To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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RAYMOND J. VANDERVEER and DAWN VANDERVEER,

Plaintiffs,

-against-

BRAUNAGEL & GREENWALD INC, ELKA REALTY, INC., MENTAL HEALTH ASSOCIATION IN ORANGE COUNTY, INC., BEENA 1 REALTY, INC., BEENA 1, INC., BEENA 3, INC., BEEN 3, INC. d/b/a ACCUCARE PHARMACY and TAM ENTERPRISES.

Defendants.

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DECISION AND ORDER

INDEX NO.: EF010295-2018
Motion Date: 7/28/2021
Sequence Nos.: 1 - 4

SCIORTINO, J.

The following documents were read on the motions by defendant Mental Health Association in Orange County, Inc., (Sequence #1); defendant Beena 1 Realty, Inc. Beena 1, Inc., Beena 3, Inc., and Beena 3, Inc. d/b/a Accucare Pharmacy (Sequence #2); Elka Realty, Inc., (Sequence #3); and Tam Enterprises, Inc. (Sequence #4) brought pursuant to CPLR §3212, seeking summary judgment dismissing the Complaint against them:

PAPERS	NYSCEF #
Notice of Motion (Seq. #1)/Affirmation in Support (McKenna)/Exhibits A - M	24 - 39
Notice of Motion (Seq. #2)/Affirmation in Support (Husain)/Exhibits A - Q	65 - 88
Notice of Motion (Seq. #3)/Affirmation in Support (Nash)/Exhibits A - T	41- 62
Notice of Motion (Seq. #4)/Affirmation in Support (Badura)/Exhibits A - N	89 - 104
Affirmation in Opposition (Lefland)/Affidavit (Altschule and Lombardo)/ Response to Statement of Material Facts	108 - 110
Reply Affirmation (Seq. #1)(McKenna)	111
Reply Affirmation (Seq. #2)(Husain)	115
Reply Affirmation (Seq. #3)(Nash)	116

Background and Procedural History

This is an action for personal injuries allegedly sustained by plaintiff on December 14, 2017. Plaintiff claims he sustained injuries as the result of a slip and fall on ice on the walkway near the entranceway of a premises at 73 James P Kelly Way, Middletown, New York. This action was commenced by the filing of a Summons and Verified Complaint on October 10, 2018. Issue was joined as to defendant Mental Health Association in Orange County, Inc. ("MHA") by filing of an Answer on November 5, 2018. Issue was joined as to defendant Beena 1 Realty, Inc., Beena 1, Inc., Beena 3, Inc. And Beena 3, Inc. d/b/a Accucare Pharmacy (collectively "Accucare") by filing of an Answer on November 12, 2018. Issue was joined as to defendant Elka by filing of an Answer on November 19, 2018. Issue was joined as to defendant TAM Enterprises, Inc. ("TAM") by filing of an Answer on November 27, 2018.

Bill of Particulars was served on or about December 28, 2018. Supplemental Bills of Particular were served on August 2, 2019, and December 3, 2019. The Bills of Particular allege that Elka was the owner of the premises; MHA and Accucare were tenants. TAM was a contractor hired to perform snow and ice removal services.

Examinations before trial were held: Plaintiff Raymond Vanderveer on July 24, 2019; Deborah de Jong, on behalf of MHA, on September 11, 2019; Nicola Trama, Jr., on behalf of defendant Elka, and Beena Kanabar, on behalf of defendant Accucare, on November 15, 2019, and Brian Cutler, on behalf of defendant TAM, on January 20, 2020. Note of Issue was filed on March 24, 2021.

Plaintiff Raymond Vanderveer's Testimony

Plaintiff testified that, on December 14, 2017, he was driven to the subject property by his wife, arriving between 2:00 p.m. and 3:00 p.m. The temperature was below freezing. There was approximately an inch and a half of snow on the ground from the night before. MHA and Accucare pharmacy are located on the premises and share a single entrance into the building. Plaintiff had walked approximately 30 feet from his vehicle on the walkway that ran in front of the building. Plaintiff's wife was walking just ahead of him and was holding the door to the building open for him. As the plaintiff reached for the door, he slipped and fell on his right side and right hand.

