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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

MARIA VILLEGAS x

- against -

BJ'S WHOLESALE CLUB, INC., et al. x

Index Number 17124 2006

Motion Date August 19, 2009

Motions Cal. Numbers 31, 32, 33

Motion Seq. Nos. 2, 3, 4

The following papers numbered 1 to 27 read on this motion by Sweeping Plus Corp. (Sweeping), to dismiss the third-party complaint; motion by BJ's Wholesale Club Inc., (BJ's) and Whitestone Development Partners (Whitestone), to dismiss the complaint and motion by Meadowlands Contracting, Inc. (Meadowlands), to dismiss the third-party complaint, insofar as asserted against it.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	1-12
Answering Affidavits - Exhibits.....	13-20
Reply Affidavits.....	21-27

Upon the foregoing papers it is ordered that the motions are decided as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on February 19, 2006, when she slipped and fell in the parking lot adjacent to BJ's, located in College Point, New York. Plaintiff alleges that she slipped on a chunk of "black ice," which caused her to fall. Plaintiff commenced this action against BJ's and Whitestone, the owners of the subject property. Whitestone subsequently commenced a third-party action against

Meadowlands and Sweeping, its snow removal and cleaning subcontractors, respectively. Sweeping moves to dismiss on the grounds that, inter alia, it was not responsible for snow removal at the premises and, in any event, it had no notice of the alleged condition which caused plaintiff's fall. BJ's and Whitestone move to dismiss on the ground that it had no notice of the alleged dangerous condition on the premises; and Meadowlands moves to dismiss on the ground that it owed no duty to plaintiff. The motions are opposed.

Upon her examination before trial, plaintiff testified as follows: The accident happened on February 19, 2006, at around 4:00 P.M., in the parking lot of the BJ's store in College Point. Plaintiff had no difficulty seeing. She had gone to the shopping center with her daughter and grandson, in her daughter's minivan. Plaintiff's daughter parked the minivan and plaintiff and her party walked into the BJ's store without incident. Plaintiff testified that at no time prior to her fall did she see any ice or other defects anywhere in the parking lot. Plaintiff and her party shopped at BJ's for approximately 1 ½ hours. The accident happened as they were leaving, at the minivan, in the parking lot, as plaintiff and her daughter were loading groceries into the vehicle after shopping. Prior to the fall, plaintiff was on the passenger side of the minivan, which was in the same position that it occupied when plaintiff alighted without incident from the minivan a short time before to go shopping. Plaintiff slipped and fell to the ground. At no time prior to the accident did plaintiff see ice or any other defect at the spot where she slipped and fell. Only after the accident did plaintiff see, for the first time, a chunk of loose ice that was "black" because it was dirty and covered in dust or dirt or other such grime. Plaintiff testified that the loose chunk of dirt-covered ice was next to the minivan and part of it was protruding from underneath the vehicle.

Sweeping's Motion for Summary Judgment

Whitestone's managing agent testified, upon her examination before trial, that Meadowlands provided snow removal services at the subject parking lot. Whitestone's property manager also testified that in 2006, Meadowlands was the outside vendor that provided snow removal services at the subject parking lot. This witness (Raphael Vibar) also testified that he was familiar with Sweeping as the sweeping/porter contractor for the subject location. According to Vibar, Sweeping was responsible for daily parking lot sweeping and clean-up but that those duties did not include any snow removal and they were not responsible for maintaining any snow piles at the subject location.

Sweeping's president, Michael Cristina, also testified that Sweeping was hired to sweep the subject parking lot and pick up litter after hours; his workers used a Schwartz vacuum sweeper to perform this work; Sweeping never received any complaints regarding Sweeping's work or the condition of the parking lot. In the event of snowfall, Cristina

testified, Sweeping would not sweep the parking lot for a few days until the snow had been cleared from the lot as the vacuum sweeper did not work in the snow.

As the record establishes that Sweeping at no relevant time undertook to remove snow from the parking lot, and did not control the manner in which Meadowlands removed snow from the parking, Sweeping's motion for summary judgment is granted (*see Ortiz v Citibank*, 62 AD3d 613 [2009]).

BJ's and Whitestone's Motion for Summary Judgment

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Britto v Great Atl. & Pac. Tea Co.,* 21 AD3d 436 [2005]; *Joachim v 1824 Church Ave.,* 12 AD3d 409 [2004]). Only after the defendant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Joachim v 1824 Church Ave., supra*). Under the circumstances, the defendants failed to meet its initial burden as the movant. There was no evidence submitted by defendants as to the weather conditions preceding the accident, the practices of their employees in snow removal or salting of the ice on the property, and the duration of the existence of the patch of ice on which plaintiff fell. Moreover, there was no deposition testimony on behalf of defendants establishing that any of their employees regularly inspected the parking lot (*see Corsaro v Stop and Shop*, 287 AD2d 678 [2001]).

Moreover, even though the court need not consider the papers in opposition because defendants failed to make a prima facie showing (*Winegrad v New York Univ. Med. Ctr., supra*; *Joachim v 1824 Church Ave., supra*), it is noted that a property owner may be held liable for a hazardous condition on the premises created by snow or ice only if the owner had actual or constructive notice of the condition and had a reasonably sufficient time after the conclusion of the snowfall or temperature fluctuation to remedy the situation (see *Brunson v National Amusements,* 292 AD2d 413 [2002]; *Gam v Pomona Professional Condominium,* 291 AD2d 372 [2002]; *see also Simmons v Metropolitan Life Ins. Co.,* 84 NY2d 972 [1994]). Plaintiff testified that she was caused to slip and fall on thick, dirty and black ice that covered an area of the parking lot. Plaintiff submitted evidence that the weather report shows that, prior to the accident, the last significant snowfall was on February 12th when 23.3 inches of snow fell. These facts are sufficient to establish that defendants had constructive notice of the icy condition of the lot (*see Gannon v All Car Movers, Ltd.*, 18 AD3d 702 [2005]; *Priester v City of New York*, 276 AD2d 766 [2000]). Accordingly, the motion by BJ's and

Whitestone to dismiss the complaint on the ground that they lacked noticed of the alleged icy condition in the parking lot, is denied.

Motion by Meadowland

By the express terms of the contract, Meadowland was obligated to plow only when the snow accumulation had ended and exceeded two inches. This contractual undertaking is not the type of "comprehensive and exclusive" property maintenance obligation contemplated by *Palka v Servicemaster Mgt. Servs. Corp.* (83 NY2d 579 [1994]). Meadowland did not entirely absorb Whitestone's duty as a landowner to maintain the premises safely (Id. at 584). Indeed, under the contract, Meadowland was obligated to plow when the accumulation reached two inches or more; a final clearance of snow was to be performed at the dissipation of snowfall; and Meadowland was not obligated to return to perform snow and ice removal efforts unless contacted to do so. Although Meadowland undertook to provide snow removal services under specific circumstances, Whitestone at all times retained its landowner's duty to inspect and safely maintain the premises. Meadowland was under no obligation to monitor the weather to see if melting and refreezing would create an icy condition.

Moreover, generally, a snow removal contractor's contractual obligation for snow removal, 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, it launched a force or instrument of harm, (2) the plaintiff detrimentally relied on the continued performance of the snow removal contractor's duties, or (3) the snow removal contractor has entirely displaced the property owner's duty to maintain the premises safely (*see Abbattista v King's Grant Master Assn., Inc.,* 39 AD3d 439 [2007]). Where, as here, a snow removal contract is not the type of comprehensive and exclusive property maintenance obligation that could provide a basis for liability, a snow removal contractor owes no duty to a third party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]). In *Espinal,* the Court of Appeals found that a snow removal contractor owed no duty of care to a person who slipped and fell on an icy parking lot that the contractor failed to properly clear of snow. Although the *Espinal* Court acknowledged that a contractor who created or exacerbated a dangerous condition might be liable, plaintiff has not offered any support for the allegations that Meadowlands' activities increased the hazardous condition of the lot. Merely plowing snow and salting, after two inch falls or on request, as required by a contract, is insufficient for a factual finding that the work either created or exacerbated a dangerous condition and is also insufficient to impose a duty of care toward a third person (*Fung v Japan Airlines Co. Ltd.,* 9 NY3d 351 [2007]).

Accordingly, the motion by Meadowlands to dismiss the third-party complaint, insofar as asserted against it, is granted.

Conclusion

The motion by Sweeping is granted. The motion by BJ's and Whitestone is denied. The motion by Meadowlands is granted.

Dated: September 17, 2009

J.S.C.