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SHORT FORM ORDER
SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

- -

RALPH VOLINO,

Plaintiff

Trial/IAS Part 14
Index No. 04-14950
Sequence No. 01, 02, 03
Submit Date 10/9/09
XXX

against

CALVIN AXINN, HOUSE BEAUTIFUL AT WOODBURYHOMEOWNERS ASSOCIATION INC., FAIRFIELD PROPERTY SERVICES, L.P. AND BROTHERS II LANDSCAPES, INC.,

Defendants

- -

The following papers read on this motion:

Notice of Motion/Order to Show Cause..... X
Cross-Motions..... X
Answering Affidavits..... X
Replying Affidavits..... X

PRESENT: HON. JOSEPH P. SPINOLA

Motion by defendant Brothers II Landscapes ("Brothers II") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross-claims asserted against it is granted. Motion by defendant Calvin Axinn ("Axinn") for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint and all cross-claims asserted against him is granted. Motion by defendant House Beautiful at Woodbury Homeowners Association, Inc. and Fairfield Property Services, L.P. (hereinafter collectively referred to as "HOA") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and third-party complaint and any and all cross- claims asserted against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on February 9, 2004 at approximately 6:30 p.m.

Plaintiff alleges that he was caused to slip and fall on an accumulation of ice

located on th exterior stairs leading to the entrance of Axinn's premises. At the time of the accident, plaintiff was working as a delivery person for Cottage Pharmacy and was delivering medications to Axinn's condominium located at 108 Chestnut Lane in Woodbury, New York.

Defendant Axinn is the owner of a condominium located at 108 Chestnut Lane in Woodbury, N.Y. Unit 108 is part of a 125-unit condominium complex known as Woodbury Greens Condominiums ("Woodbury Greens"). House Beautiful at Woodbury Homeowners Association, Inc. is the homeowners association. Fairfield Property Services, L.P. is the management company for the condominium complex. Defendant Brothers II had a contract with Woodbury Greens covering both landscaping and snow removal services.

At his examination before trial, plaintiff testified that it was dark outside and all the steps leading to Axinn's residence were slippery with ice. Upon making his delivery and taking his first step onto the steps leading to the residence, plaintiff felt the steps were icy and he grabbed the handrail. Upon reaching the second platform to the residence, plaintiff observed and felt ice below him so he continued to hold onto the handrail. Plaintiff recalled turning to leave the front door when he slipped and fell.

At his examination before trial, Axinn testified that he owns a condominium located at 108 Chestnut Lane, Woodbury. During the time that he lived at the premises, he did not perform any snow removal or put down any salt on the stairs. Axinn testified that such services were performed by a crew whom he believed worked for the condominium association. Axinn never made any complaints nor received complaints about ice in front of his residence. Axinn learned of the accident when he heard moaning outside the front door. Axinn then came outside and saw plaintiff lying on the stairs. The platform at the top of the stairs was slippery.

At his examination before trial Mr. D'Agostino testified that he is the superintendent for House Beautiful at Woodbury Gardens. His duties include general maintenance for condominiums in the complex, including sprinkler systems and roofing. As to snow removal, he would perform same and/or put down calcium chloride only on a complaint basis. If residents had complaints about snow/ice, they were to contact Fairfield Properties. Mr. D'Agostino confirmed that the condominium association had a contract with Brothers II to perform landscaping and snow removal services. He did not receive any prior complaints of ice at Axinn's residence nor did he receive any complaints from residents regarding the snow removal performed by Brothers II.

At his examination before trial, Dan Joseph testified that he is the President of

Brothers II and as such, he oversees the company's day-to-day operation. Brothers II had a contract with Woodbury Greens for both landscaping and snow removal. The snow removal contract was in effect as of September, 2003. The contract required Brothers II to begin snow removal operations after one inch of snow had fallen and to plow the condominium complex's roads, shovel the walks, and put down salt and calcium chloride. Brothers II would shovel or snow blow the resident walks leading to each condo unit, including the stairs up to the resident's front door. After snow removal on the walks, calcium chloride was put down, by spreader, hand and/or shovel. Brothers II would return within 24 hours after the completion of snow removal to check for windblown snow or previously uncleared areas.

According to Brothers II's records, it performed snow removal at Woodbury Greens on February 6, 2004. Since more than one inch of snow had fallen, Brothers II plowed, shoveled the walkways and driveways and applied ice melt or calcium chloride. On February 7, 2004, at approximately 9:00 a.m. Brothers II returned to the subject premises to remove windblown snow in a parking area and to apply extra salt to roadways. There were no requests to clear snow or ice on February 9, 2004.