After the fall, plaintiff entered MHA and told a woman at the front desk that he had slipped and fallen on ice. Plaintiff testified that the woman told plaintiff and his wife that she had also fallen earlier that day, and the maintenance man had been called. When he left the building, he did not observe any sand or salt on the walkway. He did, however, observe ice and snow on the walkway. Plaintiff's wife took photographs of the area approximately five minutes after he fell.

MHA Motion for Summary Judgment (Sequence #1)

Defendant MHA argues the lease between MHA and Elka did not place any maintenance responsibilities on MHA for the exterior sidewalk/walkway or the parking lot. MHA appends the affidavit and deposition transcript of Deborah de Jong, Associate Executive Director of Mental Health Association in Orange County, Inc. Jong avers that the lease between MHA and Elka required MHA to hire snow plow services for the parking lot and walkways at the property; the cost was to be split between the tenants. Co-defendant TAM was retained to perform snow plowing services for 2017.

Jong avers that the lease does not put maintenance responsibilities for the walkways or parking lot on MHA. The only snow removal that MHA performs is to clear snow from between the four (4) company-owned vehicles parked in the rear of the building; the snow is removed by shovel. Any issues regarding snow or ice in the parking lot or walkway would be brought to the attention of Jody Chalmer and Nick Trama, Elka employees, or TAM to remedy the condition.

On the date of the accident, the receptionist notified Jong and the MHA's Executive Director that plaintiff had slipped and fallen. Prior to the accident, no one had reported any icy conditions on the walkway. On the day of the accident, Jong entered MHA through the front entrance. She did not recall observing ice, but testified that she had no difficulty walking in the entrance.

MHA argues, as Elka was responsible for the maintenance of the parking lot and sidewalk/walkway where plaintiff allegedly fell, summary judgment should be granted. MHA did not owe a duty to the plaintiff in terms of maintenance of the sidewalk/walkway where the accident occurred. Further, MHA had no notice of any icy conditions prior to the accident.

Accucare Motion for Summary Judgment (Sequence #2)

Accucare argues that, pursuant to the Section 7(e) of its Lease Agreement with Elka, Accucare had no duty to maintain the exterior of the property and was only responsible for paying a percentage of the costs of any external maintenance (Exhibit A to Kanabar Affidavit). Accucare did not own, control, or have special use for the parking lot and walkway located at the entrance to the subject building shared with co-defendant MHA. Accucare did not create the snow and/or ice condition alleged by plaintiff and had no notice of any allegedly slippery condition. Furthermore, plaintiff testified that he never made any complaints to any Accucare employees regarding slippery conditions.

Accucare appends the affidavit of its president, Anil Kanabar. Accucare had no involvement in retaining or instructing the snow removal contractor. Anil Kanabar arrived at the building around 9:00 a.m. and did not see any snow or ice conditions. Throughout the day he received no complaints from any customers regarding the exterior of the property, and no employees reported to him that they were aware of any slippery condition.

Accucare argues co-defendant TAM employee, Brian Cutler, confirmed that TAM entered into a contract with MHA only. Accucare was not a party to any contracts or agreements between MHA and Tam, never directed, supervised, or controlled the work of TAM in any way, and was never involved in apprising TAM of any snow and/or ice conditions.

Elka Motion for Summary Judgment (Sequence #3)

Elka argues that, in December 2017, there was no agreement between Elka and TAM for snow and/or ice removal services at the property. Elka argues it was an out-of-possession landlord for the property, and owed no duty to remove snow and ice from the property. Defendant Elka argues it lacked the requisite notice; did not create the condition at issue, and cannot be held liable. Further, the record is devoid of any proof regarding how long the condition allegedly existed prior to the incident.

In support of the motion, defendant Elka appends the deposition transcript of its part time general maintenance employee, Nicola Trama, Jr. Trama testified that he would drive by the property either before or after a snow storm to check on the property. He did not have a set schedule, and would check on the property when his schedule permitted. He handled complaints by tenants regarding ice, and would salt the parking lot and walkways upon receiving complaints from the tenants. Trama testified that, after heavy ice storms, there had been issues with water dripping onto the walkway in front of the entrance at the subject premises. However, on

December 14, 2017, he did not receive any communication from either MHA or Accucare requesting any snow and/or ice removal services at the property or notifying of any snow and/or ice accumulation.

TAM Motion for Summary Judgment (Sequence #4)

TAM argues there is no basis for Elka's cross-claim against TAM, as Elka hired its own maintenance person to perform snow and ice removal. There is no proof that TAM negligently performed its duties or improperly performed its work, and there was no breach of any contractual obligation between TAM and co-defendant MHA, as it was only required to perform snow services at three plus inches of snow. No proof has been submitted that plaintiff Raymond Vanderveer detrimentally relied on the continued performance of TAM's duties, or that TAM entirely displaced the lessor or lessee's duty to maintain the premises safely. There is also no proof that TAM either created or exacerbated the condition that allegedly caused the plaintiff's accident or launched any force or instrument of harm.

In support of the motion, TAM appends the deposition transcript of Brian Cutler, TAM's Chief Financial Officer since December of 2017. Cutler testified that, pursuant to TAM's proposal dated September 5, 2017, TAM would perform snow removal services, including sidewalk clearing and salting for the winter of 2017-2018 for MHA (Exhibit L). These services were performed after three or more inches of snow had accumulated. The parking lot was plowed by a truck and the sidewalks were cleared by shovel and snowblower. The sidewalk was salted by hand and the parking lot by a truck salter.

Appended to the motion is TAM's snowplow account and billing list for December 14, 2017, and an invoice from TAM dated January 2, 2018 for services performed on December 9,

2017. The account and billing list and invoice indicate that, on December 14, 2017, salting was performed on the premises for 1-2 inches of snow.

Opposition

In opposition, plaintiffs argue that Raymond Vanderveer's deposition testimony establishes that when he arrived at the subject premises, the snow on the walkway was not cleared, sanded, or salted. Plaintiffs append the affidavit of Howard Altschule and John Lombardo, expert meteorologists. Plaintiffs' experts aver that, due to melting and refreezing, new ice formed on December 13, 2017, between 3:28 and 5:28 p.m. On December 14, 2017, approximately 1.7 inches of snow accumulated from 12:00 a.m. through 8:03 a.m. No precipitation fell for approximately six hours prior to the time of the incident. Plaintiffs' experts conclude that gusty winds occurred on December 14, 2017, between 12:30 p.m. and 2:05 p.m., which would have caused ice to be covered by a light dusting of snow in some locations.

With respect to defendant Elka, the terms of Elka's lease with MHA regarding the property creates an issue of fact. Even though Elka required the tenant to retain snow removal services, the fee for snow plowing as a common charge evidences further control. Further, the fact that Elka has a maintenance employee on site creates questions of fact as to whether Elka retained possession and control of the premises. Nicola Trama testified that he would check on the property before and after snowstorms, throw salt and remove ice from the sidewalk. Defendant Elka has also failed to address the issue of constructive notice in its motion.

As to defendant MHA, plaintiffs argue there are questions of fact as to notice and the special use doctrine. Plaintiff testified that, after advising a woman at MHA that he had fallen, the woman told the plaintiff she had fallen earlier that morning as well, had notified the landlord and was waiting for the maintenance man to arrive. The lease between Elsa and MHA require

the tenant to retain snow removal services. Plaintiffs argue the walkway and entrance to the MHA facility, access to which is given to MHA in the lease, should fall under the special use and be subject to a duty to clear ice.

As to defendant Accucare, plaintiff argues the special use doctrine should also apply. The affidavit of Accucare's president submitted in support of its motion, in which he claims he did not see any snow or ice conditions as he entered into the store, directly conflicts with the plaintiff's testimony in which he indicated that approximately an inch and a half of snow had fallen the night before and was on the ground at the time of the incident. Although Accucare may not have had actual notice, there are questions of fact as to whether it had constructive notice of the condition.

As to defendant TAM, plaintiff argues that defendant TAM has failed to establish that it did not create the dangerous condition. In support of TAM's motion, no one from the movant testified or offered an affidavit about the specific work done by TAM at the property: what was done, when it was done, or how it was done.

Reply (Seq # 1)

MHA argues that the language of the lease between Elka and MHA demonstrates that MHA had no responsibility for the area of the accident. The lease was only for the interior portions of the building. MHA retained TAM at Elka's expense, pursuant to the lease. The lease did not place on MHA any maintenance responsibilities for the exterior of the property. The special use doctrine imposes an obligation on the abutting landowner where he puts part of a public way to special use for his own benefit. MHA made no special use of the common sidewalk nor is there evidence that the defect was caused by use of the sidewalk.

Reply (Seq # 2)

Accucare argues plaintiffs' bare assertion that the special use doctrine applies is inapplicable and insufficient to raise a triable issue of fact. Plaintiffs' opposition fails to address defendant's argument that it had no contractual obligation to arrange for snow services under the lease agreement. Plaintiffs argue, without any authority, that because Accucare contributes toward the payment of snow removal services, it should share in the liability. Accucare did not create the alleged condition, nor did it have any actual or constructive notice of any prior incidents, conditions, or complaints.

Reply (Seq # 3)

Elka reiterates its argument that it was an out-of-possession landlord. Elka had no actual or constructive notice of the alleged condition. Plaintiffs' meteorology experts opine that the condition occurred as the result of gusting winds during the afternoon on December 14, 2017. Under the circumstances, the short period of time in which plaintiffs' experts opine the condition occurred did not provide a reasonable opportunity for it to be discovered and corrected.

Reply (Seq # 4)

TAM argues that because plaintiffs' pleadings did not allege facts which would establish the applicability of any exception outlined in *Espinal v. Melville Snow Contrs.*, 98 NY2d 136 (2002), TAM is not required to affirmatively demonstrate those exceptions that do not apply in order to make a *prima facie* showing. Even if plaintiffs' complaint did allege sufficient facts, TAM made its *prima facie* showing of entitlement to summary judgment. Photographs taken immediately after the subject accident did not show any condition that was created by the defendant TAM. Instead, they show the walkway with a light coating of snow. Here, there is no proof that TAM performed any affirmative action which created the alleged condition. TAM did not completely displace Elka's duty to maintain the premises.

Discussion

It is well established that "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 Hosp.*, 68 NY2d 320, 324 [1986]; *see also William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 NY3d 470, 475-476 [2013]; CPLR 3212 [b]). Once the movant makes the proper showing, "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" (*Alvarez*, 68 NY2d at 324). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

"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 when it created the alleged dangerous condition or had actual or constructive notice of it (*Somekh v. Valley Nat. Bank*, 151 AD3d 783 [2017]; *citing Rudloff v. Woodland Pond Condominium Assn.*, 109 AD3d 810 [2013]). An out-of-possession owner is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions (*Scott v. Bergstol*, 11 AD3d 525 [2d Dept 2004]). A defendant party in possession or control of real property who moves for summary judgment has the initial burden of making a *prima facie* showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence (*Hanney v. White Plains Galleria*, 157 AD3d 660 [2d Dept 2018]). A defendant has constructive notice of a defect when the defect is visible or apparent, and existed for a sufficient length of

time that it could have been discovered and remediated (*Hickson v. Walgreen Co.*, 150 AD3d 1087 [2d Dept 2017]).

Generally, the breach of a contractor's contractual obligation does not give rise to tort liability to others not in privity with the contractor, as the duty flows between only the parties to the contract (*Espinal v. Melville Snow Constr.*, 98 NY2d 136 [2002]). However, exceptions arise when (1) the contracting party, in failing to exercise reasonable care in the performance of contractual duties, launches a force or instrument of harm; (2) the plaintiff detrimentally relies on the continuing performance of the contractor's duty; or (3) where the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely (*id.*) A snow removal contractor cannot be held liable for personal injuries "on the ground that the snow removal contractor's passive omissions constituted the launch of force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition (*Santos v. Deanco Services, Inc.*, 142 AD3d 137 [2d Dept 2016]).

With respect to defendant TAM, there is no evidence in the record that TAM either created or exacerbated the alleged condition. The Second Department has held that a contractor's failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a pre-existing ice condition from improving (*Santos*, 142 AD3d 137). Pursuant to the contract between MHA and TAM, TAM would perform snow removal services when there was an accumulation of three or more inches of snow, or upon request. However, this "contractual undertaking is not the type of 'comprehensive and exclusive' property maintenance obligation" which would "entirely absorb [the] duty... [of the] landowner to maintain the premises safely" (*Espinal*, 98 NY2d at 141). Plaintiffs have offered nothing more

than speculation that the failure to perform that duty rendered the property less safe. Accordingly, defendant TAM's motion for summary judgment is granted.

The Accucare defendants established their entitlement to judgment as a matter of law by submitting the lease agreement indicating that defendant Elka, and not Accucare, was responsible for maintaining the walkway. Pursuant to the Section 7(e) of its Lease Agreement, Elka was responsible for "the structural elements of the Premises, Building and common area including but not limited to, the roof of the building, landscaping, parking lot..." Based on the plain language of the lease, Accucare owed no duty to maintain the exterior of the property (*Davis v. Catsimatidis*, 129 AD3d 766 [2015]). Accordingly, defendant Accucare's summary judgment motion is granted.

With respect to defendant MHA, the Lease Agreement between MHA and Elka provides:

> 12.1. Landlord, at its sole expense, shall perform all repairs and maintenance and make all replacements as are necessary to keep in good order, condition and repair... (b) all elements and portions of the Building exterior to the Premises, (c) the parking areas, drives, sidewalks and other improvements located on the Property exterior to the Building...(e) all common areas of the Property as defined in Section 15.1...
>
> 15.1. Common Areas are defined as "all portions of the Property intended for common use... including but not limited to the Property parking lots, entranceways... Notwithstanding the foregoing, Tenant hereby acknowledges that Tenant shall be responsible for securing snow and ice removal service at Landlord's reasonable cost and expense to be amortized as a Common Charge.

Defendant MHA also established its entitlement to judgment as a matter of law by submitting the lease agreement indicating that defendant Elka was responsible for maintaining the walkway of the premises. Although MHA was required to retain snow removal services, the lease did not place any maintenance responsibilities on MHA with respect to the exterior of the property. Based on the plain language of the lease, MHA owed no duty with respect to the

exterior of the property (*Davis*, 129 AD3d 766). Accordingly, defendant MHA's Summary judgment motion is granted.

With respect to defendant Elka, viewing the facts in the light most favorable to the plaintiffs, defendant has failed to meet its initial burden of establishing entitlement to judgment as a matter of law (*Vega*, 18 NY3d at 503). This Court finds that there are questions of fact regarding whether Elka retained control over the premises, was contractually obligated to repair unsafe conditions and whether it had constructive notice of the alleged condition of the walkway (*Scott*, 11 AD3d 525; *Somekh*, 151 AD3d 783).

Conclusion

On the basis of the foregoing, it is hereby

ORDERED that defendants Acccucare, MHA, and TAM's motions for summary judgment are granted, and all cross-claims asserted against them are dismissed; and it is further

ORDERED that defendant Elka's motion for summary judgment is denied.

All matters not addressed herein are denied.

A virtual conference is scheduled for November 15, 2021 at 11:45 a.m. A Microsoft Teams link will be provided a week before the conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 14, 2021
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*