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SHORT FORM ORDER

INDEX No. 09-30654
CAL. No. 11-01184OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 8-4-11 (#001)
MOTION DATE 8-25-11 (#002)
ADJ. DATE 10-13-11
Mot. Seq. # 001 - MG
002 - MD

---X

THOMAS J. GIMPEL and THERESA GIMPEL,

Plaintiffs,

- against -

MIKE & ANDY REALTY CORP. d/b/a METROPOLIS,

Defendant.

---X

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MIKE & ANDY REALTY CORP. d/b/a METROPOLIS,

Third-Party Plaintiff,

- against -

KEITH'S LAWN MAINTENANCE & LANDSCAPING,

Third-Party Defendant.

---X

BREEN & CLANCY
Attorney for Third-Party Defendant
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Upon the following papers numbered 1 to 50 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 18 - 35; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 15; 39 - 48; Replying Affidavits and supporting papers 16 - 17; 49 - 50; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by third-party defendant Keith's Lawn Maintenance and Landscaping dismissing the third-party complaint and the motion (#002) by defendant Mike & Andy Realty Corp. seeking summary judgment dismissing plaintiffs' complaint hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by third-party defendant Keith's Lawn Maintenance and Landscaping dismissing the third-party complaint is granted; and it is further

ORDERED that the motion by Mike & Andy Realty Corp. seeking summary judgment dismissing plaintiffs' complaint is denied.

Plaintiff Thomas Gimpel commenced this action against defendant Mike & Andy Realty Corp., d/b/a Metropolis Diner (hereinafter referred to as "Metropolis Diner"), to recover damages for injuries he allegedly sustained as a result of a slip and fall in the parking lot of the Metropolis Diner on January 11, 2009. The accident allegedly occurred when plaintiff, as he was stepping out of his vehicle, slipped and fell on snow and ice in the parking lot of the subject premises, located at 1711 Route 112, Medford, New York. At the time of the accident, there was a snow removal and sanding/salting contract in effect between Metropolis Diner and Keith's Lawn Maintenance, Inc., s/h/a Keith's Lawn Maintenance and Landscaping (hereinafter referred to as "Keith's Lawn Maintenance"). The contract required Keith's Lawn Maintenance to perform snow and/or ice removal services, including salting and sanding, for the diner's premises whenever there was at least one inch of snow on the ground. Thereafter, defendant Metropolis Diner commenced a third-party action against Keith's Lawn Maintenance seeking indemnification and/or contribution on the basis that Keith's Lawn Maintenance breached its contractual duty. Plaintiff's wife, Theresa Gimpel, instituted a derivative claim for loss of services.

Keith's Lawn Maintenance now moves for summary judgment on the basis that it fulfilled its obligation under the contract to clear and/or sand the subject premises parking lot, and that it did not owe a duty of care to the injured party. In support of the motion, Keith's Lawn Maintenance submits copies of the pleadings, the parties' deposition transcripts, and a copy of the snow removal and salting invoice for Metropolis Diner, dated January 14, 2009. Metropolis opposes the instant motion on the ground that its snow/ice removal contract with Keith's Lawn Maintenance is comprehensive and exclusive, and, therefore, it was entitled to rely upon Keith's Lawn Maintenance performance of its contractual obligations. Metropolis Diner also contends that there are material questions of fact as to whether the snow removal work performed by Keith Lawn Maintenance was adequate and in compliance with the aforementioned contract. In opposition, Metropolis Diner submits a copy of the executed snow and ice removal contract between itself and Keith's Lawn Maintenance, dated November 3, 2008.

A court's task on a motion for summary judgment is issue finding rather than issue determination (*see* ***Sillman v Twentieth Century Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (*see* ***Boyce v Vazquez***, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Therefore, in determining a motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). In the first

instance, the moving party bears the burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

Fundamental to a plaintiff's recovery in a negligence action, plaintiff must establish that the defendant owed plaintiff a duty to use reasonable care, that the defendant breached that duty, and the resulting injury was proximately caused by the defendant's breach (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Generally, a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries and mere inaction, without more, will only establish a cause of action for breach of contract (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 557 NYS2d 286 [1990]). Thus, in order for a plaintiff to establish a prima facie case and a defendant's liability in a slip and fall accident involving snow and ice, plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*see* ***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]; ***Tsivitis v Sivan Assoc.***, 292 AD2d 594, 741 NYS2d 545 [2d Dept 2002]). Furthermore, a plaintiff must show that by virtue of a defendant's snow removal contract, the defendant displaced the duty of the landowner to safely maintain the premises (*see* ***Espinal v Melville Snow Contrs.***, 283 AD2d 546, 724 NYS2d 893 [2d Dept 2001]; ***Tiwari v EAB Plaza***, 261 AD2d 534, 690 NYS2d 624 [2d Dept 1999]), and assumed a duty to the plaintiff to exercise reasonable care to prevent all foreseeable harm to the plaintiff such that the plaintiff detrimentally relied on the defendant's performance of the defendant's duties under the snow removal contract (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Eaves Brooks Costume Co.v Y.B.H. Realty Corp.***, *supra*; ***Pavlovich v Wade Assoc.***, 274 AD2d 382, 710 NYS2d 615 [2d Dept 2000], *lv denied* 95 NY2d 767, 717 NYS2d 547 [2000]), or that the defendant's actions "advanced to such a point as to have launched a force or instrument of harm" (*see* ***Abbattista v King's Grant Master Assn., Inc.***, 39 AD3d 439, 833 NYS2d 592 [2d Dept 2007]; ***Pavlovich v Wade Assoc., Inc.***, *supra*).

In addition, to sustain a claim for contribution, it must be proven that the defendant owed a duty of reasonable care separate and independent of the defendant's contractual obligations, or that a duty was owed to the injured plaintiff and the breach of that duty contributed to the injuries sustained by the plaintiff (*see* ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; ***Phillips v Young Men's Christian Assn.***, 215 AD2d 825, 625 NYS2d 752 [3d Dept 1995]; ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***, 125 AD2d 754, 509 NYS2d 177 [3d Dept 1986]). A claim for indemnification must be expressly based upon either an expressed contract provision or a common law theory of implied indemnity (*see* ***Baratta v Home Depot USA***, 303 AD2d 434, 756 NYS2d 605 [2d Dept 2003]; ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***, *supra*). Indemnity "involves an attempt to shift the entire loss from one who is compelled to pay for a loss...to another person who should more properly bear responsibility for that loss" (*see* ***Phillips v Young Men's Christian Assn.***, *supra*). A claim for common-law indemnification requires a showing that the claiming party was not actively negligent in contributing to the plaintiff's injuries (*see* ***Rosado v Proctor & Schwartz***, 66 NY2d 21, 494 NYS2d 851

[1985]).

Here, Keith's Lawn Maintenance established its prima facie entitlement to judgment as a matter of law by demonstrating that its snow removal contract with Metropolis Diner was not of such a comprehensive and exclusive nature as to have removed Metropolis's duty to maintain its premises in a safe condition (*see* ***Linarello v Colin Serv. Sys., Inc.***, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; ***Gor v High View Estates Owners Corp.***, 17 AD3d 316, 793 NYS2d 98 [2d Dept 2005]). The contract required Keith's Lawn Maintenance to provide snow removal services when the snowfall exceeded one inch, and to spread a 20% salt and 80% sand mixture on the diner's premises upon request. The contract additionally states that it is the owner's responsibility to inspect the property within eight hours of the performance of snow removal services. Andrew Manesis, who testified on behalf of Metropolis Diner, stated that he is one of the owners of the Metropolis Diner, that the diner has used Keith's Lawn Maintenance as its snow removal contractor for 19 years, and that Keith's Lawn Maintenance comes to the premises automatically if there is snow or icy conditions. Manesis testified that he or his partner would phone Keith's Lawn Maintenance to return to the premises if either of them believed it had not done an adequate job of removing snow from the premises. Manesis further testified that he does not ever recall having to place a call to Keith's Lawn Maintenance for a return trip, because it always has performed its contractual obligations adequately. In addition, Keith Blandeburgo, testifying on behalf of Keith's Lawn Maintenance, stated that he plowed the subject premises at 12:00 a.m. on January 11, 2009, placing the snow in the grassy areas, and returned to sand and salt the premises at 4:30 a.m. Blandeburgo testified that he examined the parking lot after applying the sand and salt mixture, and that he applied additional sand and salt where needed. Blandeburgo testified that he does not recall if there was any precipitation when he plowed the premises, but that the precipitation had ceased by the time he applied the sand and salt mixture. Blandeburgo further testified that he did not receive any calls from either of the partners at Metropolis Diner requesting him to return to the diner to perform additional snow removal procedures. Moreover, plaintiff and his wife testified that the parking lot of the diner was plowed and that the snow was piled near the parking lot's sidewalks.

Furthermore, Keith's Lawn Maintenance did not owe any duty of care to plaintiff under the circumstances, there is no evidence in the record that shows that Keith's Lawn Maintenance ever agreed to indemnify Metropolis Diner, and the record demonstrates that the injured plaintiff's accident was not due solely to the negligent performance or nonperformance of an act solely within the discretion of Keith's Lawn Maintenance (*see* ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]; ***Roach v AVR Realty Co., LLC***, 41 AD3d 821, 839 NYS2d 173 [2d Dept 2007]; ***Corley v Country Squire Apts., Inc.***, 32 AD3d 978, 820 NYS2d 900 [2d Dept 2006]; *compare* ***Vilorio v Suffolk Y Jewish Community, Ctr., Inc.***, 33 AD3d 696, 823 NYS2d 101 [2d Dept 2006]). Nor is there evidence that Keith's Lawn Maintenance's actions "advanced to such a point as to have launched a force or instrument of harm" (***Dorestant v Snow, Inc.***, 274 AD2d 542, 543, 712 NYS2d 131 [2d Dept 2000]; *see* ***Church v Callanan Indus.***, 99 NY2d 104, 782 NYS2d 50 [2002]). In opposition to Keith's Lawn Maintenance's prima facie showing, Metropolis Diner has failed to raise a triable issue of fact (*see* ***Murphy v M.B. Real Estate Dev. Corp.***, 280 AD2d 457, 720 NYS2d 175 [2d Dept 2001]). Accordingly, Keith's Lawn Maintenance's motion for summary judgment is granted.

