SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

----------X

STEWART WALDEN and ELLYN WALDEN,

Plaintiff,

-against-

JAMES AMATO, as Executor of the Estate of JERRY AMATO, deceased, & SUPER WASH BASKET, INC., d/b/a PLAZA LAUNDROMAT, and ARATE LANDSCAPING, INC.,

Defendants.

----------X

JAMES AMATO, as Executor of the Estate of JERRY AMATO, deceased, & SUPER WASH BASKET, INC. d/b/a PLAZA LAUNDROMAT,

Third-Party Plaintiff,

-against-

ARATA LANDSCAPING, INC.,

Third-Party Defendant.

----------X

PART 15

INDEX NO. 3532/04

MOTION DATE: 11/28/05
SEQUENCE NO. 001, 002, 003

Notice of Motion, Affs. & Exs.....1
2-Notices of Cross-Motion, Affs. & Exs.....2-3
4-Affirmations In Opposition & Exs.....4-7
3-Reply Affirmations & Exs.....8-10
Defendant Memorandum of Law 11

Upon the foregoing papers, it is ordered that the motion by Defendant/Third-Party Defendant, Arata Landscaping, Inc., ("Arata") for an order of this Court, pursuant to CPLR 3212, granting summary judgment dismissal of Plaintiffs, Stewart Walden and Ellyn Walden's Complaint and Defendants/Third Party Plaintiffs, James Amato, as Executor of the Estate of Jerry Amato, deceased (referred to herein as "Amato" or "Owner") and Super Wash Basket, Inc. d/b/a Plaza Laundromat ("Laundromat")'s third party complaint, and all cross claims and counter claims as against it is herewith granted in its entirety.

Likewise, the cross motion by Defendant/Third-Party Plaintiff, Laundromat, for an order of this Court, pursuant to CPLR 3212, granting summary judgment dismissal of Plaintiffs, Walden's Complaint is granted.

The cross motion by Defendant/Third-Party Plaintiff, Amato, for an order of this Court, pursuant to CPLR 3212, granting summary judgment dismissal of Plaintiffs, Walden's Complaint is denied.

On February 7, 2003, at approximately 5:00 p.m., Plaintiff, Stewart Walden, allegedly slipped and fell in the parking lot at the Hillside Plaza Shopping Center in which Defendant, Plaza Laundromat, is a tenant. It is undisputed in this case that earlier in the day of Plaintiff's accident, there had been a snow fall. The parties herein also agree that the snow fall had stopped well in advance of Plaintiff's accident. In response to a Notice to Admit, Defendant, James Amato, as Executor of the Estate of Jerry Amato, admitted that on February 7, 2003, Defendant Jerry Amato, was the title owner of the subject premises, including the parking lot. It is undisputed in this case that Defendant, James Amato, as the operator of the subject premises, had an oral agreement with Defendant, Arata Landscaping, for the latter to plow the snow and to apply sand/salt to the plowed area at the parking lot where Plaintiff slipped and fell.

Pursuant to the terms of the verbal agreement, Arata was required to perform its snow removal activities only when the parking lot was "covered" with snow. Attributing his fall to "a sheet of surface ice", Plaintiffs herein sued Defendants, Amato, the Laundromat and Arata Landscaping in negligence for, *inter alia*, failure to plow and remove snow from the subject parking lot.

Upon the instant motion, Arata Landscaping seeks summary judgment dismissal of the Plaintiff's Complaint and of the Defendant/Third Party Plaintiffs' Complaint. For the sake of clarity, this Court will address Arata's summary judgment motion as to each Complaint, individually, and in turn.

It is well settled that to establish a prima facie case of negligence in a slip and fall case, Plaintiff must show that the Defendant, either created a dangerous condition (*Cellini v. Waldbaum, Inc.*, 262 A.D.2d 345*)* or had actual or constructive knowledge of the condition (*Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837). In order to constitute constructive notice, a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owners'] employees to discover and remedy it'" (*see, Gordon v. American Museum of Natural History, supra,* at 837). The burden may also be satisfied by providing evidence that an "ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the [owner]" (*see, Bradish v. Tank Tech Corp.*, 216 AD2d 505, 506*; see also Gaeta v. City of New York,* 213 AD2d 509*; Pirillo v. Longwood Assocs.*, 179AD2d 744).

In this case, the Plaintiff alleges that Defendant, Arata Landscaping "[h]ad actual notice of the icy condition in that [it] created and or made the icy condition worse by failing to salt and sand [the] area after removing the snow covering" .

Plaintiff also alleges that Defendants "[h]ad constructive notice of this icy condition, in that the snow covering was removed hours earlier, and defendant had sufficient time to have discovered the ice and taken steps to correct said condition".

Arata seeks to have Plaintiffs' complaint dismissed on the grounds that it, as a snow plowing contractor, did not assume any duty of care to the Plaintiff. Specifically, Arata grounds its motion on the fact that the evidence establishes that it, as the landscaper, performed its snow plowing services on the date of the accident, before Plaintiff's fall and that it did so to the complete satisfaction of its customer, Defendant, James Amato.

It is well settled that though there may exist a snow plowing agreement between the landowner and the snow plowing contractor, a snow plowing agreement, standing alone, does not give rise to tort liability against the snow plowing contractor in favor of a third party (*see, Espinal v. Melville,* 98 NY2d 136*; see also Mitchell v. Fiorini Landscape, Inc.,* 284 A.D.2d 313*; Cochrane v. Warwick Assocs.,* 282 A.D.2d 567. The Court of Appeals, in *Espinal*, ruled that a snow plowing contractor does not assume a general maintenance obligation for the premises. Therefore, an agreement to provide snow plowing services "...is not the type of comprehensive and exclusive property maintenance obligation..." that will subject a snow plowing contractor to liability to an injured plaintiff. The mere plowing of snow by the contractor is not sufficient to be considered to create or exacerbate a dangerous condition (*See id.*).

This Court accepts that the terms of the verbal snow plowing agreement between Arata Landscaping and James Amato were never memorialized in writing. Based upon the papers submitted for this Court's consideration, this Court finds that the aforesaid contractual undertaking to plow the snow and sand/salt the parking lot, like the agreement in ***Espinal***, was not the type of "comprehensive and exclusive"

property maintenance obligation in which Arata agreed to entirely absorb the landowner, Amato's duty to maintain the premises safely (*see, Espinal* at 141). In fact, Defendant, Amato, at his sworn examination before trial testified that once Arata would perform its services, and after Arata finished plowing the parking lot, either Mr. Amato or one of his managers would inspect the work "looking around to see if things were right". Mr. Amato would personally inspect "several things" after the job was done "just to make sure things were done adequately", that the snow was removed and what needed to be sanded was sanded. Accordingly, there is ample evidence on this record that James Amato, retained and exercised the ultimate authority over and responsibility for the condition of the parking lot, including the snow plowing work. Thus, the claims by Defendant, Amato, that the oral snow plowing agreement completely displaced any obligation by the Defendant, Estate of Jerry Amato, as the property owner, is without merit. Although defendant Arata undertook to provide snow removal services under specific circumstances, defendant owner, Amato, also acknowledges that, he, at all times, retained its duty as the landowner to inspect and safely maintain the premises.

Insofar as Plaintiff alleges that Arata had actual notice of the icy condition because it "created" and "made the icy condition" by failing to salt and sand the area after removing the snow, this Court notes that, in this context, "a Defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury" (*see, Espinal v. Melville,* supra at 141-42*; see also, Church ex rel. Smith v. Callanan Industries, Inc.,* 99 N.Y.2d 104).

However, based upon the papers submitted for this Court's consideration, this Court finds that Plaintiff's only support for this contention that Defendant, Arata Landscaping, create the icy condition because it did not salt and sand the area after it

plowed the snow thereat, is his sworn testimony that he did not notive any salt/sand mixture at any time prior to the accident.

The sworn deposition testimonies of both Plaintiffs confirm that they arrived at the shopping center on the day of the accident at approximately 4:45 p.m., for the purpose of retrieving laundry from the dry cleaners. Although Plaintiff noticed a "thin film of snow" on the pavement in the parking lot around the area of his car door, he did not notice if there was any salt or ice melt material in the parking lot. At his deposition, the Plaintiff also testified that upon leaving the dry cleaner, he returned to the parking lot and placed the dry cleaning to the car via the passenger side rear door. He then went around the front of the car, back onto the sidewalk, down the sidewalk to the driver's side of the car, into the parking lot and got back into the car through the driver's side door. Through this entire errand, Plaintiff testified that he still did not notice if there was any salt or ice melting material on the sidewalk area. In fact, the deposition testimony of the Plaintiff also confirms that it was only after Plaintiff fell to the ground that he realized that underneath the thin layer of snow was ice.

Thus, it is clear and undisputed by the parties that Arata cleared the snow from the earlier snow fall as required by the terms of its oral agreement with Amato. In fact, in support of its *prima facie* showing of its lack of any notice of the dangerous condition as a matter of law, Arata Landscaping, submits proof that not only did it, in fact, perform its obligatory snow removal services on the date of Plaintiff's accident, but that such services were completed to the satisfaction of James Amato, the operator of the subject premises. Specifically, Arata relies on the sworn testimony of James Amato, wherein Mr. Amato stated as follows:

> Q: Did you, yourself, have any inspection practice after [Arata Landscaping] finished plowing your lot?

A: Generally, what would happen, if I didn't, one of my managers would and report to me.

* * *

Q: But the times that you were there, did you, yourself, do an inspection practice?

A: Yes.

Q: Do you know if Arata did any inspections or have an inspection practice after the area was plowed?

A: I'm sure he did.

Q: Did you ever observe it?

A: Yes.

Q: What did you see him do?

A: What he would do, if he saw that there was snow, and then it started to snow a little later on, he would come back and inspect the property. If he thought it needed any extra removal of snow or any sanding, he would do it.

Q: In a situation where the lot was plowed, did you ever observe him, following that immediate plowing, inspect to see that all of the lot was plowed of snow and that sand was equally distributed.

A: Yes. He was very responsible in the job that he did.

* * *

Q: Your practice was after you saw him do this, you also would inspect the lot?

A: Yes.

Q: How soon after his inspection, did you inspect the lot?

A: If he came in the middle of the night and plowed the snow, depending on when the snowfall came, then the following morning, I would look around to see if things were right.

* * *

Q: In your inspections, there were several things you looked for, am I correct, after the job was done?

A: Yes.

* * *

Q: What did you specifically look for?

A: Just to make sure that things were done adequately. That the snow was removed, and what needed to be sanded was sanded.

* * *

Q: Did you make any complaints to Robert Arata or anyone at Arata Landscaping about snow plowing services at the shopping center in response to the February 7th, 2003 snowfall?

A: No. I was very happy with the work that he did.

Arata also submits as evidentiary proof, a copy of an invoice dated February 28, 2003 for the services it rendered at the Hillside Plaza Shopping Center on three separate dates in February 2003. Said invoice confirms that on the date of the accident, February 7, 2003, Arata Landscaping plowed and sanded the parking lot in question. The invoice is marked "paid" as of March 5.

Based on the foregoing, this Court finds that Defendant Arata has made its prima facie showing entitling it to summary judgment as a matter of law (*see, Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York,* 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404).

Plaintiff's fall on the ice was not the result of Arata Landscaping having "created" an icy condition or it having failed to salt/sand the plowed area. The Defendant, movant, Arata, has made a *prima facie* showing that it lacked notice, actual and constructive, of the dangerous condition. which caused Plaintiff's fall. Defendant Arata has also shown through the submission of evidentiary proof in admissible for that it did not "create" the dangerous condition. Plaintiffs, on the other hand have failed to offer any support for its allegation that Arata did not salt/sand the area or their failure to establish the existence of material issue of fact which would require a trial of the action precludes the denial of summary judgment in Defendant, Arata's favor (*see, Zuckerman v. City of New York, supra at 562).*

Moreover, in addition to the Plaintiffs' failure to substantively raise any material issues of fact requiring a trial Plaintiff's opposition to Defendant, Arata's motion

papers are also procedurally infirm. The Plaintiff's opposition to the motion consists of an affidavit of Stewart Walden which contradicts his earlier sworn deposition testimony, as well as photographs which the Plaintiff's attorney admits do not depict the condition of the premises as they existed at the time of the accident.

It is well settled that where the Plaintiff's affidavit in opposition to a motion for summary judgment contains discrepancies with Plaintiff's earlier sworn testimony, such affidavit is considered to be inadequate to oppose a motion for summary judgment (*see, Barretta v. Trump Plaza Hotel & Casino,* 277 AD2d 262*; see also, Capraro v. Staten Island University Hospital,* 245 AD2d 256).

Plaintiff, Stewart Walden, claims that he did not see or feel any salt or sand on the parking lot surface "in the limited area I walked." However, in his sworn deposition testimony, he acknowledged that he never noticed whether or not salt or sand or similar substances had even been applied and took no particular notice of it. He was unable to state, at his deposition, that there was no salt or similar substance on the parking lot surface. On the other hand, Defendant, Arata, put forth evidentiary proof, in admissible form, that not only was salt and sand applied at the parking lot where Plaintiff fell, but also that Plaintiff was never able to recount at his earlier deposition whether he noticed such salt or sand. Thus, Plaintiff's admission at his deposition that he did not know whether the parking lot had been sanded and salted, was fatal to his complaint. His affidavit submitted in opposition to the Defendant's motion is clearly designed "to avoid the consequences of the earlier admission" (*see, Barretta v. Trump Plaza Hotel & Casino, supra; see also, Prunty v. Keltie's Bum Steer,* 163 A.D.2d 595, 596*; see also, Garvin v. Rosenberg,* 204 A.D.2d 388).

With regards to the photographs submitted in opposition to Defendant's motion, it is well settled that photographs submitted by a Plaintiff in opposition to a summary

judgment motion, which are not accompanied by an affidavit of the Plaintiff indicating that they fairly and accurately represent the condition of the sidewalk at the time of the incident, do not constitute proof in admissible form (*see, Lakhan v. Singh,* 269 AD2d 427*; see also, see, Lewis v General Elec. Co.,* 145 AD2d 728, 729). Moreover, where, as in this case, the Plaintiff's attorney has expressly admitted that the photographs are not representative of the conditions of the subject parking lot as they existed at the time of the accident. Such photographs clearly will not be considered by this Court to determine whether there remain material issues of fact mandating a trial (*see, Lakhan v. Singh, supra.*).

It is well settled that a the party opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim; mere conclusions, expressions of hope or unsubstantiated allegations or assertions, as in this case, are insufficient (*see, Zuckerman v. City of New York, supra at 562*). In this case, Plaintiffs have not offered any support for their conclusory assertions that Defendant, Arata, in fact failed to plow the snow or salt and sand the parking lot.

Also, it is well settled that speculative allegations with respect to, *inter alia*, the alleged origin of an ice condition or the period of time during which it was visible and apparent are insufficient to defeat a properly supported motion for summary judgment (*see Pala v. D. Braf., supra; Trainor v. Dayton Seaside Assocs. No. 3,* 282 AD2d 524*; Trabolse v. Rizzo,* 275 AD2d 320*; cf Bernstein v. City of New York* 69 NY2d 1020, 1022). In this case, the Plaintiff attributes his fall to what he "assume[s]" was ice, that he first saw once he was on the ground, after his fall. The fall that he believed to have been the result of no sand/salt being applied at the parking lot, is predicated solely upon conjecture and surmise and has no evidentiary foundation in the record (*see*

Cohen v. Chase Manhattan Bank, 280 AD2d 511). The Plaintiff is unsure as to exactly what caused him to fall. At his sworn deposition, he was unable to describe the ice, does not know how long it was there and has no recollection of having seen it before.

Although summary judgment is a drastic remedy (*see, Mosheyev v. Pilevsky,* 283 AD2d 469) "[m]ere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment properly made by the moving parties" (*see Dunlap v. Levine, 271 AD2d 396; see also, Zuckerman v. City of New York 49 NY2d 557, 562*). Accordingly, and inasmuch as the Plaintiff's opposing submissions fail to generate triable issue of fact with respect to the alleged liability of Arata Landscaping, its motion is granted.

It is undisputed in this case that the Defendant, Laundromat, was a tenant at the subject premises owned by Jerry Amato and operated by Defendant, James Amato. Pursuant to the terms of a written lease agreement, the landlord, Amato, was responsible for snow removal in the parking lot at the subject premises.

On the grounds that Arata had verbally agreed with the owner Defendant, Amato, to provide snow plowing services at the subject parking lot, Defendants/third party plaintiffs, Amato and the Laundromat, seek contribution and indemnification from the movant herein, Arata, so that in the event that Plaintiff is able to recover on its negligence causes of action as against the third party Plaintiffs, Amato and the Laundromat, the third party plaintiffs should, in turn, be permitted to collect the costs of their judgment from the third party Defendant, Arata.

It is well settled that where there is no evidence of any contractual obligation to indemnify, and where there is no evidence that a party to the verbal contract at any time, expressly or impliedly, agreed to defend, indemnify or hold the other party

harmless, the claims should be dismissed as a matter of law (*see Keshavarz v. Murphy,* 242 AD2d 680*; see also, Miranti v. Brightwaters Racquet and Spa, Inc.,* 666 NYS2d 946). Moreover, unless there is clear language expressing the intention by one party to indemnify the other, this Court will decline to read indemnification obligations into contracts or agreements (*see, Hooper Associates v. EGS Computers, Inc.,* 74 NY2d 487, 549 NYS2d 365*; see also Wisnieski v. Kings Plaza,* 279 AD2d 570).

In this case, it is abundantly clear that Arata Landscaping's only agreement was a verbal agreement with James Amato to simply provide snow plowing services at the parking lot of the subject premises. There is simply no evidence that Arata agreed at any time, expressly or impliedly, to defend, indemnify or hold the owner of the premises, James Amato, harmless. Therefore, in the absence of any evidence that it was the intention of one or both parties to indemnify the other, this Court will decline to read indemnification obligations into the Amato-Arata verbal snow plowing contract (*see, Hooper Associates, supra.*).

As such, insofar as the movant, Arata Landscaping has made its prima facie showing of entitlement to judgment as a matter of law (*see, Winegrad v New York Univ. Med. Center,* 64 NY2d 851, 853*; Zuckerman v City of New York,* 49 NY2d 557, 562), the burden now shifts to the parties opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see, Zuckerman v City of New York, supra,* at p 562).

In opposition, Defendant/Third Party Plaintiff, Amato, contends that while a contractual obligation standing alone generally does not give rise to tort liability in favor of a third-party, there are three exceptions to this rule, including:

"(1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continuing 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" (*see Davilmar v. City of New York,* 7 AD3d 559).

It is Amato's contention that at least two of these exceptions apply in the case at bar and create questions of fact which mandate a denial of the motion for summary judgment. Specifically, Amato contends that because Arata Landscaping launched a force or instrument of harm by failing to exercise reasonable care in the performance of its duties, and because Arata Landscaping displaced Amato's duty to maintain the premises safely, it should not be entitled to summary judgment as a matter of law. At best, Amato argues that there remain issues of fact which would preclude summary judgment in the contracting party, Arata's favor.

However, as this Court has described above, there is simply no support for the conclusory allegations that such exceptions apply in this case.

As stated above, although Arata Landscaping undertook to provide snow removal services under specific circumstances, Defendant, Amato, at all times, retained its landowner's duty to inspect and safely maintain the premises. Moreover, where there is no evidence that Arata Landscaping did not, in fact, salt/sand the plowed parking lot (before Plaintiff's fall) as required under its verbal agreement. It cannot be said that merely because the Plaintiff did not notice the existence or absence of salt/sand on the lot that Arata created or exacerbated a dangerous condition.

Thus, since there is no evidentiary proof that Arata performed its work negligently or that it entirely displaced Amato's duty to maintain the premises safely, this Court finds that there is no basis for Amato and the Laundromat to be indemnified

or to receive contribution. As such, Arata's motion for summary judgment dismissal of Defendants third party complaint is granted.

Insofar as the Plaintiffs herein do not oppose Defendant, Laundromat's cross motion pursuant to CPLR 3212, for summary judgment dismissal of Plaintiffs' Complaint and "consent[] to the complaint against Super Wash Basket, Inc. d/b/a Plaza Laundromat", this Court grants Defendant, Laundromat's cross motion for summary judgment (*see, Bijou. Lechtenberg,* 156 A.D.2d 626).

Upon the instant cross-motion, Defendant/Third Party Plaintiff, Owner, James Amato, as Executor of the Estate of Jerry Amato, deceased, seeks summary judgment dismissal of Plaintiff's Complaint on the grounds that it had no notice, actual or constructive, of the dangerous condition – the ice upon which Plaintiff fell. Amato also contends that it did not cause or create the allegedly dangerous condition which caused Plaintiff's fall. Moreover, Defendant grounds his motion on the fact that all of the snow removal activities were done by Defendant, Arata and not by Defendant, Amato; therefore, it is impossible for defendant Amato to have caused a dangerous condition. In addition, Defendant argues that since Plaintiff did not see the ice patch upon which Plaintiff fell prior to the accident, and since no complaints were made to Defendant Amato prior to the accident, it is clear that Plaintiff cannot establish that Defendant, Amato, had actual or constructive notice of any dangerous condition.

However, based upon the papers submitted for this Court's consideration, this Court finds that insofar as Defendant, James Amato, himself testified that it was part of his routine practice to inspect the plowed area (either personally or through his agents) once Arata performed its obligation under the verbal agreement, to "make sure things were done adequately", Defendant Amato has not met its prima facie burden

of entitlement to judgment as a matter of law. (*see, Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York,* 49 NY2d 557, 562*).*

It is well settled that, generally, to hold an owner liable for injuries caused by defective or dangerous conditions upon the property, the owner must have retained sufficient control over the premises and must have actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, he or she could have corrected it (*see, Putnam v. Stout,* 38 NY2d 607, 612*; Carvano v. Morgan,* 270 AD2d 222, 223). "There must be some proof that the potential danger reasonably could have been neutralized and that its existence was or should have been discovered by the [landowner]"(*see, Abrams v. Berelson,* 283 AD2d 597 *(citing, Preston v. State of New York,* 59 NY2d 997, 999**).** In this case, the Defendant, Amato, has not established that he did not have actual or constructive notice of the dangerous condition or that he could not have discovered the ice, particularly if he actively participated in the inspection of the premises.

Therefore, as a result of Defendant, Amato's failure to make a prima facie showing, Defendant, Amato's cross motion seeking summary judgment dismissal of Plaintiffs, Walden's Complaint is denied (*see, Winegrad v New York Univ. Med. Center, supra*, at p 853).

This shall constitute the Decision and Order of this Court.

Dated: January 10, 2006.

Anthony L. Parga, J.S.C.