SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

ILENE GRUBER,

Plaintiff,

-against-

SANDY HOLLOW ASSOCIATES, LLC, J.M.I. MANAGEMENT COMPANY, INC. AND EAGLE SANITATION, INC.,

Defendants.

MOTION DATE: 7/18/06
Adjourned for further Documentation to 10/16/08
MOTION SEQ. NO.: 003

INDEX NO.: 2991/2007

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Affirmation in Opposition to Co-Defendant's Motion.....2
Affirmation in Opposition.....3
Reply Affirmation.....4
Conferences with the Court thru October 16, 2008.....5

Motion by defendant Sandy Hollow Associates, LLC (Sandy Hollow) pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and any cross-claims asserted against said defendant is **denied.**

To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to plaintiff, a breach of that duty, and that such breach was the proximate cause of injury to the plaintiff. *Comack v VBK Realty Associates, Ltd.*, 48 AD3d 611, 612 [2nd Dept. 2008]. The imposition of liability for a dangerous condition on property is predicated upon occupancy, ownership, control or special use of the premises. *Casale v Brookdale Medical Associates,* 43 AD3d 418 [2nd Dept. 2007]; *Ellers v Horowitz Family Ltd. Partnership*, 36 AD3d 849 [2nd Dept. 2007]. A responsible party must act as a reasonable person in maintaining its property in a reasonably safe condition in

view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk. *Peralta v Henriquez*, 100 NY2d 139, 144 [2003]. Here, the submissions of moving defendant Sandy Hollow are insufficient to establish, *prima facie* its non-liability in tort to the injured plaintiff.

Plaintiff alleges that she sustained injury on July 21, 2006 at 187 Pond View Drive, located within a gated residential community (Mill Pond Acres, Port Washington, New York) when she tripped over a wooden board which protruded from the base of a garbage dumpster which was improperly placed on the roadway a few doors down from plaintiff's condominium unit and around the curve in the roadway. [Plaintiff's deposition testimony]. Defendant Sandy Hollow, the developer/sponsor of the condominium property, seeks summary dismissal of the complaint predicated on the two-pronged contention that it neither owned the property in question at the time of plaintiff's accident nor contracted for the dumpster which was involved in plaintiff's accident.

In support of its position, defendant Sandy Hollow offers the deposition testimony and sworn affidavit of Michael Puntillo, a member since its creation of defendant limited liability company, Sandy Hollow, which was formed for the purpose of developing the Mill Pond Acres Condominium Project. Mr. Puntillo testified that defendant Sandy Hollow transferred its ownership interest in the land now known as Pond View Drive to Mill Pond Acres Condominium in or about July, 2003 before any of the individual units were completed or sold.[1] The witness further testified that in July, 2006, defendant Sandy Hollow maintained an office

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[1]Mr. Puntillo was until August, 2007 also a member of the Board of Managers of the Mill Pond Acres Condominium.

on the property staffed by customer services representative Theresa Manella. According to her deposition testimony, plaintiff complained to Ms. Manella that some of her garbage[2] had not been picked up curbside at her home and was advised that, during the moving-in period, residents were to dispose of large cartons and other moving supplies in specifically designated dumpsters on the property. When asked whether defendant Sandy Hollow had a policy of advising residents of Mill Pond Acres to discard moving supplies (moving boxes, crates and other debris) in specifically designated dumpsters, Mr. Puntillo responded that, although he had nothing to do with the creation of such a policy, it was possible that such a policy existed.

The proponent of a motion for summary judgment must make a showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the lack of any material issues of fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. Where, as here, the movant fails to make such *prima facie* showing, the motion must be denied, regardless of the opposing papers. *Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]. The evidence presented by the opponent of summary judgment must be accepted as true and it must be given the benefit of every inference which can reasonably be drawn from that evidence. *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 [2nd Dept. 2006].

Although defendant Sandy Hollow contends that it had transferred title to the Mill Pond Acres Condominium property prior to plaintiff's accident, as evidenced by the Declaration Establishing a Plan of Condominium Ownership,

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[2]Corrogated boxes which had been flattened and brought to the curb allegedly per instructions from Eagle Sanitation, Inc.

recorded on September 11, 2003 in the Office of the Clerk of Nassau County, only the cover sheet has been provided by the movant which in and of itself is not dispositive on the issue of ownership. While a parcel of real property becomes a condominium, and thus subject to the jurisdiction of the Condominium Act [Real Property Law § 339-f] by the filing of a declaration [Real Property Law § 339-n], the administration of the condominium's affairs is governed principally by its by-laws which set forth the manner in which the condominium will operate. These documents have not been provided. Neither the Declaration nor the By-Laws has been provided.

While defendant Sandy Hollow maintains that the opposing parties have offered nothing more than speculative theories regarding its ownership, control and/or special use of the property in question, whether defendant Sandy Hollow had an ownership interest in the subject property, whether it contracted for the garbage dumpster that is the claimed cause of plaintiff's accident, and/or whether it made special use of the property cannot, be resolved based on the incomplete and contradictory papers before the court. A search of the records of the Nassau County Clerk reveals the existence of a deed to property known as Mill Pond Acres dated July 31, 2003 from Dallas Realty Company to Sandy Hollow Associates, LLC. As evidenced by another deed, dated June 10, 2005, defendant Sandy Hollow conveyed a portion of the subject property to Sandy Hollow Associates II, LLC. Further, the deed to plaintiff's own unit was transferred to her on or about July 17, 2006 by defendant Sandy Hollow. Whether and when the property in question was transferred out of defendant Sandy Hollow's ownership, and to whom it was transferred, are factual questions which require resolution by the fact finder. A further question exists as to which of the defendant entities

contracted for the subject garbage dumpster as the written service agreement in the account name "Mill Pond Acres," provided by defendant Sandy Hollow, ostensibly refers to residential garbage pick up at the individual units and does not specifically refer to the dumpster involved in plaintiff's accident.

While the arguments advanced by defendant Sandy Hollow *vis a vis* its ownership interest might be persuasive if, in fact, it had demonstrated that its interest in the subject property had been transferred prior to the incident in question, defendant Sandy Hollow has failed to establish its alleged lack of ownership, control, management or special use of the property, or the absence of a duty on its part to plaintiff, as a matter of law thereby requiring **denial** of its motion for summary dismissal of the complaint.

This constitutes the Order of the Court.

Dated: December 9, 2008 ENTER:

J.S.C.

ENTERED

DEC 18 2008

NASSAU COUNTY

COUNTY CLERK'S OFFICE