

**ORIGINAL**

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

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SUSAN GOLDEN,

Plaintiff,

- against -

THE SUMMIT AT HIGH POINT OWNERS  
ASSOCIATES, INC., THE BOARD OF  
MANAGERS OF THE SUMMIT AT HIGH  
POINT, NORTH HILLS CONDOMINIUM II,  
EXCALIBUR MANAGEMENT SERVICES INC.,  
EXCALIBUR MAINTENANCE INC. and  
TRIPLE A EXTERIORS, INC.,

Defendant.  
\_\_\_\_\_

TRIAL / IAS PART 35  
NASSAU COUNTY

Action No. 1

Index No. 601436/13

Motion Sequence No. 002, 003,  
004

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THE SUMMIT AT HIGH POINT OWNERS  
ASSOCIATES, INC., THE BOARD OF  
MANAGERS OF THE SUMMIT AT HIGH  
POINT, NORTH HILLS CONDOMINIUM II  
and EXCALIBUR MANAGEMENT SERVICES  
INC.,

Third Party Plaintiff,

- against -

EXCALIBUR MAINTENANCE INC.,  
COMPLETE BUILDING MAINTENANCE and  
TRIPLE "A" EXTERIORS, INC.,

Third Party Defendant.  
\_\_\_\_\_

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits . . . . .	<u>1, 2, 3</u>
Answering Affidavits . . . . .	<u>4, 5, 6</u>
Replying Affidavits . . . . .	<u>7, 8</u>
Briefs: Plaintiff's / Petitioner's . . . . .	<u>9, 10</u>
Defendant's / Respondent's . . . . .	<u>11</u>

Triple "A" Exteriors, Inc., a defendant and one of the third party defendants moves (sequence 002) for summary judgment and dismissing the complaint and all cross claims asserted against it. Triple "A" Exteriors, Inc. asserts it was the contractor hired by Excalibur Maintenance Inc., another defendant and a third party defendant to perform roof and siding work at the plaintiff's condominium unit at 150 The Crescent, Roslyn Heights, New York, and Complete Building was a contractor it hired to perform snow removal there. Triple "A" Exteriors, Inc. maintains it repaired the roof and shingles at 150 The Crescent, but none of that work involved the gutters at the plaintiff's condominium unit nor the removal or installation of any heater cables there. Triple "A" Exteriors, Inc. explains that all of its work was inspected by Excalibur Management Services Inc. prior to it being paid for the work, and neither Excalibur Management Services Inc., other condominium homeowners nor the plaintiff ever complained to Triple "A" Exteriors, Inc. about its work performance at that condominium development.

The plaintiff does not oppose the motion by Triple "A" Exteriors, Inc., and the Court determines Triple "A" Exteriors, Inc. establishes a prima facie entitlement to summary judgment as a matter of law regarding the complaint and all cross claims asserted against it. Triple "A" Exteriors, Inc. provides proof in admissible form that it

performed all of the work contained in the relevant contracts, and none of that work involved any work to the gutters at issue. In opposition, neither the plaintiff nor any of the codefendants raise a triable issue of fact regarding liability, contribution or indemnification as to Triple "A" Exteriors, Inc. Triple "A" Exteriors, Inc.'s contract obligation with Excalibur Maintenance Inc. did not give rise to liability for the plaintiff. The plaintiff and the codefendants fail to provide proof in admissible form showing Triple "A" Exteriors, Inc. failed to exercise reasonable care in the performance of its work, launched a force or instrument of harm in this matter. The plaintiff and the codefendants do not show Triple "A" Exteriors, Inc. exacerbated any existing condition. The plaintiff and the codefendants fail to provide proof in admissible form showing the plaintiff detrimentally relied on the continued performance of any Triple "A" Exteriors, Inc. alleged duty. Further, the plaintiff and the codefendants fail to provide proof in admissible form showing Triple "A" Exteriors, Inc. had entirely replaced any other defendants' duties to maintain the premises safely. Hence, any cross claims for common law indemnification or contribution against Triple "A" Exteriors, Inc. are dismissed because there is no showing negligence, or any duty to the plaintiff.

The plaintiff alleged personal injuries from slipping and falling on February 7, 2013, on ice in the driveway of the plaintiff's condominium unit at 150 The Crescent, Roslyn Heights, New York. The plaintiff claims Triple "A" Exteriors, Inc. was negligent in the maintenance and repair of roof drainage system, the gutters, on the front of the

premises.

The plaintiff asserts a big snowstorm occurred on February 8, 2013, the day before the accident. The plaintiff avers the snow began at about 3:00 p.m., on February 8, 2013, and ended in the early morning on February 9, 2013. The plaintiff testified she left the condominium unit at about 11:30 a.m. to get a cup of coffee at Dunkin' Donuts, and initially noticed water pouring down from the top of the building when the plaintiff opened the garage door. The plaintiff testified the ice was a thick, circular hump, and thinner as the water ran away from that spot. The plaintiff testified when she returned home that the water was still coming down from the top of the condominium unit from the front gutter as if pouring rain.

The plaintiff testified she again left her residence at 6:30 p.m. to retrieve a pair of glasses from the car parked in her driveway. The plaintiff testified the front steps of the condominium unit were shoveled at that time, and the water was not dripping down from the top of the condominium unit, but there were some drips. The plaintiff testified she walked around the front of the car in the driveway, then turned to walk on the driver's side of the car, took about two steps and fell down. The plaintiff maintains she fell on black ice in her driveway, and believes the ice was related to the ice formed by the water pouring out of the gutter.

The bill of particulars stated the ice on the driveway resulted from icicles that formed on the outside and inside edges of the gutter above the garage. The bill of

particulars also indicated the defendants had notice of the defective roof drainage system, and they failed to properly determine the reason for and repair the defective drainage system. The plaintiff also alleged the defendants improperly installed heater cables in the drainage system and improperly operated the heater cables because they melted the snow and ice on the roof which could not be properly drained by the defective drainage system causing the water to overflow and then freeze on the driveway.

Excalibur Maintenance Inc., the defendant/third party defendant moves (sequence 003) for summary judgment and dismissing the complaint and all cross claims asserted against it. Excalibur Maintenance Inc. asserts it owes no duty of care to the plaintiff. Excalibur Maintenance Inc. asserts the plaintiff's condominium unit is in a development owned and operated by Summit at High Point Owners Association, Inc. and The Board of Managers of the Summit at High Point North Hills Condominium II, defendants and third-party plaintiffs which entered into a contract with the Excalibur Management Services Inc. to serve as their exclusive agent for the complex. Excalibur Maintenance Inc. maintains, despite the name similarity, that it and Excalibur Management Services Inc. are separate corporations with separate attorneys and liability insurance carriers, and have different employees, functions and principals.

Excalibur Maintenance Inc. avers that the agreement includes maintenance of the exterior of each unit, as well as the driveway, gutters and roof of the plaintiff's condominium unit. Excalibur Maintenance Inc. notes the agreement required Excalibur

Management Services Inc. to hire and pay personnel and contractors necessary to maintain the complex, maintain a phone line for homeowner complaints and remedy those complaints, inspect the units and grounds for defects, and provide and supervise the work necessary to maintain the complex. Excalibur Maintenance Inc. maintains all maintenance work is performed by it or an outside contractor only when Excalibur Management Services Inc. directs them to do the work and inspects that work when it is completed as requested in the work order.

Excalibur Maintenance Inc.'s contract obligation with Triple "A" Exteriors, Inc. or Summit at High Point Owners Association, Inc., or The Board of Managers of the Summit at High Point North Hills Condominium II did not give rise to liability for the plaintiff. The plaintiff fails to provide proof in admissible form showing Excalibur Maintenance Inc. failed to exercise reasonable care in the performance of its work, launched a force or instrument of harm in this matter. The plaintiff fails to provide proof in admissible form show the plaintiff detrimentally relied on the continued performance of Excalibur Maintenance Inc.'s duties. Further, the plaintiff failed to provide proof in admissible form showing Excalibur Maintenance Inc. had entirely replaced any other defendant's duty to maintain the premises safely.

Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. move (sequence 004) for summary judgment and dismissing the complaint and all

cross claims asserted against them. Excalibur Management Services Inc. asserts it provides services which include fielding homeowner phone calls, billing, collecting payments, obtaining quotes from vendors, attending monthly board meetings and consulting board meetings. Rita Maringo, president of Excalibur Management Services Inc. testified, at a deposition dated October 16, 2014, for Excalibur Management Services Inc. and Excalibur Maintenance Inc., the in-house maintenance department for Excalibur Management Services Inc. which performs maintenance services for Summit at High Point North Hills Condominium II. Rita Maringo testified there was a search of the records managed by Excalibur Management Services Inc. for work orders pertaining to work performed at the plaintiff's residence on and prior to the date of the accident which showed eight work orders. Rita Maringo also testified there were never any discussions between her and Michael Maringo, her husband who is the president of Excalibur Maintenance Inc. regarding gutters dripping and causing ice to form in the plaintiff's driveway. Jennifer Dolan testified, at a deposition dated October 16, 2014, in her capacity as the secretary for Excalibur Management Services Inc. for several years on and prior to the date of the accident, that her duties included answering the telephones and typing letters and work orders. Dolan testified if the plaintiff made a complaint regarding gutter cleaning or repairs a work order would be created for it.

Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services

Inc. assert they did not create the alleged condition that allegedly caused the plaintiff's accident. Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. point out the only work performed in the gutter over the garage of the plaintiff's residence was the installation of heat cables. Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. aver the decision to install the heating cables was made solely by Michael Maringo acting in his capacity as an agent for Excalibur Maintenance Inc. Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. maintain they did not have actual or constructive notice of the alleged condition. Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. submit Excalibur Maintenance Inc. is not entitled to contractual indemnification because there is no written contract or agreement with Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc.

In opposition, the plaintiff challenges the assertion that Excalibur Maintenance Inc. is an independent contractor hired by Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II



and Excalibur Management Services Inc., and not liable here. The plaintiff alleged the accident was due to the improper installation of heat cables which caused ice to ultimately form on her driveway. The plaintiff contends Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. may be held liable to the plaintiff as the roof drainage system is part of the common elements of the condominium, and Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. are vicariously liable for the torts of Excalibur Maintenance Inc. The plaintiff asserts Excalibur Management Services Inc. has not proved freedom from liability for nonfeasance in failing to repair the defective gutter because it has not submitted its property management agreement with Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. and failed to disprove the allegations of negligence for nonfeasance.

The plaintiff asserts Excalibur Maintenance Inc. is the in-house maintenance department and an extension of Excalibur Management Services Inc. The plaintiff points out Michael Maringo is also a supervisor at Excalibur Management Services Inc., and Excalibur Management Services Inc. and Excalibur Maintenance Inc. are located occupy the same office space at 331 Dante Court, Holbrook, New York. The plaintiff notes that

any work to be performed at Summit at High Point North Hills Condominium II was the result of a work order generated by Excalibur Management Services Inc., and given to Excalibur Maintenance Inc. which would perform the work, conduct inspections and contract another company to perform if deemed necessary by Michael Maringo. The plaintiff contends none of the cross claims for contribution and indemnification should be dismissed because Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Inc. have a valid cause of action for common law indemnity. The plaintiff asserts Excalibur Maintenance Inc.'s action regarding the decision to install heat cables contributed to and caused the alleged occurrence.

The plaintiff submits Stuart Sokloff, P.E., the plaintiff's expert, inspection and personal knowledge raise questions of fact whether the Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. caused or exacerbated the formation of injurious ice on the plaintiff's driveway by affirmative conduct or nonfeasance. The plaintiff adds Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. are not entitled to summary judgment on notice because the plaintiff's deposition and affidavit raise questions of fact as to actual notice and notice of a recurring dangerous condition of the injurious ice on the plaintiff's

driveway. The plaintiff maintains several verbal complaints over several years were made by the plaintiff to Excalibur Management Services Inc. about the condition.

In reply to the plaintiff's opposition and in further support of its motion for summary judgment, Excalibur Maintenance Inc. contends it satisfied the burden of proof, and there is no triable issue of fact regarding liability by it. Excalibur Maintenance Inc. reiterates it does not owe the plaintiff a duty of care, and the plaintiff failed to show any exception to that legal precept.

In reply, Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. maintain they did not create or have actual or constructive notice of the water and ice on the plaintiff's driveway due to the installation and use of heat cables. Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. assert the plaintiff's self-serving affidavit contains inconsistencies about actual and constructive notice to the defendants, and creates a feigned issue of fact designed to avoid the consequences of the plaintiff's deposition. Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. aver they made a prima facie showing of a lack of constructive notice of the alleged black ice.

The motion Court's granting of summary judgment is a drastic remedy divesting a party of the day in court, and it "should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The motion Court's function is not resolution of material issues of fact or to credibility, but merely to determine whether triable issues of fact exist (*see Guadalupe v New York City Tr. Auth.*, 91 AD3d 716 [2012]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Furthermore, in determining such a motion, evidence must be viewed in the light most favorable to the nonmoving side (*see Pearson v Dix McBride, LLC*, 63 AD3d 895 [2009]). This Court determines there are numerous issues of fact and issues of credibility in this litigation, including but not limited to, negligence, causation, vicarious liability, actual notice of the condition, constructive notice of the condition, contribution, indemnification, duty of care, whether in failing to exercise reasonable care in performance of a duty a party launched a force or instrument of harm, whether the plaintiff detrimentally relied on the continued performance of a duty by Excalibur Management Services Inc. or whether Excalibur Management Services Inc.'s entirely displaced the owner's duty to maintain the subject premises safely.

ORDERED that the motion by Triple "A" Exteriors, Inc. (sequence 002) is GRANTED for summary judgment and dismissing the complaint and all cross claims asserted against it, and it is also,

ORDERED that the motion by Excalibur Maintenance Inc. (sequence 003) is DENIED for summary judgment and dismissing the complaint and all cross claims asserted against it, and it is further,

ORDERED that the motion by Summit at High Point Owners Association, Inc., The Board of Managers of the Summit at High Point North Hills Condominium II and Excalibur Management Services Inc. (sequence 004) is DENIED for summary judgment and dismissing the complaint and all cross claims asserted against them.

This will constitute the decision and order of the Court.

So ordered.

Dated: **September 20, 2016**

ENTER:



J. S. C.

NON FINAL DISPOSTION

**ENTERED**

SEP 22 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE