing of the sidewalks. Safe Step Calcium was used as a de-icer and was placed by hand on steps and ramps, and a rotary device was used to spread it on the

sidewalk. The contract called for plowing at two inches of snow and then sanding and salting the driveways and interior roadways. He used a premixed, 60/40 sand/salt mixture which was applied with a highway road sander with a gas driven conveyor system sand and salt spreader mounted on a truck, and the spreader was pre-set for the season at just enough to cover the parking lot with a light coating. On December 27, 2004, prior to the incident, there was five inches of snow so plowing and sanding were done. On December 28, 2004, he states, he re-sanded and salted the lots in certain areas. No work was done between December 29, 2004 and January 3, 2005. He stated there were always traces of sand in the parking lot and he did not know when the lot was cleaned up. Mr. Kole testified that he was asked by KAM to be named as an additional insured on his insurance policy and he provided the insurance through Farm Family.

The maintenance agreement for the period November 1, 2004 through October 30, 2006, entered into between KAM, HIP and Hawkins Realty Group, provides, inter alia, that KAM is to provide supervisory services and provide the liaison between the property owners and the subcontractors who will perform the actual physical maintenance and repair services to the exterior common areas of the office park, including the sidewalks, parking lots and landscaped areas of the office park. The actual maintenance and repair services to maintain the exterior, common areas of the office park were set forth to include, but not limited to, snow removal and seasonal clean ups. The maintenance fee charged by KAM included the cost of comprehensive general liability insurance in an amount not less than one million dollars which KAM agreed to provide for the duration of the contract period for HIP, Hawkins Realty and Hawkins Medical. Additionally, KAM agreed with regard to the services to be provided that it would only contract for services from subcontractors who hold comprehensive general liability insurance in an amount of not less than one million dollars combined single limit. HIP, Hawkins Realty and Hawkins Medical also represented that they would hold comprehensive general liability insurance in an amount of not less than one million dollars combined single limit, insuring in addition to any other coverages, the sidewalks and parking lots owned by each owner. HIP, Hawkins Realty, Hawkins Medical and KAM each agreed to indemnify, protect and hold harmless each other and their officers, agents, and employees from and against any and all claims, demands, losses, damages, causes of action, suits and liability of every kind, including all expenses of litigation, court costs, and attorney's fees, and including injury to or death of any person.... The policy further provides that where such claims, demands, losses, damages, causes of action, suits or liability, having been caused, in whole or in part, by the joint or concurrent acts or omissions of any of the parties hereto, each such party's duty of indemnification shall be limited in proportion to their respective allocable share of such joint or concurrent acts or omissions. It is further the express intention of all parties hereto, that each of them shall be liable for the consequences of their own acts or omissions, and for the consequences of the acts or omissions of their own officers, agents, employees, or subcontractors whether those acts or omissions are the sole, joint or concurring cause of any claims, demands, losses, damages, causes of action or other liabilities, to the extent such consequences are attributable to each such party. Each party represents, covenants and agrees to be solely and exclusively responsible for any injury, loss or damage to persons or property related to the sidewalks or parking areas owned by the respective parties prior to the date of the Agreement and agrees to indemnify and hold the others harmless for any claims, damages or costs.... The contract entered into between Island Mobile and KAM covered the period from December 1, 2004 until March 31, 2005 and provides for sanding only for freezing rain, ice control re-freezing of melt down, clearing walks and steps and ramp and treating with Safe Step De-Icer, and snowplowing and sanding for snow fall of

two inches or more up to a total of eight inches in the parking lot and interior roadways. Drifts or snow piles are removed as per requests. The invoice from Island Mobile dated January 3, 2005 indicates snow plowing was done according to the contract.

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (***Spiegel v Fine Paint Co.*** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see*, ***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731[2001].

To prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 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 (***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 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [2d Dept 1994]). Constructive notice is a legal inference from established facts (***Hudson v Union Free School District No. 2, Town of Geddes and Town of Camillus,*** 55 AD2d 1003, 391 NYS2d 487 [4th Dept 1977]). For purposes of a slip and fall injury, neither a general awareness that litter or some other dangerous condition may be present is legally sufficient to charge a defendant with constructive notice (***Sutton v Bruno's Village, Inc.***

Based upon the foregoing, it is determined that HIP, KAM and Island Mobile have demonstrated prima facie entitlement to summary judgment dismissing the complaint. It is undisputed that HIP, as owner of the premises where the incident occurred, entered into an agreement with KAM to provide supervisory services and provide the liaison between the property owners and the subcontractors who performed the actual physical maintenance and repair services to the exterior common areas of the office park, including the sidewalks, parking lots and landscaped areas of the office park. KAM, in turn, entered into an agreement with Island Mobile for the sanding and plowing of the parking lot. Donald Ryan testified that HIP had a project manager who oversees the premises. KAM, by way of Kyle Mendelsohn, inspected the parking lot and premises at least once weekly. KAM, HIP, and Island Mobile all acknowledge that the parking lot was to be sanded and salted pursuant to the contract terms, and they all denied knowledge that there was an accumulation of too much sand on the parking lot and received no complaints concerning the same after the sanding and salting was conducted following the December 27, 2004 snow storm. Robert Kole testified that he used a premixed, 60/40 sand/salt mixture which was applied with a highway rotary road sander with a gas driven conveyor system sand and salt spreader

mounted on a truck, and that the spreader was pre-set for the season at just enough to cover the parking lot with a light coating. Here the defendants have met their burden of demonstrating that they did not create a dangerous condition in the parking lot by virtue of the within described sanding operation (*see, **Schleuter v Town of Brookhaven,*** 304 AD2d 641, 759 NYS2d 90 [2nd Dept 2003]), and thus have no liability relating to the cause of the accident.

The plaintiff, in opposing the motion, has submitted, inter alia, an attorney's affirmation and various invoices, contracts and copies of photographs. In reviewing the plaintiff's testimony submitted with the moving papers, it is determined that the plaintiff testified that she was caused to slip on the sand in the parking lot and never noticed any ice or snow in the parking lot. She stated she only realized it was sandy after she fell. When asked if there was any accumulation of sand in the area where she fell, she stated that she did not know, and she did not remember if the sand that she saw was evenly spread around or if it was in greater concentrations in some areas. The photographs do not show sand on the parking lot surface, although the plaintiff agrees that they represent the area where the incident occurred.

Based upon the foregoing, the plaintiff has not raised a factual issue to preclude summary judgment as she has not submitted any testimony or admissible proof of actionable negligence by the defendants that the sand in the parking lot was spread unevenly or excessively to submit the issue to the jury to determine whether the defendants negligently created a dangerous condition in the parking area, or failed to keep it in a reasonably safe condition for its ordinary use; such determination would require mere speculation by the jurors (*see, **Errante v City of New York,*** 74 AD2d 122, 427 NYS2d 18 [1st Dept 1980]; ***Hofstein v Bronx Water Works, Inc.*** 265 AD2d 493, 39 NYS2d 498 [1st Dept 1943; ***Halpin v New York Railways Corporation,*** 250 AD2d 613, 294 NYS2d 946 [1st Dept 1937]).

Accordingly, motions (003), (004) and (005) are granted and the complaints in the main action and the first and second third-party actions, and the related cross claims are dismissed with prejudice.

Dated: 8 Oct. 2008

J.S.C.

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION