To commence the statutory time period for appeals as of right (CPLR §5513[a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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EVANGELINE BROOKS,

Plaintiff,

-against-

1922-44 BOSTON ROAD CORP., DAMFINO CONSTUCTION CO., INC., DERFNER MANAGEMENT, INC., and HAMPTON OAKS SHOPPING CENTER, LLC,

Defendants.

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DECISION & ORDER

Index No. 50961/2011

Hubert, A.J.S.C.

Before the Court are the motions of the defendant 1922-44 Boston Road Corp (1922). and the defendant Damfino Constuction Co., Inc (Damfino) for an order granting summary judgment pursuant to CPLR § 3212. The plaintiff Evangeline Brooks (Brooks) opposes by Affirmation in Opposition. The defendants respond by Reply Affirmation.

The Complaint pleads four causes of action. The first cause of action is pleaded against defendant 1922, and the third cause of action is pleaded against defendant Damfino. The defendant 1922 is the owner of the shopping center and parking lot located at 1099 North Division Street, City of Peekskill, New York (the Lot). The defendant Damfino is under contract with 1922 to plow and clear snow in the Lot.

The plaintiff alleges that while lawfully on the property of the defendant 1922, on December 26, 2008, she slipped and fell, sustaining severe injuries as a result of the negligence

of the defendants in failing to properly maintain the Lot. Specifically, the defendants, jointly and severally, are alleged to have failed to properly clear and remove snow from the Lot causing a condition of "black ice" to develop. They further failed to remove said ice or otherwise mitigate the condition, and/or failed to warn the defendant and others of the condition. The black ice is alleged to have caused the plaintiff to slip and fall and thereby sustain injury.

The Court has examined and reviewed the submissions of the parties, including the pleadings, moving, opposing and replying papers, the exhibits annexed thereto, the deposition transcripts, the affidavits, including the affidavit of the plaintiff's meteorological expert, and the memoranda of law. After due consideration of the issues raised by the defendants, the Court denies the defendants' motions.

In order to prevail on a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986)(citations omitted). Once this showing has been made, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" on which the party rests his or her claim, or must demonstrate an "acceptable excuse" for failing to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1981); see, also, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324.

On December 26, 2008, the plaintiff arrived at the afore-stated Lot at or about 5:45 p.m. She was a passenger in a vehicle driven by an acquaintance, Mr. Punto. Mr. Punto pulled into a parking space next to a raised median, or "island," upon which plowed snow had been piled. The

plaintiff exited from the passenger side of the vehicle, and as she stepped out of the vehicle and onto the paved area (the asphalt), it is alleged she immediately slipped and fell to the ground striking her head and sustaining other injuries. According to the deposition testimony of the plaintiff, there was no visible snow or ice under her feet or on the asphalt where the car was parked, and she observed none as she stepped down on to the asphalt. She testified that the area where she fell, however, was "shiny" and that she believed "black ice" accumulation caused her to slip and fall. As stated previously, she testified that the pile of snow on the island was less than one foot distance away from where she stepped in the parking space. The asphalt upon which the car was parked, was otherwise clear of visible snow and ice.

Defendant 1922 employed defendant Damfino, under contract, to clear snow from the lot. As relevant to the facts of this case, Damfino's contractual obligation was initially to plow the parking area after the snow stopped falling (or commence plowing by 7 a.m. on any given day if snow had not stopped falling by that time), and to then sand and/or salt (collectively, salt) the plowed areas. Damfino would also perform "maintenance" after the initial plowing, as needed "as decided by Dam-Fino or at request of tenant owner." What constituted "maintenance" cannot be determined from the record before the Court except that it most likely pertained to additional plowing and/or salting after the initial plowing.

Prior to the incident, Damfino had last plowed two days earlier, December 24, 2008, on a day when snow and freezing rain fell. No snow or other precipitation is alleged to have fallen on December 25, 2008, or on December 26, 2008, the day the plaintiff allegedly slipped and fell.

Plaintiff's theory of negligence is that rising and falling temperatures between December 24th, and December 26th caused the snow piled by Damfino on the island next to Mr. Punto's

parked vehicle, to leach water into the space where Mr. Punto parked. This water, in turn, froze and formed so-called black ice. Given the temperature fluctuations over the two days leading up to the accident, and the pile of snow, it was foreseeable that black ice (a dangerous condition) would form in the space where Punto parked, which created a dangerous condition for the plaintiff or anyone who parked there and got out of their vehicle to walk to one of the stores.

The defendants, not unreasonably, claim they should not be held liable for a condition that is visible and/or obvious to no one, and which they didn't create. Damfino's obligation under it's contract, was to come to the Lot after it snowed. Because there was no precipitation on either December 25th or 26th, 2008, defendant Damfino would have no cause to come to the Lot to clear snow and ice or otherwise perform maintenance. By the same measure, and in the absence of precipitation, defendant 1922 would have no cause to call Damfino (or take other steps) to clear snow and ice, or perform maintenance. The law does not make either defendant an insurer against any possible injury to anyone under any or all circumstances, especially circumstances created by natural forces (random outdoor temperature fluctuations), and invisible to the naked eye (black ice).

