SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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ANGELA PELUSO,

Plaintiff,

-against-

DECISION / ORDER
Index No. 307474/2011

TRAIN CITY, LTD.,

Defendant.

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TRAIN CITY, LTD.,

Third-Party Plaintiff,

Index No. 83701/2012

-against-

STEVE'S LANDSCAPING & LAWNCARE, INC.,

Third-Party Defendant

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The following papers numbered 1 to 11 read on the below motions noticed on **August 5, 2014** and duly submitted on the Part IA15 Motion calendar of **October 1, 2014**:

Papers Submitted	Numbered
Train City's Notice of Motion, Exhibits, Memo of Law	1,2,3
SLL's Notice of Motion, Exhibits	4,5
Plaintiff's Cross-Motion, Aff., Exhibits	6,7
Train City's Aff. In Opp., Exhibits	8,9
Train City's Aff. In Opp. to Cross-Motion, Reply	10
SLL's Aff. In Reply	11

In an action seeking damages for personal injuries arising out of an alleged slip and fall accident, defendant Train City, Ltd. ("Train City") moves for an Order (1) dismissing the complaint as a discovery sanction pursuant to CPLR 3126 due to the plaintiff Angela Peluso ("Plaintiff")'s spoliation of evidence; (2) in the alternative, an Order granting summary judgment to Train City pursuant to CPLR 3212(b), (3) in the alternative, and Order granting Train City summary judgment on its third-party action against third-party defendant Steve's Landscaping & Lawncare, Inc. ("SLL") for common law indemnification. Plaintiff opposes the motion. Separately, SLL moves for an Order (1) granting summary judgment on the issue of liability, and

dismissing the third-party complaint, pursuant to CPLR 3212. Plaintiff and Train City opposes the motion. Plaintiff cross-moves for an Order extending her time to serve an amended complaint upon defendant SLL pursuant to CPLR 306-b. In the interest of judicial economy, the above motions are consolidated and disposed of in the following Decision and Order.

I. Background

According to the complaint, on January 29, 2011, at approximately 5:00AM, Plaintiff slipped and fell on an icy condition near the premises located at 515 Bement Avenue, Staten Island, New York. Plaintiff testified that on January 28, 2011, at around midnight, she left her apartment in the Bronx to go to a friend's house. Before leaving, she had taken Oxycodone and Gabapentin, but could not recall how many doses she took. Plaintiff remained at her friend's house until 2-3:00AM, when she left to go to a bar in Manhattan. Plaintiff recalled staying at the bar for approximately 1 hour. She then took a bus to meet another individual who drove her to 515 Bement Avenue in Staten Island. When they arrived at the location, Plaintiff exited the vehicle and took two or three steps. She testified that she took one step onto the street, and two steps onto the sidewalk, and then fell while reaching for the door. Plaintiff related that there was "two inches of black ice" on the ground that looked "absolutely clear." She was not looking at the ground prior to the accident. After her fall, Plaintiff testified that another witness observed a drain pipe with ice coming out of the bottom and leaking water onto the sidewalk. Train City notes that Plaintiff provided no statement from this witness, or expert opinion regarding whether the drain pipe caused ice to accumulate and cause the accident. Plaintiff stated it was not snowing when her accident occurred and did not remember if it was sleeting.

Train City provides weather records that indicate there was light snow in the late evening of January 28, 2011, from 9:51-10:51PM, hours prior to the accident. Between January 26 and January 27, 2011, there were approximately 15 inches of snowfall. Plaintiff testified that she took photographs of the accident location with her phone after she fell, and provided them to her attorneys. Plaintiff, however, failed to produce these photographs during discovery and has stated that they are unavailable.

Stuart Waldman testified on behalf of Train City which owned 515 Bement Avenue. He

testified that Train City hired SLL to perform snow removal at the premises. There was no written contract with SLL, but SLL was required to clear the sidewalks within 30 minutes after the cessation of snowfall. Mr. Waldman testified that Train City never received any complaints or violations regarding SLL's snow removal efforts. Mr. Waldman was at the premises from Monday through Friday every week, and on occasion observed SLL remove snow. He never received any complaints regrading a snow or ice condition existing at the premises. During discovery, SLL produced invoices for snow removal performed at the premises on January 26 and 27, 2011. At those times, SLL removed snow and applied salt.

Steve Titner of SLL testified that SLL performed snow and ice removal on January 26 and 27, 2011, at the subject location. It was SLL's practice to apply calcium chloride with a spreader once the sidewalks were clear of snow. SLL would inspect the sidewalks upon completion of the work. Mr. Titner was present for this snow removal work. He noted that SLL did not return to the site after completion of the work on January 27, 2011, because it had no obligation to do so, and SLL received no additional requests for work at the premises.

Train City now moves to strike the complaint as a sanction for spoliation of evidence. The Plaintiff confirmed at her deposition that she took photographs of the ice condition on the night of her accident. Despite subsequent demands, however, Plaintiff has failed to produce those photographs and has stated that they are unavailable.

In the alternative, Train City moves for summary judgment, dismissing Plaintiff's complaint. Train City contends that it adequately discharged its duties to maintain its property, since it hired a snow removal company, SLL, to maintain the premises in the event of snow or ice conditions. Train City also argues that there is no evidence that it created, or had actual or constructive notice of this hazardous condition. Plaintiff herself testified that she could not see the "black ice" after she fell. Moreover, Train City notes that there was appreciable snow fall in the hours before Plaintiff's accident, thus the ice condition could have been formed during that time. Train City argues that they would have had no duty to address a snow or ice condition that formed only hours before this accident.

Train City asserts alternatively that they are entitled to judgment as a matter of law on their third-party complaint against SLL seeking common law indemnification. Train City argues

that the evidence demonstrates it was not actively negligent, and that if Plaintiff's accident was caused by negligent snow removal efforts, those efforts were performed by SLL.

SLL moves for summary judgment, dismissing the third-party complaint. SLL contends that it performed snow and ice removal at the subject location in accordance with their agreement with Train City, to the satisfaction of Train City. Upon leaving the premises, there was no snow or ice condition, according to Steven Titner. SLL argues that there is no evidence that their work "launched an instrument of harm" to Plaintiff so as to render them liable in this matter.

Plaintiff opposes both motions. Plaintiff contends that Train City has not demonstrated that the subject photographs were a "key piece of evidence" that was integral to their defense. Moreover, there is no evidence that Plaintiff intentionally or negligently disposed of the photographs. In any event, Plaintiff argues that the defendants have not established that they have suffered prejudice by not having an opportunity to inspect the photorgraphs, so as to require the striking of the complaint. Regarding the summary judgment motion, Plaintiff argues that Train City had a non-delegable duty to maintain the sidewalk. Plaintiff argues that she described the ice condition as "two inches" of ice that must have been the result of the snowfall that occurred from January 26 to January 27, 2011, or two days before this accident. Although there was "trace" precipitation the night before, that precipitation did not result in any accululation. Accordingly, there is evidence that the ice condition lasted for 48 hours and thus Train City is chargeable with constructive notice. Plaintiff also contends that third-party defendant SLL owes her a duty of care. Plaintiff testified that she saw no sand or salt buckets in the area, and therefore there is a genuine issue of fact as to whether SLL negligently performed its snow-removal activities.

Plaintiff also seeks additional time to serve SLL with an amended complaint. On August 27, 2013, an Order was entered allowing Plaintiff leave to serve an amended answer within 30 days. Plaintiff failed to do so, but now argues that it must be granted additional time to serve the proposed pleading in the interest of justice.

Train City opposes SLL's motion, arguing that if there was a hazardous condition on the premises, it was the created by SLL, who was responsible for performing snow removal on the property.

II. Standard of Review

To be entitled to the "drastic" remedy of 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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Motion to Strike Answer - Spoliation

Train City's motion to strike the complaint for spoliation of evidence, pursuant to CPLR 3126, is denied. Even if the apparent deletion of the subject photographs is considered "spoliation," Train City has not established that the "extreme sanction" of striking the complaint is warranted (*see Alleva v. United Parcel Service, Inc.*, 112 A.D.3d 543 [1st Dept. 2013]). The photographs were not the sole means for Train City to establish a defense to the action (*Id.*, citing *Schantz v. Fish*, 79 A.D.3d 481 [1st Dept. 2010]), and their absence, accordingly, does not fatally compromise the defense (*see Fatash v. Tepler*, 294 A.D.2d 396 [2nd Dept. 2002]). Train City

may seek a lesser sanction, such as an adverse inference charge, if deemed appropriate by the trial court (*Alleva, supra*).

Summary Judgment for Train City

Next, Train City moves for summary judgment, dismissing the complaint with prejudice. The Administrative Code of the City of New York, §7-210 imposes upon owners of real property the affirmative duty to maintain abutting public sidewalks in a reasonably safe condition. The duty created by §7-210 is non-delegable. (*Cook v. Consolidated Edison Co. of N.Y.*, 51 A.D.3d 447, 448 [1st Dept. 2008]). Accordingly, evidence that Train City retained a snow removal contractor, alone, does not warrant dismissal of the complaint. Train City argues that they are entitled to dismissal of the complaint because they did not create the allegedly hazardous condition, or have actual or constructive notice. Indeed, to impose liability in a slip-and-fall case, a defendant must have either created or had actual or constructive notice of the dangerous condition which caused the injury (*Smith v. Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Matias v. Rebecca's Bakery Corp.*, 44 AD3d 429 [1st Dept 2007]). "To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it" (*Barrerra v. New York City Tr. Auth.*, 61 AD3d 425 (1st Dept 2009]). When a defendant moves for summary judgment in a slip-and-fall case, it has the burden of demonstrating that it neither created nor had notice of the allegedly dangerous condition (*see Manning v. Americold Logistics*, LLC, 33 AD3d 427 [1st Dept 2006] [on a motion for summary judgment, "defendant met its initial burden of demonstrating, prima facie, that it did not create the alleged hazard or have actual or constructive notice of it"]); *Giuffrida v. Metro N. Commuter R.R. Co.*, 279 A.D.2d 403, 404 [1st Dept 2001] ["Contrary to defendant's suggestion, it is not plaintiff's burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law"]).

Here, Train City failed to satisfy their initial burden of establishing entitlement to judgment as a matter of law with respect to constructive notice of the allegedly hazardous

condition. Train City failed to submit any evidence of someone with personal knowledge as to when one of its representatives last inspected the accident area, or evidence of the condition of the accident area before Plaintiff's alleged fall (*Spector v. Cushman & Wakefield, Inc.*, 87 A.D.3d 422 [1st Dept. 2011]). The last time someone was at the accident location appears to be January 27, 2011, when SLL was performing snow removal services following a storm that resulted in approximately 15 inches of snow in the area. Weather records demonstrate that the temperatures fluctuated between 37 degrees and 30 degrees on January 28, 2011, and between 38 degrees and 32 degrees on the day of the accident, with "trace" precipitation in the evening hours. There is, however, no indication that the premises were inspected at all after SLL performed their services. Defendants argue that Plaintiff's own testimony (describing the condition as "black ice" that was "absolutely clear") establishes that the ice condition was not "visible or apparent" (see *Gordon v. American Museum of Natural History,* 67 N.Y.2d 836 [1986]). This is the argument proffered by the dissent in *Spector* – which noted that the plaintiff had only described the condition as "black ice" and that he did not notice it until he was kneeling close to the ground after slipping (87 A.D.3d at 424). The majority in *Spector* did not adopt the dissent's view. In *Wright v. Emigrant Savings Bank*, the First Department likewise concluded that the defendant did not establish *prima facie* entitlement to summary judgment as a matter of law where it failed to submit evidence concerning snow/ice removal and inspection efforts taken on the day of the accident with respect to the area of the fall (112 A.D.3d 401 [1st Dept. 2013] *see also Rodriguez v. Bronx Zoo Rest., Inc.*, 110 A.D.3d 412 [1st Dept. 2013], *compare Rodriguez v. 705-7 East 179th St. Housing Dev. Fund Corp.*, 79 A.D.3d 518 [1st Dept. 2010][defendant satisfied initial burden through both plaintiff's own testimony as well as that from defendant's employee detailing last time premises was inspected]; *see also Dominguez v. 2520 BQE Assoc., LLC.*, 112 A.D.3d 550 [1st Dept. 2013]) (*cf. Stoddard v. G.E. Plastics*, 11 A.D.3d 862 [3rd Dept. 2004]; *Carricato v. Jefferson Val. Mall Ltd. Partnership*, 299 A.D.2d 444 [2nd Dept. 2002]). Moreover, the record before this Court presents evidence that temperatures remained at or below freezing the entire day following the significant snowfall that occurred on January 26 and 27.

Defendant has also not established as a matter of law that the ice condition was created by a "storm in progress" – to wit, the trace snowfall occurring between 9:51PM and 10:51PM the

night before this incident, as opposed to the significant snowfall that occurred two days beforehand (*see Mike v. 91 Payson Owners Corp.*, 114 A.D.3d 420 [1st Dept. 2014]; *Vosper v. Fives 160th, LLC.*, 110 A.D.3d 544 [1st Dept. 2013]). Plaintiff described the condition of the sidewalk as "two inches of black ice" yet it is unknown whether she is referring to the thickness of the patch or its dimensions. Permitting Plaintiff all favorable inferences, it must be determined that Train City has failed to demonstrate that it lacked constructive notice of this condition as a matter of law.

Summary judgment on Train City's Third-Party Complaint

Train City's motion for summary judgment on the issue of common law indemnification against third-party defendant SLL is denied. A party seeking common law indemnification must demonstrate not only that it is not guilty of any negligence beyond statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the accident (*see Mikelatos v. Theofilaktidis*, 105 A.D.3d 822 [2nd Dept. 2013). In this matter, Train City failed to demonstrate its own freedom from negligence, as they have not established a lack of constructive notice of the allegedly hazardous condition (*see Holub v. Pathmark Stores, Inc.*, 66 A.D.3d 741 [2nd Dept. 2009]; *Urban v. No. 5 Times Square Development, LLC*, 62 A.D.3d 553 [1st Dept. 2009]; *Prenderville v. International Service Systems, Inc.*, 10 A.D.3d 334 [1st Dept. 2004]).

SLL's Motion for Summary Judgment

SLL has filed a motion to dismiss the third party complaint of third party defendant Train City. SLL argues that it is entitled to dismissal of the third-party complaint because there is no evidence that their snow removal activities were insufficient, or caused the allegedly hazardous ice condition. SLL performed snow and ice removal in response to a 4-5 inch snow storm on January 26, and a 15 inch snow fall that occurred the next day, January 27, 2011. The principal for SLL testified that on those days, all snow and ice was cleared from the subject sidewalk, and calcium chloride was applied. No complaints were made about the work performed, and SLL

received no additional requests for work from the landlord since January 27. A representative from Train City testified that he never had any problems with SLL's work and it was always completed to his satisfaction. SLL argues that the mere act of shoveling snow and applying salt did not exacerbate a dangerous condition or "launch an instrument of harm." Moreover, weather records indicate that trace amounts of snow fell between the time SLL left the premises and the time of the accident. Under these circumstances, SLL argues that it would be speculative to opine that the two-inch patch of black ice existed when SLL was at the premises two days before this accident.

In general, a contractor does not owe a duty of care to a non-contracting third party (*Espinal v. Melville Snow Constr.*, 98 N.Y.2d 136, 139-141 [2002]). Such a duty does arise, however, where a contractor "who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so as to have 'launched a force or instrument of harm' (*Prenderville v. International Service Systems, Inc.*, 10 A.D.3d 334 [1st Dept. 2004], citing *Espinal,* N.Y.2d at 141-42). SLL, who provided snow removal services for the accident location two days prior, must therefore demonstrate that its efforts did not create or exacerbate a dangerous situation.

This Court finds that SLL satisfied its initial burden in this respect. SLL provided evidence that it performed its requested duties in response to the snow storm that occurred two days prior to this accident. Steve Titner, who performed snow removal on that date, testified that there was no snow or ice in the area when the work was completed. SLL received no further requests for snow removal. SLL had no duty to continue to monitor the condition of the sidewalk after performing their work. No other events occurred after SLL left the property that "triggered" SLL's duty to return and perform more services. Merely plowing or salting in accordance with an agreement is insufficient for a factual finding that the work either created or exacerbated a dangerous condition (*see Tamhane v. Citibank, N.A.*, 61 A.D.3d 571 [1st Dept. 2009]).

In response, Plaintiff and Train City have failed to raise a triable issue of fact. The fact that Plaintiff encountered ice at the scene and observed no salt does not raise a triable issue of fact as to whether SLL exacerbated a dangerous condition. Indeed, the Court of Appeals

recognized that snow removal efforts may leave residual snow or ice in an area, and more evidence is needed to demonstrate that the contractor left the area in a condition that was more dangerous than when they started (*see Lenti v. Initial Cleaning Services, Inc.*, 52 A.D.3d 288 [1st Dept. 2008], citing *Espinal, supra*, 98 N.Y.2d at 142). In *Prenderville* **v.** *International Service Systems, Inc.*, 10 A.D.3d 334 [1st Dept. 2004]), there was evidence that the defendant created a hazardous condition within a marble curb cut, where the plaintiff encountered "slushy ice" between two piles of snow, with no salt or sand in the area. In *Figueroa v. Lazarus Burman Assoc.*, 269 A.D.2d 215 [1st Dept. 2000], the defendants admitted that the parking lot was not properly salted or sanded. Plaintiff has only argued in opposition papers that she encountered an ice patch, and did not see "salt or sand buckets" in the area. This is patently insufficient to raise a genuine issue of fact as to whether SLL launched a force or instrument of harm (*see also Rudolff v. Woodland Pond Comminity Assn.*, 109 A.D.3d 810 [2nd Dept. 2013], citing *Church v. Callahan Indus.*, 99 N.Y.2d 104, 112 [2002] [speculative to assume that failure to sand and salt rendered property in a less safe condition than before snow removal efforts had begun]). Since SLL is not liable to Plaintiff, Train City is not entitled to common law indemnification against it (see *Kogan v. North Street Community, LLC*, 81 A.D.3d 429 [1st Dept. 2011]). SLL's motion for summary judgment is therefore granted, and the third-party complaint is dismissed.

(5) *Plaintiff's Cross-Motion*

In light of the foregoing, Plaintiff's cross-motion seeking leave to serve an amended complaint against SLL is denied as SLL owed no duty to Plaintiff and her claims or potential claims against SLL are dismissed.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Train City's motion to strike the complaint for spoliation of evidence is denied, and it is further,

ORDERED, that Train City's motion for summary judgment, dismissing the complaint, is denied, and it is further,

ORDERED, that Train City's motion for summary judgment on its cross-claims against SLL for common law indemnification, are denied, and it is further,

ORDERED, that SLL's motion for summary judgment, dismissing the third-party complaint, is granted, and the third-party complaint is dismissed with prejudice, and it is further,

ORDERED, that Plaintiff's cross-motion for leave to serve an amended complaint is denied.

This constitutes the Decision and Order of this Court.

Dated: 12/1, 2014

Hon. Mary Ann Brigantti, J.S.C.