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SHORT FORM ORDER

INDEX No. 09-15903
CAL. No. 11-00031 OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 3-3-11 (# 004)
MOTION DATE 3-3-11 (# 005)
MOTION DATE 4-11-11 (# 006)
ADJ. DATE 4-18-11
Mot. Seq. # 004 - MG # 006 - MD
Mot. Seq. # 005 - XMD

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NORA ROBLES,

Plaintiff,

- against -

DAVID BRUHNS d/b/a WOOD BROOK LANDSCAPING, ALL ISLAND LANDSCAPE & MASONRY, INC., and FAIRVIEW AT ARTIST LAKE LIMITED PARTNERSHIP d/b/a FAIRVIEW ARTIST LAKE CONDOMINIUM I, and THE BOARD OF MANAGERS OF FAIRVIEW ARTIST LAKE CONDOMINIUM I,

Defendants.

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Upon the following papers numbered 1 to 38 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; 12 - 20; Notice of Cross Motion and supporting papers 21 - 26; Answering Affidavits and supporting papers 27 - 32; Replying Affidavits and supporting papers 33 - 38; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 004) by All Island Landscape & Masonry, Inc. for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the cross motion (# 005) by The Board of Managers of Fairview Artist Lake Condominium I for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion (# 006) by David Bruhns d/b/a Wood Brook Landscaping for summary judgment dismissing the complaint and all cross claims against it is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Nora Robles, on October 26, 2008 at approximately 7:00 p.m. when she tripped and fell over a tree stump on a grassy island in the parking lot of a condominium complex known as Fairview Artist Lake Condominium I in Middle Island, New York. Plaintiff alleges in her amended verified complaint that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition which caused her to fall and sustain permanent serious physical injury.

The following facts are undisputed. Prior to the accident, defendant The Board of Managers of Fairview at Artist Lake Condominium I ("The Board of Managers") had entered into a contract with defendant David Bruhns d/b/a Wood Brook Landscaping ("Wood Brook Landscaping") to perform snow removal and landscaping services. In December 2006, upon request of The Board of Managers, Wood Brook Landscaping cut down bushes on the subject island, leaving stumps behind. Subsequently, defendant All Island Landscape & Masonry, Inc. ("All Island Landscape") was hired to replace Wood Brook Landscaping.

All Island Landscape now moves (# 004) for summary judgment dismissing the complaint and all cross claims against it on the ground that it neither owed a duty of care to plaintiff stemming from its service contract with The Board of Managers nor created a dangerous condition which caused plaintiff to trip and fall. In support, All Island Landscape submits, *inter alia*, the pleadings, the deposition testimony given by plaintiff, Wood Brook Landscaping's representative, defendant David Bruhns, All Island Landscape's representative, David Donofrio, and The Board of Managers' representatives, Laura Lambert and Harry Brooke.

At her examination before trial, plaintiff testified to the effect that she has lived with her daughter in the subject condominium since 2000, and that, on the night of the accident, she was walking her dog with her daughter. There were several islands and a parking lot that she had to cross to get to the dog-walk area from her unit. She walked through the first island and the parking lot and arrived at the subject island. When she walked several steps on the island, her left foot "got stuck on the lip" of the stump, causing her to trip and fall straight down, and her leg to come into contact with the stump. She

had no recollection as to whether there was anything blocking her view of the stump as she was walking past it. Prior to the accident, she had tripped, once or twice, over other stumps in the parking lot area.

At his deposition, defendant David Bruhns testified to the effect that he is the owner of Wood Brook Landscaping, and, prior to the accident, Wood Brook Landscaping was hired by The Board of Managers to provide landscaping as well as snow removal. Defendant Bruhns stated that, in December 2006, Mr. Harry Brooke called him and asked him to "cut the bushes down" as low as he could go on the corner of the building number 26 and the parking lot, including the subject island. Upon following the instructions from Mr. Harry Brooke, defendant Bruhns cut down bushes on the requested area by himself on December 20 and 21, 2006. After Wood Brook Landscaping provided the landscaping service for a full season in 2007, The Board of Managers no longer entered into the contract with Wood Brook Landscaping.

At his deposition, David Donofrio testified to the effect that he is the owner of All Island Landscape, and that, since All Island Landscape was hired in October 2007, The Board of Managers has entered into the contract with it to perform landscaping services, including lawn mowing, weed whacking, blowing, and hedge trimming. In October 2007, when he worked in the condominium for the first time, he saw several six or seven-inch high stumps in the parking lot area. Mr. Donofrio testified that he neither cut down any of the stumps in the parking lot area nor touched anything with regard to the stumps, except for doing weed whacking on the islands where the stumps were. In 2009, upon request by the property manager, All Island Landscape removed all the stumps and filled them in with concrete.

At her deposition, Laura Lambert testified to the effect that she has been a member of The Board of Managers since November 2006, and that The Board of Managers hired Wood Brook Landscaping to remove bushes on the islands in the parking lot area. Ms. Lambert stated that, although The Board of Managers wanted all the bushes to be taken out completely, Wood Brook Landscaping just cut down bushes, and that The Board of Managers did not inspect the area where the bushes were removed. Ms. Lambert also stated that All Island Landscape did not perform any work related to the stumps, and that no work was done on the stumps until the time of the accident.

At his deposition, Harry Brooke testified to the effect that, while he was serving as the president of The Board of Managers, Wood Brook Landscaping was hired to get rid of the bushes on the islands in the parking lot, but he gave no instructions as to how to remove them. Wood Brook Landscaping cut bushes down, leaving about four-inch high stumps. When Mr. Brooke asked defendant Bruhns why he did not remove all the stumps, he said that he could not get the stumps out due to electrical and water lines underneath the islands. The Board of Managers did not obtain a second opinion from either the electric company or water company or any other landscapers. Mr. Brooke did not consider the stumps to be a tripping hazard. Subsequently, All Island Landscape was hired to replace Wood Brook Landscaping prior to the accident. Mr. Brooke stated that All Island Landscape has never done any maintenance work to the stumps.

Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party. In general, contractual obligations will not create a duty towards a third party unless (1) the third party has

reasonably relied, to his or her detriment, on the continued performance of the contracting party's duties under the contract; (2) the contract is so comprehensive and exclusive that it completely displaces the other contracting party's duty toward the third party; or (3) the contracting party has launched a force or instrument of harm, thereby creating or exacerbating a dangerous condition (*see*, ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Karac v City of Elmira***, 14 AD3d 842, 788 NYS2d 456 [3d Dept 2005]).

When a party, by its affirmative acts of negligence, has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (*see*, ***Espinal v Melville Snow Contrs.***, *supra*; ***Figueroa v Lazarus Burman Assocs.***, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, All Island Landscape is required to establish that it did not perform any work related to the stumps whose condition caused plaintiff's injury (*see*, ***Prenderville v International Serv. Sys.***, 10 AD3d 334, 781 NYS2d 110 [1st Dept 2004]).

Here, the evidence in the record reflects that All Island Landscape neither cut down any of the stumps on the subject island nor performed any work on the stumps, except doing weed whacking on the island. Moreover, under the contract between All Island Landscape and The Board of Managers, All Island Landscape was obligated only to perform landscaping services, including lawn mowing, weed whacking, blowing, and hedge trimming. A limited contractual undertaking to provide landscaping services generally does not render the contractor liable in tort for the personal injuries of third parties (*see*, ***Espinal v Melville Snow Contrs.***, *supra*; ***Huttie v Central Parking Corp.***, 40 AD3d 704, 835 NYS2d 701 [2d Dept 2007]). All Island Landscape has established its prima facie entitlement to judgment as a matter of law.

In opposition, plaintiff contends that, although All Island Landscape did not create the initial defective condition, it was aware of the condition, but never took any affirmative measures to attempt to cure the defect. Plaintiff asserts that All Island Landscape is obligated to cure the defective condition, but has offered no proof demonstrating that All Island Landscape is under such a duty. Plaintiff has failed to prove that her injury was the result of All Island Landscape having created or exacerbated a dangerous condition. By merely providing landscaping services, All Island Landscape cannot be said to have created or exacerbated a dangerous condition (*see*, ***Espinal v Melville Snow Contrs.***, *supra*).

Accordingly, the instant motion by All Island Landscape for summary judgment dismissing the complaint and all cross claims against it is granted. The action is severed and shall continue against the remaining defendants.

The Board of Managers cross-moves (# 005) for summary judgment dismissing the complaint and all cross claims against it on the ground that it is not negligent, and contends that the subject stump was open and obvious, and that The Board of Managers owes no duty to protect or warn against an open and obvious condition which is not inherently dangerous. Moreover, The Board of Managers alleges that, prior to the accident, the plaintiff was familiar with the configuration of the subject premises and was aware of the location and condition of the stumps, and that further, she tripped and fell as the result of her own culpable conduct.

While, to prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see, **Sloane v Costco Wholesale Corp.***, 49 AD3d 522, 855 NYS2d 155 [2d Dept 2008]; ***Scoppettone v ADJ Holding Corp.***, 41 AD3d 693, 839 NYS2d 116 [2d Dept 2007]), the defendant, as the movant in this case, is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (*see*, ***Carrillo v PM Realty Group***, 16 AD3d 611, 793 NYS2d 69 [2d Dept 2005]; ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2d Dept 2003]). The issue of actual or constructive notice is irrelevant where the defendant had a duty to conduct reasonable inspections of the premises and failed to do so (*see*, ***Pommerenck v Nason***, 79 AD3d 1716, 914 NYS2d 826 [4th Dept 2010]; ***Weller v Colleges of the Senecas***, 217 AD2d 280, 635 NYS2d 990 [4th Dept 1995]; ***Watson v New York***, 184 AD2d 690, 585 NYS2d 100 [2d Dept 1992]). Moreover, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see*, ***Trincere v County of Suffolk***, 90 NY2d 976, 655 NYS2d 615 [1997]; ***Clark v AMF Bowling Ctrs.***, 2011 NY Slip Op 3016, 921 NYS2d 273 [2d Dept 2011]). The issue of negligence, whether of the plaintiff or defendant, is usually a question of fact (*see*, ***Bruni v City of New York***, 2 NY3d 319, 778 NYS2d 757 [2004]). Furthermore, while there is no duty to protect or warn against an open and obvious condition, the proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence (*see*, ***DiVietro v Gould Palisades Corp.***, 4 AD3d 324, 771 NYS2d 527 [2d Dept 2004]; ***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]).

Here, The Board of Managers failed to establish its entitlement to judgment as a matter of law. It is undisputed that the subject stump was observable and known to plaintiff prior to the accident. While an open and obvious defect merely negated any duty that The Board of Managers owed plaintiff to warn of a potentially dangerous condition, it does not, without more, obviate the duty to maintain the property in a reasonably safe condition (*see*, ***Anton v Correctional Med. Srvs.***, 74 AD3d 1682, 904 NYS2d 535 [3d Dept 2010]; ***England v Vacri Constr. Corp.***, 24 AD3d 1122, 807 NYS2d 669 [3d Dept 2005]). There are several questions of fact as to whether an alleged dangerous condition existed on the island in the parking lot so as to create liability on the part of The Board of Managers and whether it exercised reasonable care under the circumstances (*see*, ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***DiVietro v Gould Palisades Corp.***, *supra*). There is also a question of fact as to whether plaintiff was comparatively negligent (*see*, ***Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]).

In the alternative, The Board of Managers seeks summary judgment for contractual indemnification against Wood Brook Landscaping.

A party is entitled to contractual indemnification when the intention to indemnify is clearly implied from the language and purposes of the entire agreement and the surrounding circumstances (*see*, ***Centennial Contrs. Enterprises v East New York Renovation Corp.***, 79 AD3d 690, 913 NYS2d 274 [2d Dept 2010]; ***Canela v TLH 140 Perry St.***, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]). A party seeking contractual indemnification must prove itself free from negligence, because to the extent its

negligence contributed to the accident, it cannot be indemnified therefor (*see*, ***Reisman v Bay Shore Union Free Sch. Dist.***, 74 AD3d 772, 902 NYS2d 167 [2d Dept 2010]; ***Cava Constr. Co. v Gealtec Remodeling Corp.***, 58 AD3d 660, 871 NYS2d 654 [2d Dept 2009]).

Here, The Board of Managers failed to establish its entitlement to summary judgment for contractual indemnification against Wood Brook Landscaping since a question of fact exists with respect to whether Wood Brook Landscaping breached the contract by failing to perform one or more of the services for which it was retained (*see*, ***Peycke v Newport Media Acquisition II***, 17 AD3d 338, 793 NYS2d 92 [2005]; ***Baratta v Home Depot USA***, 303 AD2d 434, 756 NYS2d 605 [2003]). Moreover, as discussed above, *supra*, there is a triable issue of fact as to the The Board of Managers' liability for the accident. These questions of fact preclude the granting of The Board of Managers' request for summary judgment for contractual indemnification against Wood Brook Landscaping.

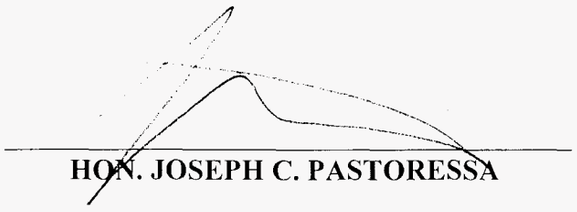
Therefore, the instant cross motion by The Board of Managers for summary judgment dismissing the complaint and all cross claims against it is denied.

Wood Brook Landscaping moves (# 006) for summary judgment dismissing the complaint and all cross claims against it on the ground that it never owed a duty of care to plaintiff.

Here, Wood Brook Landscaping failed to establish its entitlement to judgment as a matter of law. The adduced records indicate that Wood Brook Landscaping was obligated to remove the bushes on the subject island under a verbal contract between Wood Brook Landscaping and The Board of Managers, which was a separate contract from the regular landscape contract. While The Board of Managers wanted the bushes removed, Wood Brook Landscaping did not take out the bushes. Rather, Wood Brook Landscaping cut bushes down to the stumps, as it claimed there were electrical and water lines underneath the island. There are several questions of fact as to whether Wood Brook Landscaping properly performed its contractual obligations to The Board of Managers and whether Wood Brook Landscaping created a dangerous condition by cutting down the bushes to the stumps. Thus, Wood Brook Landscaping failed to meet its initial burden on the motion. This Court has considered Wood Brook Landscaping's other allegations and finds them to be without merit.

In view of the foregoing, the motion (# 004) by All Island Landscape for summary judgment is granted. The cross motion (# 005) by The Board of Managers for summary judgment and the motion (# 006) by Wood Brook Landscaping for summary judgment are denied in their entirety.

Dated: June 14, 2011



HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION