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SHORT FORM ORDER

INDEX No. 09-6986
CAL No. 11-00502OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 8-2-11 (#002)
MOTION DATE 9-12-11 (#003)
ADJ. DATE 9-12-11
Mot. Seq. # 002 - MD
003 - XMG

---X

GLORIA ALOMAR,

Plaintiff,

- against -

CORAM EQUITIES, LLC and THE COUNTY OF SUFFOLK,

Defendants.

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CORAM EQUITIES, LLC,

Third-Party Plaintiff,

- against -

UNITED LANDSCAPE ASSOCIATES,

Third-Party Defendant.

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Upon the following papers numbered 1 to 43 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers 28 - 43 ; Answering Affidavits and supporting papers 18 - 24 ; Replying Affidavits and supporting papers 25 - 27 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendant Coram Equities, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims as against it is denied; and it is further

ORDERED that this cross motion (003) by the defendant County of Suffolk for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims as against it is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on January 23, 2008 between approximately 9:00 a.m. and 9:30 a.m. when she slipped and fell on ice in the parking lot of the Elsie Owens North, Brookhaven Health Center located at 82 Middle Country Road, in Coram, New York. By her bill of particulars and supplemental bill of particulars, the plaintiff alleges that the defendants Coram Equities, LLC (Coram Equities) and County of Suffolk (County) were negligent in, among other things, their ownership, maintenance and control of the premises; allowing said area to become and remain in a slick, slippery, icy and trap-like condition; and failing to provide a clear, safe, and secure means of traversing the premises by pedestrians. In addition, the plaintiff alleges that the defendants created the alleged dangerous condition and had actual and constructive notice of the condition inasmuch as it was visible and apparent and had existed for a sufficient length of time to allow defendants, their agents or employees to discover and remedy it. The plaintiff also alleges that the defendants violated section 302.3 of the New York State Property Maintenance Code.

The defendant Coram Equities now moves for summary judgment dismissing the complaint and all cross claims as against it on the grounds that there is no evidence that it created or had notice of the alleged dangerous condition of an ice patch. Coram Equities asserts that the plaintiff admitted at her deposition that she did not see the ice before she slipped or see any snow or ice anywhere on the property when she drove into the parking lot, and was unable to describe the actual size of the ice. In addition, Coram Equities asserts that there had not been any significant snow event for an extended period of time prior to the plaintiff's fall as evidenced by its own snow removal log. Coram Equities also asserts that there is no evidence of any prior complaints concerning said condition; that Coram Equities and its snow removal contractor, the third-party defendant United Landscape Associates, routinely inspected the premises prior to the incident, and that there is no evidence that their snow removal efforts were improper or insufficient. In support of its motion, Coram Equities submits, among other things, the pleadings, the bills of particulars, and the deposition transcripts of the plaintiff, of Christine Martirano on behalf of Coram Equities, and of Valerie Preas-Romeo on behalf of the County.

The defendant County cross-moves for summary judgment dismissing the complaint and all cross claims as against it on the grounds that it had no responsibility for snow and ice removal at the subject location and that the County did not receive prior written notice of the alleged defective condition. In support of its cross motion, the County submits, among other things, the notice of claim and pleadings, the General Municipal Law § 50 (h) hearing transcript of the plaintiff; the deposition transcripts of the plaintiff, of Ms. Martirano on behalf of Coram Equities, and of Ms. Preas-Romeo on behalf of the County, the lease agreement between Coram Equities and the County dated July 2002, the affidavit dated July 26, 2011 of Richard Bloch, an Investigator of the County in the Office of the County Attorney, the affidavit dated July 27, 2011 of Renee Ortiz, Chief Deputy Clerk of the County Legislature, and the affidavit of service of the cross motion upon the attorneys for the plaintiff and Coram Equities.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986];

Zuckerman v City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324 [1986], citing to ***Zuckerman v City of New York***, 49 NY2d at 562).

As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property (*see* ***Forbes v Aaron***, 81 AD3d 876, 918 NYS2d 118 [2d Dept 2011]). "In slip-and-fall cases involving snow and ice, a property owner is not liable unless he or she created the defect, or had actual or constructive notice of its existence" (***Gil v Manufacturers Hanover Trust Co.***, 39 AD3d 703, 704, 833 NYS2d 634 [2d Dept 2007]; *see* ***Powell v Cedar Manor Mut. Hous. Corp.***, 45 AD3d 749, 749, 844 NYS2d 890 [2d Dept 2007]). "An out-of-possession landlord may not be held liable for injuries occurring on its premises unless it is contractually obligated to perform maintenance and repairs or it has retained control over the premises" (***Salaices v Gar-Ben Assoc.***, 82 AD3d 740, 741, 918 NYS2d 510 [2d Dept 2011]; *see* ***Sciammarella v Manorville Postal Assoc.***, 87 AD3d 530, 530-531, 927 NYS2d 798 [2d Dept 2011]).

To prevail in a slip-and-fall case, a plaintiff must demonstrate that the defendant had actual or constructive notice of the allegedly defective condition that caused the fall, or created the condition (*see* ***Brown v Outback Steakhouse***, 39 AD3d 450, 833 NYS2d 222 [2d Dept 2007]). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; *id.*). A general awareness of the presence of snow or ice is legally insufficient to constitute notice of the particular condition which caused the plaintiff's fall (*see* ***Kaplan v DePetro***, 51 AD3d 730, 858 NYS2d 304 [2d Dept 2008]).

The plaintiff's testimony from her deposition on August 5, 2010 indicates that the weather was chilly on January 23, 2008, that it had not rained or snowed within 24 hours prior to her fall, and that it was not raining or snowing at the time of her fall. The plaintiff testified that her accident occurred after she arrived and parked her vehicle in the parking lot, two or three aisles from the front of the building. She explained that she got out of her vehicle and as she was walking in the "aisle" or roadway of the parking lot and was passing the front of the vehicle parked on her driver's side, she fell. In addition, the plaintiff testified that prior to her fall she had not driven in the area where she fell, and she had not noticed any snow or ice anywhere on the premises when she had driven into the parking lot. She also testified that at the time of her fall she had been looking straight ahead and that she did not see the cause of her fall prior to her fall. The plaintiff stated that after she fell on her right side she noticed a thin sheet of ice, which was clear and shiny with no debris, under her that was "pretty big," extending from her vehicle to the vehicle next to it. According to the plaintiff there was no snow in any of the parking spaces or in the aisle.

The deposition testimony of Christine Martirano (Ms. Martirano) from November 19, 2010 reveals that she is a member of the defendant Coram Equities, which owns and manages the subject property, and that at the time of the subject incident the property was leased to the County. In addition, Ms. Martirano testified that the lease provided that defendant Coram Equities was responsible for snow and ice removal on

the premises, and Coram Equities contracted out the service to United Landscaping. According to Ms. Martirano, a snowfall that exceeded two inches would automatically trigger United Landscaping's responsibility for snow removal, sanding, and shoveling of walkways and entrances under the contract. If there was less than two inches of snow but some freezing conditions, they would sand or salt after contacting Coram Equities for consent. If there was no snowfall, United Landscaping would not salt or remove ice from the parking lot but if there was a season of heavy snowfall and daytime melting and nighttime freezing, United Landscaping or the County would notify Coram Equities, and United Landscaping would salt or sand the areas. Ms. Martirano also testified that one of the members of Coram Equities would visit the property once a month to inspect the parking lot by car, and that Coram Equities did not have a full-time maintenance employee or supervisor or keep any snow or ice removal equipment at the building. She further testified that she kept a log to track the dates of snowfalls, which indicated that there was a thin sheet of ice from melting snow on December 20, 2007 and that the parking lot was salted and sanded, and indicated that there was no snowfall and no service of the parking lot by United Landscaping thereafter until February 12, 2008.

Valerie Preas-Romeo (Ms. Preas-Romeo) testified on behalf of the County at her deposition on November 19, 2010 stating that she is the assistant facilities space manager for the County, which involves managing daily problems. She testified that the County rented the subject building from Coram Equities in January 2008; that there was no building superintendent; that pursuant to the lease, the County was not responsible for snow or ice removal at said location; and that the County did not keep any snow or ice removal equipment at said location. Ms. Preas-Romeo could not recall if she had been notified of the plaintiff's accident or if she had received a report on it.

Here, the defendant Coram Equities failed to establish, prima facie, that it did not have actual or constructive notice of the allegedly dangerous condition (*see* ***Joe v Upper Room Ministries, Inc.***, ___ NYS2d ___, 2011 WL 5085745, 2011 NY Slip Op 07610 [NYAD 2 Dept Oct 25, 2011]). In attempting to meet its burden that it lacked actual or constructive notice of the icy condition, the defendant Coram Equities relies heavily on the plaintiff's deposition testimony that it did not rain or snow within 24 hours prior to her fall and that she did not see the ice prior to her fall. However, the defendant Coram Equities must independently demonstrate lack of notice, and Ms. Martirano failed to provide any testimony as to when she or the other members of Coram Equities last inspected the subject parking lot prior to the incident, or what the parking lot looked like when it was last inspected, and when the last significant precipitation, in the form of snow or sleet or rain, occurred prior to the incident (*see* ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]; *compare* ***Werny v Roberts Plywood Co.***, 40 AD3d 977, 836 NYS2d 297 [2d Dept 2007]). Inasmuch as the defendant Coram Equities failed to meet its initial burden as the movant, the Court need not review the sufficiency of the plaintiff's opposition papers (*see* ***Baines v G & D Ventures, Inc.***, 64 AD3d at 529).

Regarding the cross motion by the County, its lease agreement with Coram Equities provides that the landlord, Coram Equities, would be responsible for snow removal from the parking lots of the subject premises. A tenant may be held liable for a dangerous or defective condition on the premises it occupies, even where the landlord has explicitly agreed in the lease to maintain the premises and keep it in good repair (*see* ***McNelis v Doubleday Sports***, 191 AD2d 619, 595 NYS2d 118 [2d Dept 1993]; ***Chadis v Grand Union Co.***, 158 AD2d 443, 550 NYS2d 908 [2d Dept 1990]). Therefore, the fact that the landlord Coram Equities was contractually responsible for snow and ice removal does not relieve the County from liability

for the alleged dangerous condition on the premises (*see* ***Cohen v Central Parking Sys., Inc.***, 303 AD2d 353, 353, 756 NYS2d 266 [2d Dept 2003]).

However, the County did establish its prima facie entitlement to judgment as a matter of law by submitting proof that it had not received prior written notice of the dangerous condition allegedly presented by ice in the parking lot as required by the Suffolk County Charter (*see* Suffolk County Charter § C8-2A; ***Stallone v Long Is. R. R.***, 69 AD3d 705, 894 NYS2d 65 [2d Dept 2010]; ***Flederbach v Faymen***, 65 AD3d 1010, 884 NYS2d 867 [2d Dept 2009]; ***Delgado v County of Suffolk***, 40 AD3d 575, 835 NYS2d 379 [2d Dept 2007]; *see also* ***Brown v County of Suffolk***, ___ NYS2d ___, 2011 WL 5222916, 2011 NY Slip Op 07793 [NYAD 2 Dept Nov 01, 2011]). The prior written notice requirements of the Suffolk County Charter § C8-2A are applicable to a parking lot (*see* ***Groninger v Village of Mamaroneck***, 67 AD3d 733, 888 NYS2d 205 [2d Dept 2009], *affd* 17 NY3d 125, 927 NYS2d 304 [2011]; *see also* ***Brown v County of Suffolk***, ___ NYS2d ___, 2011 WL 5222916, 2011 NY Slip Op 07793 [NYAD 2 Dept Nov 01, 2011]). Mr. Bloch explained in his affidavit that prior to November 16, 2004, the Suffolk County Charter § C8-2A required that written notice be sent to the County Attorney's office and that the Charter was amended so that after said date it required that written notice be given to the Clerk of the Legislature. He attested that he maintains records of all written complaints received by the County Attorney's office and that his search of County records revealed that the County was not in receipt of any written notice or complaints concerning any alleged defective condition at the subject premises at any time prior to the plaintiff's accident on January 23, 2008. Ms. Ortiz averred in her affidavit that she maintains records of all written complaints received by the Clerk of the Legislature and that her search revealed that the Clerk of the Legislature was not in receipt of any written notice or complaints concerning any alleged defective condition at the subject premises at any time prior to the plaintiff's accident on January 23, 2008.

The burden then shifted to the plaintiff to establish the applicability of an exception to the prior written notice requirement, either that the County made special use of the parking lot which resulted in a special benefit to it or that the County's affirmative act of negligence immediately resulted in the dangerous condition (*see* ***Stallone v Long Is. R. R.***, 69 AD3d at 706). The plaintiff did not submit any opposition to the cross motion and thus failed to meet that burden (*see id.*).

Accordingly, the motion by the defendant Coram Equities is denied and the cross motion by the County is granted. The action is severed and continued against the defendant Coram Equities.

Dated: 11/29/11

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION