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SHORT FORM ORDER

INDEX No. 08-6315
CAL. No. 10-02270 OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 3-24-11 (#007)
MOTION DATE 3-21-11 (#008)
MOTION DATE 3-30-11 (#009)
ADJ. DATE 6-8-11
Mot. Seq. # 007 - MD # 008 - MD # 009 - MD

MICHELLE BOWES and WILLIAM BOWES,

Plaintiffs,

- against -

FERRANDINO & SON INC., TRUGREEN LANDCARE LLC and WASHINGTON MUTUAL BANK,

Defendants.

GRUENBREG & KELLY, LLP
Attorney for Plaintiffs
3275 Veterans Memorial Highway, Suite B-9
Ronkonkoma, New York 11779

JAMES R. PIERET & ASSOCIATES
Attorney for Ferrandino & Son, Inc.
400 Garden City Plaza
Garden City, New York 11530

WASHINGTON MUTUAL BANK,

Third-Party Plaintiff,

- against -

TRUGREEN LANDCARE LLC,

Third-Party Defendant.

RONALD W. RAMIREZ, ESQ.
Attorney for Trugreen Landcare LLC
107-19 71st Street
Forest Hills, New York 11375

CULLEN & DYKMAN LLP
Attorney for Washington Mutual Bank
100 Quentin Roosevelt Boulevard
Garden City, New York 11530-4850

TRUGREEN LANDCARE LLC,

Fourth-Party Plaintiff,

- against -

FERRANDINO & SON INC.,

Fourth-Party Defendant.

JOSEPH C. TONETTI, P.C.
Attorney for Superior Landscaping Solutions, Inc.
548 West Jericho Turnpike
Smithtown, New York 11787

FERRANDINO & SON INC.,

Fifth-Party Plaintiff,

- against -

SUPERIOR LANDSCAPING SOLUTIONS INC.,

Fifth-Party Defendant.

Upon the following papers numbered 1 to 69 read on th motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 20 - 26; 27 - 47 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 48 - 62 ; Replying Affidavits and supporting papers 63 - 69 ; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by Washington Mutual Bank (# 007) for summary judgment dismissing the complaint in the main action and all cross claims against it is denied; and it is further

ORDERED that the motion by Superior Landscaping Solutions Inc. (# 008) for summary judgment dismissing the fifth-party complaint and all cross claims against it is denied; and it is further

ORDERED that the motion by Trugreen Landcare LLC (# 009) for summary judgment dismissing the complaint in the main action and all cross claims against it is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff William Bowes on December 17, 2007, when he slipped and fell on ice on the parking lot of defendant Washington Mutual Bank ("WAMU") in Riverhead, New York. Prior to the accident, WAMU entered into a snow removal contract with defendant Trugreen Landcare LLC ("Trugreen"). Trugreen subcontracted its snow removal services to defendant Ferrandino & Son Inc. ("Ferrandino"). In turn, Ferrandino subcontracted its snow removal duties to the fifth-party defendant Superior Landscaping Solutions Inc. ("Superior"). The gravamen of the complaint in the main action is that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition.

WAMU now moves (# 007) for summary judgment dismissing the plaintiffs' complaint and all cross claims against it on the grounds that it did not create the alleged dangerous condition, and that it had no actual or constructive notice of the condition. In support, WAMU submits, *inter alia,* the pleadings, a bill of particulars, and the transcripts of the deposition testimony given by plaintiff William Bowes and WAMU's representative, Nancy Beattie.

At his examination before trial, plaintiff William Bowes testified to the effect that, on the day of the subject accident, he arrived at the Riverhead branch of WAMU and parked his vehicle in the front parking lot. While walking from his vehicle to the bank, he had no recollection as to whether he saw any snow or ice on the parking lot or on the curb of the sidewalk. When exiting the bank, he did not retrace the same route that he had taken as he came into the bank. Rather, when he walked down a little ramp, approximately 15 or 16 inches wide and 18 or 20 inches long, which went into the parking lot, he slipped and fell to the ground. After his fall, the plaintiff observed that the ramp was entirely covered with a clear patch of ice which caused him to fall. Prior to the accident, plaintiff did not observe the ice.

At her deposition, Nancy Beattie testified to the effect that she was an assistant manager of WAMU in Riverhead, and that her job duties did not include doing any inspections of the parking lot or sidewalks for snow and ice. In the morning of the accident, when she entered the bank, she had no recollection as to whether there was any ice or snow on the ramp or on the parking lot. After she heard that the accident happened, she went outside and saw plaintiff William Bowes laying down on the ground near the ramp. Although she "walked down" the ramp, she had no recollection as to whether she looked

at the ramp or whether she saw any ice on it. She did not see any sand or salt in the area of the accident. She stated that she had no recollection of the last time that the snow removal service was performed prior to the subject accident. In addition, she stated that she never heard of Trugreen.

While, to prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition (*see* ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]), 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* ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2d Dept 2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358, 671 NYS2d 494 [2d Dept 1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.*** 84 NY2d 967, 622 NYS2d 493 [1994]). Moreover, 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* ***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]). Furthermore, 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* ***Moons v Wade Lupe Constr. Co.,*** 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Fasano v Green-Wood Cemetery***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]).

