[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 105973/2007

AQUINO, MARIA

vs

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

CAL #6

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/28/11
APR 28 2011

BJ

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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MARIA AQUINO,

Plaintiff,

-against-

THE CITY OF NEW YORK, TRI-MAINTENANCE & CONTRACTORS, INC., TMC SERVICES INC., MET LIFE INC., METROPOLITAN LIFE INSURANCE COMPANY, INC., METROPOLITAN INSURANCE COMPANY d/b/a MET LIFE, INC., CENTRAL PARKING OF NEW YORK, INC., AND ROSE ASSOCIATES, INC.,

Defendants.

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Index No.: 105973/07

Mot. Date: 2/22/11
Mot. Seq. Nos.: 003, .

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
Helene Blank, Esq.
Blank & Star
387 New Lots Avenue
Brooklyn, NY 11207
718-498-3333

For MetLife and Rose:
Michael Cannella, Esq.
White & McSpedon, P.C.
875 Ave. of the Americas, Ste 800
New York, NY 10001
212-564-6633

For defendant New York City:
Jessica Wisniewski, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl
New York, NY 10007
212-788-0609

For defendant TMC Services:
Ira Goldman, Esq.
Cohen, Kuhn & Associates
2 Park Avenue, 6th Fl
New York, NY 10016
212-553-8300

For defendant Central Parking:
Jason Fixler, Esq.
Fixler & LaGattuta, LLP
61 Broadway, Suite 1105
New York, NY 10006
212-785-9800

This personal injury action arises from plaintiff's trip and fall alleged to have resulted

from an icy sidewalk condition on property owned by Met Life Inc., Metropolitan Life Insurance Company, Inc., and Metropolitan Insurance Company d/b/a Met Life, Inc. (MetLife) and managed by Rose Associates, Inc. (Rose).

By notice of motion dated September 28, 2010, MetLife and Rose move pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims asserted against them. Plaintiff and City oppose the motion.

By notice of motion dated September 28, 2010, Central Parking System of New York, Inc. (Central Parking) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims asserted against it. Plaintiff opposes the motion.

By notice of motion dated October 8, 2010, Tri-Maintenance & Contractors, Inc. and TMC Services, Inc. (TMC) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims asserted against them. Plaintiff and City oppose the motion, while MetLife and Rose oppose the dismissal of their cross claims against TMC.

The motions are consolidated for decision.

I. BACKGROUND

A. Factual allegations

According to a New York City Department of Environmental Protection (DEP) Service Request, on November 13, 2005 a civilian placed a 311 call to report that a fire hydrant in the street in front of a garage operated by Central Parking and located at 528 East 20th Street in Manhattan, within Stuyvesant Town and Peter Cooper Village complex (Stuyvesant Town), which is owned by MetLife and managed by Rose, was defective. (Affirmation of Michael Cannella, Esq., dated Sept. 27, 2010 [Cannella Aff.], Exhs. C, K). DEP repairs to the hydrant

began on November 17, 2005 and the problem was deemed resolved on December 5, 2005 after the hydrant was repaired and/or replaced. (*Id.*). Another Service Request reflects that on November 16, 2005, a 311 caller reported that a different hydrant on the street was defective and inoperative, that repairs were commenced on November 24, 2005, and that the problem was deemed resolved on November 30, 2005, after the hydrant was repaired and/or replaced. (*Id.*). A comment on the Request indicates that the hydrant was leaking when it was turned on.

On December 14, 2005, another caller reported that the first hydrant was causing an icy condition, possibly as a result of a water main break. On December 15, 2005, DEP inspected the hydrant and discovered water was running and coming out of the top of the hydrant and could not be shut off; the hydrant was placed out of service that day. On December 21, 2005, DEP made some repairs to the hydrant to stop the leak and the hydrant was placed back in service. (*Id.*).

On January 13, 2006, a caller reported that a hydrant on the street was leaking. DEP inspected it that day and found no leaks. (Affirmation of Helene E. Blank, Esq., dated Dec. 8, 2010 [Blank Aff.], Exh. B).

Plaintiff alleges that on February 9, 2006, at approximately 8:15 a.m., she sustained personal injuries when she slipped and fell on ice and/or snow on a sidewalk/driveway/public walkway in front of and adjacent to Central Parking's garage. (Cannella Aff., Exh. C). According to plaintiff, defendants permitted the area of the accident to "become and remain frozen, slick, slippery, glazed and accumulated with snow and ice," thereby giving rise to a "traplike condition." (*Id.*). As a result of the accident, plaintiff required surgery on her right wrist and claims that she suffered severe pain in the right wrist and hand, among other injuries. (*Id.*).

At an examination before trial held on May 1, 2008, plaintiff testified that it was "really

cold and below zero" on the day of her accident, and that she was walking on the sidewalk and slipped on ice on the ground in front of the exit and entrance to Central Parking's garage. She had walked the same route and over the same sidewalk many times and twice a day, and had never before noticed any icy conditions. Although she had noticed water in a hole on the street in front of the garage many times as she walked her usual route, she never complained to anyone about it. Immediately before she fell, plaintiff noticed water and a big hole on the street and a lot of ice on the sidewalk which was "really shiny," and she saw no sand or salt. (Cannella Aff., Exh. E).

Plaintiff also stated that immediately after the accident, she informed a Stuyvesant Town security officer and he told her that he would call somebody to take her report. Stuyvesant Town security guards then met her in front of the garage and they asked a Central Parking employee at the garage why he had not placed salt on the sidewalk and directed him to do so, whereupon the employee spread salt on the sidewalk. (Cannella Aff., Exh. E).

At a deposition held on October 28, 2009, Thomas M. Yard, Jr., a former Rose employee assigned to supervise the daily security operations at Stuyvesant Town on the date of plaintiff's accident, testified that when he or any of the other guards observed any icy condition on a sidewalk, they would call the central security dispatcher employed by Rose, who would then contact TMC, its maintenance contractor, and a TMC employee would fix the problem. On the day of plaintiff's accident, another Rose security guard called Yard to the scene, and upon his arrival, Yard noticed that the ground in front of the garage was icy and wet and heavily salted. Yard learned from the other guard that plaintiff had slipped on the ice, that the guard had called the Rose dispatcher, and that TMC had then salted the area. Yard denies speaking to anyone who

worked for Central Parking and does not recall anyone from Central Parking speaking to him, and denies asking a Central Parking employee to spread salt as it was not Central Parking's responsibility to do so, but TMC's as it was responsible for maintaining the grounds in Stuyvesant Town. (Cannella Aff., Exh. G).

Yard testified that he saw the ice, "followed the track of the water" that was leading to it, and determined that the water had been pumped out of a hole near a fire hydrant in the street by DEP. He recalled seeing a DEP truck with its hoses inside the hole and a pumping device hooked up to the truck but no employees, and he described the water as a constantly flowing trickle and the street as sloping downhill and causing the water to pool in front of the sidewalk curb cut. He recalled no portion of the sidewalk being blocked off due to the work DEP was performing. Yard called TMC later that day and requested that they re-salt the area, which they did. Finally, Yard stated that the Stuyvesant Town security guards were employed by Rose. (*Id.*).

Yard filed an accident report, which he also sent to TMC. In it, he set forth, in pertinent part, that plaintiff's fall resulted from "water having been pumped from around a fire hydrant F/O 520 E20 and pooling in the low lying area in front of the garage. Cars entering and leaving the garage are causing the water to be spread onto the sidewalk, and freezing in the sub 30 degree temps outside. Upon my arrival on the scene, the area had already been heavily salted. I notified dispatch to have TMC re-salt the area." (Cannella Aff., Exh. J).

At a deposition held on September 1, 2009, Greg Tolwinski, a DEP employee, testified that a leak from the hydrant must have been detected by DEP sometime between December 21, 2005 and February 9, 2006, which is why he was sent to fix the hydrant on February 9, as usually DEP employees do not go back to check on a leak after it is fixed. On February 9, he and other

DEP employees repaired the hydrant, tested it to make sure there were no more leaks, and backfilled and restored the street around the hydrant which had been dug up during their repairs. The repairs he made were not related to the repairs made on December 21. Tolwinski and his crew arrived at the location at approximately 8 a.m. and left at 3 p.m. Tolwinski did not recall whether there was any water on the street and running down the curb line from the hydrant when he and his employees arrived there, and confirmed that DEP had hoses in a hole in the street which were pumping water out of the hole toward a sewer. If a DEP employee noticed a puddle forming as a result of the water being pumped out, he or she would try to fix it, although Tolwinski did not remember seeing any puddles on February 9. (Cannella Aff., Exh. J).

At a deposition held on October 28, 2009, Mark Quigley, a TMC employee who was TMC's facility manager at Stuyvesant Town in 2006, testified that TMC was responsible for clearing snow from the sidewalks, including the sidewalk in front of Central Parking, although he remembered that some of the personnel at the parking garages within Stuyvesant Town, including Central Parking's garage at issue here, maintained the entrances in front of the garages including salting and sanding. TMC employees cleared ice from sidewalks, regardless of the source of the ice, and if an employee observed an icy condition, he or she would report it to a TMC supervisor. (Affirmation of Ira Goldman, Esq., dated Oct. 8, 2010 [Goldman Aff.], Exh. H).

At a deposition held on April 30, 2010, John Isaacs, a Central Parking facility manager at the time of plaintiff's accident, testified that in 2006, Central Parking managed six garages at Stuyvesant Town including the garage located at 528 East 20th Street, that Central Parking employees had no responsibility related to the sidewalk or driveway in front of the garage, that

TMC was responsible for clearing snow and ice in front of the garage, and that Central Parking kept no salt or sand or de-icing solution. Isaacs had seen TMC employees cleaning the sidewalks at Stuyvesant Town and putting down salt or sand after it had snowed. He did not know if Central Parking made any complaints to MetLife regarding icy conditions on the sidewalk in January or February 2006 and stated that Central Parking did not request from MetLife any maintenance related to ice. If Central Parking received a complaint about an icy condition in front of the garage, it would notify MetLife. Isaacs did not remember ever seeing a puddle of water in the street or any icy conditions on the driveway or sidewalk in front of the garage and was unaware of whether the fire hydrant near the garage had been leaking before plaintiff's accident. (Fixler Aff., Exh. 12).

B. Applicable contracts

1. Contract between TCM and Rose

Pursuant to a contract between Rose and TMC, TMC was responsible for grounds maintenance, janitorial services, and snow and ice removal, among other services, for Stuyvesant Town. (Affirmation of Michael Cannella, Esq., dated Oct. 20, 2010, Exh. B). Stuyvesant Town, as set forth in the contract, included, among other things, "6 parking garages, approximately 6.6 miles of asphalt paths, approximately 2.6 miles of sidewalk, approximately 1.7 miles of roads . . ." (*Id.*). TMC was required to employ full-time supervisors, responsible for the quality and the cleanliness of the property and available to be contacted at any time. (*Id.*).

There are two sections of the contract which specifically reference snow removal. The first section provides as follows, in pertinent part:

[TMC] shall anticipate weather conditions and provide supplemental personnel to

> facilitate the early removal of snow and ice from sidewalks. At no time during precipitation shall snow accumulation exceed one half inch (½"). If snow falls during the evening, sidewalk must be completely cleared by 6 A.M. the following morning . . . When snowfall stops and sidewalks have been completely cleared, [TMC] will apply snow and ice melt to the affected areas to insure against ice.

(*Id.*). Pursuant to the second section:

> [TMC] shall be directly responsible for the administration, management and supervision of the snow and ice removal plan. [TMC] shall clear all paths, sidewalks, stoops, stairs, driveways, and roadways throughout [Stuyvesant Town]. All defined areas stated above shall be free of ice and snow and maintained in a safe condition. At no time during precipitation shall any accumulation exceed one half inch (½").

(*Id.*).

The contract also provides that TCM is responsible to Rose for any acts and omissions of TCM's agents or employees and contains an indemnification provision:

> To the fullest extent permitted by law, [TCM] agrees to protect, indemnify, defend and hold [Rose] harmless from any and all claims . . . arising out of or resulting from (i) any acts or omissions of [TCM], its employees or agents ... (ii) ... the negligent or tortious acts or omissions of [TCM], its employees and agents ... and/or (iii) [TCM]'s failure to perform its obligations under the Contract.

(*Id.*).

2. Contract between Central Parking and MetLife

Central Parking contracted with MetLife to operate garages located in Stuyvesant Town, including the garage at 528 E. 20th Street. Pursuant to the contract, Central Parking, referenced in the contract as an independent contractor, would admit MetLife's parking customers into the garage and maintain their accounts in exchange for a flat fee. Central Parking was also responsible for parking rates, labor schedules, and routine cleaning and maintenance of parking facilities and equipment as directed by MetLife, and Central Parking was directed to keep their premises, equipment, and furniture in good condition and repair. There is no mention of Central

Parking being responsible for monitoring the sidewalk for snow or remedying any icy conditions. MetLife also agreed to reimburse Central Parking for its out-of-pocket expenses for snow removal, to the extent not performed by MetLife. (Affirmation of Jason L. Fixler, Esq., dated Sept. 28, 2010 [Fixler Aff.], Exh. A).

Hector Chevalier, Vice-President of Central Parking for the Northeast Region, was fully responsible for negotiating and entering into the contract with MetLife. According to him, Central Parking's "maintenance responsibilities were limited to keeping the garage, its premises, equipment and furniture in good condition and repair," and it "was not responsible for performing any snow or ice removal on the sidewalks adjacent to the subject garage. Instead, that obligation was retained by MetLife and contracted out to their property-wide maintenance contracts, TMC." (Fixler Aff.; Affidavit of Hector Chevalier, dated Sept. 28, 2010 [Chevalier Affidavit], Exh. 13).

II. PROCEDURAL BACKGROUND

On or about April 30, 2007, plaintiff commenced the instant action against defendants by filing and serving her summons and complaint. (Goldman Aff., Exh. A). On or about June 8, 2007, TMC served its answer which included a cross claim for apportionment, contribution, and common law indemnification against all of the other defendants. (*Id.*, Exh. B). On or about June 11, 2007, Central Parking served its answer which included a cross claim for apportionment against all of the other defendants. (Fixler Aff., Exh. B). On or about July 5, 2007, MetLife and Rose served their answer which included a cross claim for apportionment against all of the other defendants. (Cannella Aff., Exh. B).

III. APPLICABLE LAW

"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." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must "lay bare" its evidence (*Silberstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); "unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d 557, 562). A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

To establish, *prima facie*, a cause of action for injuries resulting from a slip and fall, the plaintiff must prove that the defendant either created the condition which caused the accident or that it had actual or constructive notice of the condition and failed to remedy it. (*Kesselman v Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). A defendant moving for summary judgment in a slip and fall case has the initial burden of establishing, *prima facie*, that it neither created the defective condition, nor had actual or constructive notice of it. (*Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]).

IV. MOTION BY METLIFE AND ROSE

A. Contentions

MetLife and Rose deny having had actual or constructive notice of the ice on the sidewalk on which plaintiff fell, observing that plaintiff never informed them of the icy condition and thus precluding any actual notice. They claim that plaintiff did not identify how long the icy condition had existed or establish that it was visible and apparent for a sufficient amount of time to allow them to discover and remedy it. MetLife and Rose also deny receiving notice of any problems with the fire hydrant and surmise that as DEP arrived at the hydrant at approximately 8:00 a.m. on the day of plaintiff's accident and the pumped-out water began to trickle out shortly thereafter, and as plaintiff's accident occurred at the latest at 8:20 a.m., the ice could have been created only minutes before, giving them insufficient time to remedy the problem.

Plaintiff contends that MetLife and Rose had a duty to maintain the sidewalk in a safe condition as the landowners and as they derived a special use from the garage, that they failed to establish that they had no notice of any conditions on the street or sidewalk that may have caused plaintiff's accident, and that even if the accident was caused by a defect on the sidewalk it was their responsibility to fix it. (Blank Aff.).

In reply, MetLife and Rose argue that plaintiff failed to establish that they had actual or constructive notice of the condition, deny liability for the allegedly defective fire hydrant, and observe that plaintiff testified that she had never noticed any icy conditions in front of Central Parking during the many times that she walked past it. (Reply Affirmation, dated Dec. 16, 2010).

City contends that MetLife and Rose failed to prove that they had no constructive notice of the icy condition. (Affirmation of Jessica Wisniewski, ACC, dated Nov. 19, 2010).

B. Analysis

1. Dismissal of complaint

It is undisputed that MetLife and Rose neither created nor had actual notice of the icy condition. However, MetLife and Rose offer no evidence based on personal knowledge showing that they did not observe any water pooling on the street or any ice on the sidewalk in front of Central Parking before plaintiff's accident or when they had last inspected the sidewalk, thus failing to establish that they lacked constructive notice of the condition. (*See De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566 [1st Dept 2010] [defendant's president's testimony not probative as to actual or constructive notice of icy sidewalk absent personal knowledge of when defendants' employees last inspected sidewalk or sidewalk's appearance before accident]; *Martinez v Khaimov*, 74 AD3d 1031 [2d Dept 2010] [defendant failed to establish lack of constructive notice of snow on sidewalk as he provided no evidence as to when he last inspected sidewalk and what it looked like then or that the condition lasted insufficient length of time for him to discover and remedy it]; *Mignona v 7-Eleven, Inc.*, 76 AD3d 1054, 1055 [2d Dept 2010] [defendant "failed to submit evidence from his employees who were at the premises on the day of the accident and who were responsible for shoveling and salting the area where the plaintiff allegedly fell, stating when the parking lot was last inspected, shoveled, or plowed"]; *Lebron v Napa Realty Corp.*, 65 AD3d 436 [1st Dept 2009] [defendant did not prove lack of notice as manager had no personal knowledge of condition of sidewalk at time of or immediately prior to accident and did not establish that no employees could not have noticed ice in time to clear it]).

MetLife and Rose's contention that the ice was formed by DEP's work only minutes before plaintiff's accident is speculative, and in any event, to the extent that the ice may have

been formed by water leaking from the fire hydrant, there is evidence that water had been leaking for several months before plaintiff's accident, raising a triable issue as to whether MetLife and Rose had or should have had constructive notice of it.

2. Dismissal of cross claims

As Central Parking has been dismissed from this action (*see infra* V.), as City does not oppose the dismissal of its cross claim against MetLife and Rose, and as the complaint has been dismissed against TMC (*see infra* VI.), MetLife and Rose are entitled to dismissal of any cross claims asserted against them.

V. MOTION BY CENTRAL PARKING

A. Contentions

Central Parking denies any responsibility for inspecting or maintaining the sidewalk and driveway area in front of the garage, alleging that such responsibility was undertaken contractually by MetLife and Rose and TMC. (Fixler Aff.).

Plaintiff maintains that questions of fact exist as to whether Central Parking made "special use" of the sidewalk and whether such use created or exacerbated the icy condition, and as to whether Central Parking's premises, which it was required to maintain, encompassed the sidewalk in front of the garage. Plaintiff also argues that based on her testimony and Quigley's, there exist triable issues as to whether Central Parking employees undertook to and maintained the sidewalk in front of the garage, and that Central Parking launched an instrument of harm, i.e. by permitting cars to go in and out of the garage, which conferred on it a duty to protect plaintiff. (Blank Aff.).

In reply, Central Parking argues that TMC had the sole duty to maintain the sidewalk in

front of the garage, that it is disputed as to whether Central Parking employees ever put salt on the sidewalk or otherwise maintained it, and that any duty that arose as a result of the special use of the driveway retained by MetLife and Rose was contracted out to TMC. (Reply Affirmation, dated Dec. 17, 2010).

B. Analysis

Although Central Parking was responsible for keeping the premises and equipment in good condition, there is no evidence that the premises encompassed the sidewalk in front of the garage or that Central Parking was responsible for monitoring the sidewalk for icy conditions and remedying such conditions. Indeed, the contract between TMC and Rose indicates that TMC was responsible for maintaining and removing snow and ice in front of the garage, and the contract between Central Parking and MetLife provides that any extra expenses that Central Parking incurred for snow removal not provided by MetLife would be paid for by MetLife, thereby indicating that MetLife assumed responsibility for the snow removal on Central Parking's sidewalk. The fact that some Central Parking employees may have cleaned the sidewalk on some occasions does not mean that they assumed the legal obligation to do so. Thus, Central Parking has established that it was not contractually responsible for remedying the icy condition on the sidewalk.

Alternatively, plaintiff argues that Central Parking owed her a duty to keep the sidewalk safe, having launched an instrument of harm or made special use of the driveway across the sidewalk. As held by the Court of Appeals in *Espinal v Melville Snow Contractors*, an independent contractor owes no duty to a third party, unless, as pertinent here, in failing to exercise reasonable care in the performance of its duties, it "launche[s] a force or instrument of

harm." (98 NY2d 136 [2002]). Thus, the relevant issue is whether the contractor undertook to render services and then negligently created or exacerbated a dangerous condition. (*Id.* at 141-142). There must be some evidence that the contractor left the premises in a condition more dangerous the one it found. (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210 [2d Dept 2010]).

Here, there is no evidence that Central Parking, by permitting cars to enter and exit its garage, which allegedly splashed water which froze on the sidewalk, negligently created or exacerbated a dangerous condition by leaving the premises in a more dangerous condition than it had found them. (*See Lin v Yam*, 62 AD3d 740 [2d Dept 2009] ["[e]vidence that melting snow on the defendants' property on the sides of the defendants' driveway may have run off onto the sidewalk does not indicate that the defendants made the naturally-occurring conditions more hazardous"]; *O'Connor v Consol. Edison Co. of New York, Inc.*, 55 AD3d 356 [1st Dept 2008] [even if "ice patch was created by defendant's structures on defendant's abutting lot that allegedly diverted the flow of rain water from the lot," defendant had no duty to prevent flow of water from premises]; *Rader v Walton*, 21 AD3d 1409 [4th Dept 2005] [owner did not cause water to flow from premises by artificial means and thus not liable for icy condition on sidewalk caused by water]).

Plaintiff also argues that as the driveway, which intersected the sidewalk, was used solely by Central Parking customers, Central Parking made a special use of it, citing *Tormey v City of New York* (302 AD2d 277 [1st Dept 2003]). In *Tormey*, the plaintiff tripped on a metal-sheathed section of curb in front of a Central Parking garage, and the court determined that Central Parking had made special use of the curb as it was used only by Central Parking customers to enter the garage and was not used by the general public. (*Id.* at 277-278). Here, similarly, it is

undisputed that the driveway itself was used only by Central Parking customers to enter and exit the garage. And in general, a driveway that is part of or intersects a sidewalk constitutes a special use. (*Campos v Midway Cabinets, Inc.*, 51 AD3d 843 [2d Dept 2008]; *Katz v City of New York*, 18 AD3d 818 [2d Dept 2005]).

However, even if an owner has made special use of a driveway across a sidewalk, the owner may be entitled to summary judgment if it establishes that it did nothing to create the condition or cause the condition through its special use of the driveway. (*Marino v Parish of Trinity Church*, 67 AD3d 500 [1st Dept 2009]; *Katz*, 18 AD3d 818). Here, Central Parking demonstrated that it neither created the icy condition, nor did its use of the driveway create the condition. (*See eg Blum v City of New York*, 267 AD2d 341 [2d Dept 1999] [owner's use of driveway did not create icy condition thereon]).

And absent opposition to Central Parking's motion to dismiss cross claims against it, and in light of my finding that Central Parking made not be held liable to plaintiff here, the cross claims asserted against it are dismissed.

VI. MOTION BY TMC

A. Contentions

TMC denies having had notice of the icy condition and observes that there is no evidence of when the condition first developed, and argues that DEP created the condition. It also contends that as an independent contractor, it owed plaintiff no duty of care. (Goldman Aff.).

Plaintiff maintains that TMC owed a duty to her as TMC's contract with MetLife and Rose was an all-encompassing maintenance contract by which TMC supplanted MetLife and Rose's duty to maintain safely the sidewalks at Stuyvesant Town, and observes that TMC failed

to offer proof that it had no notice of the condition absent any evidence based on personal knowledge as to the condition of the sidewalk the day of plaintiff's accident or any work logs demonstrating when and how TMC inspected and/or monitored the sidewalk, which logs it was contractually required to provide to MetLife and Rose. (Blank Aff.).

TMC also seeks to have all cross claims asserted against it dismissed as it did not negligently perform the contract. MetLife and Rose oppose the motion, arguing that there are triable issues as to whether TMC performed its contractual obligation to remove ice from the sidewalk. City also opposes TMC's motion for dismissal of the cross claims against it, arguing that there exists a question of fact as to whether TMC complied with its contractual obligation to clear ice from the sidewalk. (Wisniewski Aff.).

B. Analysis

1. Dismissal of complaint

As an independent contractor, TMC owed plaintiff a duty of care only if, as pertinent here, it entirely displaced MetLife/Rose's duty to maintain the premises safely. (*Espinal*, 98 NY2d at 140).

Here, TMC's contract required it to monitor the sidewalks only certain days and times, and it was obliged to remove snow and ice accumulation only when it exceeded one-half inch; and if snow fell during the evening, it had until 6 a.m. the following morning to remove it, thus demonstrating that it did not entirely displace MetLife and Rose's duty. (*See Espinal*, 98 NY2d at 140 [as contractor required to plow only when snow ended and accumulation exceeded three inches, it did not displace owner's duty to maintain premises]; *Kearsey v Vestal Park, Inc.*, 71 AD3d 1363 [3d Dept 2010] [contractor required to plow only if accumulation exceeded two

inches]; *Linarello v Colin Svce. Sys., Inc.*, 31 AD3d 396 [2d Dept 2006] [owner required contractor to remove snow as needed or when accumulation exceeded particular depth]; *Patterson v New York City Tr. Auth.*, 5 AD3d 454 [2d Dept 2004] [contractor had to remove ice and snow within 24 hours of snowfall]).

TMC and MetLife/Rose witnesses also testified that it was the customary practice and procedure that any defects or unsafe conditions at Stuyvesant Town would first be reported to MetLife/Rose which would then contact TMC to repair them, establishing that MetLife/Rose had control or supervision over TMC's repairs. (*See Foster*, 76 AD3d at 214-215 [although contract required contractor to clear ice and snow, deposition testimony indicated that if owner received complaint, it would direct contractor to perform work or repair condition itself]; *Garcia v Mack-Cali Realty Corp.*, 52 AD3d 420 [1st Dept 2008] [triable issue as to whether owner retained control over snow removal operations by contractor]).

Thus, having failed to establish that TMC entirely displaced MetLife and Rose's duty to maintain safely the sidewalk, plaintiff offers no ground upon which TMC may be held liable to her.

2. Dismissal of cross claims

However, as triable issues of fact remain as to what caused or contributed to causing the icy condition, and absent evidence demonstrating that TMC fulfilled its contractual obligation to remove any icy accumulation from the sidewalk, TMC has not established that it may not be required to indemnify MetLife and Rose here. (*Trzaska v Allied Frozen Storage, Inc.*, 77 AD3d 1291 [4th Dept 2010] [contractor failed to establish as matter of law that it fulfilled snow removal contract]; *Peycke v Newport Media Acquisition II, Inc.*, 17 AD3d 338, 339 [2d Dept 2005]

[contractual indemnification claim not dismissed as triable issue remained as to whether contractor breached contract by failing to perform required service]).

VII. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Met Life Inc., Metropolitan Life Insurance Company, Inc., Metropolitan Insurance Company d/b/a Met Life, Inc. and Rose Associates, Inc.'s motion for summary judgment is granted only to the extent of dismissing any cross claims asserted against them; it is further

ORDERED, that defendant Central Parking System of New York, Inc.'s motion for summary judgment is granted and the complaint and any cross claims asserted against it are hereby severed and dismissed in their entirety as against Central Parking System of New York, Inc., with costs and disbursements to Central Parking System of New York, Inc., as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Central Parking System of New York, Inc.; it is further

ORDERED, that defendants Tri-Maintenance & Contractors, Inc. and TMC Services, Inc.'s motion for summary judgment is granted with respect to dismissal of plaintiff's complaint and denied as to the cross claims asserted as against Tri-Maintenance & Contractors, Inc. and TMC Services, Inc.; and it is further

ORDERED, that the complaint is hereby severed and dismissed in its entirety as against Tri-Maintenance & Contractors, Inc. and TMC Services, Inc., with costs and disbursements to Tri-Maintenance & Contractors, Inc. and TMC Services, Inc., as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Tri-Maintenance

& Contractors, Inc. and TMC Services, Inc.; and it is further

ORDERED, that all remaining claims and cross claims shall continue.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 28, 2011
New York, New York

APR 2 9 2011

FILED

APR 29 2011

NEW YORK
COUNTY CLERK'S OFFICE