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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN Justice PART 7

Index Number : 100913/2006
TINDEL, MARTIN
VS.
ENGEL, IVY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 100913/06

MOTION DATE 9/10/09

MOTION SEQ. NO. 002

MOTION CAL. NO. 113

The following papers, numbered 1 to ___ were read on this motion and cross motion

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-M	1-2
Affirmation in Opposition	3
Notice of Motion— Affirmation — Exhibits A-P	4-5
Affirmation in Opposition – Exhibits A-B; Reply Affirmation in Response to Opposition; Reply Affirmation in Response to Opposition; Affirmation in Opposition to Cross Motion – Exhibit A; Affirmation in Opposition to Cross Motion	6, 7, 8, 9, 10
Reply Affirmation; Reply Affirmation — Exhibit A; Reply Affirmation	11, 12, 13

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

Dated: 12/24/09
New York, New York

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MICHAEL D. STALLMAN J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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MARTIN TINDEL,

Plaintiff,

Index No. 100913/06

-against-

Decision and Order

IVY ENGEL, THE HUNT CLUB HOMEOWNERS' ASSOCIATION, INC., TOTAL COMMUNITY MANAGEMENT, INC. and XANADU LAND DEVELOPMENT CORP.,

Defendants.

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THE HUNT CLUB HOMEOWNERS' ASSOCIATION INC. AND TOTAL COMMUNITY MANAGEMENT, INC.,

Third-Party Plaintiffs,

Third Party Index No. 491198/06

-against-

XANADU LAND DEVELOPMENT CORP.,

Third-Party Defendant.

----------X

HON. MICHAEL D. STALLMAN, J.:

This personal injury action and related third-party claim arises out of plaintiff Martin Tindel's alleged trip and fall as a result of a snowy/icy condition on a driveway on property owned by Ivy Engel (Engel). Motions with sequence numbers 002 and 003 are hereby consolidated for disposition.

In motion sequence 002, defendant and third-party defendant Xanadu Land Development Corporation (Xanadu) moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing

any and all claims and cross claims as against it. Engel cross-moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing plaintiff's claim, as well as any cross claims as against her.

In motion sequence 003 (third-party action), defendant and third-party plaintiffs The Hunt Club Homeowners' Association, Inc. and Total Community Management, Inc. (Hunt Club) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint and dismissing any and all cross claims against them, and also awarding Hunt Club summary judgment on its claims for common-law indemnification against Xanadu.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff alleges that, at approximately 7:10 A.M. on February 21, 2003, he sustained personal injuries when he slipped and fell on a patch of black ice on a driveway. The driveway was attached to a condominium/townhouse owned by plaintiff's then fiancé, Engel, who was residing at 89 Hunt Drive in Jericho, New York. This townhouse is part of a residential community, called The Hunt Club, which is comprised of 94 units, a pool, a clubhouse, tennis courts and a security booth. Rogers Affirmation, ¶ 38. At the time of plaintiff's accident, Xanadu was under a contract with Hunt Club to provide "snow removal services with respect to the roadways, parking areas and walkways automatically for any accumulation greater than 2 inches and to also apply a salt/sand mixture and

Ice-Melt." Brown Affirmation in Support, ¶ 19.

There had been a blizzard on Monday, February 21, 2003, resulting in approximately 21 inches of snow. Plaintiff alleges that, on the morning of the accident, after Engel had already left for work, he went through the garage to warm up his car which had been on the driveway overnight. After he exited the car, he slipped and fell on a patch of "black ice" on the driveway. Plaintiff described this ice as running the entire length of the driveway in two-to three-foot ribbons leading from a drainage pipe to the road. *Id.*, ¶ 17. As a result of his fall, plaintiff required surgery on his dominant hand and was rendered disabled from his profession as a trained surgeon. Plaintiff asserts that the ice was on the driveway due to a faulty gutter and drainage system which leaked water on the driveway and/or that the removal of the snow/ice on the driveway was negligent.

