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SHORT FORM ORDER

INDEX No. 07-235

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-6-09 (#001)
MOTION DATE 4-23-09 (#002)
MOTION DATE 7-30-09 (#003)
ADJ. DATE 7-30-09
Mot. Seq. # 001 - MG
002 - MG
003 - MG

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MARIA TORTORICE,

Plaintiff,

- against -

MALL AT SMITH HAVEN, LLC, E.W. HOWELL CO., INC., RF PAVING CORP., McCLEAN CONTRACTING, LLC and WADE ASSOCIATES, INC.,

Defendants.

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MALL AT SMITH HAVEN, LLC, and E.W. HOWELL CO., INC.,

Third-Party Plaintiffs,

- against -

R.F. PAVING CORP., McCLEAN CONTRACTING, LLC and WADE ASSOCIATES, INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 27 read on these motions to dismiss and for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4 ; 5 - 8; 9 - 12 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers 13 - 15; 16 - 18; 19 - 21 ; Replying Affidavits and supporting papers 22 - 23; 24 - 25; 26 - 27 ; Other ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendant/third-party defendant, R.F. Paving Corp., for an order pursuant to CPLR 3212 in its favor dismissing the complaint and third-party complaint is granted; and it is further

ORDERED that the motion (002) by defendant/ third-party defendant, McLean Contracting, LLC, s/h/a McClean Contracting, LLC, for an order pursuant to CPLR 3212 in its favor dismissing the complaint and third-party complaint is granted; and it is further

ORDERED that the motion (003) by defendants/third-party plaintiffs, the Mall at Smith Haven, LLC and E.W. Howell Co., Inc., for an order pursuant to CPLR 3212 dismissing the complaint and all cross claims is granted.

In this negligence action, plaintiff, Maria Tortorice, seeks damages for injuries she allegedly sustained after tripping and falling in the parking lot owned by defendant, the Mall at Smith Haven, LLC, on October 6, 2006. The accident allegedly occurred at or near the main entrance to the mall as plaintiff was walking to her vehicle at the end of her work day. Plaintiff alleges that defendants were negligent in the ownership, control, maintenance and management of the parking lot at the Smith Haven Mall which was under construction. Plaintiff also alleges that defendants failed to inspect and warn of an unsafe and dangerous condition in the parking lot. Defendant/third-party defendant, R.F. Paving Corp. (hereinafter referred to as "R.F.") moves to dismiss the complaint and cross claims as asserted against it. Defendant/third-party defendant, McClean Contracting, LLC (hereinafter referred to as "McClean"), also moves to dismiss the complaint and third-party complaint. Defendants/third-party plaintiffs, The Mall at Smith Haven, LLC and E.W. Howell Co., Inc. (hereinafter referred to as "The Mall defendants"), move to dismiss the action and all cross claims as asserted against them.

A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see*, ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (see, ***Winegrad v N.Y. Univ. Med. Ctr.***, 64 NY2d 851,487 NYS2d 316 [1985]). On a motion for summary judgment the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties (***Nicklas v Tedlen Realty Corp.***, 305 AD2d 385, 759 NYS2d 171 [2d Dept 2003]).

The threshold question in any negligence action is whether defendant owed plaintiff a duty of care. Ordinarily, a breach of a contractual obligation will not be sufficient in and of itself to impose a duty owed to third parties, which would result in tort liability (***Church v Callanan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]). Only three sets of circumstances create exceptions to this general rule. First, tort liability may ensue if the promissor to the contract, through his affirmative actions, has launched a force or instrument of harm. Second, if a plaintiff reasonably relies upon defendant's continuing performance of a contractual obligation to her detriment, tort liability might be imposed. Third, liability could be imposed if a comprehensive maintenance contract is such that the contracting party entirely assumes the duty of another to maintain the premises safely (***Church v Callanan Indus.***, *supra*; ***Espinal v Melville Snow Contrs., Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]).

In support of their motions for summary judgment, R.J. and McClean submit, *inter alia*, the pleadings, a copy of a subcontract between R.J. and E.W. Howell Co. Inc., dated June 30, 2006, the deposition transcripts of the plaintiff, Scott Erickson, Lenny Joerg, and Raoul Pisani, and the personal affidavit of Scott Erickson. The gravamen of the motions is that the work performed by the movants in the parking lot had not yet begun at the time of plaintiff's fall. The subcontract between E.W. Howell Co., Inc., and RF provided that R.F. would furnish and install concrete paving, asphalt paving, install signage and stripe the designated parking areas, as part of a renovation of the mall.

Plaintiff testified that she was an employee of J.C. Penney's at the time of the accident. She was a new employee in training for approximately four weeks prior to the date of the accident. On that date, she exited the mall through the main entrance door and walked along the sidewalk. She waited for traffic to clear and crossed the traffic lanes to the parking lot. She stated that after she passed approximately three parked cars she tripped on a rock and went flying in the air. She landed on her arm and needed help to get up from the ground. She stated that the parking lot was not paved and that she had to walk on rocks and dirt to and from her vehicle. She parked in the same place each time she came to work and traversed the parking lot twice a day four times each week. She stated that the parking lot was in this condition throughout this period. She stated that there were no cones or barricades where she fell.

Mr. Scott Erickson testified that he is the project superintendent for R.F. He stated that on or about June 30, 2006, R.F. entered into a subcontract with defendant E.W. Howell, the construction manager for defendant Mall at Smith Haven, LLC to provide paving in the parking lot at the Smith Haven Mall as part of a renovation project. Pursuant to the contract, R.F. was to install concrete sidewalks and curbs, provide signage, pave the parking lots and stripe the parking spaces upon completion. R.F. performed its repaving and resurfacing of the parking lots in segments. He stated that the work began approximately December, 2006 and was completed sometime in December, 2007. Upon reviewing the photographs taken by plaintiff's attorney on October 6, 2006, he stated that R.F. had not yet begun work at that site. The pictures revealed a parking lot which was not ready for his work due to an open trench and ongoing excavation.

Mr. Erickson also noticed that the pictures revealed that there were no barricades placed around the area. He stated that before beginning a job, barricades are always placed around the work area to prevent public access. In addition, he stated that his company would not have been able to begin its work with the existing loose concrete and debris. The company that performed pre-paving work would have cleared the debris. In addition, the area would be fine graded and the surface would be compacted for the installation of asphalt. Therefore, the preparatory work by another subcontractor, McClean, had not yet been completed. He further stated that although there was a second contract for the maintenance of the parking lot between the Mall defendants and R.F., the area where plaintiff fell was not included in that contract. Mr. Erickson's statements in his personal affidavit supported his testimony.

Lenny Joerg, who testified that he was employed as the construction superintendent by E.W. Howell, the general contractor and construction manager of the renovation of the Smith Haven Mall, at the time of plaintiff's accident. He stated that the project began in January, 2005 and ended in

December, 2007. He stated that E.W. Howell was hired by Simon Properties, the owner of Smith Haven Mall, to remodel a portion of the interior of the mall and to construct a building addition on the west end of the mall.

Mr. Joerg stated that a portion of asphalt pavement, as depicted in one of plaintiff's photographs, had been removed for a newly installed sanitary pump station to move sanitation from the new addition to the mall to the existing sewage plant. The pump station work was performed by non-party WHM. He also stated that the following procedures needed to be performed to repair the parking areas: remove the asphalt, re-establish elevation or grades, set new recycled concrete aggregate ("RCA") to new grades, compact the RCA and top with asphalt. He stated that McClean was hired to perform the above sub-paving work with the exception of applying the asphalt, which would be performed by R.F. He also stated that McClean was responsible for clearing the debris to be trucked away off site or recycled. He further testified that all paving work was performed after October, 2006.

Mr. Raoul Pisani testified that he was employed by McClean at the Smith Haven Mall as the project manager and project superintendent during the above-stated renovations in 2006 and 2007. He stated that McClean was hired to perform excavation, drainage, sanitary work and grading work as well as actual building extension work. He stated that all parking lot work began in early 2007 and was completed by July, 2007. In October 2006, he stated that McClean had not performed any services to the parking lot. He stated that the trenches noted in plaintiff's photographs represented pump station work which was performed by a separate contractor named WHM Plumbing. All the trench work was performed prior to any work which was performed by McClean. Defendants R.F. and McClean have demonstrated their *prima facie* entitlement to judgment as a matter of law by establishing that they did not owe a duty of care to plaintiff inasmuch as they had not yet begun their work in the area where plaintiff fell (***Zuckerman v New York***, *supra*). Thus, it cannot be said that defendants launched a force or instrument of harm, or that plaintiff relied upon defendant's continuing performance of a contractual obligation to her detriment, or that these defendants entirely assumed the duty of another to maintain the premises safely in a comprehensive maintenance contract (***Church v Callanan Indus.***, *supra*). The burden shifted to the plaintiff to raise an issue of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

In opposition, plaintiff submits the affirmation of counsel which is which is not probative in a motion for summary judgment since he has no personal knowledge of the incident (***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the motions for summary judgment by R.F. Paving and McClean are granted.

Turning to the motion by the Mall defendants who contend that they had no duty to plaintiff inasmuch as the defect which caused plaintiff's fall was trivial and not unreasonably dangerous. In support, defendants rely upon plaintiff's testimony that she was familiar with the condition of the parking lot since she parked there at least four times per week and safely traversed the area twice each work day for approximately four weeks prior to tripping and falling on a pebble on October 6, 2006.

A landowner "must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others,

the seriousness of the injury, and the burden of avoiding the risk" (***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]; ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]). The scope of the duty varies with the foreseeability of the potential harm (*see*, ***Tagle v Jakob***, 97 NY2d 165, 168, 737 NYS2d 331 [2001]). There is, however, no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (*see*, ***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]). Here, the Court finds that the parking lot in its unpaved condition was not inherently dangerous and was readily observable by the reasonable use of one's senses (***Gibbons v Lido and Point Lookout Fire Dist.***, 293 AD2d 646, 740 NYS2d 440 [2d Dept 2002]). In addition, plaintiff conceded that she was familiar with the parking area inasmuch as she parked in the same location each day that she arrived for work. Thus, The Mall defendants have demonstrated their prima facie entitlement to judgment as a matter of law by establishing that they had no duty to plaintiff under the circumstances (***Jang Hee Lee v Sung Whun Oh***, 3 AD3d 473, 771 NYS2d 134 [2d Dept 2004]).

In opposition, plaintiff relies upon her deposition testimony and the testimony of Mr. Lenny Joerg. Plaintiff testified that there were no barricades surrounding the unpaved parking area and that the parking area where she fell was covered with many loose pebbles. In addition, Mr. Joerg stated that E W. Howell was responsible for placing barricades around construction areas to protect the public, which plaintiff testified were not present where she fell. Plaintiff has failed to present sufficient evidence which would raise an issue of fact since the court determined above that the condition was not inherently dangerous, and therefore, there was no need for a barricade.

Accordingly, the motions by defendants R.F. Paving, McClean and the Mall defendants are granted. The plaintiff's claims against R.F. Paving, McClean and the Mall defendants, dismissed herein, are severed and the plaintiff's remaining claims shall continue.

Dated: Oct. 5, 2009

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**