SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

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FRANCES CONTONZO,

Plaintiff(s),

-against-

3660 PARK WANTAGH OWNERS, INC., EINSIDLER MAINTENANCE SERVICES, INC., EINSIDLER MANAGEMENT, INC., EINSIDLER PROPERTIES, LLC, EINSIDLER REALTY, INC., and SUPERIOR CONTRACTING, INC. d/b/a SUPERIOR CONTRACTING,

Defendant(s).

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TRIAL/IAS, PART 27
NASSAU COUNTY

Index No. 601540/15

Motion Seq. No.: 001 & 002
Motions Submitted: 10/2/17

The following papers read on this motion:

Notice of Motion/Supporting Exhibits....................................X
Notice of Cross Motion/Supporting Exhibits..............................X
Affirmation in Opposition/Supporting Exhibits...........................X
Reply Affirmations..XX

Defendants, 3660 Park Wantagh Owners, Inc. (3660 Park), Einsidler Maintenance Services, Inc., Einsidler Management, Inc., Einsidler Properties, LLC, Einsidler Realty, Inc. (collectively "the Einsidler Defendants"), move this court, pursuant to CPLR §3212,

for an order granting summary judgment and dismissing the complaint and all cross claims against them. Co-Defendants Superior Contracting, Inc. d/b/a Superior Contracting (Superior), cross move for summary judgment dismissing the complaint and all cross claims against it. Plaintiff, Frances Contonzo (Contonzo), opposes the motions. Neither Defendant opposes the other's motion regarding the cross claims.

This slip-and-fall-on-ice action was commenced by Contonzo by service of a summons and complaint dated February 24, 2015. Issue was joined by service of an answer by 3660 Park and the Einsidler Defendants dated April 9, 2015. Superior interposed an answer dated July 11, 2016. The case certified ready for trial on February 28, 2015 and a note of issue was filed on May 25, 2017.

The following facts are taken from the pleadings and the deposition transcripts annexed to the moving papers. Contonzo owns an apartment, a co-op, located at 3666 Park Avenue, Wantagh, County of Nassau. The co-op complex is owned by 3660 Park and managed by the Einsidler Defendants. Superior was under contract to perform snow removal and de-icing services at 3666 Park Avenue. On February 2, 2015, at approximately 11:00 a.m. Contonzo left her apartment, walked to her car the in complex's parking lot, and drove to an appointment. Upon returning to her apartment at approximately 1:30 p.m., Contonzo parked her car in her spot. She exited her car but because of a mound of previously plowed snow, she had to walk around the front of her and then come around the passenger side to get to her apartment. After walking passed

her car, but while still in the parking lot, she fell on a patch of ice. As a result of the fall, she allegedly suffered left hip pain and a pubic ramus fracture. The parties differ on the weather at the time she left for her appointment and at the time of her return, with Defendants stating there was a snow and ice storm occurring, and Contonzo mostly stating it was dry after some precipitation earlier in the morning.

3660 Park and the Einsidler Defendants move for summary judgment arguing they had no notice of a defective condition and that, due to the storm-in-progress rule, they were not required to have the parking lot maintained until a reasonable time after the storm ended. Superior argues it is entitled to summary judgment because it had no contract with Contonzo, and that none of the exceptions elucidated *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 [2002] apply herein

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*,

64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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,* 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line,* 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy,* 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). "To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time"

(*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

A defendant who moves for summary judgment in a slip-and-fall-action has the initial burden of making a prime facie demonstration that it neither created the dangerous condition, nor had actual or constructive notice of its existence (*see Manning v. Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006].

3660 PARK'S AND THE EINSIDLER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Herein, 3660 Park and the Einsidler Defendants rely upon, *inter alia*, the "storm in progress" rule, which holds that a landowner cannot be held liable for accidents on his property resulting from the accumulation of snow and ice until an "adequate period of time" has passed following the end of the storm in which to address the weather-created hazard. (*Marchese v. Skenderi*, 51 A.D.3d 642 [2nd Dept. 2008]). In this regard, 3660 Park and the Einsidler Defendants submit certified records from the U.S. Department of Commerce, Nation Center of Environmental Records from February 2, 2015. The records are for readings taken at both Republic Airport in Farmingdale, and JFK Airport in Queens. According to the records, JFK experienced freezing rain at 12:51 p.m, and then bouts of freezing rain and snow from 1:30 p.m. until after 4:00 p.m. Republic reported snow and freezing rain from 12:01 a.m. until almost noon, and then again from just before

2:00p.m. until after 4:00 p.m. According to the storm-in-progress rule, 3660 Park and the Einsidler Defendants argue they would not have been under an obligation to shovel or de-ice until some time after 4:00 p.m., more than two and half hours after Contonzo fell.

However, where a landowner undertakes snow and ice removal efforts while a storm is ongoing, it must take reasonable care to do so. (*DeMonte v. Chestnut Oaks at Chappaqua*, 134 A.D.3d 662 [2nd Dept. 2015] 1999]). Under such circumstances, a defendant must establish that the actions it took neither created nor exacerbated an alleged dangerous, defective or hazardous condition. *Id.* Herein, 3660 Park and the Einsidler Defendants offer the deposition testimony of Contonzo as an exhibit to the motion. Contonzo testified to hearing and seeing workers shoveling snow on the property around the time she woke up, approximately 8:30 a.m. 3660 Park and the Einsidler Defendants also offer an invoice from Superior that indicates Superior performed shoveling and de-icing at the property on the date of the fall, but does not indicate what time, nor could Frederick Sparacino, who was deposed on behalf of Superior, specify a time. If Superior, or someone else on 3660 Park's and the Einsidler Defendants' behalf, was removing snow and de-icing at 8:30 a.m., when the weather records they submitted indicated there was a storm occurring, they were required to take reasonable care in doing so, changing the burden to 3660 Park and the Einsidler Defendants to establish that the actions Superior, or whoever was performing the shoveling, took during the storm neither created nor exacerbated the existing dangerous conditions. *Id.* The within motion fails to

meet this burden. (*Anderson v. Landmark at Eastview, Inc.*, 129 A.D.3d 750 [2nd Dept. 2015]). Further, if 3660 Park and the Einsidler Defendants had Superior, or someone else, clearing snow and ice from the property during the storm, they cannot argue lack of notice. As such, 3660 Park and the Einsidler Defendants have not established entitlement to summary judgment as a matter of law as against Contonzo. Their motion will therefore be denied regardless of the sufficiency of the opposition papers. (*Winegard v. New York University Medical Center, supra*). Superior's cross claims against 3660 Park and the Einsidler Defendants will be dismissed as they are rendered moot, *infra*.

SUPERIOR'S MOTION FOR SUMMARY JUDGMENT

Relying on the rule enunciated in *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 [2002], Superior claims that it has no liability for Contonzo's injuries because they complied with and met the terms of their contract with 3660 Park and the Einsidler Defendants, and had no contractual relationship with Contonzo. The only exceptions to the *Espinal* rule are: 1) where the contracting party launches a force or instrument of harm, 2) where the plaintiff relies, to her detriment, on the continuing performance of the contractor's duty and 3) where the contracting party has completely absorbed the landowner's duty to maintain the premises. (*Id.; Santos v. Deanco Services, Inc.*, 142 A.D.3d 137 [2nd Dept. 2016]).

Herein, the contract makes clear that the Superior did not absorb 3660 Park's

and/or the Einsidler's duties to maintain the property. Further, there is no evidence that Contonzo relied upon the continuing performance of Superior's duty, despite Contonzo attempting to couch her testimony in those terms. Therefore, the remaining question is whether Superior has established they did not launch a force or instrument of harm.

Superior agrees it performed snow removal and de-icing services on the date of the accident, but does not know at what time they performed the services. It is undisputed that whenever the services were performed, neither 3660 Park nor the Einsidler Defendants complained about the manner in which they were performed. Further the mere existence of ice in the parking is not and indication that Superior either inadequately performed its duties or exacerbated a dangerous condition. (*Espinal v. Melville Snow Contractors, Inc., supra*). The court therefore finds that Superior has established entitlement to summary judgment as against Contonzo[1]. The burden will shift to Contonzo to raise a material issue of fact requiring a trial of the action.

The only evidence offered in support of summary judgment against 3660 Park's and the Einsidler Defendants' cross claim for indemnification is the contract, labeled a "Snow Proposal Contract", that is signed by the Einsidler Defendants only. The contract states "Superior Contracting Inc. is not responsible for claims resulting from melting or re-freezing snow, ice or rain."

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[1]This finding is not inconsistent with the finding, *supra*, that 3660 Park and the Einsidler Defendants failed to establish that Superior, or whoever was shoveling on their behalf, did not create or exacerbate a defective condition. The burdens and law applied on each motion were different, and the court's finding in 3660 Park's and the Einsidler Defendants' motion was they they did not meet their burden, not that there was evidence that Superior created or exacerbated a dangerous condition.

