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Committee on Opinions (22 NYCRR 7300.1)**

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

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LISA GRASSO MURPHY

Plaintiff,

-against-

136 NORTHERN BOULEVARD ASSOCIATES et.al

Defendants.

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Index No: 6113/95

Motion Date: 12/4/01

Motion Cal. No: 39

The following papers numbered 1 to 17 read on this motion by defendant 136 Northern Boulevard Associates and cross-motion by defendant Mid-Island Masonry Corp. for summary judgment in their favor dismissing the complaint so far as it is asserted against these defendants.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1 - 4
Notice of Cross Motion - Affidavits - Exhibits ...	5 - 10
Answering Affidavits - Exhibits .....	11 - 13
Reply Affidavits .....	14 - 15
Reply Affidavits .....	16 - 17

Upon the foregoing papers it is ordered that the motion is determined as follows:

The defendant, 136 Northern Boulevard Associates' motion for summary judgment is denied.

The defendant, Mid-Island's motion for summary judgment is granted to the extent that the plaintiff's complaint, so far as it is asserted against Mid-Island as well as all cross-claims for contribution and indemnification are dismissed, except as to Kimco's cross-claim against Mid-Island for contractual indemnification is denied. Kimco's cross-claim for contractual indemnification is hereby converted into a third-party action against the defendant Mid-Island and the title of the action is amended as follows.

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LISA GRASSO MURPHY

Plaintiff,

-against-

136 NORTHERN BOULEVARD ASSOCIATES et.al

Defendants.

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KIMCO REALTY CORP.,  
KIMCO DEVELOPMENT CORP. and THE KIMCO CORP.  
Third-PARTY Plaintiff,

-against-

MID-ISLAND MASONRY CORP.  
Third-party Defendant

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The plaintiff was injured in a slip and fall accident on black ice located in the driveway leading to a parking lot and commenced this action against, inter alia, the owner of the premises, 136 Northern Boulevard Associates, the managing agent, Kimco Realty Corp., Kimco Development Corp and the Kimco Corp. (hereinafter "Kimco") and Mid-Island Masonry (hereinafter "Mid-Island") who performed snow removal services at the premises. Plaintiff alleges that negligent snow plowing was the proximate cause of her injuries.

Liability for a dangerous condition on property is predicated upon occupancy, ownership or control of such premises. (Gilbert Properties v City of New York, 33 AD2d 175,178 aff'd 27 NY2d 594.) The existence of one of the above elements gives rise to a duty of care owed to those upon the property. Absent a duty of care owed to the injured person a party cannot be found liable in negligence. (See, Palsgraf v LIRR, Co., 248 NY 339,342, rehearing den. 249 NY 511; Balsam v Delma Engineering Corp., 139 AD2d 292, app dismissed in part denied in part 73 NY2d 783.) It is well settled that a contract for the limited purposes of snow and ice removal does not give rise to a duty on the part of the contractor to a plaintiff who may be injured as a result of the snow removal. (See, Mitchell v Fiorini Landscape, Inc., 284 AD2d 313; Pavlocich v Wade Assoc. Inc., 274 AD2d 382, lv denied 95 NY2d 767.)

Defendant Mid-Island has made a prima facie showing of its

entitlement to summary judgment dismissing the complaint so far as it is asserted against it demonstrating that it did not owe a duty of care independent of its contractual obligation. Plaintiff has failed to raise a triable issue of fact warranting denial of the motion. Plaintiff's claim that the negligent performance of such duties created or exacerbated a hazardous condition does not provide a basis for liability. (See, Mitchell v Fiorini Landscape Inc., supra at 314; Pavlovich v Wade Assocs., supra at 383.)

Accordingly, the defendant, Mid-Island's motion for summary judgment is granted to the extent that the complaint, so far as it is asserted against Mid-Island and all cross-claims for contribution as well as defendant, 163 Norther Boulevard Assocs.' claim for indemnification are dismissed, except for Kimco's cross-claim against Mid-Island for contractual indemnification which is denied.