Snow Removal

At the time of the accident, Xanadu was hired by Hunt Club to provide snow and ice removal of the roadways of the residential community, as well as each individual homeowner's driveway. According to Engel, none of the residents hired any other snow removal service. She stated that although she was not satisfied with Xanadu's service, she had no choice but to use it. She states that she frequently had to shovel herself after Xanadu performed its snow removal services. She also claims that, if one of the

residents had a need for extra snow removal services, they had to contact Hunt Club, and could not contact Xanadu directly. Xanadu notes that it would not return to provide additional services unless requested by Hunt Club. *Id.*, ¶ 21. Xanadu also states that, according to Hunt Club's president, Xanadu was a "very good contractor," and avers that Engel never complained about its work. *Id.*, ¶ 22, 23.

Xanadu provided snow removal and ice abatement immediately after the subject blizzard. Once the snow had been cleared from the driveways, Xanadu applied sand and an ice melt chemical. *Id.*, ¶ 20. Although Engel testified that she usually would shovel herself, she did not put sand, salt or ice melt on her driveway. Plaintiff testified that he did not see any snow or ice on the driveway two to three days after the plowing had occurred. *Id.*, ¶ 18.

Gutter and Drainage System

According to Engel, one of the gutters on the left-hand side of the townhouse was angled and "would drain onto the left side of the driveway." Mastellone Affirmation in Support, ¶ 27. She asserted that this was a chronic problem and when the temperature dropped, the water on the driveway would freeze. She noticed ice on the left-hand side of her driveway as being "flame shaped" as she was backing out the day of the purported accident. Silber Affirmation in Opposition, ¶ 5. Engel states that, as a result of

a flood in her basement before the accident, she complained to Hunt Club about the drainage system. Although she complained, Hunt Club never offered to repair or alter the system. In response, Hunt Club states that "pursuant to the offering plan," the homeowners are responsible "for maintenance of the exterior of their homes, including the leaders and gutters, and the homeowners are also responsible for their own driveways."[1] Rogers Affirmation, ¶ 44.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Id.* at 544, citing

[1] Hunt Club did not attach a copy of the offering plan for the court's review.

Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dept 1990).

Xanadu's Motion

Xanadu now moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing any claims or cross claims asserted against it. In general, independent contractors, such as Xanadu, do not owe a duty of care to third parties.

Espinal v Melville Snow Contractors, 98 NY2d 136 (2002).

However, three exceptions occur, which include the following:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [internal citations omitted].

Id. at 140.

In the present case, as in *Espinal (supra)*, Xanadu did not "launch an instrument of harm" by simply plowing the snow after the storm, as required by the contract. Accordingly, the first exception does not apply to Xanadu.

Plaintiff did not detrimentally rely on Xanadu's continued performance, therefore, as set out below, the second exception does not apply. Xanadu maintained a contract with Hunt Club and plaintiff could not contact Xanadu directly for services. Plaintiff, not even being the homeowner, did not know the name of the snow removal service. Furthermore, Xanadu was not required to

monitor the premises for subsequent re-freezing. Similar to the situation in *Espinal v Melville Snow Contractors* (98 NY2d at 141), Xanadu was "under no obligation to monitor the weather to see if melting and refreezing would create an icy condition."

Xanadu did not "entirely absorb [Hunt Club's] duty as a landowner to maintain the premises safely." *Id.* Similar to the situation in *Espinal (supra)*, it was Hunt Club's duty to decide if Xanadu should be called back for additional snow removal services. Although Xanadu was required to come and provide services as per its contract when certain weather conditions occurred, the contract does not require it to inspect or safely maintain the premises. As such, the third exception cannot be satisfied.

As stated comprehensively in Xanadu's papers, Xanadu did not owe the plaintiff a duty of care and Xanadu's actions do not fall into the three exceptions where it would be liable for plaintiff's injuries. Accordingly, Xanadu's motion for summary judgment is granted with respect to plaintiff's claims.

Engel's Cross Motion and Hunt Club's Motion

Engel cross-moves and Hunt Club moves, pursuant to CPLR 3212, for orders granting summary judgment and dismissing any claims or cross claims asserted against them.