Brothers II moves for summary judgment dismissing the complaint. In support thereof, Brothers II relies upon the deposition testimony of the aforementioned individuals, its contact with Woodbury Gardens and climatological data taken from Long Island MacArthur Airport for the month of February 2004. According to the local weather records, a mixture of snow and freezing rain fell on February 6, 2004 in an amount of 1.77".

"Generally, a snow removal contractor's contractual obligation, standing alone, will not give rise to tort liability in favor of third parties unless: (1) the snow removal contractor, in failing to exercise reasonable care in the performance of its duties, 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 owner's duty to maintain the premises safely." *Schultz v Bridgeport & Port Jefferson*, __ NYS2d, 2009 WL 4852069 quoting *Castro v Maple Run Condominium Assn.*, 41 AD3d 412, 413 (2nd Dept. 2007); *Crosthwaite v Acadia Realty Trust*, 62 AD3d 823 (2nd Dept. 2009).

Brothers II has made a *prima facie* showing that its contract to provide snow removal services was not comprehensive and exclusive. *See Lattimore v First Mineola Co*, 60 AD3d 639, 642-643 (2nd Dept. 2009); *Roach v AVR Realty Co., LLC*, 41 AD3d 821 (2nd Dept. 2007); *Linarello v Colin Service Systems, Inc.*, 31 AD3d 396 (2nd Dept .2006). Moreover, Brothers II made a *prima facie* showing that the plaintiff did not

detrimentally rely on the continued performance of its alleged contractual duties (*see Wheaton v East End Commons Associates, LLC*, 50 AD3d 675 [2nd Dept. 2008]; *Castro v Maple Run Condominium Assn., supra; Bugiada v Iko,* 274 AD2d 368, 369 [2nd Dept. 2000], *appeal dismissed, leave to appeal denied* 96 NYS2d 726 [2001]) and that it did not launch a force or instrument of harm which created or exacerbated a hazardous condition. *See Murphy v M.B. Real Estate Development Corp.*, 280 AD2d 457 (2nd Dept. 2001); *Pavlovich v Wade Associates, Inc.*, 274 AD2d 382 (2nd Dept. 2000), *lv to app den.* 95 NY2d 767 (2000). In opposition, plaintiff failed to raise a triable issue of fact. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Plaintiff's claim that Brothers II caused or created the alleged icy condition through incomplete or negligent snow removal is based on speculation which is insufficient to defeat the motion. *Crosthwaite v Acadia Realty Trust, supra*. Here, plaintiff alleges that he fell on ice on February 9, 2009, over three days after Brothers II performed snow removal. Plaintiff offers no proof as to when or how the ice developed or that Brothers II's snow removal efforts caused his fall. As to plaintiff's partial claim that the icy condition was caused by melting icicles from an overhang, such assertion is based on speculation and conjecture. *Simon v PABR Associates, LLC*, 61 AD3d 663 (2nd Dept. 2009); *Aurilia v Empire Realty Assoc.*, 58 AD3d 773 (2nd Dept. 2009). Hence, "any finding as to when the alleged icy condition developed and whether it existed for a sufficient amount of time to have provided constructive notice and a reasonable time to remedy it could only be based on speculation." *Simon v PABR Associates, LLC, supra*; *see DeVivo v Sparago*, 287 AD2d 535 (2nd Dept. 2001).

Axinn moves for summary judgment dismissing the compliant on the grounds that he did not own the stairway or exercise any control over it; and he did not create or have constructive notice of the alleged dangerous condition.

HOA moves for summary judgment claiming that it did not have any actual or constructive notice of the allegedly dangerous condition.

A property owner or a party in possession or control will be held liable for a slip-and-fall involving snow and ice on its property only when it created the alleged dangerous condition or had actual or constructive notice of it. *See Nielsen v Metro-North Commuter R.R. Co.*, 30 AD3d 497 (2006); *Zabbia v Westwood, LLC*, 18 AD3d 542, 544 (2005); *Voss v D&C Parking*, 299 AD2d 346 (2002).

In opposition to defendants' *prima facie* showing of their entitlement to judgment as a matter of law, plaintiff failed to establish that these two defendants created the complained of condition or had actual or constructive notice thereof. *Crosthwaite v Acadia Realty Trust, supra; Nielsen v Metro-North Commuter R.R. Co., supra.*

Plaintiff's conclusory assertions that issues of fact exist as to whether these two defendants possessed actual or constructive notice of the icy and dangerous condition prior to the occurrence are insufficient to defeat the motions for summary judgment. *See Simon v PABR Associates, LLC, supra.*

In view of the foregoing, all three motions for summary judgment are granted in their entirety. Accordingly, the complaint, cross-claims and the third-party complaint are hereby dismissed.

This constitutes the decision and order of the Court.

ENTER:

Joseph P. Spinola, Justice
Supreme Court, Nassau County
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Dated: January 19, 2010