The "Hold Harmless Agreement" expressly states that defendant Mid-Island shall hold harmless Kimco Realty Corp. for work performed from January 5, 1994 through May 1, 1994. The fact that the document was not signed by Mid-Island until June 1, 1994 has no bearing on its validity. Accordingly, the cross-claim of Kimco against Mid-Island for contractual indemnification is converted to a third-party action

In support of its motion for summary judgment, the owner, asserts that it is not liable to the plaintiff in this case on the ground that it is an out of possession landlord who has not retained any control of the premises. The court finds that the defendant's argument is without merit.

It is well settled that an out-of-possession owner/or lessor of premises is not liable for negligence with respect to the condition of the property after transfer of possession and control to a tenant unless the owner/lessor has retained control over the premises or is contractually obligated to repair or maintain the premises. (Carvano v Morgan, 270 AD2d 222.) It is equally well settled that a principal is liable for the torts of its agent acting within the scope of its authority. The agent is one who acts for the principal by authority from the principal to transact business or manage the affairs of the principal. (See, 24 NY Jur2d Agency § 1; Tucci v Hartford Casualty Ins. Co., 167 AD2d 387.) The owner, however, may be relieved of the liability for the injuries resulting from a defective condition on the premises where there exists a comprehensive and exclusive agreement giving the managing agent complete and exclusive control of the management, operation and maintenance of the property such that it may be said that the agent has displaced the property owner's duty as landowner to maintain the property. (See, Kamphefner v Allstate, 284 AD2d 305; German v Bronx United in leveraging Dollars, Inc., 258 AD2d 251; Gardner v 111 Corporation, 286 AD 110, aff'd 1 NY2d 758.)

The property consists of a building subdivided and leased to three separate commercial tenants and a parking lot immediately adjacent to the building and provided for the use of the tenants and their customers. None of the leases were provided in this motion, and there is no evidence that the parking lot was leased to any of the tenants. Michael Lester, a partner of the owner testified that, pursuant to an oral contract, the management and maintenance of the property, including snow removal, was the responsibility of Kimco, the owner's managing agent. He also testified that there were certain limitation upon the repairs Kimco may make to the premises without consulting him. Under these circumstances, it appears that the owner has retained a certain amount of control of the maintenance and operation of the property. However, since there is no written agreement setting forth the precise nature and extent of Kimco's duties, there exists a question of fact precluding summary judgment. (See, German v Bronx-United in Leveraging Dollars Inc., *supra*; Lennon v Oakhurst Gardens Corp., 229 AD2d 897; Ioannidu v Kingswood Management Corp., 203 AD2d 248.)

Nor may defendant/owner obtain relief on the ground that it did not have notice, actual or constructive of the icy condition. In support of this argument, defendant submitted his attorney's affirmation asserting in conclusory fashion that plaintiff has failed to establish notice of the condition. It is, however, not plaintiff's burden, in opposing the motion to show in the first instance that he slipped on a condition either created by the defendant or of which defendant had notice, but rather, it is defendant's burden to show in the first instance, that it did not create the condition or had actual or constructive notice of the condition. (See, Tiles v City of New York, 262 AD2d 174; *see also*, Alvarez v Prospect Hosp., 68 NY2d 320, 324; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853; Zuckerman v City of New York, 49 NY2d 557, 562.) No such prima facie showing has been made by the defendant and, therefore, summary judgment must be denied. In any event, plaintiff has presented sufficient evidence to raise a question of fact as to whether the defendant had constructive notice of the icy condition. In view of the passage of two days after the plowing and sanding of the property and the fluctuating weather conditions which would make it likely that there would be icing on the premises, a question of fact exists as to whether or not, in the exercise of reasonable care, the defendant had sufficient time and opportunity to discover the condition. (Pepito v City of NY, \_\_\_\_ AD2d \_\_\_\_, 692 NYS2d 691, 692; Bertram v Board of Managers of Omni Court Condominium I, 233 AD2d 283.)

Dated: January 23, 2002

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J.S.C.

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