Here, WAMU has failed to establish its entitlement to judgment as a matter of law. There are questions of fact as to whether a dangerous condition existed on the subject ramp so as to create liability on the part of WAMU; whether it had actual or constructive notice of the ice on the ramp (*see* ***Rhodes-Evans v 111 Chelsea LLC***, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]); and whether WAMU 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]). Accordingly, this branch of WAMU's motion for summary judgment is denied.

WAMU also seeks summary judgment for contractual indemnification against Trugreen. WAMU's submissions, however, failed to establish its entitlement to summary judgment for contractual indemnification against Trugreen since a question of fact exists with respect to whether Trugreen 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]). The question of fact precludes the granting of WAMU's request for summary judgment for contractual indemnification against Trugreen.

Superior moves (# 008) for summary judgment dismissing the fifth-party complaint by Ferrandino against it on the grounds that Superior was not liable to plaintiffs and defendants, including Ferrandino, in the main action since Superior did not perform any snow removal work after December 13, 2007. Superior's motion for summary judgment, however, is denied as procedurally defective for failure to submit a complete copy of the pleadings (*see* CPLR 3212 [b]; ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2d Dept 2005]; ***Gallagher v TDS Telecom***, 280 AD2d 991, 720 NYS2d 422 [4th Dept 2001];

Mathiesen v Mead, 168 AD2d 736, 563 NYS2d 887 [3d Dept 1990]). Superior has not submitted copies of the complaint of the plaintiffs in the main action against WAMU and the answers of WAMU, Trugreen and Ferrandino with its moving papers. Pursuant to CPLR 3212 (b), a motion for summary judgment "shall be supported by ... a copy of the pleadings."

Trugreen moves (# 009) for summary judgment dismissing the plaintiffs' complaint and all cross claims against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. In support, Trugreen submits, *inter alia,* the pleadings, a bill of particulars, and the transcripts of the deposition testimony given by plaintiff William Bowes, WAMU's representative, Nancy Beattie, and Ferrandino's representative, Christine Bilek, as well as the snow removal contract between Trugreen and Ferrandino.

At her deposition, Christine Bilek testified to the effect that she is a project manager employed by Ferrandino, and that Ferrandino was hired as a subcontractor by Trugreen to provide snow plowing services during the 2007 and 2008 period. According to the snow removal contract between Trugreen and Ferrandino, if the weather event met the requirements in the contract for auto deploy, Ferrandino would initiate service without being directed by Trugreen. In December 2007, Ferrandino would also receive a work order through emails or phone calls from Trugreen indicating what extra services needed to be performed. Ms. Bilek has not maintained any work order for December 2007. Ferrandino hired Superior as a subcontractor to provide snow removal services at the Riverhead branch of WAMU. Ferrandino would not go to a site which was assigned to subcontractors. Ms. Bilek stated that she had no knowledge as to whether Superior was called back to the subject site at any time between December 13, 2007 and December 17, 2007. Ferrandino has no inspection procedures for the premises where subcontractors have worked.

Pursuant to the contract between Trugreen and Ferrandino, Ferrandino was obligated to "supply the specified labor, material, equipment and competent supervision to execute and furnish all of the Work assigned to it in accordance with the instructions of TruGreen in a safe, expeditious, careful and workmanlike manner in accordance with the instruction of TruGreen." In case Ferrandino fails to complete remedial work notified by Trugreen, Trugreen "shall have the right to engage the services of another Subcontractor to perform such work."

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 toward 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* ***Stiver v Good & Fair Carting & Moving***, 9 NY3d 253, 848 NYS2d 585 [2007]; ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Rubistello v Bartolini Landscaping, Inc.***, 2011 NY Slip OP 6483, 2011 NY App Div Lexis [2d Dept 2011]).

When a party, including a snow removal contractor, 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 Assoc.***, 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, Trugreen was required to establish that it did not perform any snow removal operations related to the condition which caused plaintiff's injury or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (*see* ***Schwint v Bank St. Commons, LLC***, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; ***Keese v Imperial Gardens Assoc. LLC***, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]).

Here, Trugreen's limited contractual undertaking to provide snow removal services is not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see*, ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; ***Katz v Pathmark Stores***, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]). Nevertheless, Trugreen's submissions failed to establish its entitlement to judgment as a matter of law on this issue (*see* ***Keese v Imperial Gardens Assoc. LLC***, *supra*). There are questions of fact as to whether Trugreen had actual or constructive notice of the ice on the subject parking lot; whether Trugreen performed any snow removal operations related to the condition which caused plaintiff's injury; and whether Trugreen exercised reasonable care under the circumstances. Accordingly, this branch of Trugreen's motion for summary judgment is denied.

Trugreen also seeks summary judgment for contractual indemnification against Ferrandino. Trugreen, however, has failed to establish its entitlement to summary judgment for contractual indemnification against Ferrandino since a question of fact exists with respect to whether Ferrandino 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***, *supra*; ***Baratta v Home Depot USA***, *supra*). The question of fact precludes the granting of Trugreen's request for summary judgment for contractual indemnification against Ferrandino.

In view of the foregoing, the motion (# 007) by Washington Mutual Bank and the motion by Trugreen Landcare LLC (# 009) for summary judgment dismissing the complaint in the main action are denied. The motion by Superior Landscaping Solutions Inc. (# 008) for summary judgment dismissing the fifth-party complaint is also denied.

Dated: OCT 04 2011

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION