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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

ANTHONY ALCAMO,

Plaintiff(s),

- against -

FLOWER HILL REALTY, LLC and TONY DI STEFANO LANDSCAPING CORP. d/b/a TONY DISTEFANO LANDSCAPING CORP.,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 3869/11

MOTION SEQUENCE NO. 1

MOTION SUBMISSION DATE: January 23, 2013

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**XX**
Affirmation in Reply	**X**

Upon the foregoing papers, the motion by the defendant Tony Di Stefano Landscaping Corp d/b/a Tony Distefano Landscaping Corp. (hereinafter referred to as Distefano) for an Order pursuant to CPLR §3212, dismissing plaintiff's complaint and any and all cross-claims against them on the grounds that no party can establish a prima facie case of negligence as against defendant Tony Di Stefano Landscaping Corp. d/b/a Tony Distefano Landscaping Corp., is determined as hereinafter provided:

This personal injury action arises out of an alleged slip and fall upon ice on January 26, 2011 at approximately 12 noon in the parking lot of 1077 Northern Blvd. Roslyn, NY.

A review of the respective submissions sets forth that at the time of the alleged incident in issue the plaintiff was an employee of a non-party that occupied space at 1077 Northern Blvd., Roslyn, NY. The defendant Flower Hill Realty LLC was the holding company for the building at the premises. The defendant Distefano had performed snow removal services for Flower Hill Realty LLC pursuant to an oral agreement for approximately thirty years. Distefano billed the LLC as th work was performed and the LLC submits a letter dated January 26, 1999 that set forth that Distefano was not tp apply salt and sand unless directed to with an alleged post-it attached that stated no plowing unless the depth of the snow was 3"-4". Prior to the date of the alleged incident that had been significant amounts of snow. On January 26, 2011 while attempting to help a fellow employee park her car, the plaintiff alleges that he fell on ice that had accumulated in the parking lot.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

In examining the issue of a contracting parties liability to a non-party, the Court in **Espinal v Melville Snow Contractors, Inc.**, 98 NY2d 141, 746 NYS2d 120 set forth:

> "Finally, in Palka, we considered whether a maintenance company under contract to provide preventive maintenance services to a hospital assumed a duty of care to the plaintiff, a nurse who was injured when a wall-mounted fan fell on her as she was tending to a patient. The contract between the parties was "comprehensive and exclusive" (*Palkam 83 NY2dd at 588, 611 NYS2d 817, 634 NE2d 189)* and required the maintenance company to inspect, repair and maintain the facilities, and to train and supervise all support service personnel. The Company's obligation to the hospital was so broad that it entirely displaced the hospital in carrying out maintenance duties and became "the sole privatized provider for a safe and clean hospital premises" (id. at 589, 611 NYS2d 817, 634 NE2d 189). Because the company's contractual obligation was comprehensive, we found this to be another instance in which a contracting provider owed a duty to "noncontracting individuals reasonably within the zone and contemplation of the intended safety services," including the plaintiff (id).
>
> In sum, *Moch, Eaves Brooks and Palka* identify three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care - and thus be potentially liable in tort - to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" (*Moch, 247 NY at 168, 159 NE 896);* (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*see Eaves Brooks, 76 NY2d at 226, 557 NYS2d 286, 556 NE2d 1093)* and (3) where the contracting party has entirely displaced the other party's duty tot maintain the premises safely (*see Oalka, 83 NY2d at 489, 611 NYS2d 817, 634 NE2d 189).* These principles are firmly rooted in our case law, and have been

generally recognized by other authorities (*see e.g. Restatement [Second] of Torts §324A).*"

Espinal v Melville Snow Contractors, Inc., supra at 123

Of significance to the instant application, the defendant Flower Hill Realty LLC by Allison C. Collard set forth at its deposition:

"Q. After you hired DiStefano, did you hire anybody else to do the snow removal work at the premises?
A. I can't recall anybody else doing it after they were hired. No.
Q. DiStefano has been continuously doing snow removal work since you hired them?
A. Yes.
Q. What did the snow removal maintenance work consist of?
A. Whenever it snowed to a depth that he felt needed plowing, he plowed me an everybody else in that neighborhood at a commercial establishment."

see deposition transcript of Allison C. Collard at pgs 12-13

Q. Do you know if anybody from Flower Hill who spoke with DiStefano knew that they would have to call regarding whether to apply salt or sand?
A. I don't known that.
Q. At the time of the accident in January of 2011, what was your understanding regarding, you know, the snow plowing work and the salting and sanding?
A. Well, you are talking the day of the accident?
Q. Yes. A few weeks prior to the day and through.
A. He would plow whenever there was an issue of snow on the ground. And I don't know the -- I don't know where we were with the sand and salt. But I left it to him.
Q. Is it fair to say that if you didn't call him -- if somebody from Flower Hill or Collard & Roe did not call him regarding sand or salt, he would not apply that?
MR. TIERNEY: Objection to form. I don't think he said that.

A. I don't think we had any prohibition on it.
I known he has billed us more than this bill for sand and salt in earlier times and later times. I think there are some other bills maybe there was some salt and sand on.
Q. If you did call him regarding a request to apply salt or sand, would that be memorialized anywhere?
A. No. It would be a call somebody made to say, would you put down some sand, or something like that?
Q. Looking at the entry next to January 26th and January 27th in Defendant's Exhibit E, can you tell if sand or salt was applied on those days?
A. I have no idea whether it was or not. It is not indicated on the bill.
Q. But it is indicated next to January 28th that salt and sand was applied, correct?
A. Yes. On the 26th, and possibly other days, we had a supply of salt and sand in the building for the entranceways coming into the building.
Q. Who was that sand and salt purchased by?

A. It was purchased by me earlier in the summer, a good supply of it.
Q. Who did you employ to apply that sand and salt?
A. The Plaintiff, Anthony Alcamo.
Q. Where was it kept?
A. It was kept under the stairs of the older building in an unlocked closet, along with hand spreaders and shovels.
Q. Who owned the hand shovels?
A. That was my equipment.
Q. Flower Hill?
A. Yes.
Q. Where would Mr. Alcamo apply the salt and sand?
A. He would apply it on the entranceways and in any icy areas he saw?
Q. Would that include the parking lot?
A. Yes.
Q. Would you pay him additionally, in addition to his duties as a Network Administrator?
A. No. That was part of his regular duties."

see deposition transcript of Allison C. Collard at pgs 27-30

John DiStefano of the defendant Distefano stated as his deposition:

Q. What would precipitate the snow clearing on each of these dates; was it a certain amount of snow?
A. Yes. Mr. Collard and all of our - - anyone we cleaned the snow for leaves it to our discretion. Anything over approximately three inches of snow would be cleaned.
Q. At any time prior to January 12, 2011, did anyone from Collared & Roe ever request that you put salt or sand down?
A. Not to my recollection.
Q. At any time prior to January 18, 2011?
A. No.
Q. And the same question prior to January 21, 2011, did anyone from Collard -
A. No.
Q. -- & Roe ever request you to place salt or sand in the parking lot area?
A. No.
Q. You have to just let me get me question out.
Between January 21, 2011 and January 26, 2011, did anyone from Collard & Roe ever request that you place sand or salt in the parking lot area?
A. No.
Q. Who did the snow removal on January 26, 2011 at this location?
A. We do a round robin. We go from one place to another. More than likely, it was myself.
Q. Do you have any recollection, as you sit here today, what the parking lot area of Collard & Roe looked like before you did the snow removal on January 26, 2011?
A. Not specifically, no."

see deposition transcript of John DiStefano at pgs 24-25

While a review of the foregoing raises an issue as to the authority for the application of salt, the plaintiff in opposition offers no submission as to condition of the parking lot as it related to the action/inaction

of the Distefano defendant. In this regard the Court in **Foster v Herbert Slepoy**, 76 AD3d 210, 905 NYS2d 226 (Second Dept., 2010) set forth:

> "Similarly, the owners and the plaintiff did not raise a triable issue of fact as to whether Clancy so failed to exercise reasonable care in the performance of his duties that he launched a force or instrument of harm by creating or exacerbating the snow and ice condition (*see Espinal v Melville Snow Contrs., 98 NY2d at 140).* Indeed by merely plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area, Clancy cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm (*see Fung v Japan Airlines Co., Ltd, 9 NY3d 351, 361 [2007]; Espinal v Melville Snow Contrs., 98 NY2d at 142).* Moreover, a claim that a contractor exacerbated an existing condition requires showing that the contractor left the premises in a more dangerous condition than he or she found them (*see e.g. Figueroa v Lazarus Burman Assoc., 269 AD2d 215, 217 {2000}.* Therefore, even if Clancy had the obligation to apply salt or sand to the driveway/parking lot area after plowing, the owners and the plaintiff have offered nothing more than speculation that the failure to perform that duty rendered the property less safe than it was before Clancy started his work (*see Church v Callanan Indus., 99 NY2d at 112; Crosthwaite v Acadia Realty Trust, 62 AD3d at 825).*"

Foster v Herbert Slepoy, supra at 215

Based upon all of the foregoing, the defendant Distefano's application for an Order pursuant to CPLR §3212, dismissing plaintiff's complaint and any and all cross-claims against them on the grounds that no party can establish a prima facie case of negligence as against defendant Tony Di Stefano Landscaping Corp. d/b/a Tony Distefano Landscaping Corp., is **granted**.

SO ORDERED.

DATED: 3/27/2013

Ray S. Mekon
J.S.C.

ENTERED
APR 01 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE