COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT
C.A. NO.: 99-1759A

STEVEN SIGEL	)
Plaintiff	)
	)
v.	)
	)
THOMAS J. FLATLEY d/b/a	)
THE FLATLEY COMPANY and	)
ZURICH U.S. /ZURICH AMERICAN	)
INSURANCE GROUP,	)
Defendant	)

DEFENDANT THOMAS J. FLATLEY D/B/A THE FLATLEY COMPANY'S MOTION FOR SUMMARY JUDGMENT

Now comes the defendant Thomas J. Flatley, d/b/a The Flatley Company ("Flatley") and respectfully moves for summary judgment. The plaintiff alleges that he slipped on ice on steps leading from his apartment building. Summary judgment should be granted on his allegations of negligence and breach of statute because the plaintiff's own testimony shows that he slipped on a natural accumulation of ice for which Flatley cannot be held liable. Summary judgment should be granted on allegations of breach of contract because there was no contract between the plaintiff and Flatley by which Flatley can be held liable.

In further support of this motion, Flatley relies on its attached memorandum of law.

THE DEFENDANT,
Thomas J. Flatley d/b/a The Flatley Company,
BY ITS ATTORNEY,

Date: _____

_____
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ZURICH U.S. /ZURICH AMERICAN	)
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Defendant	)

DEFENDANT THOMAS J. FLATLEY D/B/A THE FLATLEY COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The defendant Thomas J. Flatley, d/b/a the Flatley Company ("Flatley") respectfully moves for summary judgment. The plaintiff alleges that he slipped on ice on steps leading from his apartment building. Summary judgment should be granted on the plaintiff's allegations of negligence and breach of statute because the undisputed evidence, including the plaintiff's own testimony, shows that the ice on which the plaintiff slipped was a natural accumulation for which Flatley cannot be liable. Summary judgment should be granted on allegations of breach of contract because there was no contract between Flatley and the plaintiff by which Flatley can be held liable in this action.

UNDISPUTED FACTS

For the purposes of this motion, the following facts are undisputed:

The plaintiff alleges that on December 31, 1996, he was a tenant of Royal Crest Estates, owned and managed by Flatley. He alleges that Flatley shoveled snow from the stairs of the

plaintiff's building, left a film of moisture on the stairs, and did not salt or sand the area. As a result, a thin sheet of ice formed on the stairs. (See complaint, attached as Exhibit 1, at para. 7.) The plaintiff slipped on the ice on the stairs. (See complaint at para. 8.) The plaintiff has alleged against Flatley negligence; breach of quiet enjoyment/G.L. c. 186; and breach of contract/promissory estoppel. (See complaint at Counts I, II, and III.)

The plaintiff moved into Royal Crest Estates in approximately September, 1995. (See transcript of plaintiff's deposition, attached as Exhibit 2, at pp. 7-8.) He does not recall having any discussion with Royal Crest Estates personnel regarding their snow removal policies. (See transcript of plaintiff's deposition at pp. 7-8.) More specifically, he has no recollection of such a discussion prior to his alleged accident on December 31, 1996. (See transcript of plaintiff's deposition at p. 30.) He never received anything in writing from Flatley regarding a snow-removal policy. (See transcript of plaintiff's deposition at p. 163.) His lease did not include any agreement regarding snow removal. (See lease, attached as Exhibit 3.)

At least several inches of snow fell on December 31, 1996. (See transcript of plaintiff's deposition at p. 39.) The plaintiff arrived home from work at around 2:00 PM. (See transcript of plaintiff's deposition at p. 159.) As the plaintiff walked into his apartment building two or three people were removing snow from the sidewalk leading to the building. (See transcript of plaintiff's deposition at pp. 41-42.) They had not yet finished

shoveling the stairs leading to the building. (See transcript of plaintiff's deposition at p. 44.) The stairs had an accumulation of white snow on them where they had not yet been shoveled. (See transcript of plaintiff's deposition at p. 160.)

The plaintiff's then-girlfriend, Michelle Tousignant, arrived at the apartment shortly after the plaintiff. (See transcript of Michelle Tousignant's deposition, attached as Exhibit 4, at p. 27.) On her way to Royal Crest Estates Ms. Tousignant drove through a snowstorm which made the roads "very poor." (See transcript of Michelle Tousignant's deposition at p. 30.) When she arrived at the apartment it was still flurrying. (See transcript of Michelle Tousignant's deposition at p. 31.) The sidewalk leading to the plaintiff's apartment had been shoveled. Two or three people were still shoveling the top half of the stairs. (See transcript of Michelle Tousignant's deposition at p. 33-34.) The bottom half of the stairs, which had been shoveled, were not slippery, but they were wet. (See transcript of Michelle Tousignant's deposition at p. 34.)

