Disp _x_ Dec ____ Seq. Nos. 1-2 Type _ SJ_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**

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MARIE BRUNO,

Plaintiff,

-against-

SCARSDALE FAIRWAY, LLC and C.M. LAWN SERVICE, INC.,

Defendants.

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Index No. 61650/2018

DECISION AND ORDER

The following papers numbered 1 to 10 were read on these motions:

| Paper | Number |
|---|---|
| Notice of Motion, Affirmation and Exhibits | 1 |
| Memorandum of Law | 2 |
| Affirmation in Opposition | 3 |
| Affirmation in Reply | 4 |
| Notice of Motion, Affirmation and Exhibits | 5 |
| Memorandum of Law | 6 |
| Affirmation and Exhibit in Opposition | 7 |
| Affirmation in Opposition | 8 |
| Reply Affirmation | 9 |
| Reply Affirmation | 10 |

There are two motions for summary judgment, one filed by each defendant, in this slip and fall case. The motion filed by defendant Scarsdale Fairway, LLC ("Scarsdale") also seeks summary

judgment in its favor on its cross-claims against defendant C.M. Lawn Service, Inc. ("CM").

The facts are as follows. Plaintiff resided, for many years, in an apartment in a complex managed by Scarsdale. The other defendant, CM, is the longtime landscaper for Scarsdale. There is no dispute that Scarsdale and CM had a contract in which CM was obligated to maintain the grounds of the premises once a week. CM was not required to be on the premises at any other time.

On a late September day, plaintiff got in her car, which she had parked in a spot in the upper lot, to go do some errands. Upon her return at around midday, plaintiff pulled in to a parking spot, also in the upper lot, got out of her car and fell, injuring herself. Plaintiff testified at her deposition that there were leaves, twigs and rocks right where she fell. The Court has seen photos of the area, taken after plaintiff fell, which show some leaves and other autumnal debris near the car. Plaintiff also testified that she did not notice any such debris when she left to go do her errands.

There is no dispute that CM had workers on site at the time of the accident. There is also no dispute that plaintiff testified at her deposition that she saw CM's workers using leaf blowers on the **lower** level of the parking lot. Plaintiff further

testified that the first time she heard a leaf blower was about five minutes after her accident.

One of Scarsdale's employees testified that after plaintiff had fallen, he saw some of CM's workers using leaf blowers on the upper level. There is no dispute that he did not see any of them using leaf blowers prior to the accident, only afterwards.[1] CM's witness testified at his deposition that none of the workers had used a leaf blower on the upper level at any time that day prior to the accident. Specifically, he testified that upon arrival that morning, they spent two to three hours cutting the grass at the property. They then began to use leaf blowers to clean up the grass by the front door of the building. He testified very plainly that they had not used any leaf blowers in the area where plaintiff fell until they began to clean up the lot **after** the accident. He further testified that he believed that the leaves fell naturally in the area where plaintiff had her accident.

CM argues that it owes no duty to plaintiff. It also argues that it did not have notice of any dangerous condition on the

[1]This witness, Mr. Hutaj, testified both that the workers were close to plaintiff, and that they were **not** close to plaintiff. When asked "Where were the leaf blowers in relation to where Marie Bruno was?" he answered "Not that far. It's very close, they was." Only two pages later, however, when asked "Just to clarify, sir. You didn't see the landscaping company blow the leaves onto the area where Marie Bruno was on the ground, correct?" he answered "Not close to it, but on other side, yeah, they was there." The lawyer then asked "But did you see them blow leaves onto the spot she was sitting on?" He replied "Not that time. When I came there, I just saw the guys doing the other side, not close to her."

premises. Similarly, Scarsdale contends that it had no responsibility for plaintiff's accident because if there were a dangerous condition, then it was open and obvious.

Beginning with CM's motion, "Generally, a contractual obligation standing alone will not give rise to tort liability in favor of a third party. However, the Court of Appeals has identified three situations wherein the party who enters into a contract to render services may be held liable in tort to a third party: (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." *Lubell v. Stonegate at Ardsley Home Owners Ass'n, Inc.*, 79 A.D.3d 1102, 1103-04, 915 N.Y.S.2d 103, 105 (2d Dept. 2010).

CM alleges that it had nothing to do with the pile of leaves and debris on which plaintiff fell. All of the testimony submitted to the Court indicates that CM did not work in that area, or blow leaves into the area, prior to the accident, but only afterward. Anything to the contrary is taken out of context; was clarified and corrected by the witness; or, with respect to the testimony of Mr. Hutaj, shows that he contradicted

himself. Mr. Hutaj's "unclear and contradictory deposition testimony" is valueless. *Motor Vehicle Acc. Indemnification Corp. v. Levinson*, 218 A.D.2d 606, 606, 630 N.Y.S.2d 747, 748 (1st Dept. 1995). *See also Carthen v. Sherman*, 169 A.D.3d 416, 417, 94 N.Y.S.3d 34, 35 (1st Dept. 2019) ("internally contradictory deposition testimony" has no weight). Nor is there any allegation of reliance and, since CM only did landscaping work one day per week, it did not completely supplant Scarsdale's obligation to maintain the premises. This suffices to establish CM's prima facie case.

In opposition, plaintiff states that "It is undisputed that workers from C.M. Lawn were performing debris removal on the property at the time of Ms. Bruno's slip and fall accident and that the workers were using leaf blowers in close proximity to the location of her fall. This evidence is surely sufficient to raise a triable issue of fact as to whether the debris condition that Ms. Bruno slipped on was caused and/or exacerbated by C.M. Lawn's work activities at the property that day." The problem with this statement is that it is not undisputed that CM's workers were using leaf blowers in close proximity to the location of her fall. Rather, the undisputed evidence shows that CM's workers were **not** in close proximity to the area.

Having reviewed plaintiff's opposition to CM's motion, the Court finds that CM "is entitled to summary judgment in light of the fact that, in response to a prima facie showing of a right to judgment as a matter of law, the opponents of its motion produced no evidence demonstrating an issue of fact as to whether [it] failed to perform or negligently performed its contract, or as to whether [it] created the condition in question, or had actual or constructive notice of it." *Rivas v. 525 Bldg. Co., LLC*, 293 A.D.2d 733, 734-35, 742 N.Y.S.2d 83, 85 (2d Dept. 2002). Put simply, plaintiff presents to the Court no evidence that demonstrates that CM's workers were in the area prior to the accident, or that they somehow blew leaves and debris from the lower level - where she saw them - to the upper level. Anything else is pure speculation. It is well-settled that "speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment." *Leggio v. Gearhart*, 294 A.D.2d 543, 545, 743 N.Y.S.2d 135, 137 (2d Dept. 2002).

With respect to Scarsdale's motion, it "established their prima facie entitlement to summary judgment dismissing the complaint by demonstrating the absence of a triable issue of fact regarding whether they created or had actual or constructive notice of the dangerous condition." *Semple v. Sterling Estates, LLC*, 300 A.D.2d 297, 297, 751 N.Y.S.2d 306, 307 (2d Dept. 2002). There is no dispute that Scarsdale did not do any leaf blowing

that day. Nor is there any question that Scarsdale had actual or constructive notice of the allegedly dangerous condition; plaintiff herself testified that the leaves and debris were not there when she left to do errands, but were there when she returned a few hours later. "In the absence of proof as to how long the [leaves and debris were] on the floor, there is no evidence which would permit an inference that the defendants had constructive notice of the condition." *Goberdhan v. Waldbaum's Supermarket*, 295 A.D.2d 564, 564, 745 N.Y.S.2d 46, 47 (2d Dept. 2002).

The motions for summary judgment are thus granted, and the action is dismissed. The motion with respect to the cross-claims is denied as moot.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
December 14, 2020

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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