The Court of Appeals, however, has a different view. They have stated:

> We have recognized the problem of negligent snow removal going back to 1949 . . . where judgment for the injured plaintiff was affirmed . . . [upon facts showing] that a plaintiff fell on black ice that had accumulated as a result of melting and refreezing of snow that the property owner had shoveled on the sidewalk in front of her home. *San Marco v. Village/Town of Mount Kisco*, 16 N.Y.3d 111, 118, 919 N.Y.S.2d 459 (2010) *citing, Zahn v. City of New York,* 299 NY 581 (1949). See, also, *Smith v. County of Orange*, 51 A.D.3d 1006, 858 N.Y.S.2d 385 (2d Dep't 2008) *citing, Knee v. Trump Vil. Constr. Corp.*, 15 AD3d 545, 546, 791 N.Y.S.2d 576 (2d Dep't 2005)(triable issue of fact is raised regarding whether the ice upon

> which the plaintiff slipped was formed when snow piles created by the County's snow removal efforts melted and refroze).

The issue in the instant case, then, is whether the defendants may be said to have negligently created the condition, either jointly or severally, as a result of their snow removal efforts.

There is no question that two days before the alleged accident, the defendant Damfino placed the plowed snow on the island which adjoined the space where Punto parked on December 26, 2008. Damfino argues, however, that at all times it was simply performing what was required by the contract between it and defendant 1922 and is not subject to third party liability.

As a general rule, a contractual relationship between A (Damfino) and B (1922) will not, by itself, give rise to tort liability in favor of third party C (the plaintiff) against A. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120 (2002), citing, *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226, 557 N.Y.S.2d 286 (1990). More is required in order for tort liability to extend to the contracted party in favor of the the third party. The putative wrongdoer, in failing to exercise reasonable care in the performance of his duties, must be said to have launched a force or instrument of harm. *Espinal, supra* at 139, *citing H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 168 (1928). See, also, *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 585-586, 611 N.Y.S.2d 817 (1994). Alternatively, the contractual undertaking must be comprehensive and exclusive, i.e., a type which may be said to entirely absorb the landowner's duty to maintain the premises safely. *Palka, supra* at 584.

While Damfino's contract with 1922 was exclusive, it may not be said to be

comprehensive. Damfino's "maintenance" obligations were discretionary unless otherwise requested by the "tenant owner" (Damfino would perform "maintenance" after the initial plowing as needed "as decided by Dam-Fino or at request of tenant owner"). Furthermore, the undefined nature of what constituted maintenance makes it speculative to assume that Damfino was responsible for returning to the property at discrete times to see that black ice didn't form.

However, it is not disputed that Damfino's practice was to pile the plowed snow onto the so-called "islands." There was no dedicated area on the 1922 property to place plowed snow, and Damfino was not responsible for hauling it away. Damfino had limited options as to where to put the plowed snow and chose to place it on the medians where pedestrians did not walk and vehicles did not park. Defendant 1922 never directed Damfino to do anything different with the snow and provided no alternative disposal sites. Under the facts of this case, the decision to place snow on the medians can only be described as a shared determination between both defendants.

The plaintiff avers, through its expert, that the black ice, which allegedly caused the plaintiff to fall, was most likely (within a reasonable degree of "meteorological" certainty) the result of water melting from the snow pile into the parking space when the ambient temperature rose above freezing, which then re-froze into black ice when the temperature fell sufficiently. Therefore, by placing the snow on the island, it is argued, the defendant Damfino may be said to have launched a force or instrument of harm insofar as it was foreseeable that the snow would form black ice as the temperature fluctuated over time.

Removing a hazard, i.e plowing accumulated snow and ice in the parking spaces and placing it in areas where the shoppers are not expected to park or walk, hardly seems like a

creation or exacerbation of a hazardous condition. Nevertheless, the Court of Appeals has clearly chosen to extend liability in situations where the placement of cleared snow creates the possibility that black ice may form in the cleared areas. *Espinal, supra* at 142-143. The analysis set forth in *Espinal*, and in cases as otherwise cited and discussed herein, would appear to preclude a determination by this Court in the instant case that there is no admissible proof sufficient to require a trial of material questions of fact on the issue of whether the stock-piling of snow on the medians represented a failure to exercise reasonable care. Accordingly, the motions of the defendants are denied.

It is therefore ORDERED that the parties shall appear before the Settlement Conference part on the 29th day of March, 2014, or as soon thereafter as shall be determined by the Court for trial of the matter and such further and other proceedings as shall be directed.

The foregoing constitutes the decision and order(s) of the Court.

Dated: White Plains, New York
March 7, 2014

James W. Hubert
Acting Supreme Court Justice

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