The cross claim does not address what type of indemnification exists, but it is clear from the terms of the contract that there is no contractual indemnification. For common law indemnification to exist, the party seeking to be indemnified must establish both that it was not negligent, and that the party from whom it seeks indemnification was negligent. (*Kielty v. AJS of L.I., Inc.*, 83 A.D.3d 1004 [2nd Dept. 2011]; *George v Marshalls of MA, Inc.* 61 A.D.3d 925 [2nd Dept. 2009]). As, in its moving papers, 3660 Park and the Einsidler Defendants provide evidence of neither, Superior has established entitlement to summary judgment as a matter of law on the cross claims. The burden will shift to 3660 Park and the Einsidler Defendants to raise a material issue of fact requiring a trial on the cross claims.

In opposition, Contonzo submits the affirmation of counsel, her own affidavit and the deposition transcript of Mr. Sparacino, Superior's representative. In her affidavit, Contozo attempts to prove she relied on Superior performing their duty to fit into one of the *Espinal* exceptions. The court is unpersuaded. The fact that she alleges in the past she had noticed the efforts of the snow removal companies, which may or may not have been Superior, does not mean she relied on their efforts to her detriment. In her affidavit, she now claims being familiar with "sounds" and "cadence" of the workers, but offers no proof it was always the same workers. She claims to remember every other snow and ice storm in the eight years she lived there, and in every other one there was sand and salt put down in the parking lot for her safety, yet on this occasion, as she was leaving her

apartment, she noticed no salt or sand. This begs the question as to why, if she was so attuned to every snow and ice storm, and if this one stood out for the failure to properly place down salt and sand, out of concern for her safety she did not contact the property manager upon successfully leaving the complex? She testified to having contacted them in the past about issues, and then contacting them after she fell. Yet the very unusual occurrence of there being no salt or sand during this one storm for some reason failed to motivate her to contact them and ensure her own safety upon return. In fact, she cannot reasonable argue that she detrimentally relied upon Superior doing their job when she very clearly noted they had not done it at all.

Contonzo further attempts to argue that Superior created or exacerbated a dangerous condition. However, she offers no admissible evidence in support of this contention. Though Contonzo states she saw workers at the property in the morning, she could not say for certain it was Superior, and while Superior acknowledges performing its duties at the property on the date of the accident, they are not certain when they were there. She also only saw the workers in front of the property, and not in the parking lot. Regardless, while she denies there was any precipitation in the area after the time she woke up, certified weather records soundly contradict her memory, with indications of freezing rain occurring for over eight hours before she woke up, up until around the time she fell, at least intermittently. The workers she claims to have seen were there approximately five hours before she fell, which allowed five more hours for freezing rain

to fall. Even if it was Superior Contonzo saw in the morning, and even if the ice spot upon which Contonzo fell was present while Superior was there and they failed to remove it, that alone does not mean they exacerbated the dangerous condition. (*Arnov v. St. Vincent's Hous. Dev. Fund Co., Inc.* 145 A.D.3d 648 [2nd Dept 2016]).

Finally, Defendants were not required to include an affidavit from a meteorologist to explain the certified weather records. CPLR §4528. While the records themselves required some concentration to glean the appropriate information, they were not impossible to understand as Contonzo alleges.

As for 3660 Park and the Einsidler Defendants, they do not raise an issue of fact as to their cross claims.

Accordingly, it is hereby

ORDERED, that 3660 Park's and the Einsidler Defendants' motion for summary judgment against Contozo is DENIED; and it is further

ORDERED, that 3660 Park's and the Einsidler Defendants' motion for summary judgment against Superior to dismiss the cross claims is DENIED as moot; and it is further

ORDERED, that Superior's motion for summary judgment as against Contonzo is GRANTED. The complaint is dismissed against Superior; and it is further

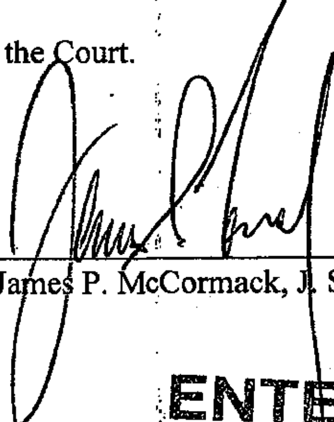
ORDERED, that Superiors' motion for summary judgment against 3660 Park's and the Einsidler Defendants' cross clams is GRANTED. As the complaint and cross claims are dismissed against Superior, their cross claims are dismissed as moot.

The court has considered the other arguments raised by the parties and finds them

to be without merit.

This constitutes the Decision and Order of the Court.

Dated: November 30, 2017
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

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