NO. KNL-CV-106002710S	: SUPERIOR COURT
DIANE MANNING	: NEW LONDON JUDICIAL DISTRICT
VS.	: AT NEW LONDON
S.R. WEINER & ASSOCIATES, INC.	: MARCH 22, 2011

MEMORANDUM OF DECISION
RE: MOTION FOR SUMMARY JUDGMENT (NO. 116)

The defendants request that summary judgment enter in their favor because at the time the plaintiff slipped and was injured on their property there was an ongoing snow storm. The plaintiff asserts that there are material facts in dispute and therefore summary judgment should not enter.

FACTS

The plaintiff, Diane M. Manning, filed this complaint, return of service and summons with the court on January 22, 2011. In her two count complaint, the plaintiff alleges that the defendants, S.R. Weiner & Associates, Inc. and Allied Snow Plowing Removal and Sanding

Service Corp., through their negligence and carelessness, are liable for injuries she suffered when she fell on an accumulation of snow and ice in the parking lot at O'Neil Theaters at Lisbon Landing in Lisbon.[1] The plaintiff alleges the following facts in support of her claim. On December 31, 2008, at approximately 4:10 p.m., the plaintiff arrived at the O'Neil Theaters at Lisbon Landing, and was walking from the parking lot to the movie theater when she slipped and fell due to an accumulation of snow and ice. The plaintiff alleges that at the time of her fall she was forced to walk over an accumulation of snow and ice that had been plowed slick by a snow plow, but not salted or sanded, which made the surface slippery and dangerous. As a result of her fall, the plaintiff suffered a broken right humerus, which required surgery. She also suffered various bruises and contusions, and she claims pain and suffering, mental and emotional distress and anguish and physical limitation. The plaintiff alleges that the parking lot in front of the theaters was, at all relevant times, owned, controlled, operated, possessed, supervised, managed, inspected, repaired and/or maintained by the defendant, S.R. Weiner & Associates, Inc. The plaintiff further alleges that S.R. Weiner & Associates, Inc. contracted with the defendant, Allied Snow Plowing Removal and Sanding Service Corp., for snow and ice removal and sanding services for the parking lot.

The plaintiff has alleged that her injury was directly and proximately caused by a

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[1] The allegations of negligence against S.R. Weiner & Associates, Inc. and Allied Snow Plowing Removal and Sanding Service Corp. are identical and they will be referred to collectively as "the defendants."

dangerous condition created by the carelessness and negligence of the defendants. The plaintiff alleges that the defendants: failed to remove snow and ice from the parking lot; caused or allowed ice and snow to remain in the parking lot for an unreasonably long period of time; failed to clear the parking lot of snow and ice to make it safe for pedestrians within a reasonable period of time when they knew invitees would need to traverse the area; chose to plow the parking lot before the end of the snowfall, but failed to salt and sand, making the parking lot even more slippery and dangerous than if they had not plowed at all; failed to salt and sand the parking lot, failed to properly maintain the parking lot; failed to inspect the parking lot or discover its dangerous condition and/or failed to warn the plaintiff that the area in which she fell was unsanded and extremely slippery.

On February 2, 2010, the defendants jointly filed an answer in which they acknowledge that S.R. Weiner & Associates, Inc. supervised and maintained the parking lot and contracted with Allied Snow Plowing Removal and Sanding Service Corp. for snow and ice removal and sanding services for the parking lot, but the defendants denied any wrongdoing.[2] The defendants also presented a special defense in which they assert that the plaintiff's own negligence was the direct and proximate cause of any injuries she may have suffered. On February 5, 2010, the plaintiff answered the special defense by denying the allegations contained therein.

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[2] The defendants deny that they own the property.

On January 5, 2011, the defendants jointly filed a motion for summary judgment on the ground that there are no issues of material fact and they are entitled to judgment as a matter of law. The motion was accompanied by a memorandum of law and supported by the following exhibits: the defendants' answers to interrogatories and response to production of documents; the defendants' response to the plaintiff's request for production of premises liability; the contract between S.R. Weiner & Associates, Inc., Allied Snow Plowing Removal and Sanding Service Corp. and Lisbon Landing Phase II, LLC, for snow plowing of the premises; a copy of the defendant, S.R. Weiner & Associates, Inc.'s, insurance policy with Liberty Mutual Fire Insurance Company; the affidavit of meteorologist Thomas Else; Else's curriculum vitae; an expert's report prepared by Else; portions of the transcript of the deposition testimony of Diane M. Manning, accompanied by an affidavit of the defendants' counsel speaking to its validity; and the affidavit of F.R. Whittle II, president of Allied Snow Plowing Removal and Sanding Service Corp., accompanied by the snow plowing contract and a log of activities conducted by Allied Snow Plowing Removal and Sanding Service Corp. at the parking lot on the date of the alleged incident.

On February 15, 2011, the plaintiff filed what they denominated as an objection to the defendants' motion for summary judgment on the ground that issues of material fact remain and thus the defendants are not entitled to judgment as a matter of law. That pleading was accompanied by a memorandum and supported by the following exhibits: portions of the

transcript of the deposition of Diane M. Manning and portions of the transcripts of the depositions of Chris Manning and Amber Diehl, who are alleged to have been with the plaintiff at the time of the incident. On February 16, 2011, the plaintiff filed a supplemental memorandum in opposition to the motion for summary judgment accompanied by the affidavits of Diane M. and Chris Manning.

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Brooks* v. *Sweeney*, 299 Conn. 196, 210, 9 A.3d 347 (2010).

In the present case, the defendants have moved for summary judgment on the ground that there is no genuine issue of material fact and they owed no duty of care to the plaintiff, and thus judgment should enter in their favor. The defendants argue that there is no dispute that it was snowing at the time of the alleged incident, and thus they had no duty to act

because they are not required to initiate the snow removal process until a reasonable time after snowfall has ceased.[3] In support of their argument the defendants have presented the affidavit of meteorologist Thomas Else and an expert's report prepared by Else, which state that snow was falling in the area at the approximate time of the incident. The plaintiff has not disputed this fact and thus, for the purposes of this motion, the court may conclude that snow was falling at the time of the incident.

The plaintiff counters by arguing that there are remaining disputed facts regarding the defendants' actions before the slip and fall that are material to the disposition of this matter. The plaintiff argues that once the defendants took actions to clear snow and ice from the property they were under a duty to do so non-negligently, and thus the manner in which the defendants conducted snow removal prior to the incident is material, and summary judgment is improper. The plaintiff contends, and the defendants do not dispute, that the defendants had plowed snow in the parking lot while snow was still falling. The plaintiff further alleges, and

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3 For the purposes of this motion the same allegations of negligence are aimed at both defendants, and they are subject to the same standard of care, and thus, they will be discussed together. See *Gazo* v. *Stamford*, 255 Conn. 245, 249 n.4, 765 A.2d 505 (2001), in which the court found that in order to prevail against a contractor in an action for a slip and fall on ice, the plaintiff was required to prove that the contractor breached the landowner's duty of care. See also *Uhelsky* v. *One Research Drive Associates, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV 01 0075247 (December 20, 2002, *Lager, J.*) (33 Conn. L. Rptr. 549, 549-550), ("[I]n an action brought pursuant to *Gazo* against both the landowner and snow removal contractor, a plaintiff is required to establish that the contractor breached the landowner's duty of care to the plaintiff in order to prevail.").

the defendants deny, that the defendants failed to spread salt or sand over the plowed snow prior to the incident. In support of this allegation, the plaintiff offers portions of her own deposition testimony and portions of the depositions of her two companions at the time of the incident, as well as her affidavit and that of Chris Manning, who was with her at the time of the incident. In all of these documents, it is stated that there was no salt or sand on the ground where the plaintiff fell. The defendants dispute this allegation, stating that they did spread salt and sand over the plowed snow prior to the alleged incident. In support of their contention, the defendants have offered the affidavit or F.R. Whittle, II, owner of Allied Snow Plowing Removal and Sanding Services Corp., which states that the area was salted and sanded at the time of the incident. Attached to Whittle's affidavit is a log of Allied's activities at the location on the date in question, which notes that the parking lot was pretreated at with "magic salt" at 7:45 a.m., and the lots and walks at the location were "scraped" and a "sand/salt mix" was applied at 9:45 a.m., 11:30 a.m., 1:30 p.m., 3:30 p.m., 5:30 p.m. and 7:30 p.m, and the lots were "scraped" again at 10:15 p.m. Thus, it appears this issue of fact remains disputed. The plaintiff argues that this disputed fact is material because once the defendants undertook efforts to clear the snow, they were obligated to do so in a non-negligent manner, and plowing the snow without applying sand or salt to the plowed snow created a more dangerous condition than the naturally fallen snow. Thus, the defendants made the situation worse and therefore breached their duty of care.

The issue for the court then is a determination of the duty of care, or lack thereof, owed by the defendants to the plaintiff for snow removal during a storm if the defendants voluntarily began the snow removal process while it was still snowing. If no such duty exists then the disputed issue as to spreading salt or sand is immaterial; if a duty is owed then the issue may make the present case improper for summary judgment as the reasonableness of the defendants' actions may be properly left to the fact finder.

"The existence of a duty of care is a prerequisite to a finding of negligence. . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." (Internal quotation marks omitted.) *Leon* v. *DeJesus*, 123 Conn. App. 574, 576, 2 A.3d 956 (2010).

The general rule for the duty of care of a property owner to clear snow or ice during a storm is: "[I]n the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps. To require a landlord or other inviter to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is inexpedient and impractical." *Kraus* v.

Newton, 211 Conn. 191, 197-98, 558 A.2d 240 (1989). The Appellate Court has explored several "unusual circumstances" that may trigger a duty to remove snow and ice. In *Sinert* v. *Olympia & York Development Co.*, 38 Conn. App. 844, 664 A.2d 791 (1995), the court found that "there is no authority for the proposition that a defendant's status as the owner of a commercial property imposes a different, and higher, duty of care than that imposed on owners of private or residential property." Id., 849. In *Cooks* v. *O'Brien Properties, Inc.*, 48 Conn. App. 339, 710 A.2d 788 (1998), the court ruled that the trial court properly instructed the jury that, when determining if unusual circumstances existed, they could consider "evidence presented with respect to the changeover in precipitation and the availability of alternative means of egress from the defendant's property in determining whether such unusual circumstances existed on the day of the plaintiff's accident." Id., 346-47.

There is no appellate authority regarding the duty of care of a property owner who begins snow removal during a storm, despite having no obligation to do so. The Superior Court, however, has been faced with the issue several times, resulting in conflicting case law.

The court, in *Rodriguez* v. *Midstate Medical Center*, Superior Court, judicial district of New Haven at Meriden, Docket No. CV 07 5002619 (June 17, 2008, *Taylor, J.*), when faced with facts similar to those in the present case, found no duty of care. In that case the storm was ongoing at the time of the incident, but the plaintiff alleged that the defendant, "negligently removed the snow in a manner causing it to be packed down, creating an icy

effect, resulting in a fall and injury." Id. The court entered summary judgment for the defendant, stating: "[T]he allegations in this case do not involve something so unusual as to constitute an exception to the holding in *Kraus*. It is not unusual to plow during a snowstorm. To suggest that one should not begin to plow because they may then become liable for an icy condition during the snowstorm is contrary to the holding of *Kraus*, which did not find a duty to clear snow *or to spread sand or ashes while a storm continues*." (Emphasis in original; internal quotations marks omitted.) Id.

In *Victoria* v. *Wilson*, Superior Court, judicial district of New London, Docket No. 543819 (September 21, 1999, *Corradino, J.*) (25 Conn. L. Rptr. 502), the court found that a defendant may be liable for snow removal before the storm has concluded if he voluntarily and gratuitously undertakes the removal process. In that case, the facts were, again, similar to those in the present case. The allegation was that, "the defendant plowed away the snow, left sheer ice and did not spread any abrasive material on the ice. . . . [T]he previous traction he had relied on was no longer there and he slipped on the ice and injured himself." Id., 503. The court found that the claim should survive a summary judgment, stating: "It still makes sense to say that it is impractical to require a party, who has the responsibility to do so, to keep an area safe while ice and snow still flies. But if you do take this gratuitous obligation on yourself, you face liability if you make the situation worse." Id., 504. This ruling appears to be in line with Connecticut law in the area of negligence while not running afoul of the *Kraus*

v. *Newton* decision.

A general rule of tort law in Connecticut, as evidenced by our pattern civil jury instruction, is that: "A person who voluntarily performs an act, without legal obligation to do so, has the same duty of care in performing that act that any other person would have under the same circumstances. That duty is the duty to use reasonable care under the circumstances." Conn. Civil Jury Instructions 3.6-8, available at http://www.jud.ct.gov/JI/Civil/part3/3.6-8.htm (last visited March 11, 2011). The notes to that jury instruction cite to 2 Restatement (Second), Torts § 323, which states: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."

Here, there are no allegations of such unusual circumstances as would require the defendants to begin snow removal efforts before the snow stopped falling, and thus they had no duty to act until a reasonable time after the snow stopped. Once they did begin the snow removal process, however, they were required to act reasonably under the circumstances. As stated by the court in *Victoria* v. *Wilson*: "Here action was taken which was not required, and the claim is made that the action taken was done negligently and made the situation worse.

What possible social policy would be advanced by not imposing liability in such a situation? What is the cost benefit analysis to be applied–the law wants to encourage people to take steps to make others safe so much that when they attempt to do so, although not required by law, liability is not imposed . . . even if their attempt is so negligent that someone is injured? No rational social policy should encourage affirmative acts of negligence in a situation where the actor could have chosen to do nothing at all." *Victoria* v. *Wilson*, supra, 25 Conn. L. Rptr. 503.

In the present case there is a genuine issue of fact as to whether the defendants acted reasonably in conducting snow removal efforts prior to the alleged incident, while snow was still falling. The determination of whether the defendants acted reasonably–including whether they spread sand or salt on the plowed snow–properly lays within the province of a fact finder. For these reasons, there are disputed material facts and the court therefore denies the motion for summary judgment.

Cosgrove, J.