SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

DALE RINA and MARIETTA RINA	**TRIAL PART: 21** **NASSAU COUNTY**
Plaintiff,	**INDEX NO: 11764/06-**
-against-	**MOTION SEQ. NO: 1,2,&3**
WINDEMERE HOME OWNERS ASSOCIATIONS, INC., DEBENEDITTIS LANDSCAPING, INC., ROBERT SILVERMAN, DEBRA LAITMAN SILVERMAN and TOTAL COMMUNITY MANAGEMENT CORP.	
Defendant.	**SUBMIT DATE:6/2/08**

The following papers having been read on this motion:

Notice of Motion 1, 2
Cross-Motion..... 3
Opposition (Silvermans.....4,5,6
Opposition..... 7,8,9
Opposition (Debenedittis)....10
Reply(Debenedittis)..... 11,12
Reply(Silvermans).....13

This motion by defendant Debenedittis Landscaping, Inc., for an order pursuant to CPLR §3212 granting it summary judgment dismissing the complaint and any and all cross-claims against it is denied.

This motion by defendants Robert Silverman and Debra Laitman Silverman for an order pursuant to CPLR §3212 granting it summary judgment dismissing the complaint and any and all cross-claims against them or, in the alternative, an order granting them summary judgment on their cross-claims against defendants Debenedittis Landscaping, Inc., Windemere Home Owners

Association, Inc., and Total Community Management Corp. is denied.

This cross-motion by defendants Windemere Home Owners Association and Total Community Management Corp. for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint and any and all cross-claims against them is granted.

In this action, the plaintiff Dale Rina seeks to recover damages for personal injuries he sustained on January 29, 2004 when he slipped and fell on defendant Silverman's ice covered driveway. The Silvermans' home is located in a gated community operated by the defendant Windemere Home Owners Association ("the Home Owners Association"). In addition to the Silvermans, the plaintiffs have advanced claims against the Homeowners Association, the Home Owners Association's Managing Agent defendant Total Community Management Corp. ("the Managing Agent"), as well as the snow removal contractor who was hired by the Home Owners Association, defendant Debenedittis Landscaping ("the snow removal contractor"). The Silvermans have cross-claimed against the snow removal contractor, the Home Owners Association and the Managing Agent. The Home Owners Association and Managing Agent have cross-claimed against the Silvermans and the snow removal contractor. The snow removal contractor has cross-claimed against the Silvermans and the Home Owners Association. All of the defendants seek summary judgment dismissing the complaint and any and all cross-claims against them. Should any of the defendants be granted summary judgment dismissing the complaint against them, the remaining defendants seek to convert their cross-claims against those defendants to third-party claims.

"On a motion for summary judgment pursuant to CPLR §3212, the proponent 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." Sheppard-Mobley v King, 10 AD3d 70, 74

(2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

The pertinent facts are as follows:

The plaintiff Dale Rina testified at his examination-before-trial that he was sent by his employer Fal-Ken Heating and Cooling Corporation on a service call to the Silvermans on January 29, 2004. It had snowed within the previous 24 hours. Rina testified that when he got out of his truck in the driveway in front of the Silvermans' residence, he saw that the driveway was a complete sheet of ice approximately one inch thick right up to the front door. To him, it appeared that there had been no attempt to clear the snow and ice in front of the door.

The defendant Robert Silverman testified at his examination-before-trial that he paid an annual fee to the Home Owners Association with the understanding that it was responsible for, *inter alia*, snow and ice removal in common areas, driveways and porches. He testified that he never performed snow or ice removal at his property and that he had no practice or procedure for inspecting his driveway after a snowfall because he simply relied on the contractor to perform its duties. He testified that he never made any complaints about the snow clearing process, but if he had

done so, it would have been to the Managing Agent. He testified that he was unaware of salt and/or sand ever being used in his driveway. He could not recall whether there was any ice or snow on his driveway on January 29, 2004.

The defendant Deborah Laitman Silverman also testified at her examination-before-trial that she and her husband paid a monthly fee to the Home Owners Association which included the cost of snow removal. She testified that she had no idea how the snow and ice were cleared in 2004 and never heard of Debenedittis. She also never complained about the snow removal procedure. She testified that she never observed her driveway covered by an inch of ice. In her Affidavit in support of the Silvermans' motion, Deborah Laitman Silverman attests that she relied on the Home Owners Association for snow and ice removal in her driveway and that it was her understanding that the Home Owners Association contracted for snow removal through the Managing Agent. She further attests that she never performed snow removal work at her property because it was solely the contractor's responsibility, nor did she inspect the contractor's work, as that was not her responsibility, either.

Jennifer Nader testified that she was the Home Owners Association's Managing Agent. She testified that while the homeowners were responsible for snow removal on their property, i.e., on their walkways and driveways, the Home Owners Association provided that service via a contract with Debenedittis which was procured by the Managing Agent. Ms. Nader testified that the Home Owners Association's prospectus provided that the homeowners were responsible for their driveways and walkways but that service was provided by the Home Owners Association in connection with the monthly maintenance fee. Ms. Nader testified that it was her understanding that Debenedittis was responsible for clearing the streets, driveways and walkways of the gated community and to apply sand and/or salt as well, including to the driveways. She testified that pursuant to the contract,

Debenedittis was required to furnish services until the snow stopped and to perform a 24-hour site check post-storm as well. However, Debenedittis was not required to return in the event of a melting and refreezing unless called upon to do so.

Gary Denner, the president of the Home Owners Association, testified at his examination-before-trial that while the Home Owners Association had a contract for snow removal with Debenedittis, it was procured by the Managing Agent. He testified that Debenedittis contacted him about plowing and/or salting only on occasions when the situation was borderline or "if-y." He testified that Debenedittis did not typically need approval to plow or to clear the driveways and walkways. Denner also acknowledged that the homeowners could hire their own contractors if they wished to.

Roy Debenedittis, the president of Debenedittis Landscaping, Inc., testified at his examination-before-trial that while Debenedittis was under contract with the Home Owners Association to perform snow removal services, all removal operations required approval by the Home Owners Associations' president or its Managing Agent. He acknowledged that snow removal generally applied to both the roads and the driveways unless he was instructed to only plow the streets. While driveways were required to be cleared, salt and sand were not normally applied to the driveways: That was only done upon the homeowner's request. Debenedittis testified that during or immediately following a plowing, he would recommend salt and/or sand if warranted and the Home Owners Association almost always agreed. He acknowledged that in accordance with the contract, he would always return 24 hours after a plowing and would perform touch-up work if necessary. Debenedittis testified that in the event of melting and refreezing, he would await a call from the Home Owners Association's Managing Agent. Debenedittis testified that the day before the plaintiff's accident, he plowed the roads and driveways and applied sand and salt to the roads.

The contract between the Home Owners Association and Debenedittis requires Debenedittis to "[c]lear snow from all unobstructed blacktop roadway surfaces, driveways, and parking stalls, commencing when snowfall has reached an average depth of not more than two inches; [r]emain on the site to repeat clearing of snow from asphalt surfaces until snowfall is completed; [and to] [r]eturn to the site twenty-four hours after the snowfall to clear snow from previously obstructed areas." It also required Debenedittis to "[a]pply flaked calcium chloride or urea (Dow) pellets to concrete walkways and landings in accordance with manufacturer's directions, as necessary, to prevent icing conditions;" to "[a]pply rock salt or salt/sand mix, to asphalt roadway, driveway, and parking area surfaces at the conclusion of snow clearing to prevent icing conditions if necessary;" and to "[m]onitor prevailing weather conditions to assure timely arrival at the site, and be available, as necessary, at all times and days of the week to respond to the clearing of snow as described in this Agreement."

An invoice from Debenedittis demonstrates that Debenedittis performed snow removal and applied sand and salt in response to a "6-9 inch" snowfall the day before plaintiff fell.

The Silvermans' Motion to Dismiss the Complaint

"A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice thereof." Oliveri v GM Realty Co., LLC, 37 AD3d 569 (2nd Dept. 2007), citing Nielsen v Metro-North Commuter R.R. Co., 30 AD3d 497 (2nd Dept. 2006); Fahey v Serota, 23 AD3d 335, 336 (2nd Dept. 2005); Zabbia v Westwood, LLC, 18 AD3d 542, 544 (2nd Dept. 2005); Cody v DiLorenzo, 304 AD2d 705 (2nd Dept. 2003); Voss v D&C Parking, 299 AD2d 346 (2nd Dept. 2002); see also, Simons v Maimonides Medical Center, ___ AD3d ___, 2008 WL 2447804 (2nd Dept. 2008). Thus, in order to prevail on a motion for summary judgment dismissing the complaint,

a property owner is required to demonstrate that it did not create the icy condition and had neither actual nor constructive notice of it. Oliveri v GM Realty Company, LLC., supra, at p. 569, citing Nielsen v Metro-North Commuter R.R. Co., supra; Fahey v Serota, supra, at p. 336-337; Voss v D & C Parking, supra, at p. 346-347. "[A] property owner may be liable for injuries that result from a slip-and-fall accident on ice where the property owner's snow removal efforts caused or exacerbated the icy condition." Oliveri v GM Realty Company, LLC., supra, at p. 570, citing Knee v Trump Vil. Constr. Corp., 15 AD3d 545, 546 (2nd Dept. 2005); Karalic v City of New York, 307 AD2d 254, 255 (2nd Dept. 2003); Mahoney v Affrunti, 297 AD2d 717 (2nd Dept. 2002). "Although, as a general rule, a property owner is not responsible for conditions created by an independent contractor. . . the defendant may be held vicariously liable for the negligence of its independent contractor if such negligence violated the defendant's nondelegable duty as the property owner to provide safe ingress and egress." Oliveri v GM Realty Company, LLC., supra, at p. 570, citing Kleeman v Rheingold, 81 NY2d 270 [1999]; Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663, 668 [1992], rearg dism. 82 NY2d 825 [1993]); Backiel v Citibank, N.A., 299 AD2d 504, 505 (2nd Dept. 2002); June v Bill Zikakis Chevrolet, 199 AD2d 907 (3rd Dept. 1993); Thomassen v J & K Diner, Inc., 152 AD2d 421 (2nd Dept. 1989), app dism. 76 NY2d 771 (1990), recon den., 76 NY2d 889 (1990); see also, Scott v Redl, 43 AD3d 1031 (2nd Dept. 2007). The Silvermans as property owner and plaintiff's employer "is subject to liability here upon the theory that the responsibility to keep public thoroughfares safe is so important to the community that the employer should not be permitted to transfer liability therefore to another." Rothstein v State, 284 AD2d 130, 131 (1st Dept. 2001), citing Boylhart v DiMarco & Reimann, 270 N.Y. 217, 221 (1936).

The Silvermans' motion for summary judgment dismissing the complaint against them is denied. They have not established their lack of actual and/or constructive notice of the icy condition

of their driveway. It had snowed within 24 hours and while it certainly appears that Debenedittis made an attempt to clear the Silvermans' driveway, the Silvermans are conspicuously silent with regard to their knowledge of their driveway's condition on January 29, 2004. See, Wheaton v East End Commons Associates, LLC, 50 AD3d 675 (2nd Dept. 2008); Pearson v Parkside Ltd. Liability Co., 27 AD3d 539 (2nd Dept. 2006).

Debenedittis' Motion to Dismiss the Complaint

A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties. Wheaton v East End Commons Associates, LLC, 50 AD3d 675 (2nd Dept. 2008), citing Espinal v Melville Snow Contrs., 98 NY2d 136, 141-142 (2002); Baratta v Home Depot USA, Inc. 303 AD2d 434, 435-436 (2nd Dept. 2003). "As a general rule, a contract for the removal of snow and ice does not give rise to a duty on the part of the snow removal contractor to exercise reasonable care to prevent foreseeable harm to a plaintiff unless: (1) in failing to exercise reasonable care in the performance of its duties, the snow removal contractor launched a force or instrument of harm, (2) the plaintiff detrimentally relied upon the continued performance of the snow removal contractor's duties, or (3) the snow removal contract has entirely displaced the property owner's duty to maintain the premises safely." Roach v AVR Realty Company, LLC, 41 AD3d 821, 823 (2nd Dept. 2007), citing Espinal v Melville Snow contrs., supra; Abbattista v Kings Grant Master Assoc., Inc., 39 AD3d 439 (2nd Dept. 2007); Mitchell v Fiorini Landscape, Inc., 284 AD2d 313 (2nd Dept. 2001).

The Debenedittis' motion for summary judgment dismissing the complaint against it is denied. While it has established that its contract with the Home Owners Association was not a comprehensive property management contract that displaced the owners' duty to maintain the premises and that the plaintiff himself could not have relied on its performance of its duties (see,

Castro v Maple Run Condominiums, Inc., 41 AD3d 412, 413-414 [2nd Dept. 2007]; Linarello v Calin Service System, Inc., 31 AD3d 396 [2nd Dept. 2006]), it has not attempted to establish that it exercised reasonable care in the performance of its duties and that it did not launch a force or instrument of harm. Musilli v Kohler Co., 50 AD3d 1600 (4th Dept. 2008); compare, Bickelman v Herrill Bowling Corp., 49 AD3d 578 (2nd Dept. 2008); Roach v AVR Realty Co., LLC, supra.

In addition, Debenedittis has failed to address the cross-claims by the Silvermans let alone establish its entitlement to summary judgment. The Debenedittis' motion is denied.

The Home Owners Association and Managing Agent's Motion to Dismiss the Complaint

As for the Home Owners Association and the Managing Agent, " '[t]o establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff.' " Nappi v Inc. Vill. of Lynbrook, 19 AD3d 565, 566 (2nd Dept. 2005) quoting Alvino v Lin, 300 AD2d 421 (2nd Dept. 2002).. " '[L]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property.' " Nappi v Inc. Vill. of Lynbrook, supra, quoting Warren v Wilmorite, Inc., 211 AD2d 904, 905 (3rd Dept. 1995); see also, Comack v VBK Realty Associated, Ltd., 48 AD3d 611 (2nd Dept. 2008).

As a managing agent, the Home Owners Association and Managing Agent could be subject to liability for nonfeasance or malfeasance only if they were in complete and exclusive control of the management and operation of the property in question. Fung v Japan Airlines Co., Ltd., 50 AD3d 861 (2nd Dept. 2008) citing Hagen v Gilman Mgmt. Corp., 4 AD3d 330 (2nd Dept .2004); Ioannidou v Kingswood Mgt. Corp., 203 AD2d 248 (2nd Dept. 1994). However, liability may be imposed where "the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Vushaj v Insignia Residential Group, Inc., 50 AD3d 393 [1st Dept. 2008] quoting Espinal v Melville

Snow Contrs., supra, at p. 140) or if the injured party detrimentally relied to his detriment on the contractor's continuing performance of its contractual obligation to an owner. Vushaj v Insignia Residential Group, Inc., supra, citing Espinal v Melville Snow Contrs., supra, at p. 140.

The Home Owners Association and Managing Agent have established that they do not own, have occupancy, control or make a special use of the Silvermans' driveway and accordingly do not have a duty to maintain it. And, there is no evidence of a comprehensive exclusive agreement whereby the Home Owners Association and/or the Managing Agent undertook responsibility for homeowners' driveways so as to displace the homeowners' duty to maintain them. Clark v Kaplan, 47 AD3d 462 (1st Dept. 2008). Nor is there evidence that they displaced the Silvermans with respect to their responsibility for their driveway or that the plaintiff relied on them to maintain the Silverman's driveway. The plaintiff's complaint against the Home Owners Association and the Managing Agent is dismissed.

The Silvermans' Cross-Claim Against Debenedittis

As for the Silvermans' motion for summary judgment against Debenedittis,

to prevail on a contribution claim against a snow removal contractor, a party must demonstrate that the contractor "either owed them a duty of reasonable care independent of its contractual obligations, or that [it] owed a duty of reasonable care to the injured plaintiff." Roach v AVR Realty Company, supra, at p. 824 citing Torchio v New York City Housing Auth., 40 AD3d 970 (2nd Dept. 2007); Hites v Toys "R" Us, Inc., 33 AD3d 759 (2nd Dept. 2006); Baratta v Home Depot USA, supra; Mitchell v Fiorini Landscape, Inc., supra, at p. 314; see also, Wheaton v East End Commons Associates LLC, supra. To prevail on a claim for common law indemnification against a snow removal contractor, a party must establish that the accident resulted from the snow removal contractor's failure to fulfill its obligations pursuant to the terms of the snow removal contract.

Wheaton v East End Commons Associates, LLC., supra, citing Richter v Hunter's Run Homeowners Assn., Inc., 14 AD3d 601, 602 (2nd Dept. 2005); Mitchell v Fiorini Landscape, Inc., supra; see also, Vilorio v Suffolk Y Jewish Community Center, Inc., 33 AD3d 696 (2nd Dept. 2006). A snow removal contractor establishes his entitlement to summary judgment by demonstrating that "the injured plaintiff's accident was not due solely to its negligent performance or non-performance of an act solely within its province." Roach v AVR Realty Company, LLC, supra, citing Corley v Country Squire Apts., Inc., 32 AD3d 978 (2nd Dept. 2006); Murphy v M.B. Real Estate Development Corp., 280 AD2d 457 (2nd Dept. 2001); Keshavarz v Murphy, 242 AD2d 680 (2nd Dept. 1997). " ' "[I]t is the intention of the promisee which is of primary importance in ascertaining whether a party is to be considered an intended beneficiary." ' " Bradley v Benchmark Management Corp., 294 AD2d 879 (4th Dept. 2002), quoting Key Intl. Mfg. v Morse/Diesel, Inc., 142 AD2d 448, 455 (2nd Dept. 1988), quoting Goodman-Marks Assoc. v Westbury Post Assoc., 70 AD2d 145, 148 (2nd Dept. 1979) and citing Peckham Road. Corp. v Town of Putnam Valley, 218 AD2d 789, 790, app dism. 87 NY2d 912, lv den in part and dism in part 88 NY2d 867 (1996). " 'One is an intended beneficiary if one's right to performance is "appropriate to effectuate the intention of the parties" to the contract *and* either the performance will satisfy a money debt obligation of the promisee to the beneficiary or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." ' " Cole v Metropolitan Life Ins. Co., 273 AD2d 832, 833 (4th Dept. 2000), quoting Lake Placid Club Attached Lodges v Elizabethtown Bldrs., 131 AD2d 159, 161, quoting Restatement [Second] of Contracts § 302[1][a], [b]; citing Fourth Ocean Putnam Corp. v Interstate Wrecking Co., 66 NY2d 38, 44 (1985); Rekis v Lake Minnewaska Mountain. Houses, Inc., 170 AD2d 124, 128 (3rd Dept. 1991), lv dism. 79 NY2d 851, rearg den. 79 NY2d 978 (1992). "On the other hand '[a]n incidental beneficiary is a third party who may derive [a] benefit from the

performance of a contract though he is neither the promisee nor the one to whom performance is to be rendered.' " Cole v Metropolitan Life Ins. Co., supra, at p. 883, quoting Airco Alloys Div. v Niagara Mohawk Power Corp., 76 AD2d 68, 79 (4th Dept. 1980), citing 2 Williston, Contracts § 402 [3d ed] and citing Artwear, Inc. v Hughes, 202 AD2d 76, 81(1st Dept. 1994); World Trade Knitting Mills v Lido Knitting Mills, 154 AD2d 99, 103 (2nd Dept. 1990). "Among the circumstances to be considered is whether manifestation of the intention of the promisor and promisee is 'sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable.' " Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc., supra, quoting Restatement [Second] of Contracts § 302[2], comment d.

" 'Before an injured party may recover as a third-party beneficiary for failure to perform a duty imposed by contract, it must clearly appear from the provisions of the contract that the parties thereto intended to confer a direct benefit on the alleged third-party beneficiary to protect him [or her] from physical injury.' " Kotchina v Luna Park Housing Corp., 27 AD3d 696 (2nd Dept. 2006), quoting Bernal v Pinkerton's, Inc., 52 AD2d 760 (1st Dept. 1976), aff'd. 41 NY2d 938 (1977).

There is a triable issue of fact as to whether Debenedittis owed the Silvermans a duty of reasonable care as a third-party beneficiary independent of its contractual obligations to the Home Owners Association. See, Johnson City Cent. School Dist. v Fidelity and Deposit Co. of Maryland, 263 AD2d 580 (3rd Dept. 1999); see also, Kotchina v Luna Park Housing Corp., supra; Bonwell v Stone, 128 AD2d 1013 (3rd Dept. 1987); Chestnut Ridge Air, Ltd. v 1260269 Ontario, Inc., 13 Misc3d 807, 812-813 (Supreme Court N.Y. Co. 2006). Issues of fact also exist regarding the Silvermans' cross-claim for common law indemnification from Debenedittis "since there are questions of fact as to whether the accident resulted from [Debenedittis'] alleged failure to fulfill its obligations pursuant to the terms of the snow removal contract." Richter v Hunter's Run

Homeowners Association, supra, at p. 602 (2nd Dept. 2005); see also, Vilorio v Suffolk Y Jewish Community Ctr., Inc., supra; Baratta v Home Depot USA, Inc., supra; Mitchell v Fiorini Landscape, supra. Because issues of fact exist as to whether Debenedittis breached its contract and whether its efforts were the cause of plaintiff's accident, the Silvermans' motion for summary judgment against Debenedittis is be denied.

The Silvermans and Debenedittis' Cross-Claims Against the Home Owners Association and the Managing Agent

The Home Owners Association and the Managing Agent have established their entitlement to summary judgment dismissing the cross-claims against them. Neither Debenedittis nor the Silvermans have any grounds for recovery from them. There is absolutely no evidence that either of them were negligent and contrary to the Silvermans' position, there is no evidence that either the Home Owners Association or the Managing Agent contractually assumed complete responsibility for the driveways.

In conclusion, the complaint and all cross-claims against the Home Owners Association and the Managing Agent are dismissed. The Silvermans' and Debenedittis' motions are denied in their entirety.

This constitutes the decision and order of this Court.

DATED: July 17, 2008

ENTER

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