SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12**

Justice

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ANTOINETTE EDWARDS,

Plaintiff,

- v -

ROCKLAND HOSPITAL GUILD INC.,THE FLOSS GROUP LLC D/B/A ECOSCAPE LANDSCAPE & IRRIGATION, INC

Defendant.

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INDEX NO. 156523/2021

MOTION DATE 09/12/2023, 09/12/2023, 09/12/2023

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 67, 73, 74, 75, 76, 77, 90, 91, 97, 98

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 78, 92, 93

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 94, 95

were read on this motion to/for STRIKE PLEADINGS.

This action arises out of alleged injuries sustained by Antoinette Edwards (plaintiff) as a result of a slip and fall on snow and ice in a parking lot at Rockland Hospital Guild Campus, located at 2 Irvings Way, Orangeburg, NY 10962 (the parking lot) on March 5, 2019.

Defendant Rockland Hospital Guild, Inc. (Rockland) hired co-defendant the Floss Group LLC d/b/a Ecoscape Landscape & Irrigation, Inc (Ecoscape) to remove snow from the campus pursuant to a contract dated November 4, 2018. *See* NYSCEF doc. no. 47 (the contract). Ecoscape moves for summary judgment dismissing the complaint on the grounds that, as a contractor, it owed no duty to plaintiff (motion sequence 001). Additionally, Ecoscape seeks dismissal of

Rockland's crossclaims for indemnification and contribution, asserting that it fully complied with its obligations under the contract.

Rockland moves for summary judgment dismissing the complaint on the grounds that it did not create the allegedly defective condition and did not have actual or constructive notice of such condition (motion sequence 002). In a separate but related motion, Rockland also moves to strike plaintiff's opposition to its motion as untimely filed (motion sequence 003). Plaintiff opposes all three motions.

I. Background

In her deposition, plaintiff testified that the incident occurred after she drove to the Rockland Hospital Guild Campus to visit a client shortly before 7:30 a.m. on March 5, 2019.[1] Plaintiff further testified that it had not snowed that day and that she did not observe any snow or ice in the parking lot. She claims that she took two steps out of her car and fell, at which point she noticed a patch of ice on the ground that was 2 feet long, 2 feet wide, and raised a quarter of an inch.

Ecoscape produced its owner, Kevin Floss, for deposition. Mr. Floss testified that he typically plowed, shoveled, and applied salt to the campus. Mr. Floss testified that on March 4, 2019, the day before the accident, he performed an ice check at the campus, and he found that it was warm, there was no ice, and no need for additional salt. Mr. Floss also testified that it is Ecoscape's practice to perform an ice check eight hours after the last snow fall, and at 12:00 p.m. or 1:00 p.m. on March 4, 2019 he observed no ice. He further stated that he did the snow removal work in coordination with Rockland employee Richard Walsh.

[1] Plaintiff did not testify at her deposition as to what time she arrived at the premises. The Court notes that there is a discrepancy between plaintiff's deposition testimony and her verified bill of particulars. In her bill of particulars, plaintiff alleges that the alleged incident occurred at 9:30 a.m. *See* NYSCEF doc. no. 58. The Court need not address this incongruity, as the issue is irrelevant to the following disposition.

Richard Walsh, the manager of Rockland's maintenance department, provided deposition testimony on behalf of Rockland. Mr. Walsh testified that he inspected the subject parking lot every day in the winter at about 8:00 a.m. He also testified that if he found ice in the parking lot, he would salt it himself. Mr. Walsh confirmed that that Ecoscape would make sure that there was no snow anywhere when they came to the premises and that, upon completion of snow removal, Ecoscape would return on the same day to inspect the work.

Plaintiff produced the affidavit of an expert, George Wright, who documented the weather in the days leading up to the accident. Specifically, Mr. Wright reported that:

> My analysis of the weather conditions that occurred at the Premises on March 3, 2019, indicated that the weather was partly sunny and milder through approximately 2:30 p.m. Snow developed between 4:15 p.m. and 4:30 p.m. on March 3, 2019. The snow continued to fall through midnight into the early morning of March 4, 2019. The snow tapered off and ended between 4:00 a.m. and 4:15 a.m. The sky gradually cleared, and the weather became partly sunny during the afternoon with a daily high temperature of 37°. The snow that was not removed or salted by EcoScape and Richard Walsh melted in response to the sunshine and above freezing (i.e., 32°) temperatures that occurred during the aftermoon. The unremoved patch of snow partially melted into slush during the afternoon. The slush froze into the slippery ice Plaintiff fell upon by 8:00 p.m. as the temperature cooled to 29°. The patch of snow was left on the ground since the last snowfall occurred prior to 4:15 a.m. on March 4, 2019. By not fully removing the snow and not anticipating that it would melt during the afternoon and freeze into ice, EcoScape and Richard Walsh made the condition more dangerous as the patch of snow melted and refroze.

Mr. Wright states that he prepared his affidavit after reviewing official weather and climatological data, which he annexes to his affidavit. Mr. Wright concluded that the ice patches that allegedly caused plaintiff's fall were visible and apparent at the subject location, either as snow or as ice, for at least 27 hours.

II. Analysis

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989) (quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect*

Hospital, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

A. Ecoscape Motion for Summary Judgment

i. Plaintiff's Negligence Claim

Pursuant to the seminal Court of Appeals case *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002), it is the general rule that a snow removal contractor will not be held liable to a plaintiff for a snow/ice related incident unless one of three exceptions applies:

> ...(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] 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*, 98 NY2d at 140 (citations omitted).

A snow removal company which otherwise has no duty to a plaintiff as a third-party may be held liable for a plaintiff's injuries where the snow removal company left dangerous ice patches after removing snow and sanding, which increased the risk of harm to plaintiff. *Genen v Metro-N. Commuter R.R.*, 261 AD2d 211, 215 (1st Dept 1999). Proof that the acts or omissions of a snow removal company increased the risk of injury may constitute launching a force of harm imposing liability upon the snow removal company. *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 (2d Dept 2010).

Plaintiff argues that Ecoscape was negligent in failing to properly salt, shovel, and otherwise remove ice from the parking lot where she fell. As an independent contractor without

exclusive control over the parking lot, Ecoscape argues that it owes no duty to plaintiff pursuant to *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 (2002). Ecoscape moves for summary judgment to dismiss plaintiff's negligence claim against it on the basis that it owes no duty to plaintiff and none of the three *Espinal* (98 NY2d 136) exceptions apply here (i.e., force of harm, detrimental reliance, or duty to maintain premises). Ecoscape relies on the testimony of Richard Walsh and Kevin Floss, who testified as to their snow removal processes at the campus.

In opposition, plaintiff argues that the force of harm exception applies, as Ecoscape's failure to properly plow snow that was present before plaintiff's accident constitutes a failure to exercise reasonable care. Plaintiff's opposition relies wholly upon the affidavit of her meteorologist George Wright, who concludes that, given the weather conditions preceding the accident, Ecoscape's failure to properly plow led to a foreseeable melt and re-freeze which caused plaintiff's accident. Plaintiff asserts that in the absence of salting, the unremoved snow melted and re-froze, causing a more dangerous slippery ice condition.

Ecoscape has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not owe a duty of care to plaintiff, nor did it launch an instrument of harm. Ecoscape submits evidence in admissible form that demonstrates that it is an independent contractor who cleared snow pursuant to the contract and that Rockland's employee would assist in ensuring that all snow was properly removed. Kevin Floss testified that on the date before the accident, Ecoscape plowed, shoveled, and applied salt to the facility, and that it was warm, there was no ice, and there was no need for additional salt. Moreover, co-defendant's witness Richard Walsh testified that Ecoscape made sure that there was no snow anywhere following Ecoscape's plowing work and that, as a pattern and practice, he would salt any remaining snow. As stated by the Appellate Division: "[i]ndeed, by merely plowing the snow in accordance with the contract

and leaving some residual snow or ice on the plowed area, [defendant] cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm." *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 (2d Dept 2010).

As Ecoscape meets its burden, it is incumbent on plaintiff to tender evidence indicating that Ecoscape launched a force of harm. Plaintiff fails to so do, as she has not sufficiently raised a material issue of fact as to whether Ecoscape exacerbated an existing condition or left the premises in a more dangerous condition than it was before they plowed, shoveled, and salted. Even if, in contravention of the deposition testimony, Mr. Walsh left snow in the parking lot, which Mr. Walsh failed to see and/or remediate, plaintiff has offered nothing more in opposition than an expert's speculation. Notably, plaintiff's expert, Mr. Wright, did not examine the area of the accident personally or observe the ice or snow that plaintiff alleges was present on the date of his accident. *See Angelo v Vargas*, 2012 N.Y. Misc. LEXIS 1343, at *6.

