SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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JENNIFER PRUSIECKI,

Plaintiff,

-against-

100 SOUTH OCEAN AVE. REALTY CORP. and ALEXANDER WOLF & COMPANY, INC ALL AMERICAN SNOW PLOWING INC., and VILLAGE LANDSCAPING, INC., and

Defendants.

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100 SOUTH OCEAN AVE. REALTY CORP. and ALEXANDER WOLF & COMPANY, INC.

Third-Party Plaintiffs,

-against-

ALL AMERICAN SNOW PLOWING INC.,

Third-Party Defendant.

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TRIAL PART: 6

NASSAU COUNTY

INDEX NO: 603429/2017

MOTION SEQ #: 5, 6

SUBMIT DATE : 9/9/18

The following papers having been read on this motion:

Notice of Motion (All American) 1
Notice of (Cross-) Motion (Village) 2
Opposition (Plaintiff) 3
Opposition (to Cross-Motion) (Plaintiff) 4
Opposition (Village) 5
Opposition (100 South and Alexander Wolf) 6
Opposition (to Cross-Motion) (100 South and Alexander Wolf) 7
Reply (Village) 8

Defendant/Third-Party Defendant All American moves this Court for an order, pursuant to CPLR §3212, seeking summary judgment dismissing the complaint, any cross-claims, and the third-party complaint against them only. Defendant Village has opposed this application and has cross-moved for summary judgment as well, also seeking dismissal of the complaint and any

cross-claims against them. Plaintiff and Defendants 100 South and Alexander Wolf have all opposed both applications in their entirety. Based upon the following, both the motion and the cross-motion are hereby granted, the action and any cross-claims against Defendant All American and Defendant Village are hereby dismissed, and the third-party complaint against Third-Party Defendant All American is also dismissed.

The facts of this case are such that Plaintiff was, and still is, a resident at a property located at 100 S. Ocean Drive, Freeport, Nassau County, New York, the subject property where this incident took place. This property is owned by Defendant/Third-Party Plaintiff 100 South and managed by Defendant/Third-Party Plaintiff Alexander Wolf. These parties contracted with Defendant/Third-Party Defendant All American in November 2016 to perform snow removal for the 2016–2017 winter season. Thereafter, Defendant/Third-Party Defendant All American subcontracted this service to be performed by Defendant Village. Nowhere in either contract were these parties obligated to remove snow from in-between vehicles parked in the subject parking lot, nor were they tasked with removing snow manually with shovels or a snowblower.

On March 14, 2017, a snow event took place which left several inches of snow on the ground. Defendant Village performed its service as contracted for by plowing wherever possible in the parking lot area of the subject premises. Defendant Village also salted the subject parking lot twice before the following morning. Defendant/Third-Party Defendant All American inspected the work and was pleased with the performance by Defendant Village. The following morning, Plaintiff, a resident in an apartment at the property, exited her apartment and attempted to get into her vehicle; unfortunately, she slipped and fell while she neared her parking space, resulting in significant injury to her left arm.

The proponent of a summary judgment motion 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 Hospital, 68 NY2d 320, 508 NYS2d 923 (1968). To make a prima facie showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

It is well-established that in order to impose liability upon a defendant in a slip-and-fall action, evidence must show that the defendant either created the condition which caused the

accident or had actual or constructive notice of the condition. Cusack v. Peter Luger, Inc., 77 AD3d 785, 909 NYS2d 532 (2nd Dept., 2010). As a general rule, a limited contractual obligation to provide snow removal does not render the contractor liable in tort for the personal injuries of third parties. Turner v. Birchwood on the Green Owners Corp., 171 AD3d 1119, 98 NYS3d 323 (2nd Dept., 2019). However, such a contract for removal of snow and ice does give rise to a duty on the part of the snow removal contractor or subcontractor to exercise reasonable care to prevent foreseeable harm to plaintiff if in failing to exercise reasonable care in the performance of its duties, the snow removal contractor launched a force or instrument of harm, the plaintiff detrimentally relied upon the continued performance of the snow removal contractor's duties, or the snow removal contract has entirely displaced the property owner's duty to maintain the premises safely. Roach v. AVR Realty Co., 41 AD3d 821, 839 NYS2d 173 (2nd Dept., 2007). Essentially, the contract must be an exclusive and comprehensive agreement which entirely displaces the property owner's duty to maintain the premises safely. Foster v. Herbert Slepoy Corp., 76 AD3d 210, 905 NYS2d 226 (2nd Dept., 2010).

In the instant case, a review of the contract between Defendant/Third-Party Defendant All American and Defendants/Third-Party Plaintiff 100 South and Alexander Wolf make clear that this moving party did not have a duty to Plaintiff to prevent an incident such as this from occurring. That is, the minimal terms of the service agreement between these parties is not sufficiently comprehensive to have displaced Defendants/Third-Party Plaintiffs duty to keep the subject premises reasonably safe. Moreover, the facts of this case, in which Defendant/Third-Party Defendant subcontracted the work to Defendant Village, prohibit liability to be found against Defendant/Third-Party Defendant, as they did not exacerbate or launch an instrument of harm into the area where Plaintiff fell. Plaintiff's admitted lack of knowledge of this contract also prevents a finding of detrimental reliance against this moving party as well. Therefore, Defendant/Third-Party Defendant has established its entitlement to judgment as a matter of law.

Coinciding with the foregoing, the cross-motion by Defendant Village must also be granted for similar reasons as stated above. Defendant Village did not have a contract with Defendants/Third-Party Plaintiffs 100 South and Alexander Wolf; rather, it only had an agreement Defendant/Third-Party Defendant All American. As such, Defendant Village cannot be found to have a greater responsibility to keep the subject premises safe for third-parties such as Plaintiff than Defendant/Third-Party Defendant All American. In addition, the subcontracting agreement between these parties is not any more comprehensive or exclusive such that Defendant Village can be found to have entirely displaced Defendant/Third-Party Defendant All

American's duty to Plaintiff. Thus, Defendant Village has also established its entitlement to judgment as a matter of law.

The opposition papers before the Court fail to create a triable issue of fact as against either moving party herein. Plaintiff's extensive opposition papers, while attempting to demonstrate the existence of an issue of fact that is best left for a jury to decide, are insufficient to deny either set of moving papers before the Court. Indeed, none of the deposition testimony before the Court contradicts the subject contracts in play between the parties, nor has Plaintiff demonstrated that either Defendant/Third-Party Defendant All American or Defendant Village performed snow removal in a manner that could possibly be deemed to have launched a force or instrument of harm into the area where Plaintiff slipped. For all of the foregoing reasons, both the motion and cross-motion are hereby granted in their entirety and the complaint, third-party complaint, and any cross claims against All American and Village are hereby dismissed forthwith. Kaehler-Hendrix v. Johnson Controls, Inc., 58 AD3d 604, 871 NYS2d 359 (2nd Dept., 2009).

Finally, in accordance with the foregoing, the caption is hereby amended to reflect the dismissal against Defendant/Third-Party Defendant All American and Defendant Village to read as follows: "JENNIFER PRUSIECKI, Plaintiff, against 100 SOUTH OCEAN AVE. REALTY CORP. and ALEXANDER WOLF & COMPANY, INC., Defendants."

Defendant/Third-Party Defendant All American shall file and serve a copy of the within order with notice of entry upon all other parties served with the motion practice herein within thirty (30) days from the date of this order. The remaining parties shall appear as scheduled in the DCM Trial Part of Supreme Court, Nassau County, on October 21, 2019, at 9:30 am.

This hereby constitutes the decision and order of this Court.

ENTER

DATED: October 15, 2019

HON. ARTHUR M. DIAMOND
J.S.C.

ENTERED
OCT 17 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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