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SHORT FORM ORDER

COPY

INDEX # 13563-06
RETURN DATE: **4-29-09**(#003)
11-4-09(#005)
MOT. SEQ. **#003 & 005**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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KAREN SCHMOHL,

-Plaintiff,

-against-

JB OLD TOWNE REALTY CORP., JIM'S LAND AND HOME CARE and JAMES M. MELER,

-Defendants.

----------x

CALENDAR DATE: June 30, 2010
MNEMONIC: MG; MG

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DEFT'S/RESP ATTORNEY:
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Shayne, Dachs, Corker, Sauer & Dachs, LLP
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Upon the following papers numbered 1 to 34 read on this motion to strike answer and summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-15 ; 17-25 ; Notice of Cross-Motion and supporting papers _____; Answering Affidavits and supporting papers 26-30 ; Replying Affidavits and supporting papers 31-34 ; Other 16 ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion (#003) by the plaintiff to strike the answer of the defendant JB Old Towne Realty Corp., for its failure to provide discovery or comply with previous Court ordered discovery is granted and the answer of the non-responsive defendant, JB Old Towne Realty Corp., is stricken; and the motion (#005) by the defendant, Jim's Land and Home Care and James M. Meler for summary judgment and dismissal of the plaintiff's action is granted in its entirety and the plaintiff's action against the defendants, Jim's Land and Home Care and James M. Meier s/h/a/ James M.Meler, is dismissed.

The plaintiff instituted this action against the defendants for personal injuries allegedly sustained by her on January 17, 2005 at 7am when she slipped and fell on ice and snow in the parking lot of the Sunrest Health Facilities (hereinafter Sunrest) located at 70 North Country Road in Port Jefferson, Suffolk County on Long Island, New York. The defendant, JB Old Towne Realty Corp., has not appeared and counsel for this defendant was relieved in this Court's order, dated February 18, 2010.

The plaintiff now moves for an order striking the defendant, JB Old Towne Realty Corp.'s answer for its failure to comply with discovery both requested and mandated by Court order. There is no opposition to the motion and the motion is granted and the answer of the defendant, JB Old Towne Realty Corp., is stricken.

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Jim's Land and Home Care and James Meler s/h/a James M. Meler (hereinafter defendants) move for summary judgment pursuant to CPLR §3212 claiming that they did not do snow removal at Sunrest in January 2005 because the defendant alleges snow removal services were at a "per request" by Sunrest and therefore the defendant did not perform or appear and clear the parking lot. However, the defendants' claim they are unable to produce documentation for that time because of a computer malfunction and they cannot produce records of visits to Sunrest for the winter 2004-2005 season. The defendants also move for summary disposition under the authority of ***Espinal v. Melville Snow Contractors***, 98 NY2d 136, 746 NYS2d 120 (2002) which holding precludes a finding of liability in this case. The plaintiff opposes the requested relief arguing there are readily identifiable factual issues to preclude summary disposition as a matter of law because she saw a snow plow in the parking area cleaning snow and she alleges that the defendants created the condition on which she fell. The defendants in reply argue that the plaintiff could not even identify the plow clearing snow as the defendants.

For the following reasons, the defendants' motion for summary judgment dismissing the plaintiff's action as a matter of law pursuant to CPLR §3212 is granted in its entirety and the plaintiff's action against the defendants is dismissed.

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 produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979], ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal her proof in order to establish that the matters set forth in her pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [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]). Further, on a motion for summary judgment, the Court must consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the Court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

The plaintiff claims that the defendants were negligent in clearing snow because they caused a layer of ice which then was covered by a thin layer of powdery snow to cause a dangerous condition. The defendants while denying they were responsible for the snow plowing, claim that they are not liable in any event for the plaintiff's injuries resulting from snow plowing citing to ***Espinal v. Melville Snow Contractors***, *supra*. In that case the Court of Appeals

dismissed a plaintiff's slip and fall on snow against the contractor hired for snow removal finding that a contractor hired for snow removal cannot be found liable for a tort or breach of contract for an injury sustained in a fall from the snow removal work. The Court in ***Nasser v. Hubbell Inc.***, 12 Misc3d 1163(A), 819 NYS2d 211 (2006) in examining this particular issue before this Court restated the rules as follows:

> "It is well settled, that a contractor hired to perform work is generally not liable in tort or for breach of contract for injuries sustained by a third party. ***Church v. Callanan Industries, Inc.***, 99 NY2d 104 (2002); ***Espinal v. Melville Snow Contractors***...; ***Moch v. Rensslelaer Water Co.***, 247 NY 160 (1928); ***Bugiada v. Iko***, 274 AD2d 368 (2nd Dept. 2000). This is because, contractors are generally hired to perform work pursuant to a contract and '[u]nder our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party.' ***Espinal v. Melville Snow Contractors***,. When there is a breach, such contractors are generally only liable to the person who hired them, the promisee. However, they are not liable to third parties for any injuries resulting from a breach of their contractual obligation. ***Espinal v. Melville Snow Contractors***, ... Consequently, if a contractor is to be held liable for injury to a third party, occasioned by their (sic) work, one of three scenarios must exist. First, the contractor is liable for injury to a third-party if the putative [contractor] has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument of good quoting ***Moch v. Rensslelaer Water Co.***,...
>
> Stated differently, a contractor is liable to an injured third party when said contractor causes or creates the condition alleged to have caused injury. Id.; ***Church v. Callanan Industries, Inc.***,... Second, a contractor is responsible for a third party's injury when the third party detrimentally relies on the contractor's continued performance and the contractor's failure to perform, positively and actively, causes injury. ***Church v. Callanan Industries, Inc.***, ...;***Espinal v. Melville Snow Contractors***, ...; ***Eaves Brooks Costume Company, Inc v. Y.B.H. Realty Corp.***, 76 NY2d 220 (1990); ***Bugiada v. Iko***, ... Lastly, when the contract is comprehensive and exclusive as to maintenance, so that due to its broadness the contractor displaces and in fact assumes the owner or possessor's duty to safely maintain, said contractor is liable to an injured third party resulting from a breach of the services undertaken." (citations omitted).

Here, in the instant case, the plaintiff relies on a first exception in the rationale of ***Espinal v. Melville Snow Contratcors***, *supra*, that the defendants caused or created the condition in the parking lot. The plaintiff's argument is that, unlike ***Espinal v Melville Snow Contrators***, *supra*, where the contractor merely was clearing snow, the defendants, in this case, cleared the parking lot allowing ice to form which then became covered by a layer of powdery snow left behind and disguising the dangerous condition. See, ***Schwint v. Bank Street Commons, LLC***, 74 AD3d

1312, 904 NYS2d 220 (2nd Dept 2010). However, these arguments are mere speculation on the part of the plaintiff and the plaintiff fails to substantiate this particular claim that there was ice under a layer of snow, nor does she address the question of how the defendants became responsible for the alleged ice in the parking lot unlike the fact pattern stated in ***Schwint v. Bank Street Commons, LLC***, *supra.* See,***LaMoy v. MH Contractors, LLC***, 78 AD3d 1311, 911 NYS2d 203 (3rd Dept. 2010); ***Luby v. Rotterdam Square, LP***, 47 AD3d 1053, 850 NYS2d 252 (3rd Dept. 2008). At most, drawing all reasonable inferences in favor of the party [plaintiff] opposing the motion for summary judgment [***Robinson Motor Xpress v. HSBC Bank, USA***, 37 AD3d 117, 826 NYS2d 350 (2nd Dept. 2006)] and assuming it was the defendants who plowed the parking lot, the case law is clear under ***Espinal v. Melville Snow Contractors,*** *supra,* that the defendants cannot be held liable for the plaintiff's fall unless they either created the condition or the snow plow contract was so exclusive and comprehensive as to dispossess the owner of his duty to maintain his property in a safe condition. ***Nasser v. Hubbell Inc.***, *supra*, citing to ***Espinal v. Melville Snow Contractors***, *supra*, and ***Church v. Callanan Industries, Inc.*** *supra*. In the most recent pronouncement on this issue of liability for a fall allegedly caused by a snow removal contractor, and on facts similar to those presented in this case, the Court in ***Lubell v. Stonegate at Ardsley Home Owners Association, Inc.***, 79 AD3d 1102, NYS2d (2nd Dept. 2010) found for the defendant, Westchester Hills Landscaping, Inc., the contractor hired for snow removal at the condominium and dismissed the plaintiff's slip and fall action finding no duty owed to the plaintiff by the snow removal contractor. See, also, ***Abramowitz v. Home Depot USA, Inc.,*** 79 AD2d 675, 912 NYS 2nd 639 (2nd Dept. 2010); ***Seymour v. Mapes***, 22 Ad3d 1012, 803 NYS2d 250 (3rd 2002).

Here, in the case at bar, the plaintiff claims that the defendants were plowing the lot even though she is unable to determine the identity of the driver or company. A contract was in place between Sunrest and the defendants to plow the parking lot, though the defendants claim it was on a "at call" basis meaning when notified they would plow the parking lot. The contract, dated November 15, 2004, between Sunrest and the defendants does not raise any issue that the defendants' contract with Sunrest was so exclusive and comprehensive as to relieve Sunrest of its duty to maintain the property in a safe condition under the rationale of ***Espinal v Melville Snow Contractors*** *supra*. Thus on that claim any argument by the plaintiff must fail. A second exception under ***Espinal v Melville Snow Contractors*** *supra,* does not apply nor did the plaintiff allege it was applicable to the present case, leaving only the first exception under ***Espinal v Melville Snow Contractors*** *supra,* i.e., that the defendants created the dangerous condition so as to warrant a finding of both a duty and liability for the plaintiff's fall. See, ***Petry v. Hudson Valley Pavement Inc.***, 78 AD3d 1145, 912 NYS2d 616 (2nd Dept. 2010). The plaintiff does not provide any factual basis, finding or evidentiary material to raise a triable issue of fact that the defendants caused and/or created the icy conditions in the parking lot where she fell so as to preclude summary disposition in the defendants' favor. The plaintiff only claims that she exited her motor vehicle to go to work and slipped on ice and snow in the parking lot and that it snowed the night before (Sunday) and some one plowed the parking lot. See, ***Timmins v. Tishman Const. Corp.***, 9 AD3d 62, 777 NYS2d 458 (1st Dept. 2004). As has been stated so many times in the past, mere conclusions, expressions of hope or **unsubstantiated** allegations or assertions are insufficient to defeat a party's request for summary disposition. ***Savino Oil and Heating Co. Inc. v. Rana Management Corp.***, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); ***Dabney v. Ayre***, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, ***Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.***, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987).

Under the rationale of ***Espinal v Melville Snow Contractors***, *supra*, the plaintiff is unable to present a factual issue which would preclude summary disposition to the defendants. ***Lubell v. Stonegate at Ardsley Home Owners Association, Inc.***, *supra*. While summary judgment is a drastic remedy, depriving as it does a litigant of her day in court [***VanNoy v. Corinth Central School, District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. ***DiSabato v. Soffee***, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); ***Usefof v. Yamali***, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

As the Court noted in ***Andre v. Pomeroy***, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

> "[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (***Millerton Agway Co-op v. Briarcliff Farms***, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

Accordingly, the defendants' motion for summary judgment dismissing the plaintiff's action as a matter of law pursuant to CPLR §3212 is granted in its entirety and the plaintiff's action as against the defendants, Jim's Land and Home Care and James M. Meier s/h/a/ James M. Meler is dismissed.

Settle Judgment

The foregoing constitutes the decision of the Court.

Dated: February 9, 2011

J.S.C.