SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

ERNEST RUDLOFF and DAISY HOLMES RUDLOFF,

Plaintiff(s),

-against-

MOTION DATE: 12/16/11
INDEX NO.: 4188/10
SEQ. NOs. 2-5

WOODLAND POND CONDOMINIUM ASSOCIATION and LEMP LANDSCAPERS, INC.,

Defendant(s)

The parties' respective motions, pursuant to CPLR 3212, for summary judgment are determined as hereinafter provided.

The plaintiffs reside at 61 Holiday Drive, Woodbury within the defendant Woodland Pond Condominium Association's complex. On March 1, 2009 and March 2, 2009 a major winter storm passed through the area leaving between ten (see 10/12/11 affidavit of plaintiffs' expert, Howard Altschule, paras. 12 & 20) and sixteen (see 9/7/11 affirmation of the defendant Woodland Pond Condominium Association's counsel, Thomas M. Bona, Esq., para.9) inches of snow and/or ice on the ground.

Pursuant to a December, 2008 contract with the condominium (see defendant Lemp Landscaper's Exhibit E), the defendant Lemp Lanscapers, Inc. and two subcontractors, "McNail It" and "Golden Rock Design" (see defendant Lemp Lanscapers' Exhibit F, Mr. Lemp's 3/1/11 deposition, p.31,L4 and p.46,L9), subsequently plowed, shoveled and sanded the area on March 2, 2009 between approximately 3:30 a.m. (p.28,L7) and 8:00 p.m. (p.64,L2). The following morning (3/3/09) at approximately 6:30 a.m. (see defendant Lemp Landscapers' Exhibit H, p.13,L3) the plaintiff Ernest Rudloff departed for work. When he was about halfway (p.14,L15) or a third (p.21,L2) of the way down the plaintiffs' driveway, he slipped and fell prompting this personal injury action. Issue was joined on or about March 31, 2010 (defendant Woodland Pond Condominium Association) and April 1, 2010 (defendant Lemp Landscapers, Inc.), respectively. Upon the completion of disclosure, the case was certified for trial on March 31, 2011 and on June 9, 2011 a note of issue was filed. The defendants' September 7, 2011 motions are therefore timely (see CPLR

3212[a]). Although the plaintiffs' October 13, 2011 cross motion is untimely, the issues raised therein are "nearly identical" to those of the motions (see Teitlebaum v Crown Heights Assn. For the Betterment, 84 AD3d 935) and may therefore be considered.

Mr. Lemp testified, inter alia, that he dispatched an initial snow plow at approximately 3:30 a.m. to keep the condominium's main roads functioning (p.28, L10). At about 5:30 a.m. he and a subcontractor, Freddie Schad of Golden Rock Design, also responded with their own plows (p.30,L22-p.31,L6).

Thereafter, at approximately 8:00 a.m., as the snow began to taper off, four "Bobcats" were employed to clean-up the driveways and walkways (p.36,L12;p.37,L25-p.38,L2;p38,L7). A group of "shovelers" (p.63,L3) cleared the areas where the Bobcats were unable to maneuver (p.61,L3-p.63,L5). Mr. Lemp specifically recalled conducting an onsite inspection of the plaintiffs' street because "three or four board members" (p.62,L19), including, but not limited to, the board president, Mark Levine (p.61,L3-23), live nearby, "and everything was cleared" (p.62,L23-24). At approximately 2:00 p.m. and 8:00 p.m. John McNail (i.e., McNail It) applied sand and salt (p.63,L23-p.64,L4).

Mr. Lemp left about 7:00 p.m. (P.63,L8) but returned with four men on March 3, 2009 to clean up the spots which weren't vacant the day before (p.71,L4; see Woodland Pond Condominium Association's Exhibit M). Finally, on March 3, 2009 at approximately noon - after returning from the hospital - the plaintiffs' took a few photographs of the accident site (see defendant Woodland Pond Condominium Association's Exhibit P).

The defendant Leap Landscapers, Inc. has therefore demonstrated its prima facie entitlement to judgment as a matter of law by coming forward with proof that the plaintiffs were not a party to the snow removal contract and that it therefore owed no duty of care to them (see Foster v Herbert Slepoy, 76 AD3d 210,211). Nor, have the plaintiffs established a triable issue of fact as to one or more of the Espinal (see Espinal v Melville Snow Contrs., 98 NY2d 136,138) exceptions. For example, merely by leaving some residual snow and/or ice on the plowed area, Lemp Landscapers, Inc., cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm (see Henriquez v Inserra Supermarkets, Inc., ___ AD3d ___ [2nd Dept, 11/15/11]; Foster supra at 215 quoting Espinal

supra at 142).

"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" (Cantwell v Fox Hill Community Association, Inc., 87 AD3d 1106). Here, the defendant Woodland Pond Condominium Association has demonstrated, as a matter of law, that it did not create or have actual or constructive notice of the alleged condition that caused Mr. Rudloff to slip and fall. In opposition, the plaintiffs have failed to proffer any evidence sufficient to raise a triable issue of fact as to whether the condominium created or exacerbated the alleged condition through their snow removal efforts (see John v City of New York, 77 AD3d 792,793-794; Cantwell supra at 1106; Simon v PABR Associates, LLC, 61 AD3d 663,664; cf Ferguson v Shu Ham Lam, 74 AD3d 870,871).

More specifically, the October 12, 2011 affidavit of the plaintiffs' expert, Mr. Altschule, a certified meteorologist , opines "with a reasonable degree of [m]eteorological certainty" that the defendant Lemp Landscapers' use of Bobcats to remove the snow and ice created the alleged defect (para. 22). However, the plaintiffs have failed to demonstrate that Mr. Altschule possess the requisite skill, training, education, knowledge or experience to render an opinion as to snow removal (see Rosen v Tanning Loft, 16 AD3d 480; Hoffman v Toys "R" Us, 272 AD2d 296). Nor, are any industry-wide standards or accepted practices concerning snow removal or the use of Bobcats referenced. His belated and untimely November 29, 2011 "supplemental and reply affidavit" (see Exhibit A to the 11/29/11 reply affirmation of Frank Dumont, Esq.) does not rectify these deficiencies.

Accordingly, the defendants Woodland Pond Condominium Association and Lemp Landscapers' respective motions, pursuant to CPLR 3212, for summary judgment are granted and the plaintiffs' cross motion, pursuant to CPLR 3212, for summary judgment is denied.

Dated: JAN 25 2012

A.J.S.C.
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ENTERED
JAN 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE