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SHORT FORM ORDER

INDEX No. 11-33785
CAL No. 14-01369OT

COPY

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 1-15-15
ADJ. DATE 8-4-15
Mot. Seq. # 001 - MotD
002 - MG

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KATHY RULAND,

Plaintiff,

- against -

LA BONNE VIE ASSOCIATES, L.P., LBV REALTY ASSOCIATES, L.P., LBV PROPERTIES, L.L.C., LBV MANAGEMENT ASSOCIATES, L.L.C., ARNOLD WOLOWITZ and PERFECT LAWN CARE, INC.,

Defendants.

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PAGANINI, CIOCI, PINTER, CUSUMANO & FAROLE, ESQS.
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Upon the following papers numbered 1 to 49 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 11 - 25; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 26 - 35; 36 - 45; Replying Affidavits and supporting papers 46 - 49; Other sur reply; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 001) by defendant Perfect Lawn Care, Inc. for summary judgment dismissing the complaint and all cross claims against it is decided as follows; and it is further

ORDERED that the motion (# 002) by defendants La Bonne Vie Associates, L.P., LBV Realty Associates, L.P., LBV Properties, L.L.C., LBV Management Associates, L.L.C., and Arnold Wolowitz for summary judgment dismissing the complaint and all cross claims against them is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on January 27, 2011 at approximately 8:30 p.m. when she slipped and fell on ice on the walkway approximately 20 feet away from her apartment at 123K La Bonne Vie Drive in Patchogue, New York, owned by defendants La Bonne Vie Associates, L.P., LBV Realty Associates, L.P., LBV Properties, L.L.C., and LBV Management Associates, L.L.C., ("La Bonne Vie defendants"). Arnold Wolowitz is the owner of the subject apartment complex. Prior to the accident, the La Bonne Vie defendants entered into a snow removal contract with defendant Perfect Lawn Care, Inc. ("Perfect Lawn"). The gravamen of the complaint is that the defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition. In the bill of particulars, the plaintiff alleged that Perfect Lawn failed to properly perform snow removal services.

Perfect Lawn moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. In support, Perfect Lawn submits, *inter alia,* the pleadings; the bill of particulars; and the transcripts of the deposition testimony of the plaintiff, John Russo, a representative of La Bonne Vie Associates, L.P., and Michael DeCicco, a representative of Perfect Lawn, as well as the snow removal contract between the La Bonne Vie defendants and Perfect Lawn.

At her examination before trial, the plaintiff testified to the effect that it had snowed more than a foot the night before the subject accident, and there was no precipitation on the day of the accident. On the morning of the accident, her boyfriend who lived at her apartment, shoveled a walkway leading to the apartment of her friend, Kristen Walter, at 124B La Bonne Vie Drive. At around 3:00 p.m., the plaintiff observed 10 or 15 employees of a snow removal contractor shoveling and clearing the walkways or sidewalks, and putting the snow onto the grass. They performed the snow removal operation for less than 20 minutes. When they left, she observed that the walkways were "completely free of snow," and there was no ice on the walkways or sidewalks. Immediately after the snow removal was performed, she went to Walter's apartment. While walking to the apartment, the plaintiff observed no ice in the path, although there were "little tiny spots of snow" on the walkway. She had no difficulty walking along the walkway to get to Walter's apartment. At around 6:50 p.m., when the plaintiff went back to her apartment, she did not slip or trip and had no difficulty walking on the walkway. She then returned to Walter's apartment without incident. At 8:00 p.m., as the plaintiff walked back to her apartment with her daughter, she did not notice anything on the walkway. She and her daughter had no trouble walking on the walkway. At 8:30 p.m., the plaintiff returned to Walter's apartment without incident. She had no difficulty walking on the walkway and did not slip, trip, stumble or fall. Immediately thereafter, the plaintiff went back to her place again and returned back to Walter's apartment without incident. At around 9:00 p.m., on the way back to her apartment, the plaintiff, looking ahead, slipped on ice in the walkway and fell to the ground. After she fell, she observed black, thin and clear ice in the area of the accident. She took the same path on each of the trips between her apartment and Walter's apartment. During the prior trips, the plaintiff did not notice the alleged black ice. She testified that during the day of the accident, she did not make any complaints about the condition of the walkways to the La Bonne Vie defendants.

At his deposition, Michael DeCicco testified to the effect that he is the owner and president of Perfect Lawn, and that Perfect Lawn was hired by La Bonne Vie Associates, L.P. to provide snow

plowing services during the period from December 1, 2010 through April 30, 2013. Perfect Lawn was responsible for shoveling snow on the walkways. On each occasion, Perfect Lawn was requested to perform snow removal, it was called by John D'Ambrose, a property manager. The property manager instructed Perfect Lawn where to go and how to do the work. In January 2011, there were 15 to 20 people that worked for Perfect Lawn. All of them were assigned to one job site and used shovels only. When they removed snow from a sidewalk, they placed the snow onto the lawn next to it. Immediately after the snow removal operation was performed, a salt and sand mix, which was provided by La Bonne Vie Associates, was applied. The property manager inspected the work site after Perfect Lawn performed the work.

At his deposition, John Russo testified to the effect that he is a property manager employed by La Bonne Vie Associates, L.P. He testified that in January 2011, John D'Ambrose, now deceased, was a supervisor of the complex, and there were 10 to 15 maintenance staff working in the complex. At the time of the subject accident, Perfect Lawn had been hired by La Bonne Vie Associates, L.P. to provide snow removal services at the premises. While the apartment maintenance staff worked on the parking lot, Perfect Lawn removed the snow from the sidewalks. On the day of the accident, D'Ambrose was responsible for a routine inspection of the complex. Russo had no recollection as to the weather and the snow removal operation on the day of the accident. While Perfect Lawn applied salt and sand, the apartment maintenance staff also applied salt and sand.

As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties (*see* ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]; ***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 1103, 915 NYS2d 103 [2d Dept 2010]). However, in ***Espinal v Melville Snow Contrs.***, (98 NY2d 136, 746 NYS2d 120 [2002]), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*id.*).

When a party, including a snow removal contractor, by its affirmative acts of negligence has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Figueroa v Lazarus Burman Assoc.***, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]). In order to make a prima facie showing of entitlement to judgment as a matter of law, Perfect Lawn is required to establish that it did not perform any snow removal operations related to the condition which caused the plaintiff's accident or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (*see* ***Diaz v City of New York***, 93 AD3d 755, 940 NYS2d 654 [2d Dept 2012]; ***Schwint v Bank St. Commons, LLC***, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; ***Keese v Imperial Gardens Assoc., LLC***, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]).

Here, Perfect Lawn established its entitlement to judgment as a matter of law by demonstrating that its limited contractual undertaking to provide snow removal services is not a comprehensive and

exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see* ***Linarello v Colin Serv. Sys.***, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; ***Katz v Pathmark Stores***, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]). Moreover, Perfect Lawn has established, prima facie, that it did not create the allegedly dangerous condition which caused the plaintiff's fall (*see* ***Scott v Avalonbay Communities, Inc.***, 125 AD3d 839, 4 NYS3d 243 [2d Dept 2015]; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]).

In opposition, relying on an analysis of the plaintiff's expert, James Nobile, a certified meteorologist, the plaintiff contends that Perfect Lawn created a hazardous condition at the accident site by not properly performing snow removal services. While Nobile stated in his affidavit that he has extensive experience in preparing climatological studies and has a master's degree in Atmospheric Science, he has not submitted a copy of his curriculum vitae (*see* ***Ryerson v Knuppei***, 2013 NY Slip Op 30981[U], 2013 NY Misc Lexis 1916 [Sup Ct, Suffolk County 2013]; ***Barahona v Marquez***, 2013 NY Slip Op 30914[U], 2013 NY Misc Lexis 1801 [Sup Ct, Suffolk County 2013]). Thus, the plaintiff's expert has failed to establish his qualifications to render an opinion in this area (*see* ***Y.H. v Town of Ossining***, 99 AD3d 760, 952 NYS2d 579 [2d Dept 2012]; ***O'Boy v Motor Coach Indus., Inc.***, 39 AD3d 512, 834 NYS2d 231 [2d Dept 2007]). Even if the court were to determine he is an expert, Nobile's report is insufficient to defeat summary judgment. While Nobile asserts, in his affidavit, that Perfect Lawn's failure to apply the salt and sand caused any accumulated snow and ice to become ice patches in the area of the accident, the Court finds that such generalized, conclusory, and speculative assertions with no independent factual basis are insufficient to defeat a motion for summary judgment (*see* ***Losciuto v City Univ. of New York***, 80 AD3d 576, 914 NYS2d 296 [2d Dept 2011]; ***Pirie v Krasinski***, 18 AD3d 848, 796 NYS2d 671 [2d Dept 2005]). The plaintiff has failed to raise a triable issue of fact as to whether a defect, in fact, existed which would constitute a dangerous or defective condition and whether Perfect Lawn created the allegedly dangerous condition by performing its snow removal operations. Accordingly, Perfect Lawn's motion is granted to the extent it is for summary judgment dismissing the complaint and the cross complaints for contribution and common-law indemnification against it, and Perfect Lawn's own cross complaints for contribution are dismissed as academic. However, having failed in its moving papers to articulate any basis for dismissing the cross complaints for contractual indemnification and breach of contract against it, its motion is otherwise denied.

