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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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KAREN A. BUTTS, as Administrator of the Estate of JOHN LIUZZI, deceased,

Plaintiff,

-against-

SJF, LLC, ADVANCED DERMATOLOGY, P.C., SOUTH COUNTRY PLAZA CONDOMINIUM, INC., J.M. IABONI LANDSCAPING, INC. and J.M. IABONI SC ENTERPRISES, INC.,

Defendants.

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J.M. IABONI LANDSCAPING, INC. and J.M. IABONI SC ENTERPRISES, INC.,

Third-Party Plaintiffs,

-against-

KENNETH DEAN BUTTS,

Third-Party Defendants.

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INDEX NO.: 36679/2010
CALENDAR NO.: 201800356OT
MOTION DATE: 10/11/18
MOTION SEQ. NO.: 009 MD; 010 MG

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Upon the following papers read on these motions to renew and for summary judgment : Notice of Motion and supporting papers 1 - 3; 15 - 43 ; Answering Affidavits and supporting papers 4 - 8; 9 - 10; 44 - 48; 49 - 50 ; Replying Affidavits and supporting papers 11 - 12; 13 - 14; 51 - 52; 53 - 54 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion seq. no.: 009) by defendant South Country Plaza Condominium, Inc. and the motion (motion seq. no.: 010) by defendants J.M. Iaboni Landscaping, Inc. and J.M. Iaboni SC Enterprises, Inc. are consolidated for purposes of this determination; and it is

ORDERED that the motion (motion seq. no.: 009) by defendant South Country Plaza Condominium, Inc., for leave to renew its motion for summary judgment previously denied by this Court in a decision dated September 22, 2016, is denied; and it is further

ORDERED that the motion (motion seq. no.: 010) by defendants J.M. Iaboni Landscaping, Inc. and J.M. Iaboni SC Enterprises, Inc., for leave to renew their motion for summary judgment previously denied by this Court in a decision dated September 22, 2016, is granted, and, upon renewal, summary judgment dismissing the complaint and any cross claims against them is granted.

This action was commenced by John Liuzzi to recover damages for injuries he allegedly sustained on March 9, 2010, when he slipped and fell on pebbles that had accumulated on a concrete walkway incline near the entrance to the offices of defendant Advanced Dermatology, P.C. ("Advanced") located at 510 Montauk Highway, West Islip, New York. Defendant SJF, LLC ("SJF") owns one of the condominium units at the subject premises, which it leases to Advanced. Defendant South Country Plaza Condominium, Inc. ("South Country") manages the professional condominium complex and contracts with defendants J.M. Iaboni Landscaping, Inc., and J.M. Iaboni SC Enterprises, Inc. (collectively "Iaboni), to provide snow and ice removal services for the subject premises. South Country and Iaboni have each asserted cross claims against all other defendants herein. SJF, LLC and Advanced have asserted cross claims against South Country for negligence, breach of contract, and indemnification. Mr. Liuzzi died during the pendency of this action and Karen A. Butts, as administrator of his estate, was substituted as plaintiff in his place.

South Country and Iaboni now move for leave to renew their motions for summary judgment, which were denied by this Court by an order dated September 22, 2016. South Country argues that it had no constructive notice of any defective condition on the premises, and that it acted reasonably in its snow removal practices. The Iaboni defendants argue that they had no duty to remove any salt or sand they deposited at the subject premises in the course of the performance of their snow removal operations. Both movants aver that depositions held subsequent to their initial motions establish sufficient grounds to renew.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e][2]; *see Gall v Colon-Sylvain*, 151 AD3d 701, 54 NYS3d 659 [2d Dept 2017]; *Matter of Grande v City of NY*, 133 AD3d 752, 20 NYS3d 143 [2d Dept 2015]). A motion to renew "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e][3]). Renewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (*Union Temple of Brooklyn v Seventeen Dev., LLC*, 162 AD3d 710, 79 NYS3d 194 [2d Dept 2018]; *Kio Seob Kim v Malwon, LLC*, 155 AD3d 1017, 66 NYS3d 318 [2d Dept 2017]; *Matter of Weinberg*, 132 AD2d 190, 210, 522 NYS2d 511 [1st Dept 1987]).

Here, South Country failed to submit "new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e][2]; *see Union Temple of Brooklyn v Seventeen Dev., LLC*, *supra*; *see also Vyrtle Trucking Corp. v Browne*, 157 AD3d 842, 69 NYS3d 332 [2d Dept 2018]). Accordingly, South Country's motion for leave to renew its prior summary judgment motion is denied.

The Iaboni defendants' instant motion is both for leave to renew its prior summary judgment motion's arguments related to constructive notice and also a second summary judgment motion raising arguments unaddressed in their initial motion. While successive summary judgment motions are discouraged, the Court, in furtherance of judicial economy, will permit such a motion in this instance (*see Crosby v Southport, LLC*, 169 AD3d 637, 94 NYS3d 109 [2d Dept 2019]). Upon review of the Iaboni defendants' submissions, the Court finds that depositions taken subsequent to their prior motion, specifically that of Robert Forbes, offer facts not offered on the prior motion; and therefore, Iaboni's application for leave to renew is granted (*see* CPLR 2221 [e][2]). In support of their instant motion for summary judgment, the Iaboni defendants submit copies of the pleadings, copies of their prior motion papers, transcripts of the parties' deposition testimony, deposition testimony of third-party defendant Kenneth Dean Butts, copies of snow removal invoices, a copy of a 2009-2010 "snow clearing" contract, and various photographs.

Robert Forbes testified that he is the president of South Country, and was in such position on the date in question. He stated that South Country executed a snow removal contract with the Iaboni defendants which spanned the period of October 2, 2009 through March 2010. He indicated that the Iaboni defendants were responsible for plowing snow at the subject premises, then spreading salt and/or sand in the parking lot. Mr. Forbes testified that the Iaboni defendants were also hired to maintain the concrete walkways at the premises by clearing them of snow, then applying a snow-melting compound. He indicated that salt and/or sand was applied only to the parking lot at the subject premises and not its walkways. In conclusion, Mr. Forbes stated that he knows of no complaints lodged prior to decedent's fall regarding snow removal or the landscaping of the subject premises.

John Iaboni testified that at the time of decedent's injury, he was the owner of J.M. Iaboni Landscaping, Inc., and J.M. Iaboni SC Enterprises, Inc. He stated that the Iaboni defendants, in addition to other services, performed snow removal at certain commercial properties. Mr. Iaboni indicated that J.M. Iaboni SC Enterprises, Inc., was hired to remove snow and ice from the subject premises beginning in approximately 2005 and continuing until the end of March 2010. He testified that the Iaboni defendants also performed landscaping at the subject premises "[a] couple of years in that period," but not in 2010. Upon questioning as to the Iaboni defendants' practices for controlling ice at the subject premises, Mr. Iaboni explained that a mixture of salt and sand was spread on all parking areas and that calcium chloride was applied to sidewalks.

Decedent John Liuzzi testified, as the Court recounted in its decision on the initial motions, that he was standing on the sloped concrete walkway in front of the door to Advanced Dermatology, P.C. immediately prior to his fall. Upon questioning as to whether he observed sand or salt on the surface of the subject premises' parking lot, Mr. Liuzzi replied in the negative. Rather, Mr. Liuzzi stated that the cause of his fall was his foot slipping on "black pebbles."

A party moving for summary judgment "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 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). "A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties" (*Yvars v Marble Hgts. of Westchester, Inc.*, 158 AD3d 850, 850-851, 73 NYS3d 246 [2d Dept 2018], quoting *Baratta v Home Depot USA*, 303 AD2d 434, 434, 756 NYS2d 605 [2d Dept 2003]). However, there are "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, 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 Contrs.*, 98 NY2d 136, 140, 746 NYS2d 120 [2002] [internal quotation marks and citations omitted]).

The Iaboni defendants established a *prima facie* case of entitlement to summary judgment in their favor by demonstrating that they spread only sand, salt, and calcium chloride at the subject premises (*see generally Alvarez v Prospect Hosp.*, *supra*). Further, the Iaboni defendants demonstrated that plaintiff was not a party to its snow removal contract; and thus, as third-party contractors, they owed no duty to plaintiff (*see Reisert v Mayne Constr. of Long Is., Inc.*, 165 AD3d 854, 85 NYS3d 490 [2d Dept 2018]; *Espinal v Melville Snow Contrs.*, *supra*). The burden then shifted to plaintiff to raise a triable issue (*see generally Vega v Restani Constr. Corp.*, *supra*).

Plaintiff, SJF, LLC, and Advanced oppose the Iaboni defendants' motion, arguing that their submissions failed to establish that they did not launch an instrument of harm or create the

alleged dangerous condition that caused decedent's fall. Plaintiff also argues that the Iaboni defendants failed to prove that they did not have a duty to clean residual salt and sand from paved surfaces at the subject premises. Both arguments are unavailing. Mr. Iaboni testified that the Iaboni defendants spread a sand/salt mixture on the asphalt surfaces at the subject premises and spread calcium chloride on the concrete surfaces. There has been no testimony purporting to demonstrate that the Iaboni defendants spread the "black pebbles" decedent testified caused his fall, or that they spread an excessive amount of sand at the premises (*see Jeansimon v Lumsden*, 92 AD3d 640, 937 NYS2d 869 [2d Dept 2012]). While decedent's son-in-law, Mr. Butts, testified that he observed sand and gravel on the surface of the walkway where decedent's fall occurred, it would be speculative to attribute his fall to sand, given the decedent's adamant assertion that "black pebbles" were the cause of such fall (*see Kimball-Malone v City of New York*, 7 AD3d 675, 777 NYS2d 513 [2d Dept 2004]). Further, Mr. Iaboni testified that any removal of deposited sand, subsequent to a snow-clearing operation at the subject premises, would require a request from South Country and additional fees. It is axiomatic that the Iaboni defendants' sole contractual duty to Advanced was to ensure that the subject premises' paved surfaces and walkways were reasonably free of snow and ice upon their departure from such premises on February 27, 2010. There is an insufficient causal nexus between the Iaboni defendants' application of sand and salt to the subject parking lot and decedent's fall, occurring 10 days later. Thus, the opposing parties herein have submitted no evidence of any negligent act by the Iaboni defendants.

Accordingly, the motion by defendants J.M. Iaboni Landscaping, Inc., and J.M. Iaboni SC Enterprises, Inc., for leave to renew is granted and, upon renewal, summary judgment dismissing the complaint and cross claims against them is granted.

Dated: May 17, 2019

HON. PAUL J. BAISLEY, JR.

J.S.C.