COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

BOSTON MUNICIPAL
COURT DEPARTMENT
CENTRAL DIVISION
C.A. NO. 2005 01 ST 000007

ALLISON E. BECHARA,)
Plaintiff,)
)
vs.)
)
SAMUEL ZELL, TRUSTEE OF EQUITY)
RESIDENTIAL PROPERTIES TRUST,)
FRANK CIVITARESE, d/b/a)
ADVANCED TREE & LANDSCAPE,)
and GPT-GLEN MEADOW, LLC.,)
Defendants)

PLAINTIFF'S OPPOSITION TO DEFENDANT FRANK CIVITARESE'S MOTION FOR SUMMARY JUDGMENT

Plaintiff submits this Memorandum of Law together with its attachments consisting of depositions and other discovery materials in opposition to defendant Frank Civitarese, d/b/a Advanced Tree and Landscape's motion for summary judgment.

To begin, and as set forth in the Joint Pretrial Memorandum, the parties have agreed to the following statements of fact:

1. On January 29, 2001, plaintiff Allison E. Bechara was a tenant at the Glen Meadow Apartments.

2. On January 29, 2001, title to the Glen Meadow Apartments in Franklin, Massachusetts was held by defendant GPT-Glen Meadow LLC.

3. On January 29, 2001, defendant Equity Residential Properties Management Corp. provided management services for the Glen Meadow Apartments.

4. During the winter of 2000 to 2001, Frank Civitarese d/b/a Advanced Tree and Landscape provided snow removal services for the roads, driveways, and parking lots of the Glen Meadow Apartments.

In addition to these facts, plaintiff states the following facts which are supported by depositions and other discovery materials as referenced herein:

On January 29, 2001 at approximately 11:00 a.m., Allison Bechara left her apartment at Glen Meadows in Franklin, Massachusetts to pick up her daughter from a day care facility in the area (*Deposition of Allison Bechara*, page 26, attached hereto as exhibit A). As she walked out of her apartment building, she had her three-year-old son Christopher with her (*Id.* at page 26, lines 15-20, Exh. A). As she exited the doorway, she noticed that it looked very slippery so she picked up her son and proceeded to carry him down the walkway (*Id*. at page 29-30, line 16-4, Exh. A). Ms. Bechara described what happened next in her deposition as follows:

> So we proceeded down the walkway. As I remember, the walkway was also very icy. So I was just stepping around things at the time. So we came to the end of the walkway where the parking lot had began, and the parking lot was very, very icy. There was a lot of, you know, like ice ruts and snow ruts. You more or less had to step over them. I don't know if you know when you drive a car through snow and ice and it freezes and whatnot, the tire tracks and just from people walking and, you know, their footprints, you know, freeze over. So I was trying to maneuver myself and Christopher through, you know, the ice patches and whatnot and the snow. And I turned the corner of my car. My car was just parked, and I went to turn the corner. To tell you the truth, I don't know what happened at that point. My foot had got stuck in a rut or whatnot of ice. The way that I was holding Christopher, I was holding him, you know, his face towards me and my pocketbook, you know, on my shoulder and Christopher. All of a sudden, I couldn't help it, he just -- we fell down.

(*Id.* at pages 30-31, lines 9-7, Exh. A). She went on to describe how her right foot got caught within one of the ice ruts on the parking lot (*Id.* at page 34, lines 1-4, Exh. A). She also

described the area where she fell as very rutty (*Id.*, Exh. A). She noted that some places were just flat ice, "but far and few between they had all the ruts and just like piles of ice just, you know, in big piles all along." (*Id.* at page 42, lines 11-18, Exh. A).

On the same day of the incident, Ms. Bechara's husband took a series of photographs of the parking lot area where she fell (*Id.* at page 77, lines 2-10). As shown in the photographs attached hereto as Exhibit B (two of which are reproduced below), the parking lot area where Ms. Bechara fell was filled with ice chunks, ruts and other piles left over from poor plowing operations at the apartment complex and subsequent vehicular and foot traffic. Also as shown in the photographs, the apartment complex where Ms. Bechara lives has multiple units, and the

parking area is a place where people can be expected to walk to get to and from their vehicles. Ms. Bechara has indicated with an "x" on one of the photographs the area where she fell (Attached hereto as Exhibit C). It is clear from the photos that she fell right in an area where these ruts and piles of ice were present.