Metropolis Diner also moves for summary judgment on the basis that plaintiff is unable to

establish that it created or had notice of the alleged dangerous condition in its parking lot. In support of the motion, Metropolis Diner submits copies of the pleadings, the parties' deposition transcripts, and the snow removal contract between itself and Keith's Lawn Maintenance. Metropolis Diner also submits the affirmed medical report of Edward Toriello, who conducted an independent orthopedic examination of plaintiff on January 4, 2011. Plaintiff opposes the motion on the ground that Metropolis Diner failed to demonstrate prima facie that it did not create through its agent, Keith's Lawn Maintenance, the dangerous icy condition in its parking lot, or that it did not have notice of such condition.

A property owner or a party in possession or control of real property only will be held liable for a slip and fall involving snow and ice on its property when it created the alleged dangerous condition or had actual or constructive notice of it (*see* ***Crosthwaite v Acadia Realty Trust***, 62 AD3d 823, 879 NYS2d 554 [2d Dept 2009]; ***Nielsen v Metro-North Commuter R.R. Co.***, 30 AD3d 497, 817 NYS2d 110 [2d Dept 2006]; ***Zabbia v Westwood, LLC***,18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]). To establish constructive notice, "it must be shown that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendants to discover it and take corrective action, and a general awareness that snow or ice might accumulate is insufficient" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; ***Martin v RP Assoc.***, 37 AD3d 1017, 1017-18, 830 NYS2d 816 [3d Dept 2007]; *see also* ***Torosian v Bigsbee Vil. Homeowners Assn.***, 43 AD3d 1314, 848 NYS2d 452 [3d Dept 2007]).

Under the instant circumstances, Metropolis Diner has failed to establish its prima facie entitlement to judgment as a matter of law, since triable issues of fact exist regarding its measure of control over the snow removal operations that were contracted out to Keith's Lawn Maintenance (*see* ***Garcia v Mack-Cali Realty Corp.***, 52 AD3d 420, 861 NYS2d 26 [1st Dept 2008]; *cf.* ***Gor v High View Estates Owners Corp.***, *supra*), and whether it had notice of the defective condition in existence on its premises (*see* ***Bravo v 564 Seneca Ave. Corp.***, 83 AD3d 633, 922 NYS2d 88 [2d Dept 2011]; ***Anastasio v Berry Complex***, 82 AD3d 808, 918 NYS2d 216 [2d Dept 2011]; ***Plotits v Houaphing D. Choau, LLC***, 81 AD3d 620, 915 NYS2d 626 [2d Dept 2011]). As stated above, the contract between Keith's Lawn Maintenance and Metropolis Diner was not comprehensive and exclusive (*see e.g.* ***Espinal v Melville Snow Contrs.***, *supra*; ***Linarello v Colin Serv. Sys., Inc.***, *supra*), and the evidence demonstrates that Metropolis Diner retained some oversight of the snow/ice removal process (*see e.g.* ***Prenderville v International Serv. Sys., Inc.***, 10 AD3d 334, 781 NYS2d 110 [1st Dept 2004]). Manesis testified that he or his partner always observed the plowing performed by Keith's Lawn Maintenance, and that the owners are the only ones able to determine if Keith's Lawn Maintenance has performed its snow removal contractual obligations properly. Manesis further testified that if the snow removal process was not performed adequately that he or his partner would contact Keith's Lawn Maintenance to return to the premises, and that neither he nor his partner phoned Keith's Lawn Maintenance to return to the premises to perform additional plowing or snow removal services.

Moreover, Andrew Manesis's testimony failed to demonstrate when he or his partner last inspected the premises to determine if it was unsafe, and if it needed sand or salt, or what the subject premises looked like prior to plaintiff's accident (*see* ***Martinez v Khaimov***, 74 AD3d 1031, 906 NYS2d 274 [2d Dept 2010]; ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]; ***Salvanti v Sunset Indus. Park Assoc.***, 27 AD3d 546, 813 NYS2d 110 [2d Dept 2006]). Indeed, plaintiff

testified that although the parking lot was plowed, that there was packed snow and ice spots all over the parking lot, particularly in the parking spaces, and that there was no falling precipitation at the time of his accident. Thus, Metropolis Diner has failed to show that the allegedly dangerous condition existed for an insufficient length of time for it to have been discovered and remedied (*see* ***Clarke v Pacie***, 50 AD3d 841, 855 NYS2d 269 [2d Dept 2008]; ***Musso v Macray Movers, Inc.***, 33 AD3d 594, 822 NYS2d 305 [2d Dept 2006]; ***Pearson v Parkside Ltd. Liab. Co.***, 27 AD3d 539, 810 NYS2d 357 [2d Dept 2006]). Accordingly, Metropolis Diner's motion for summary judgment is denied.

Dated: 2/8/12

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**