A. Liability of the Parties for the Drainage System

It is well settled that, "a landowner is under a duty to maintain its property in a reasonably safe condition under the

existing circumstances, which include the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk [citation omitted]." *Perez v Bronx Park South Associates*, 285 AD2d 402, 403 (1st Dept 2001). Hunt Club argues that, as the homeowner, Engel is responsible for the drainage pipes and the rain gutters. It attaches a letter sent to Engel, in October 2000, in which it advises Engel that she should repair the gutter on the left-hand side of her house. The letter specifically states, "[t]he leader on your house on the left side of the driveway should be repaired or may cause damage to your unit." Hunt Club's Exhibit N.

However, Engel asserts that she was not able to re-position or re-design the drainage system without the express permission of Hunt Club. She also mentions that Hunt Club had a mandatory policy in which the property owners were to have the gutters cleaned twice a year, and Hunt Club would bill them for it. Coupled with this information, the plaintiff asserts that Hunt Club inspected the gutters regularly and also "retained significant control over the manner of any repairs or renovations." Silber Affirmation in Opposition, ¶ 11. As such, according to plaintiff, Hunt Club may be responsible for the gutter's alleged malfunctioning.

In a slip and fall case, the plaintiff must present evidence that the landowner defendant either created the defective condition which caused the accident, or that defendant had actual or

constructive notice of it. *Mullin v 100 Church LLC*, 12 AD3d 263, 264 (1st Dept 2004). "In order 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 allow the owner to discover and remedy it." *Perez v Bronx Park South Associates*, 285 AD2d at 403, citing *to Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

Engel argues that she did not design the drainage system and had no control over the condition which caused plaintiff's accident. She also states that Hunt Club was on notice about the defective drainage system, but failed to implement any repairs. Engel states that she made "numerous" complaints to Hunt Club about the drainage system not being optimal; however, the record indicates that she did not complain to Hunt Club about the positioning of the gutters and the positioning which would lead to the water pouring on the left-hand side of the driveway. Although she did notice it before and admits that the problem was chronic, she argues that she was not "permitted to re-design or re-position the leader or drainage system, without the express permission of Hunt Club." Mastellone Reply Affirmation, ¶ 8.

Hunt Club cites to *Zabbia v Westwood, LLC* (18 AD3d 542 [2d Dept 2005]), in which the management company was not held liable for the plaintiff's slip and fall on black ice because it had no notice of the condition. As Hunt Club did not furnish the court

with a copy of the offering plan or other applicable rules of the homeowners' association, the court cannot decide the legal issue as to who is liable for the maintenance of the gutters and leaders. Furthermore, if Hunt Club had liability, there is a further factual issue of whether notice was given regarding the alleged defective drainage system which may have caused the accident.

Although it appears that Hunt Club was not given actual or constructive notice of the drainage problem, issues of fact and credibility still exist regarding Hunt Club's responsibility for the drainage system. Accordingly, because issues of triable fact remain, Engel's cross motion for summary judgment is denied, and Hunt Club's motion for summary judgment is also denied.

B. Liability of the Parties for the Snow/Ice on Driveway

Plaintiff indicates in his testimony that he believed that the black ice was due to the water freezing after leaking out of the gutter. Although plaintiff testifies that he did not see any ice or snow accumulation on the driveway after Xanadu's snow removal on February 17, 2003, Engel's testimony indicates that she believed that snow and/or ice was present after the storm. She testified that the "icy condition of her driveway was caused in part by Xanadu's failure to completely clear her driveway or apply ice melt." Mastellone Affirmation, ¶ 35. She indicates that she did have notice of the ice as she states that she noticed the ice for a couple of days prior to the plaintiff's accident and even on the

date of the accident. It should be noted that she did not attempt to call Hunt Club for additional ice abatement, nor did she attempt to ameliorate the situation by applying ice melt herself.

Although Engel acknowledges that she did see ice on the driveway right before the plaintiff's accident, she claims that "the maintenance plan for snow removal and ice abatement was exclusively the responsibility of Hunt Club and/or Xanadu." *Id.*, ¶ 34. Engel cites to *Crosthwaite v Acadia Realty Trust* (62 AD3d 823 [2d Dept 2009]), and argues that a homeowner may not be found liable in a slip and fall accident where someone else has assumed the duty to care for the premises and displaced the owner's duty to maintain the premises in a safe condition. She states that she could not contact Xanadu directly, even if she did think there was a necessity for further snow removal. As such, Engel argues that Hunt Club displaced any duty or obligation of the owner to remove snow and/or ice from the premises of the accident. Plaintiff also argues that Hunt Club exercised control over the maintenance of the snow removal, as it was the one to decide if any "extra services" were required and it was also the one who also had a practice of inspecting the property.

Accordingly, as set forth above, questions of fact remain regarding the origin of the icy condition and the liability of the parties, and, as such, both parties' motions for summary judgment are denied.

Xanadu's Motion to Dismiss the Third-Party Claims

Xanadu now moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing third-party claims asserted against it. Hunt Club argues that Xanadu's motion for summary judgment must be denied with respect to the claims for common-law indemnification.

Xanadu states that its contract with Hunt Club did not contain an indemnification provision. It also argues that Xanadu's activities at the location were not the creation or the cause of the ice condition which allegedly caused plaintiff to fall. Xanadu states that it plowed and salted after the storm and was not called back by Hunt Club for any further snow/ice removal.

Although the plaintiff testifies that he did not recall seeing any snow piled on the driveway prior to the accident, Engel testifies that she did see snow and ice piled to the sides of the driveway when she was exiting her driveway on the day of the accident. She specifically testified that the ice condition was "a combination that the water came off the gutter at an angle and then the snow removal company never put like salt to melt it so that the ice would stay there." Hunt Club's Exhibit G, at 40.

The right to indemnification may be implied by common law to "prevent an unfair result or the unjust enrichment of one party at the expense of the other." *Richter v Hunter's Run Homeowner's Association*, 14 AD3d 601, 602 (2d Dept 2005). Xanadu was

contractually obligated to perform all snow and ice removal from the driveways. Xanadu, alone, determined when and where ice melt was applied. If the plaintiff is successful against Hunt Club to recover damages for negligent failure to remove all snow/ice from the driveway, Xanadu "may be required to indemnify [Hunt Club] since there are questions of fact as to whether the accident resulted from its alleged failure to fulfill its obligations pursuant to the terms of the snow removal contract." *Id.*

Although it appears from the record that the plaintiff's fall may have been due to the freezing of water that had leaked out on the driveway from the gutter, questions of fact still remain as to the whether plaintiff's injuries resulted from a failure by act or omission on the part of Xanadu to fulfill its obligations to Hunt Club with regards to its snow removal contract. Credibility issues are "properly left for the trier of fact." *Yaziciyan v Blancato*, 267 AD2d 152, 152 (1st Dept 1999). As such, Xanadu's motion for summary judgment with respect to the third-party claim for common-law indemnification must be denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion for summary judgment brought by defendant/third-party defendant Xanadu Land Development Corporation is granted with respect to plaintiff Martin Tindel's claims, but is denied with respect to the right to common-law indemnification as

brought by third-party plaintiffs The Hunt Club Homeowners' Association and Total Community Management, Inc.; and it is further

ORDERED that the motion for summary judgment brought by defendant The Hunt Club Homeowners' Association and Total Community Management, Inc. is denied; and it is further

ORDERED that the cross motion for summary judgment brought by defendant Ivy Engel is denied; and it is further

ORDERED that the complaint is hereby severed and dismissed as against defendant Xanadu Land Development Corporation, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that all remaining claims and cross claims shall continue; and it is further

ORDERED that a conference will be held on February 11, 2010 at 9:30 AM in Part 7. During mid-January counsel shall inquire of the Part Clerk of the Justice to be assigned so as to confirm the date, time and place of the conference.

Dated: December 21, 2009

ENTER:

J.S.C.