Approximately 8 days prior to Ms. Bechara's fall, the area was hit with a major snowstorm (See *Weather Data*, attached hereto as exhibit D). According to the defendant's records, the snowfall resulted in an accumulation of 10 to 11 inches of snow at the Glen Meadow apartments where Ms. Bechara lives (See *Invoice Dated January 22, 2001*, attached hereto as Exhibit E). In addition, there had been some additional snowfall on January 27, two days prior to Ms. Bechara's fall (See *Weather Data*, attached hereto as exhibit D).

On occasions when it snowed, Glen Meadows had engaged the services of Advanced Tree & Landscape (hereinafter "Advanced Tree") to clear the parking lots (See *Contract and Specifications*, attached hereto as Exhibit F). Advanced Tree has been involved in the snow removal business for 16 years, and 80% of its business is snow plowing (*Deposition of Frank Civitarese*, page 7, lines 1-3, 12-20, attached hereto as Exhibit G). Advanced Tree does the bulk of its plowing on commercial properties with minimal residential service (Id. at page 8, lines 4-23, Exh. G). Advanced Tree used two trucks and a bobcat vehicle to clear the parking lots at Glen Meadows. The company performed the snow plowing operations on January 21, 2001 and charged Glen Meadows $2,025 (See *Invoice Dated January 22, 2001*, attached hereto as Exhibit E).

According to Frank Civitarese, the owner and sole proprietor for Advanced Tree, his object in clearing the parking lots at Glen Meadows was to "get it down to bare pavement as

much as we can." (*Deposition of Frank Civitarese*, page 15, lines 20-21, Exh. G). He also noted that as part of his job he was to clear the area to make it safe for walking (*Id.* at page 46, lines 1-18, Exh. G). To do this, Advanced Tree plows continuously during a storm (*Id.* at page 16, lines 12-21, Exh. G). Under the contract with Glen Meadows, Advanced Tree is also responsible to come back after the storm to clear up spots where vehicles had been parked during the original plowing operations. According to Civitarese, Advanced Tree is "responsible to come back one time and alert people that live in there by beeping the horn that we're here to clear their spots if they would like to move their cars." (*Id.* at page 17, lines 12-15, Exh. G). Civitarese admitted in his deposition that he would go back two or three times "to make sure that my properties are cleaned whether I get paid for it or not. It just needs to be taken care of." (*Id.* at page 29, lines 11-17, Exh. G). To get in between vehicles that had not been moved, Advanced Tree customarily used the bobcats to "make sure that I got the spot that's in between the two cars." (*Id.* at page 49, lines 13-18, Exh. G).

Despite his earlier testimony to the contrary, at another point during his deposition, Civitarese claimed that he did not notify anyone at Glen Meadow that they needed to move their vehicles (*Id.* at page 32, lines 17-21, Exh. G). At another point in the deposition, he stated that usually he goes to the front office to let them know if the section has not been cleared out because cars were in the way (*Id*. at page 37, lines 19-24, Exh. G). At yet another point in the deposition, Civitarese testified that he would tow vehicles that were in the way of snow plowing operations (*Id.* at page 41, lines 14-23, Exh. G).

Civitarese admitted in his deposition that the areas shown in the photographs needed additional snow removal, but claims that he should have been called back by Glen Meadows to

remove the snow from this area (*Id*. at page 36, lines 12-19, Exh. G). In fact, he testified that he did not expect that snow would be left in the condition shown in the photographs after he did an operation (*Id*. at page 38, line 7-9, Exh. G). He also testified that it was dangerous to leave the snow in the condition shown in the photographs for eight days (*Id*. at pages 39-40, Exh. G). He went as far as to say at one point that he would "never leave snow like that." (Deposition of Frank Civitarese, page 44, lines 1-14).

Finally, from the photographs one can observe that most of the vehicles are cleared of snow, giving rise to the inference that they had been moved from their spaces at some point following the 10 to 12 inch snowfall from eight days prior.

ARGUMENT

A. *The Standard of Review*

In considering a motion for summary judgment, a court does not weigh the evidence or make its own determination of the facts. *Attorney General v. Bailey*, 386 Mass. 367, 370 (1982). In addition, a court should neither grant a motion for summary judgment because the facts offered by the moving party appear more plausible than the non-movant, nor because it appears the opponent is unlikely to prevail at trial. *Id*. Instead, in drawing inferences from the affidavits, depositions, exhibits or other material, the court must view them in the light most favorable to the party resisting the motion. *Hub Assocs v. Goode*, 357 Mass. 449, 451 (1970) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). A mere "toehold" of controversy is enough to survive a motion for summary judgment. *Marr Equipment Corp. v. ITO Corp. of New England*, 14 Mass. App. Ct. 231, 235, *fur. app. rev. den.*, 387 Mass. 1103 (1982). For this reason, summary judgment should be granted only where the opposing party has no *reasonable*

expectation of proving an essential element of that party's case. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991) (emphasis added).

Since "summary judgment is rarely granted on the merits of a negligence action because of the jury's unique competence in applying the reasonable man standard to a given fact situation," this case must be determined by a jury. *Santella v. Whynott*, 27 Mass. App. Ct. 451, 453 (1989). In this case, plaintiff has presented ample evidence which demonstrates that summary judgment is wholly inappropriate. Summary judgment is not proper because plaintiff fell on an unnatural accumulation of ice and snow which was caused and created by the defendant's negligent snow plowing operations.

B. *Defendant Liable for Unnatural Accumulation of Snow and Ice*

An occupier of land owes a duty of reasonable care to all lawful visitors. See *Mounsey v. Ellard*, 363 Mass. 693, 707 (1973). This duty includes the taking of reasonable precautions for the safety of visitors, including measures against the hazards caused by ice or snow conditions. See *Phipps v. Aptucxet Post #5988 V.F.W. Building Assn., Inc.*, 7 Mass. App. Ct. 928 (1979). Liability arises when, "some act or failure to act may change the condition of naturally accumulated snow and ice, and the elements alone or in connection with the land become a hazard to lawful visitors." *Sullivan v. Town of Brookline*, 416 Mass. 825, 827, 626 N.E.2d 870 (1994), quoting *Aylward v. McCloskey*, 412 Mass. 77, 80 n.3, 587 N.E.2d 228 (1992). When a landowner plows away some of the snow and ice in a public area, any layer remaining underneath the plowed portion is still a natural accumulation. *Id.* at 827-28. Further, if someone is injured by slipping and falling on snow and ice that remains after shoveling or plowing, that alone is not

grounds for a finding of negligence. *Id.* However, if the person slipped and fell because of a defect or indentations in the surface below the snow and ice, or because of rutted snow or ice from vehicular or pedestrian traffic, then liability may exist. See *Delano v. Garrettson-Ellis Lumber Co.*, 361 Mass. 500, 503, 281 N.E.2d 282 (1972); *Phipps v. Aptucxet Post #5988 V.F.W. Bldg. Assoc., Inc.*, 7 Mass. App. Ct. 928, 929, 389 N.E.2d 1042 (1979).

In *Phipps*, the plaintiff fell while attending a dance sponsored by the defendant and sustained injuries due to the dangerous condition of the defendant's parking lot. The parking lot was slippery and rutted with footprints and automobile tracks that had been frozen. The routine attendance at the dances averaged 140 people and it could be inferred that the parking lot would be traversed by pedestrians walking to and from their cars. There, the court concluded that a jury could "infer that the rutted condition of the parking lot at the time of the accident may have been caused by the ingress and egress of cars of visitors and could conclude that the defendant, in the exercise of reasonable care, knew or should have known of the hazardous condition of its parking lot and should have taken reasonable precautions for the safety of its visitors." *Phipps,* 7 Mass. App. Ct. at 929.

It has also been held that ice and snow which naturally accumulates can become an unnatural accumulation due to the passage of time. *Sullivan v. Town of Brookline*, 416 Mass. 825, 827, 626 N.E.2d 870 (1994). In this case, there is evidence that there was an eight day passage of time from when it began to snow until Ms. Bechara's fall, and a number of tire and footprint ruts were present in the area which could allow a jury to find an unnatural accumulation of snow and ice. The ice had been present long enough such that the passage of time changed its character from natural to unnatural. *Yanowitz v. Augenstern*, 343 Mass. 513, 514 (1962).

Advanced Tree was engaged by the landowner in this case to perform snow removal services at the property on January 21, 2001. Ms. Bechara's fall occurred on January 29, 2001, eight days after that snowfall of 11 inches. A jury properly could infer that the plowing contractor Advanced Tree had had sufficient time to clear the hazardous condition and to take reasonable precautions for the safety of travelers on the parking lot. *Intriligator v. Boston*, 18 Mass. App. Ct. 703, 705 (Mass. App. Ct. 1984).

C. *Defendant is Liable for Negligent Performance of its Plowing Contract*

It is well established that third parties who are foreseeably injured by a contractor's negligent performance of a contractual duty have a claim in tort against the contractor. *Parent v. Stone & Webster Eng'r Corp.*, 408 Mass. 108, 113-14, 556 N.E.2d 1009 (1990). "A defendant under a contractual obligation 'is liable to third persons not parties to the contract who are foreseeably exposed to danger and injured as a result of its negligent failure to carry out that obligation.'" *Id.*, quoting *Banaghan v. Dewey*, 340 Mass. 73, 80, 162 N.E.2d 807 (1959). "Negligence in manner of performing [a contractual] duty as distinguished from mere failure to perform it, causing damages, is a tort." *Abrams v. Factory Mut. Liab. Ins. Co.*, 298 Mass. 141, 144, 10 N.E.2d 82 (1937). Here, the contract required that Advanced Tree clear the parking lot of all natural accumulations equaling or exceeding two inches. All tenants of Glen Meadows were foreseeably exposed to the risk of injury arising from negligent performance of this contractual duty. Advanced Tree therefore owed Ms. Bechara the duty to exercise reasonable care in clearing snow from the walkways and parking lot. *Rolli v. Burlington Residences, LLC*, 18 Mass. L. Rep. 571 (Mass. Super. Ct. 2004).

Defendant Advanced Tree was negligent in its performance as follows:

1 It did not properly plow the parking lot to remove snow from the parking lot.

2 It did not engage in its usual practice of notifying tenants about moving their vehicles.

3 It did not complete the plowing operations, leaving the lot in a very dangerous condition. Defendant even had eight days to complete its tasks.

4 It did not notify Glen Meadows of any problems with tenants not moving their vehicles and interfering with plowing.

5 It left the parking lot in a condition that even Civitarese admitted was improper and dangerous to people walking in the lot.

Advanced Tree owed plaintiff a duty of reasonable care in the performance of its contractual obligation to plow and remove snow and ice. This case bears a striking resemblance to *Fiore v. Action Serv. Group*, 1998 Mass. Super. LEXIS 486 (Mass. Super. Ct. 1998). In that case, the court (Gershengorn, J.) ruled as follows:

> Plaintiffs have presented sufficient evidence to raise a question of fact as to whether Action performed its plowing obligations in a reasonable manner. Mr. Fiore testified that the ice chunks "looked like what the snowplow pushed up, pieces of debris everywhere" and that they looked like they had broken "off the edge of the plow [and] just settled down where they were and they were everywhere." Moreover, Kendra Scagliotti (now known as Kendra Zimiroski), a manager of Bradlees at the time of the subject accident, stated in an incident report she filed on February 5, 1995 that she inspected the parking lot immediately after the incident and that "snow from [the] plow built up to [the] left of [the] cleaned walkway." It is foreseeable that Action's negligent performance of its contractual duties to remove snow and ice from the parking lot, and impliedly the chunks falling from its plow, may have posed risks to business invitees traversing the lot.

CONCLUSION

In light of the foregoing, summary judgment is wholly inappropriate in this case, and defendant's motion should be DENIED.

Plaintiff,
By her attorneys,

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