When the plaintiff left the building at 3:00 PM, approximately an hour after he arrived, and fifteen minutes to half an hour after Ms. Tousignant arrived, the stairs had been shoveled. (See transcript of plaintiff's deposition at p. 53, 160; transcript of Michelle Tousignant's deposition at p. 67-68.) There was no snow on the stairs. (See transcript of plaintiff's deposition at p. 53.) Snow had also been removed from the landing, although there may have been a little bit remaining. (See transcript of plaintiff's deposition at p. 53.) The snow had

either completely stopped or was very light. (See transcript of plaintiff's deposition at p. 57-58.) Ms. Tousignant described it as "spitting flurries." (See transcript of Michelle Tousignant's deposition at p. 38.)

As he left the building, the plaintiff noticed that the landing was "extraordinarily slippery." (See transcript of plaintiff's deposition at p. 48.) He warned Ms. Tousignant to be careful because it was so slippery. (See transcript of plaintiff's deposition at p. 48.) The plaintiff stated that the ice "wasn't very thick because presumably it was caused by the left remnants of shoveling. It leaves a little film of water which freezes over." (See transcript of plaintiff's deposition at p. 54.) He stated again that the ice "came from the shoveling of the snow leaving moisture which then froze, and nobody putting any sand on it to prevent it from turning to ice." (See transcript of plaintiff's deposition at p. 55.) The plaintiff slipped on the ice and fell.

After the alleged accident the plaintiff and Ms. Tousignant drove to the office of Royal Crest Estates. Flatley employee Stephanie Jones, the manager of Royal Crest Estates, told that plaintiff that "they had shoveled the stairs, but they had gone on a break of some sort, and they were going to go back and sand later.[1]" (See transcript of plaintiff's deposition at p. 66.)

The plaintiff alleges that Ms. Jones offered to pay his medical expenses. However, he denies that this was in exchange

[1] Ms. Jones denies saying this. She states that sanding was inappropriate because they had shoveled to pavement and it was

for his continued tenancy. (See transcript of plaintiff's deposition at p. 81.)

ARGUMENT

Summary judgment should be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community National Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56c. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the moving party is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). Where the party moving for summary judgment does not have the burden of proof at trial, this burden may be met by either submitting affirmative evidence that negates an essential element of the opponent's case, or by "demonstrating that proof the at that element is unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a material fact in order to defeat the motion. Pederson, supra at 17.

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still snowing, so sand would make the situation worse.

I. SUMMARY JUDGMENT SHOULD BE GRANTED ON COUNT I OF THE COMPLAINT BECAUSE THE PLAINTIFF SLIPPED ON A NATURAL ACCUMULATION OF ICE, AND FLATLEY DID NOT BREACH ANY CONTRACT WITH THE PLAINTIFF.

In Count I of the complaint, the plaintiff alleges that Flatley owed him a duty pursuant to "common law, contract, and statute," to keep the stairs of the premises free of ice and snow. In fact, Flatley breached no common law or statutory duty, because the plaintiff slipped on a natural accumulation of ice. It breached no contractual obligation because Flatley had no contract with the plaintiff in which it undertook to remove snow and ice.

A. Flatley cannot be held liable for negligence because the plaintiff slipped on a natural accumulation of ice.

A property owner owes a duty of reasonable care to people on its premises. Mounsey v. Ellard, 363 Mass. 693, 707-708 (1973). This duty of reasonable care is not violated by a failure to remove a natural accumulation of ice or snow. Anderson v. Fox Hill Village Homeowners Corp., 424 Mass. 365, 369 (1997); Sullivan v. Brookline, 416 Mass. 825, 827 (1994). Ice which is uncovered by shoveling snow off a ramp leading to a doctor's office is a natural accumulation for which liability does not attach. Sullivan v. Brookline, supra. Similarly, snow which is shoveled from a walkway and then melts to form ice is a natural accumulation for which there is no liability. Id. at 828; Mahoney v. Perreault, 275 Mass. 251, 252-253 (1931); Gamere v. 236 Commonwealth Avenue Condominium Association, 19 Mass. App. Ct. 359, 362 (1985), rev. den. 394 Mass. 1103 (1985).

Here, by the plaintiff's own testimony, he slipped on ice which was created when snow was shoveled off the stairs, and a small remaining sheet of water froze into a thin layer of ice. The case law is explicit that such ice is a natural accumulation for which Flatley cannot be held liable.

B. Flatley cannot be liable for a breach of a contractual duty, because it had no contract with the plaintiff to remove ice and snow.

Flatley did not owe any contractual duty to the plaintiff with respect to ice and snow on the stairs. The lease contained no provisions regarding snow removal, and the plaintiff testified that he never had any communications with Flatley regarding its snow removal policies. In the absence of an express or implied agreement a landlord is under no obligation to remove natural accumulations of snow and ice on common passageways. Spack v. Longwood Apartments, Inc., 338 Mass. 518, 519 (1959). A gratuitous undertaking by a landlord to remove ice and snow imposes no liability for ordinary negligence. Id. Further, a landlord's habit of removing ice and snow does not impose liability for a natural accumulation. Id.

As Flatley had no contract with the plaintiff to remove ice and snow, Flatley cannot be held liable for breach of contract for failing to do so.

C. Flatley cannot be held liable for breach of any statute, because the ice was a natural accumulation.

Finally, in Count I the plaintiff alleges that Flatley owed a duty pursuant to some unspecified statute to remove the ice on the stairs. As the plaintiff does not state what statute Flatley

allegedly breached, Flatley cannot respond specifically to this allegation. However, the case law is clear that failure to abide by an ordinance requiring property owners to remove ice and snow does not give rise to liability to someone who slips and falls. Gamere v. 236 Commonwealth Ave. Condominium Ass'n, 19 Mass. App. Ct. 359, 361-362 (1985), rev. den. 394 Mass. 1103 (1985). As the plaintiff slipped on a natural accumulation of ice, Flatley cannot be held liable for violation of any statute or ordinance in connection with this.

II. FLATLEY CANNOT BE HELD LIABLE FOR BREACH OF QUIET ENJOYMENT PURSUANT TO G.L. C. 186 BECAUSE FAILURE TO REMOVE A NATURAL ACCUMULATION OF ICE IS NOT A VIOLATION OF THIS STATUTE.

In Count II of his complaint, the plaintiff alleges breach of quiet enjoyment pursuant to G.L. c. 186, s. 14. However, there can be no breach of this statute absent negligence. McAllister v. Boston Housing Authority, 429 Mass. 300, 301 (1999) (holding that as a matter of law there was no breach of G.L. c. 186, s. 14 or breach of quiet enjoyment when plaintiff slipped and fell on ice that had accumulated on her landlord's exterior stairs, as there was no showing of negligence). As Flatley was not negligent in failing to remove a natural accumulation of ice, it cannot be held liable for breach of quiet enjoyment.

III. FLATLEY CANNOT BE HELD LIABLE FOR BREACH OF CONTRACT OR PROMISSORY ESTOPPEL BECAUSE THE PLAINTIFF DID NOT REMAIN AT ROYAL CREST ESTATES IN CONSIDERATION OF ANY PROMISE BY FLATLEY REGARDING HIS ALLEGED ACCIDENT.

In count III of the complaint, the plaintiff alleges that in consideration for the plaintiff's continued tenancy and payment of rent, Flatley promised to pay his medical expenses; that the

plaintiff relied on the promise; and that Flatley refused to pay such medical expenses. However, at the plaintiff's deposition he denied that he had ever entered into any such agreement with Flatley. The following colloquy took place:

> Q. Did you ever have any conversation with anyone from Flatley in which you agreed that you would continue to be an tenant at Royal Crest estates in exchange for Flatley paying your medical expenses?
> A. No. I never had such a conversation.
> Q. …Did you have any intention of leaving Royal Crest Estates if Flatley did not pay your medical expenses?
> A. I don't think that one thing had anything to do with the other.

(See plaintiff's deposition at p. 81.)

As the plaintiff never entered any agreement with Flatley that he would remain as a tenant in consideration for Flatley paying his medical bills, Flatley cannot be held liable for breach of contract or promissory estoppel.

CONCLUSION

Summary judgment should be granted because the plaintiff slipped on a natural accumulation of ice for which Flatley cannot be held liable in negligence or for breach of any statute. Summary judgment should also be granted on allegations of breach of contract because Flatley had no contract with the plaintiff by which it agreed to remove ice and snow, or by which the plaintiff agreed to remain a tenant in consideration for Flatley paying his medical expenses.

WHEREFORE, Flatley respectfully requests that the court grant this motion for summary judgment.

THE DEFENDANT,
Thomas J. Flatley d/b/a The Flatley Company,
BY ITS ATTORNEYS,

DATED:

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