To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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MICHAEL COLON,

Plaintiff,

-against-

TALLY HO, INC., SQUIRE VILLAGE PROPERTIES LLC, TIMOTHY C. FOLEY and VERN SPENCER MASONRY, LLC,

Defendants.

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TALLY HO., INC. and TIMOTHY C. FOLEY,

Third-Party Plaintiffs,

-against-

VERN SPENCER MASONRY, LLC,

Third-Party Defendant.

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**DECISION AND ORDER**
Index No.: 00546/2016

**Motion Date: 3/2/18**
Sequence Nos. 2 & 3

**SCIORTINO, J.**

The following papers numbered 1 to 8 were read on the motions by Defendants/Third-Party Plaintiffs, TALLY HO, INC. and TIMOTHY C. FOLEY ("Tally Ho") and Defendant/Third-Party Defendant, VERN SPENCER MASONRY, LLC ("Vern Spencer") for summary judgment dismissing the complaint and cross claims as against them. The motions are consolidated for purposes of this decision:

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion/Affirmation (Orloff) Exhibits A-N | 1 - 2 |
| Notice of Motion/ Affirmation (Cramer) Exhibits A-N | 3 - 4 |
| Affirmation in Opposition (Campbell) | 5 |
| Affirmation in Opposition (Cramer) | 6 |
| Reply Affirmation (Orloff) | 7 |

The plaintiff allegedly sustained personal injuries when he slipped and fell on ice in the parking lot of the apartment complex where he resides located at 20 Ulster Avenue, Walden, New York. Plaintiff walked from his apartment to his car, put his son in the back seat and, after closing the door, turned to walk to the back of the car when slipped on ice. He stated that he did see the patch of ice and tried to avoid it.

The complex is owned and operated by Tally Ho. Pursuant to a longstanding verbal agreement with Tally Ho, Vern Spencer performed snow plowing and ice treatment services for the parking lot at the complex and had done some sanding and plowing of the roadway in the morning prior to plaintiff's accident.

The plaintiff commenced this action against the defendants, alleging, *inter alia*, that the defendants were negligent in allowing, causing and/or permitting dangerous, hazardous, slippery and/or unsafe conditions to exist on the premises and that they had actual and/or constructive notice of the dangerous and/or defective condition, in that the condition existed for a sufficient length of time prior to the happening of the incident. Defendants thereafter commenced a third-party action against Vern Spencer for contribution and indemnification based in part on their alleged unspecified "affirmative negligence." Plaintiff thereafter amended his Complaint to assert direct claims against Vern Spencer.

Following the completion of discovery, Tally Ho now moves for summary judgment dismissing the complaint, contending that there was a storm in progress. Vern Spencer also moves for summary judgment dismissing the complaint and all cross claims as asserted against them also

contending a storm in progress. Additionally, Vern Spencer that they merely had a limited agreement to perform snow clearing services at the premises, which did not give rise to a duty of care running from them to the plaintiff and which precludes recovery against them under a negligence theory.

As the proponents of the motions for summary judgment, the defendants have to establish, prima facie, that they neither created the snow and ice condition nor had actual or constructive notice of the condition. (*See, Persaud v S & K Green Groceries, Inc.*, 72 AD3d 778, 779 [2d Dept 2010]; *Vasta v Home Depot*, 25 AD3d 690 [2d Dept 2006]) Here, the defendants sustained their burden by presenting evidence that there was a storm in progress when the plaintiff fell. (*See, Sfakianos v Big Six Towers, Inc.*, 46 AD3d 665, 665 [2d Dept 2007]; *Evans v MTA/New York City Tr. Auth.*, 41 AD3d 533,534 [2d Dept 2007]; *Mangieri v Prime Hospitality Corp.*, 251 AD2d 632, 633 [2d Dept 1998]) Plaintiff acknowledges that there was a storm in progress. Plaintiff testified that, when he woke up the morning of the accident at 9:00 a.m., it was snowing heavily and that there were 2 to 3 inches of snow accumulated in the parking lot by the time he left his home.

Accordingly, the burden shifted to the plaintiff to raise a triable issue of fact as to whether the precipitation from the storm in progress was not the cause of his accident. (*See, Alers v La Bonne Vie Org.*, 54 AD3d 698 [2d Dept 2008]; *DeVito v Harrison House Assoc.*, 41 AD3d 420 [2d Dept 2007]; *Small v Coney Is. Site 4A-1 Houses, Inc.*, 28 AD3d 741 [2d Dept 2006]) To do so, the plaintiff was required to raise a triable issue of fact as to whether the accident was caused by a patch of ice that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendants had actual or constructive notice of the preexisting condition. (*See generally, DeVito v Harrison House Assoc.*, 41 AD3d 420 [2d Dept 2007]; *Alers v La Bonne Vie Org.*, 54 AD3d 698

[2d Dept 2008]) Plaintiff failed to raise a triable issue of fact in this regard.

Here, plaintiff's contention that the ice existed prior to the storm is based entirely upon his description of the ice as 1 ½ to 2 inches thick and "yellowish." The testimony is insufficient to raise a triable issue of fact as to whether he fell on "old" ice. (*See, Small v Coney Is. Site 4A-1 Houses, Inc.*, supra at 742; *see also Chapman v City of New York*, 268 AD2d 498 [2000]; *Pohl v Sternberg*, 259 AD2d 742 [1999]) Plaintiff did not submit any evidence to substantiate his claim that the weather conditions prior to the accident date could have resulted in the creation of icy patches in the area where the accident occurred, or any proof that the defendants had notice of such a condition. (*See, Fuks v New York City Tr. Auth.*, 243 AD2d 678 [2d Dept 1997]; *see also Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972 [1994])

Attributing t "old" ice as the cause of the subject ice patch, as opposed to the storm in progress, would require a jury to resort to conjecture and speculation in order to determine the cause of the incident. Plaintiff's claim that he slipped on ice that was present before the storm began is not sufficient to establish prima facie case of negligence in absence of any proof of the origin of the icy condition, or proof that defendants had notice or sufficient time to remedy the condition.

Plaintiff relies upon the expert meteorologist produced by Tally Ho, who opined that there had been no precipitation of any kind for the two days prior to plaintiff's fall. That statement is contrary to plaintiff's own testimony that it had been snowing when he parked his car the preceding Friday night (the accident occurred Sunday morning) and continued to snow on Saturday. That condition resulted in his brushing off 1 to 2 inches from his car on Saturday night, without shoveling the pavement around the car. Plaintiff made no mention of any ice around his car the night before the accident and he fails to explain the discrepancy between plaintiff's testimony and the opinion of

Tally Ho's expert.

Plaintiff has offered nothing more than mere speculation as to the origin of the ice patch and the length of time it existed prior to his fall. He thus fails to raise a triable issue of fact.

Vern Spencer also established its prima facie entitlement to summary judgment dismissing the third-party complaint. (*See, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) by demonstrating, *inter alia*, that it did not assume a duty of reasonable care to the plaintiff (*see, Church v Callanan Indus.*, 99 NY2d 104, 111-112 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Katz v Pathmark Stores, Inc.*, 19 AD3d 371 [2d Dept 2005]), and that the plaintiff's injuries were not attributable to acts solely within Vern Spencer's province. (*See, Franklin v Omni Sagamore Hotel*, 5 AD3d 348, 349 [2d Dept 2004]; *Mitchell v Fiorini Landscape*, 284 AD2d 313, 314 [2d Dept 2001])

In response, the plaintiff and the defendants/third-party plaintiffs, failed to raise a triable issue of fact. (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986])

In general, a contract for the removal of snow and ice does not give rise to a duty on the part of the contractor to exercise reasonable care to prevent foreseeable harm to a plaintiff arising from the negligent performance of such duties unless: (1) the contract constitutes a comprehensive and exclusive property maintenance obligation that the contracting parties could have reasonably expected would displace the landowner's duty to safely maintain the property, or (2) there is evidence that the injured plaintiff detrimentally relied on the contractor's performance of such duties, or the contractor's performance of such duties had otherwise advanced " 'to such a point as to have launched a force or instrument of harm'. " (*Pavlovich v Wade Assocs.*, 274 AD2d 382, 383 [2d Dept 2000] *quoting Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]; *see also, Cochrane v*

*Warwick Assocs.*, 282 AD2d 567 [2d Dept 2001]; *Murphy v M.B. Real Estate Dev. Corp.*, 280 AD2d 457 [2d Dept 2001]) An allegation that the negligent performance of such duties created or exacerbated a hazardous condition does not provide a basis for liability. (*See, Pavlovich v Wade Assocs., Cochrane v Warwick Assocs., Murphy v M.B. Real Estate Dev. Corp.*)

Here, Vern Spencer presented an unrebutted prima facie demonstration of entitlement to judgment as a matter of law on its claim that neither its agreement with Tally Ho, nor any other fact or circumstance in the case, gave rise to a duty of reasonable care to the injured plaintiff. There was no written contract defining the nature and scope of Vern Spencer's snow and ice removal duties. In addition, Tally Ho continued to employ a property manager for the subject premises, Eric Brennan, who testified that, though one of his duties was to clear snow and ice from the sidewalks and steps, he would also check the parking lot while walking around the buildings and would salt/sand any ice that he may see. Further, there is no evidence that plaintiff was even aware that Vern Spencer performed the snow and ice removal from the parking lot at the subject premises. He could not, therefore, have detrimentally rely upon it to perform its duties.

Accordingly, it is hereby

**ORDERED** that the motion of defendants TALLY HO, INC. and TIMOTHY C. FOLEY for summary judgment is granted and the Complaint is dismissed as against them; and it is further

**ORDERED** that defendant/third party defendant's, VERN SPENCER MASONRY, LLC, motion for summary judgment is granted and the complaint and all cross-claims are dismissed as against it.

Dated: April 27, 2018
Goshen, New York

ENTER

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