Mr. Wright's affidavit is insufficient to defeat the first-hand deposition testimony of Mr. Walsh and Mr. Floss that they exercised reasonable care in their snow removal duties. Therefore, Ecoscape's motion to dismiss plaintiff's negligence claims against it is granted.

ii. Rockland's Claims for Indemnification and Contribution

Ecoscape also moves to dismiss Rockland's cross-claims for contribution and indemnification, arguing that it properly performed its obligations to plow and salt the premises under the contract. Ecoscape also maintains that the contract prohibits the cross-claims asserted. Specifically, the contract between Rockland and Ecoscape expressly bars any claims for contribution or indemnity: "EcoScape will not be held responsible for any falls, accidents or mishaps directly or indirectly associated with snow shoveling of all areas." NYSCEF doc. no. 47. Rockland does not oppose the motion.

The plain language of the contract bars any claims brought by Rockland against Ecoscape for a fall directly associated with snow shoveling (or in this case, plowing), such as the instant action. Moreover, Rockland does not oppose the motion or offer any proof to dispute that Ecoscape did not perform its duties under the contract. Thus, Ecoscape's motion for summary judgment to dismiss Rockland's cross-claims for indemnification and contribution is granted.

B. Rockland Motion to Strike Plaintiff's Opposition

Rockland moves to strike plaintiff's affirmation in opposition to Rockland's motion for summary judgment motion as untimely. After multiple stipulations, the parties agreed that plaintiff's opposition papers were to be filed by December 9, 2022. At the same time, the Court administratively adjourned the motions to January 9, 2023 and subsequently to February 9, 2023. Plaintiff filed her opposition papers on January 4, 2023.

As the matters were administratively adjourned, the parties' briefing stipulation was rendered a nullity. Moreover, defendants had additional time to respond to plaintiff's opposition and timely filed reply papers. As such, there is no prejudice to any party as the Court will consider both plaintiff's opposition and Rockland's reply. Moreover, plaintiff offered a reasonable excuse for the short delay in filing her opposition, as she was awaiting a delayed expert affidavit. Therefore, plaintiff provided good cause for her *de minimus* delay, including that the administrative adjournments led to confusion, and no prejudice results from considering plaintiff's opposition papers. As such, the Court denies Rockland's motion to strike plaintiff's opposition to its motion for summary judgment. *See* CPLR 2004.

C. Rockland Motion for Summary Judgment

To establish a prima facie case of negligence in a slip and fall case involving snow and ice, the plaintiff is required to present proof that the defendants created a dangerous condition or had

actual or constructive notice thereof. *Zabbia v Westwood*, LLC, 18 AD3d 542, 544 (2d Dept 2005); *see also Cuillo v Fairfield Prop. Servs., L.P.*, 977 N.Y.S.2d 353, 353–54 (2d Dept 2013); *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 (1994); *Bogart v F. W Woolworth Company*, 24 NY2d 936, 937 (1969); *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317 (1st Dept 2001); *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 (1st Dept 1999); *Price v. EQK Green Acres*, L.P., 275 A.D.2d 737, 738 (2d Dept. 2000).

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same. *See Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). A general awareness that a dangerous condition may have existed is insufficient to constitute notice of the particular condition alleged to have caused an accident. *See Piacquadio* at 969. The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law. *See Anderson v Central Valley Realty Co.*, 300 AD2d 422,423 (2d Dept 2002); lv denied 99 NY2d 509 (2008); *McDuffie v Fleet Fin. Group*, 269 AD2d 575 (2000).

Generally, on a motion for summary judgment a defendant establishes prima facie entitlement to summary judgment when the evidence shows the absence of actual or constructive notice. *See Hughes v Carrots Corporation*, 248 AD2d 923, 924 (3d Dept 1998); *Edwards v Wal-Mart Stores, Inc.*, 243 AD2d 803 (3d Dept 1997); *Richardson-Dorn v Golub Corporation*, 252 AD2d 790 (3d Dept 1998). If defendant meets its burden it is then incumbent on plaintiff to tender evidence indicating that defendant had actual or constructive notice. *See Strowman v Great Atlantic and Pacific Tea Company, Inc.*, 252 AD2d 384, 385 (1st Dept 1998). "To meet its initial

burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" *See Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 677 (2d Dept 2021). However, "[m]ere reference to general cleaning and inspection practices is insufficient to establish a lack of constructive notice." *Id.*

At the outset, Rockland argues that there are no allegations of any prior complaints regarding icy conditions at the campus or prior accidents that would constitute actual notice. Further, in support of its position that Rockland did not have constructive notice, Rockland submits the deposition testimony of plaintiff; of its witness, Richard Walsh; and of Ecoscape's witness, Kevin Floss. Rockland argues that plaintiff's own testimony belies the first element of constructive notices, as the snow and/or ice was not apparent to her when she exited her car and fell. Additionally, both Mr. Walsh and Mr. Floss testified as to their snow removal processes at the campus. Specifically, Mr. Floss testified that on the day before the accident, it was warm and that there was no ice at the parking lot. Further, Mr. Walsh testified that he would inspect the premises every morning around 8:00 a.m. and he would salt any ice that he noticed in his check.

In opposition, plaintiff again relies upon her expert affidavit. Meteorologist George Wright opines that there is a question of fact as to whether the ice patches would have been visible and apparent for at least 27 hours and that defendants should have anticipated a melt and re-freeze condition, causing the snow left behind to transform into a dangerous ice patch. Mr. Wright also noted that, based upon data from the National Weather Service, snow may have been on the ground from as early as March 1, 2019, extending the amount of time for Rockland to discover and remedy the purported dangerous ice condition. However, both Mr. Floss and Mr. Walksh state that the lot was cleared on March 4th.

Rockland has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not cause or create the condition, nor did it have actual or constructive notice of same. Rockland establishes that it did not create the allegedly icy condition in the parking lot through Mr. Floss' deposition testimony that it was his custom and practice to plow the snow when needed, as he did on March 4th, and that Mr. Walsh would survey the parking lot in the morning and after the snow plowing to salt any remaining snow or ice. Plaintiff does not submit an affidavit, testimony, or any other competent proof from a person with knowledge that disputes the first-hand accounts of the actual plowing, shoveling, or salting on March 4th and the subsequent inspections and salting pursuant to the custom and practice of Mr. Walsh or Mr. Floss. Further, with respect to constructive notice, plaintiff's own testimony controverts the possibility that the ice condition was visible and apparent.

In turn, Mr. Wright's affidavit is insufficient to raise an issue of fact as to whether Rockland created the icy condition or that it had constructive notice of the condition. *See Acar v Ecclesiastical Assistance Corp.*, 125 AD3d 464, 464 (1st Dept 2015) ("[t]he affidavit of plaintiff's expert meteorologist was not sufficient to raise a triable issue of fact as to whether the ice upon which plaintiff allegedly slipped and fell was a result of melting and refreezing of runoff created by defendant's snow-clearing activities"); *see also Rivas v New York City Housing Authority*, 140 AD3d 580 (1st Dept 2016); *Neidert v Austin S. Edgar, Inc.*, 204 AD2d 1030, 1031 (4th Dept 1994) ("Expert opinions which are 'contingent, speculative *or merely possible*' lack probative force and are, therefore, inadmissible." [quotations and citations omitted] [emphasis added]); *compare Contra Perez v Canale,* 50 A.D.3d 437 (1st Dept 2008) (holding that meteorologist's affidavit raises and issue of fact where, based on climatological data, it would have been *impossible* for there to have been the alleged dangerous condition).

Thus, Rockland's motion for summary judgment dismissing the complaint against it is granted, as it has established its right to judgment as a matter of law, and plaintiff has failed tender evidence indicating that Rockland had actual or constructive notice.

III. Conclusion

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant the Floss Group LLC d/b/a Ecoscape Landscape & Irrigation, Inc is granted and the complaint is dismissed against it (motion sequence 001); and it is further

ORDERED that any cross-claims against defendant Floss Group LLC d/b/a Ecoscape Landscape & Irrigation, Inc by defendant Rockland Hospital Guild, Inc. are dismissed (motion sequence 001) for the foregoing reasons and as a matter of law; and it is further

ORDERED that the motion for summary judgment of defendant Rockland Hospital Guild, Inc. is granted, and the complaint is dismissed against it (motion sequence 002); and it is further

ORDERED that the motion to strike plaintiff's opposition papers in response to defendant Rockland Hospital Guild, Inc's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

1/12/2024
DATE

LESLIE A. STROTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE