Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Jesus Garcia

Plaintiff,

- against -

The City of New York, Argiris Nihas, Jefferson Court Property Owners Association, Inc. And Magic Touch Cleaning & Maintenance, Inc.,

Defendant.

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Index Number: 22123/09

Motion Date: 8/9/11

Motion Cal. Number: 12,13,41

Motion Seq. No.: 4,5,6

The following papers numbered 1 to 44 read on this motion by defendant, Argiris Nihas, for summary judgment; motion by defendant, Jefferson Court Property Owners Association, Inc., for summary judgment; motion by plaintiff to amend the caption and the complaint to add an additional party; "cross-motion" by defendant, City of New York; and cross-motion by defendant, Magic Touch Cleaning & Maintenance, Inc., for summary judgment.

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As a preliminary matter, the notice of "cross-motion" by the City

is deemed a notice of motion, since plaintiff was not a moving party at the time the "cross-motion" was made (see CPLR 2215). A cross-motion is merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion" (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1).

Upon the foregoing papers it is ordered that the motions and cross-motion are decided as follows:

Motion by Nihas for summary judgment dismissing the complaint and all cross-claims against him is granted.

Plaintiff allegedly sustained injuries as a result of slipping and falling on ice in front of 39-48 49th Street in Queens County on January 11, 2009. There is no dispute that said premises is a two-family home owned by defendant Nihas and occupied by him and his family. Plaintiff testified in his deposition that he lived on the same street, at 39-88 49th Street, that on the day of his accident he left his home, turned left down the block and was walking to his car to clean the snow off of it. His car was parked across the street from Nihas' premises at 39-48. He believed that it had snowed approximately two days before the date of the accident, but he did not remember how much snow had accumulated, either on the ground or on his car. He also did not remember whether he had left his house at any time between the time it had snowed until the date of the accident two days later. He walked approximately 40-50 feet on the sidewalk, which was clear, before reaching the area abutting Nihas' premises, where there was a patch of ice that covered the sidewalk spanning the entire front of said property. He did not see the ice prior to slipping and falling.

An abutting homeowner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the homeowner created the defective condition or caused it through some special use, or unless a statute charges the homeowner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the homeowner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

The only statutory provision imposing liability upon property owners in the City of New York for failing to repair and maintain the public sidewalks abutting their property is section 7-210 of the New York City Administrative Code, and that section specifically excludes owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]). It is undisputed that the subject abutting premises is a residential two-family home that is owner-occupied. Therefore, Nihas may not be held statutorily liable for the condition

of the sidewalk in front of his premises pursuant to §7-210.

Nihas has also proffered unrebutted evidence that he did not create the icy condition of the sidewalk. Nihas averred in his affidavit in support of the motion that he did not perform any snow or ice removal from the sidewalk and that the homeowners association, Jefferson Court, had a contract with defendant Magic Touch to clear snow from the sidewalks and apply salt when there was an accumulation of one inch or more.

Plaintiff fails to raise an issue of fact in opposition. Contrary to the contention of plaintiff's counsel, Nihas' affidavit does not contradict his deposition testimony. His testimony that he did not remember the condition of the sidewalk in terms of snow or ice accumulation on the date of the accident does not raise an issue of fact as to whether he actually performed snow or ice removal. Likewise, contrary to the characterization of his testimony by plaintiff's counsel, Nihas did not testify that he did not remember whether or not he performed any snow or ice removal immediately prior to the accident. Rather, in response to the general question as to whether he recalled ever performing ice removal instead of Magic Touch when there was a rainstorm and it froze over, Nihas merely replied, "No, I don't remember any." Indeed, plaintiff's own testimony was that the sidewalk abutting Nihas' residence had not been cleared. With respect to walking the 40-50 feet from his house to Nihas', plaintiff testified, "I walked along the sidewalk. It was clear up until there." With respect to the reason he fell, he testified, "Because ice was formed because they hadn't cleared and cleaned the front."

Therefore, not only does plaintiff fail to present any evidence that Nihas did perform snow or ice removal, but his own testimony is that no snow or ice removal was performed. The contention of plaintiff's counsel that Nihas may have performed snow and ice removal and that such activities may have caused the icy condition in question is speculative and unsupported by any evidence on this record (see Kaplan v. DePetro, 51 AD 3d 730 [2nd Dept 2008]; Robinson v. Trade Link America, 39 AD 3d 616 [2nd Dept 2007]).

Finally, there is no issue in this case of any special use of the sidewalk by Nihas.

Therefore, in the absence of any evidence that he created the icy patch condition, Nihas is entitled to summary judgment as a matter of law.

Motion by Jefferson Court for summary judgment dismissing the complaint and all cross-claims against it is also granted.

Jefferson Court is the homeowners association for the district of Sunnyside which encompasses the subject location of plaintiff's accident. Patrick O'Reilly, Treasurer of Jefferson Court, explained in his affidavit in support of the motion that the homes in said district are situated on three U-shaped courtyards, with four alleyways and interior pathways. Jefferson Court's function is to maintain the inner pathways and alleyways. Jefferson Court also agreed with the homeowners to arrange for snow removal on the City sidewalks surrounding the development, including the subject sidewalk, when accumulation exceeded one inch. Pursuant to this agreement, Jefferson Court hired Magic Touch to do the snow removal work. O'Reilly avers that Jefferson Court does not own any of the property within the development, has no maintenance staff of its own and has never performed any snow removal itself. Moreover, avers O'Reilly, Jefferson Court did not direct, supervise, inspect or control any of the work performed by Magic Touch. O'Reilly also avers that he was unaware of the weather conditions on the date of the accident and whether Magic Touch performed any snow removal on that day.

Premises liability may ordinarily only be predicated upon ownership, occupancy, control or special use of the premises (see Gibbs v. Port Authority of New York, 17 AD 3d 252 [1st Dept 2005]). It is undisputed that the sidewalk upon which plaintiff slipped and fell is a public sidewalk owned by the City and that the abutting property is owned by Nihas. There is also no issue of occupancy, control or special use of the sidewalk by Jefferson Court.

Also, it is undisputed that Jefferson Court did not perform any snow removal and, therefore, did not create the icy condition of the sidewalk. Moreover, it was not responsible for any negligence which Magic Touch may have committed in the course of performing snow removal. It is uncontested that Magic Touch is an independent contractor. A party who hires an independent contractor is not liable for the negligence of the independent contractor unless it is shown that the one who employed the independent contractor controlled the manner in which the work was done (see McSorley v. Tripoli, 284 AD 2d 900 [4th Dept 2001]). Since plaintiff fails to proffer any evidence, or even allege, that Jefferson Court controlled or directed the manner in which Magic Touch performed snow removal, Jefferson Court is entitled to summary judgment as a matter of law (see Bennett v Commercial Flooring Specialists, Ltd., 2010 NY Slip Op 07302 [2nd Dept]).

A property owner or other hirer may also be held liable for the negligence of its independent contractor in creating a dangerous condition where "the contractor creates a special danger ... in the course of its work that is inherent in the work" (see Gamer v. Ross, 49 AD 3d 598, 600 [2nd Dept 2008]; see also Thomassen v. J&L Diner,

Inc., 152 AD 2d 421 [2nd Dept 1989]). Plaintiff does not argue, and the Court can find no controlling case law holding, that shoveling snow from a sidewalk constitutes an inherently dangerous activity, and that the risk of the presence of ice on a sidewalk in the winter after a snowstorm is a special danger.

Therefore, since the unrebutted evidence, on this record, is that Jefferson Court neither owned the sidewalk or abutting premises, did not perform any snow removal and did not control or direct the manner in which Magic Touch performed its snow removal work, and thus was not responsible for any negligence which Magic Touch may have committed, it is entitled to summary judgment as a matter of law.

Cross-motion by Magic Touch for summary judgment dismissing the complaint and all cross-claims against it is denied. The cross-motion is untimely.

Pursuant to the stipulation of the parties, so-ordered by Justice Martin E. Ritholtz on January 26, 2011, "Motions for summary judgment shall be made returnable not later than 6/21/11 before the assigned Judge." The instant cross-motion was served on July 18, 2011 and was made returnable on July 26, 2011. Therefore, it is untimely.

Pursuant to CPLR 3212(a), motions for summary judgment must be made no later than 120 days after the note of issue is filed, unless a different date is ordered by the Court, except with leave of court "on good cause shown." Moreover, CPLR 3212(a) applies to court ordered deadlines of less than 120 days (see Giudice v. Green 292 Madison, LLC, 50 AD 3d 506 [1st Dept 2008].

Unless good cause is shown for the delay, an untimely motion for summary judgment must be denied outright (see Brill v. City of New York (2 NY 3d 648 [2004]; Castro v. Homsun Corp., 34 AD 3d 616 [2nd Dept 2006]).

Magic Touch has failed to proffer any cognizable excuse for its delay in making the instant cross-motion. Counsel for Magic Touch contends that he applied the 120-day time period for making summary judgment motions under CPLR 3212(a) and calculated the 120 days from the date the note of issue was filed on April 7, 2011. He contends that any "misinterpretation" on Magic's part, "if that is what is found", was inadvertent. Counsel's argument is without merit. The stipulation so-ordered by Justice Ritholtz specifically required that summary judgment motions must be made returnable no later than June 21, 2011.This instruction was clear and unambiguous, and not amenable to "misinterpretation".

The only other excuse proffered by Magic Touch is its

unmeritorious argument that its otherwise untimely cross-motion may be considered since it seeks relief on the same issues as raised in a timely motion.

The rationale for allowing an untimely cross-motion for summary judgment notwithstanding the absence of good cause where it seeks the identical relief sought by a timely motion is that the court, in deciding a timely motion, may search the record and grant summary judgment to any party even in the absence of a cross-motion (see Filannino v. Triborough Bridge and Tunnel Authority, 34 AD 3d 280 [1st Dept 2006]). However, the court's search of the record is limited to those issues that are the subject of the timely motion in chief (id.). Here, plaintiff made no summary judgment motion. He only made a motion to amend the caption of the action to add an additional party defendant. The only timely motions for summary judgment were made by co-defendants Nihas, Jefferson Court and the City. Therefore, the exception set forth in the cases cited by counsel wherein a late cross-motion may be considered if it addresses the same issues raised in a timely motion is not applicable here, and Magic Touch may not "piggyback" its untimely cross-motion onto plaintiff's motion to amend the caption or onto co-defendants' timely motions (see Gaines v. Shell-Mar Foods, Inc., 21 AD 3d 986 [2nd Dept 2005]). Moreover, the Court notes that even if plaintiff's motion were a summary judgment motion raising the same issues as those raised in Magic Touch's motion, said motion would have been untimely since it was made returnable on July 11, 2011.

Therefore, Magic Touch's untimely cross-motion may not be considered and is denied.

Motion by the City for summary judgment dismissing the complaint and all cross-claims against it is granted. The City has proffered unrebutted evidence in the form of the deposition testimony of Michael Freitag, employed by the NYC Department of Sanitation as Supervisor of Queens West 2 District, which includes the location of the accident, that no snow or ice removal was performed by the City on the sidewalks in front of residential homes and that, therefore, the City did not create the icy condition of the sidewalk.

The Court also notes that no liability attaches to the City for failing to remove snow or ice from the street unless the condition was both dangerous and unusual or exceptional (see Williams v. City of New York, 214 N.Y. 259 [1915]; Davis v. City of New York, 255 AD 2d 356 [2nd Dept 1998]; Saez v. City of New York, 82 AD 2d 782 [2nd Dept 1981]). The definition of "unusual or exceptional" in this context is a condition of snow or ice that is "different in character from conditions ordinarily and generally brought about by the winter weather prevalent in the given locality" (Williams v. City of New

York, supra at 264). This rule is born of the facts that the City cannot possibly, or reasonably be expected to, keep its hundreds of miles of streets and sidewalks entirely clear of snow and ice at all times and that "[t]he danger arising from the slipperiness of ice and snow lying in the streets is one which is familiar to everybody residing in our climate and which everyone is exposed to who has occasion to traverse the streets of cities and villages in the winter season" (id., citing, Harrington v. City of Buffalo, 121 N.Y. 147, 150 [1890]). Therefore, it would be unreasonable to impose liability upon the City for failing to remove a snow or ice condition that, while perhaps hazardous, is not extraordinary.

The record on this motion establishes that the icy condition of the sidewalk where plaintiff slipped and fell was not unusual or exceptional but was such as could be expected during the winter in the City of New York.

Since the ice was not an unusually dangerous condition, the City was not responsible for removing it and is thus entitled to summary judgment, as a matter of law.

Finally, inasmuch as Jefferson Court is entitled to summary judgment, plaintiff's motion for leave to amend the caption to add Board of Trustees of Jefferson Court as an additional party defendant is denied.

Accordingly, Nihas', Jefferson Court's and the City's motions for summary judgment are granted and the complaint and all cross-claims are dismissed as against them, and Magic Touch's cross-motion for summary judgment and plaintiff's motion for leave to amend the caption to add Board of Trustees of Jefferson Court as a defendant are denied.

Dated: August 30, 2011

KEVIN J. KERRIGAN, J.S.C.