The La Bonne Vie defendants and Arnold Wolowitz move for summary judgment dismissing the complaint and all cross claims against them on the grounds that they did not create the alleged dangerous condition, and that they had no actual or constructive notice of the condition. In support, the movants submit, *inter alia,* the pleadings, the bill of particulars, and the transcripts of the deposition testimony of the plaintiff, John Russo, and Michael DeCicco, as well as the snow removal contract between the La Bonne Vie defendants and Perfect Lawn.

A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only if it created the dangerous condition or had actual or constructive notice of the condition (*see* ***Devlin v Selimaj***, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; ***Morreale v Esposito***, 109 AD3d 800, 801, 971 NYS2d 209 [2d Dept 2013]; ***Gushin v Whispering Hills Condominium I***, 96 AD3d 721, 721, 946 NYS2d 202 [2d Dept 2012]). Thus, a defendant who moves for summary judgment in a slip-and-fall case has the initial

burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Dhu v New York City Hous. Auth.***, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; ***Cruz v Rampersad***, 110 AD3d 669, 972 NYS2d 302 [2d Dept 2013]; ***Santoliquido v Roman Catholic Church of Holy Name of Jesus***, 37 AD3d 815, 830 NYS2d 778 [2d Dept 2007]). To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see* ***Dhu v New York City Hous. Auth.***, *supra*; ***Oliveri v Vassar Bros. Hosp.***, 95 AD3d 973, 943 NYS2d 604 [2d Dept 2012]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]).

Here, the apartment property manager testified that Perfect Lawn was hired to remove snow only from the sidewalks at the premises, while the apartment maintenance staff worked on the parking lot. The plaintiff testified that at around 3:00 p.m. on the day of the accident, she observed 10 or 15 employees of a snow removal contractor shoveling and clearing the walkways or sidewalks. The La Bonne Vie defendants and Arnold Wolowitz established their entitlement to judgment as a matter of law by demonstrating that they did not create the allegedly dangerous condition which caused the plaintiff's fall. Moreover, the La Bonne Vie defendants and Arnold Wolowitz established their entitlement to judgment as a matter of law by demonstrating that they lacked constructive notice based on the plaintiff's deposition testimony that the alleged icy condition on the walkway was not visible and apparent (*see* ***Mullaney v Royalty Properties, LLC***, 81 AD3d 1312, 916 NYS2d 545 [4th Dept 2011]; ***Lewis v Bama Hotel Corp.***, 297 AD2d 422, 745 NYS2d 627 [3d Dept 2002]). Furthermore, the La Bonne Vie defendants and Arnold Wolowitz established their entitlement to judgment as a matter of law by demonstrating that they lacked actual notice based on the plaintiff's deposition testimony that on the day of the accident, she did not make any complaint of the alleged icy condition on the walkway to the apartment. Further, while having made several trips between her apartment and Walter's apartment, the plaintiff, herself, did not notice any snow or ice on the walkway (*see* ***Mitchell v City of New York***, 29 AD3d 372, 815 NYS2d 55 [1st Dept 2006]).

In opposition, the plaintiff submits, *inter alia*, the affidavit of her expert, James Nobile, who, as noted above, failed to establish that he is qualified as an expert to render an opinion in the climatological field. The plaintiff contends that the mounds of snow on the grass created by the snow removal contractor may have melted and refrozen, and the plaintiff's deposition testimony indicated that the process of having melted and refrozen into ice on the walkway occurred during the plaintiff's last visit to Walter's apartment and her departure therefrom, which was less than 30 minutes. Evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone (*see* ***Jones-Barnes v Congregation Agudat Achim***, 12 AD3d 875, 784 NYS2d 731 [3d Dept 2004]). The Court concludes that the plaintiff's claim is purely speculative (*see* ***DiGrazia v Lemmon***, 28 AD3d 926, 813 NYS2d 560 [3d Dept 2006]). Accordingly, as discussed above, the plaintiff has failed to raise a triable issue of fact as to whether a defect, in fact, existed which would constitute a dangerous or defective condition and further as to whether the La Bonne Vie defendants and Arnold Wolowitz created the allegedly dangerous condition or had actual or constructive notice of the condition. Thus, the motion by the La Bonne Vie defendants and Arnold Wolowitz is granted, and the plaintiff's complaint against them is dismissed.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining cross complaint should continue (*see* CPLR 3212 [e] [1]).

Dated: 8/4/15

A.J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION