SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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LLENY ESTEVEZ ADAMES,

Plaintiff,

-against-

SAGASTUME LANDSCAPING CORP.,

Defendants.

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TRIAL/IAS PART 13

Index No.: 600775-17
Submission Date: 3-27-18
Motion Sequence: 001

DECISION & ORDER
XXX

	Papers Numbered
Sequence #001	
Notice of Motion, Affirmation & Exhibits	1
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Upon the foregoing papers[1], the motion by defendant SAGASTUME LANDSCAPING CORP. for an Order pursuant to CPLR §3212 dismissing the Complaint against it is determined as set forth below.

This is an action to recover for personal injuries allegedly sustained by plaintiff in a slip and fall accident that took place at around 8:30 AM on January 27, 2014 on the stairs outside her apartment located at 77 Pond Hill Rd., Great Neck, New York. Plaintiff alleges that she slipped and fell on a patch of ice on the stairs.

The premises are part of a development owned by Spinney Hills Homes I, L.P. ("Spinney Hills"). Defendant herein was the snow removal contractor hired by Spinney Hills to perform snow removal services during the relevant time period. Plaintiff brought a prior related action against Spinney Hills under Nassau County Index Number 06448/15 (the "2015 Action"), in which the defendant herein was impleaded as a third-party defendant. Motions for summary

[1] Plaintiff also served a "Reply Affirmation in Opposition" after the return date of the motion. Insofar as this constitutes an untimely and unauthorized sur-reply, it was not considered by the Court.

judgment and consolidation have been submitted in the 2015 Action, and are being considered together with the instant motion.

Defendant moves for summary judgment on the ground that, as an independent contractor, it owed no duty of care to plaintiff and, in any event, it did not create or exacerbate the condition which allegedly caused plaintiff's fall. In support of its motion, defendant submits, among other things, the deposition testimony of the parties to this action and the 2015 Action (*Mot. Exhs. D, E, F, G*), a photograph of the subject ice patch introduced into evidence (*Mot. Exh. I*); the contract between Spinney Hills and defendant (the "Contract") (*Mot. Exh. J*); and certified weather records for the period from January 19, 2014 through January 27, 2014 (the date of the accident) (*Mot. Exhs. L and M*).

The evidence demonstrates, without contradiction, that: (i) Defendant was a snow removal contractor whose responsibilities were limited to the provision of snow removal services as specified in the Contract; (ii) plaintiff was not a party to the Contract; (iii) the Contract required defendant to provide snow removal services only when the snowfall reached at least an inch; and (iv) the only snowfall amounting to more than one inch occurred six days prior to the date of the accident.

In addition, plaintiff testified that there were five to six inches of snowfall about four or five days prior to her accident. This snow was removed from the walkways and stairway prior to her accident. When she returned home at 7:00 PM on the evening before the accident she used a different stairway, but there was no snow on the walkways or steps. The next morning, there was a light snow (less than one inch) on the concrete landing above the subject stairs, which she did not think needed to be shoveled. There was no snow falling. When she stepped onto the first step, she slipped on a seven or eight inch circle of thin, clear ice. She had not seen it before she fell, and she did not know how it got there or how long it had been there. She did not see or feel any salt on the step. The weather records confirm 0.1 inches of snow on January 26, 2014, and freezing temperatures which did not rise above freezing until 5:00 AM on January 27, 2014, about three hours prior to the accident.

Based upon the foregoing, defendant argues that it had no duty to plaintiff, who was not a party to the contract, and that it cannot be held liable on the basis of any act or omission that created or exacerbated the condition on the stairway. It fully performed its obligations with respect to the prior snowfall on January 21, 2014, and it was not required to perform any services as a result of the snowfall on January 26, 2014.

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In opposition, plaintiff submits, among other things, an Incident Report dated January 27, 2014, purportedly signed by a former employee of Spinney Hill's management company (*Aff. In Opp., Exhibit B*). The report states: "Action Taken by On-Site Staff – salted steps when arrived on property approximately 9AM. Also had Sagastume on property last night 1/26/14 to salt." Plaintiff argues that this demonstrates that defendant had notice of the condition, and was negligent in the performance of its (de-icing) services.

It is well settled that a contractual obligation, standing alone, imposes no duty of care to third persons. Only three exceptions are recognized: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002) (internal citations and quotations omitted). See also *Gordon v Pitney Bowes Management Services, Inc.*, 94 AD3d 813 (2d Dept. 2012).

At bar, the record demonstrates, without contradiction, that defendant did not entirely displace the duties of Spinney Hills and its management company to maintain the premises safely, and that plaintiff did not rely on the continued performance of defendant's duties under the Contract. See *Foster v Herbert Slepoy Corp.*,76 AD3d 210, 214-215 (2d Dept. 2010). The only exception arguable here is whether the defendant, in the performance of its duties, "launche[d] a force or instrument of harm." In that context, "a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury." *Espinal,* 98 NY2d at 142. The exception applies when the contractor "while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others or increases that risk." *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104 (2002).

The Court finds that defendant has met its initial burden to demonstrate that it did not negligently create or exacerbate a dangerous condition on the subject stairs. See *Parrinello v Walt Whitman Mall, LLC,* 139 AD3d 685 (2d Dept. 2016); *Foster,* 76 AD3d 210 at 215. Defendant demonstrated *prima facie* that it adequately performed snow removal services a week prior to the accident and was not obligated to return to the premises on January 26-27, 2014.

Plaintiff's opposition fails to raise an issue of fact. The incident report is inadmissible hearsay. Plaintiff failed to lay a proper foundation for its admission as a business record, and the report is insufficient to demonstrate that the information contained therein was derived from the

personal observations of the person reporting it, that the source of the information had a duty to report it, or that some other exception to the hearsay rule applied. See *Memenza v Cole*, 131 AD3d 1020 (2d Dept. 2015). Although hearsay may be considered to defeat a motion for summary judgment if it is not the only evidence submitted in opposition (*O'Halloran v City of New York*, 78 AD3d 536 [1st Dept. 2010]), in this case, there is no admissible proof that defendant performed services at the premises on the night before the accident. Even if the incident report were considered, it is insufficient to support the inference that defendant left the stairs in a more dangerous condition than existed prior to its work. *Foster*, 76 AD3d at 215.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that defendant's motion for an Order pursuant to CPLR §3212 dismissing the Complaint against it is *granted.*

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: May 24, 2018
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.

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