NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1352-12T2

CUIYUN QIAN,

Plaintiff-Appellant,

v.

TOLL BROTHERS INC., INTEGRA MANAGEMENT CORP., THE VILLAS AT CRANBURY BROOK HOMEOWNERS ASSOCIATION,

Defendants-Respondents,

and

LANDSCAPE MAINTENANCE SERVICES,

Defendant.

Argued November 12, 2013 – Decided February 7, 2014

Before Judges Yannotti, Ashrafi and Leone.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-9867-09.

Randi S. Greenberg argued the cause for appellant (Stathis & Leonardis, L.L.C., attorneys; Ms. Greenberg, on the brief).

Matthew J. Tharney, argued the cause for respondents (McCarter & English, L.L.P., attorneys; Mr. Tharney, of counsel and on the brief; Natalie S. Watson and Ryan A. Richman, on the brief).

PER CURIAM

This is a sidewalk slip-and-fall case in which plaintiff appeals summary judgment in favor of defendants based on the Supreme Court's confirmation of the dichotomy between residential and commercial properties in Luchejko v. City of Hoboken, 207 N.J. 191 (2011). Plaintiff contends we should not apply the holding of Luchejko to the facts of this case because the place where plaintiff fell was on an interior sidewalk in a private residential community rather than a sidewalk abutting a publicly-controlled street. We do not read Luchejko as making the distinction plaintiff seeks, and so, we affirm dismissal of plaintiff's complaint.

I.

Viewed most favorably to plaintiff as the party opposing summary judgment, see R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), the record reveals the following facts and procedural history.

Plaintiff and her husband lived in a single-family home at The Villas at Cranbury Brook, an adult residential community in Plainsboro. Their son was the record owner of their home. The adult community consists of at least one hundred dwellings owned

in fee simple by each unit owner.[1] There are no retail or commercial uses in the development.

Between 3:00 and 11:00 a.m. on December 21, 2008, freezing rain fell and caused ice to accumulate on sidewalks. Plaintiff and her husband came out of their home about one hour after the rain stopped, and they walked to a food market. Plaintiff was aware of and concerned about the icy conditions. On the walk back to their home, plaintiff slipped and fell on an icy patch of an interior sidewalk within the boundaries of the residential community and directly in front of one of the homes. She suffered injuries as a result of her fall.

Defendant Cranbury Brook Homeowners Association (the Association) operates as a not-for-profit organization, and it owns and controls the common areas of the residential community, including the sidewalk where plaintiff fell. Each owner of one of the fee simple homes is automatically a member of the Association. The Association hired defendant Integra Management Corp. to perform its day-to-day management operations. At the time of plaintiff's fall, three of the five board members who governed the Association were appointed by defendant Toll

[1] Our record does not reveal the specific number of homes in the development. The offering statement indicates that 102 single-family homes were planned, and that up to 195 residential units could be built on the 40-acre property.

Brothers Inc., the developer of the residential community. Toll Brothers, however, did not own or have responsibility for maintenance of the property.

The Association's bylaws require its board to maintain the common areas of the community. One purpose of the maintenance fees the Association collects from its members is to clear the streets and sidewalks of the community when snow or ice accumulates. The Association contracted with defendant Landscape Maintenance Service (LMS) to perform snow and ice removal services. As part of its duties, LMS agreed to keep all common sidewalks "reasonably clear from ice" when there had been two or more inches of snow accumulation. The Association needed to request additional snow or ice removal services from LMS if there was less than two inches of accumulation.

On the day before plaintiff's accident, LMS cleared the streets after a snowstorm, which was accompanied by freezing rain and ice. LMS did not remove ice from the sidewalks at that time. On the day plaintiff fell, the accumulation of freezing rain was less than two inches. LMS did not provide any remediation services that morning, and the Association and Integra Management did not request that LMS perform any such remediation. No one had salted the sidewalks on the day that plaintiff and her husband walked to the food market. On

December 22, 2008, the day after plaintiff fell, LMS applied a melting agent to the sidewalks, but not because defendants had been notified of plaintiff's fall. Plaintiff communicated with the Association about her injuries approximately two weeks after the accident.

Plaintiff filed her personal injury complaint in December 2009. After discovery was concluded, all defendants moved for summary judgment. The trial court denied summary judgment to LMS but granted it to the other defendants. LMS and plaintiff subsequently reached a settlement.

While the summary judgment motions were pending, plaintiff filed a motion to enforce a purported settlement with defendant Association. The Association filed opposition, stating that plaintiff had earlier rejected its settlement offer by making a counteroffer and that the Association had then withdrawn its offer. The trial court denied plaintiff's motion to enforce a settlement with the Association.

Plaintiff now appeals from the orders granting summary judgment to defendants and denying its motion to enforce a settlement.

II.

Historically, New Jersey property owners did not have a duty under the common law to maintain sidewalks on their lands

that abutted public streets and roadways and were used by the public. Yanhko v. Fane, 70 N.J. 528, 537 (1976). Similarly, property owners had no duty at common law to clear the snow and ice from public sidewalks. See Davis v. Pecorino, 69 N.J. 1, 4 (1975). In 1981, the State Supreme Court revised the common law and imposed a duty only upon commercial property owners to maintain public sidewalks adjacent to their business property in a "reasonably good condition." Stewart v. 104 Wallace Street, Inc., 87 N.J. 146, 157 (1981). Two years later, the Court held that the common law duty of commercial property owners includes an obligation to act reasonably in removing snow and ice "after actual or constructive notice" of the hazardous condition of the sidewalk. Mirza v. Filmore Corp., 92 N.J. 390, 395 (1983). Later, the Court extended these duties to a not-for-profit private school that owned the abutting sidewalk on which a plaintiff had fallen. Brown v. St. Venantius School, 111 N.J. 325, 338 (1988).

In 1999, the Court considered whether a municipality was entitled to the benefit of the common law immunity applicable to private residential property owners for injuries to a pedestrian. Norris v. Borough of Leonia, 160 N.J. 427, 429 (1999). Stating that the common law immunity had evolved over the years, the Court extended to municipalities and other public

entities the duty to maintain public sidewalks and street curbs in accordance with the requirements and limitations of the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3. Norris, supra, 160 N.J. at 442, 446. At the same time, the Court noted and did not disturb the absolute immunity previously granted to public entities for their snow removal activities. Id. at 439, 442 (citing Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 402, 405 (1988)).

In Stewart, supra, 87 N.J. at 159 n.6, the Court had expressly declined to reach the question of whether the duty to maintain a sidewalk should also be imposed on residential property owners. In the thirty-three years since Stewart was decided, the judicial distinction drawn between residential and other types of properties has remained intact. See, e.g., Norris, supra, 160 N.J. at 442 n.2; Nash v. Lerner, 157 N.J. 535 (1999); Lodato v. Evesham Twp., 388 N.J. Super. 501, 507 (App. Div. 2006); Smith v. Young, 300 N.J. Super. 82, 85-86 (App. Div. 1997).

In Luchejko, supra, 207 N.J. at 195, the Court expressly declined to depart from these precedents and to impose sidewalk maintenance duties on an association of residential property owners that was responsible for maintenance of the common areas of the property. The Court placed the condominium owners

association on the residential side of the common law distinctions established in the case law. Id. at 196-97, 211. The Court rejected the plaintiff's assertion that a homeowners association was more like a commercial or other organizational property owner in its responsibilities to the public and its ability to spread the costs of maintaining a public sidewalk. Id. at 206-08. Instead, the Court focused on the residential "use" of the property, id. at 207, and reconfirmed "[t]he commercial/residential dichotomy." Id. at 208. The Court said prior judicial analyses had made "a fundamental choice not to impose sidewalk liability on homeowners." Ibid.

Plaintiff in this case argues that the holding of Luchejko does not apply because she was injured while walking on a sidewalk located within the 40-acre residential community rather than on a sidewalk abutting a public roadway. Plaintiff emphasizes that defendants were responsible by statute, N.J.S.A. 46:8B-14(a), and by the Association's bylaws for maintaining all common areas of the property, that they collected a maintenance fee to do so, and that they were required to and did obtain liability insurance to protect against claims arising out of the public's use of the common areas, see N.J.S.A. 46:8B-14(e).

Plaintiff's focus is not unreasonable with respect to the factual difference between Luchejko and this case as to the

specific location of plaintiff's fall, but we cannot find that distinction to have been made in or to follow clearly from the Supreme Court's analysis and holding in Luchejko. Here, as in Luchejko, the owner of the residential property had a duty imposed by law to clear snow and ice from the sidewalk where plaintiff fell. The legal duty in this case derives from the statutory obligation of the Association to maintain common areas of the community, N.J.S.A. 46:8B-14(a), while the legal duty in Luchejko was imposed by municipal ordinance, Luchejko, supra, 207 N.J. at 199. Yet in Luchejko, the duty imposed by ordinance did not equate to a civil tort duty and liability to an injured party. Id. at 200 (citing Fielders v. N. Jersey St. Ry. Co., 68 N.J.L. 343, 352 (E. & A. 1902)); see also Brown, supra, 111 N.J. at 335 ("well-settled principle that municipal ordinances do not create a tort duty, as a matter of law"); Lodato, supra, 388 N.J. Super. at 507 (same).

The Association in this case had similar powers and duties as the condominium owners association in Luchejko – to collect maintenance fees and to use the funds to maintain commonly-owned or controlled property. Yet the Court in Luchejko declined to impose a tort duty on the association.

Plaintiff argues that the Association in this case obtained liability insurance to cover accidents like hers, and that

absolving it of a duty to maintain the sidewalks creates a disincentive to provide insurance protection for the benefit of innocent injured persons. In Luchejko, however, the Court considered a similar argument and stated that "the possibility that liability insurance in sufficient amounts might be purchased by residents of a condominium organization does not eliminate the potential that a large enough liability verdict could pose the risk of a person losing what is likely his or her largest asset: one's home." Luchejko, supra, 207 N.J. at 208.

To the extent that plaintiff relies on a contractual duty arising out of the Association's bylaws, or its fiduciary duty to its members imposed by statute, see N.J.S.A. 45:22A-44, -45, the bylaws also protect the Association against liability to its homeowner-members for the Association's own negligence resulting in personal injury. As authorized by N.J.S.A. 2A:62A-13, the bylaws provide that only willful, wanton or grossly negligent conduct by the Association can result in its liability to an injured homeowner. Here, nothing in plaintiff's evidence shows willful, wanton or grossly negligent conduct by defendants. Although plaintiff herself was not an owner or member of the Association, her claims based on the contractual or fiduciary duties of the Association are derivative of those of her son, who was the record owner of her home.

Plaintiff argues most forcefully that the interior sidewalks of a private residential community are different from an abutting public sidewalk, such as in Luchejko. As a factual matter, however, the interior sidewalks in this case were not confined to use by the homeowners and their guests and licensees. All members of the public had free access to the streets and sidewalks of the community. The interior sidewalks were publicly-used sidewalks just as the abutting sidewalk was in Luchejko. They functioned like the public sidewalks of any residential development. The Association had a duty to clear the interior sidewalks of ice and snow, but that duty is not conceptually different from its duty, or the duty of the association in Luchejko, to clear an abutting sidewalk used by the public.

Plaintiff cites cases from other jurisdictions in support of her contention that a tort duty should be imposed on the entity responsible to maintain the interior common areas of a residential community. Principally, plaintiff cites Schoondyke v. Heil, Heil, Smart & Golee, Inc., 411 N.E.2d 1168 (Ill. App. 1980), as a case with facts similar to this case and in which the court held that a condominium association was liable for injuries suffered by a pedestrian who slipped and fell on a sidewalk. But the Illinois judicial decision was subsequently

superseded by legislation in that state that immunized property owners and others of any liability, except for willful or wanton conduct, if they had made any attempt to remove snow and ice from the public sidewalk. See Divis v. Woods Edge Homeowners' Ass'n, 897 N.E.2d 375, 376-77 (Ill. App. 2008) (citing 745 Ill. Comp. Stat. 75/2). The Illinois court suggested that the homeowners association's entering into a snow and ice removal contract would confer immunity under the statute to the association and its management agent. Id. at 377. So the Illinois case law is not helpful to plaintiff in pursuing her claim against defendants. The Association had entered into a contract with LMS to clear its street and sidewalks of snow and ice.

We are also aware that the original justification in the common law for immunizing private property owners was that sidewalks were for the use of the general public and that the governmental entities that built or controlled them should bear responsibility for maintaining them, using public funds. See Norris, supra, 160 N.J. at 431. Here, a governmental entity did not build or control the interior sidewalks of the property.

However, sovereign immunity initially absolved governmental entities from liability for sidewalk accidents on government property. Id. at 432. And when the Tort Claims Act restored

the potential for the liability of governmental entities, it did so with the substantial restrictions of that legislation. See id. at 441. For example, N.J.S.A. 59:4-2 requires that an injured party prove the governmental entity's failure to correct the hazardous condition of its property was not just negligent but, in fact, "palpably unreasonable." Most important, public entities are immune from liability for injury caused solely by weather conditions affecting the use of streets or highways, N.J.S.A. 59:4-7, and also for their actions or omissions in snow and ice removal activities, see Rochinsky, supra, 110 N.J. at 402. Consequently, a person injured by a fall on ice or snow on a sidewalk located on property controlled solely by a governmental entity, although innocent of negligence herself, may have limited recourse in the civil courts.

Here, the Association functions in a governing capacity for a small group of homeowners, just as a municipal government does for all its residents and taxpayers. As stated by the Illinois appellate court in Klikas v. Hanover Square Condominium Association, 608 N.E.2d 541, 545 (Ill. App. 1992), appeal denied, 612 N.E.2d 514 (Ill. 1993): "While there is no common law duty for a municipality to clear ice and snow from its streets and sidewalks, a municipality may choose to clear sidewalks, not because they [sic] are liable in tort, but

because it is a service to the public." Similarly, a homeowners association performs a statutory and contractual duty to remove snow and ice from its publicly-used sidewalks and streets as a service to its homeowner-members and to the general public that may be lawfully using the common areas of the property. Indeed, as the most likely users of the interior sidewalks, the homeowner-members of the association have a strong incentive to prompt their association's board to contract for adequate snow and ice removal services. The common law, however, does not impose a duty that makes the association answerable in tort for negligent performance of its statutory and contractual duty.

If a private residential community is to be treated differently with respect to snow and ice removal on interior sidewalks than from abutting sidewalks, it is the Supreme Court's function to make the appropriate distinctions. We conclude that the trial court did not err in viewing this case as controlled by "[t]he commercial/residential dichotomy" that was reconfirmed by the Supreme Court in Luchejko, supra, 207 N.J. at 208.

As the agent of the Association, defendant Integra Management Corp. had no greater duty to the general public or the residents of the community than did the Association. See

id. at 211-12. Summary judgment was correctly granted to it dismissing plaintiff's complaint.

We also find no merit in plaintiff's appeal of the order for summary judgment granted to Toll Brothers. Plaintiff did not produce any evidence of negligence in the design or construction of the sidewalk. At the time of the summary judgment motions, plaintiff only alleged negligence of all the defendants in failing to remove ice, which Toll Brothers had no duty to do. Toll Brothers did not own or control the property at the time of plaintiff's accident. It had conveyed the property by deed to the Association eight months earlier, on April 22, 2008. Toll Brothers had no independent duty to maintain the sidewalks, whether or not members of the Association's board had been appointed by Toll Brothers as part of the transition of control of the Association to the homeowners.

We conclude that summary judgment was correctly granted to all three respondent-defendants in accordance with the holding of Luchejko.

III.

Plaintiff also appeals from the trial court's denial of her motion to enforce a purported settlement with the Association, which was also acting on behalf of Integra Management and Toll

Brothers. The trial court determined that plaintiff rejected defendants' offer and that defendants also validly withdrew the offer before plaintiff attempted to accept it. We agree with the trial court's findings and conclusions.

The relevant facts are as follows. After oral argument on the summary judgment motions, defense counsel made an offer to plaintiff's counsel to settle the case for a substantial sum. Defense counsel said the offer would stay open until the disposition of the motion for summary judgment. Seeking a "global" settlement, plaintiff's counsel responded in part:

> [The attorney for co-defendant LMS] is willing to try and get additional authority to get the entire case settled. I am told he can't do so with your [subrogation] claim being an issue. I think we can get the entire case settled based on my call with him but he can't get additional authority without your confirmation that the [subrogation claim] goes away.

After this communication, counsel agreed to speak further. The next day, defense counsel withdrew the offer. Plaintiff's counsel then faxed a letter to defense counsel accepting the offer. Defense counsel rejected the acceptance.

The issue before us involves the law of contracts. An offer to enter into a contract is freely revocable unless an accompanying promise to hold the offer open is itself supported by consideration. See Friedman v. Tappan Dev. Corp., 22 N.J.

523, 531-34 (1956); Corbin on Contracts § 2.18 (Perillo rev. 1993). Here, defendants promised that the settlement offer would remain open until the court issued a ruling on the summary judgment motion, but plaintiff gave no consideration for that promise. Defense counsel's offer to settle for a certain sum was freely revocable.

In addition, the response of plaintiff's counsel we have quoted was a counteroffer with additional terms, namely, defendants' abandonment of any subrogation claim they may have had against LMS. Such a counteroffer constitutes rejection of defendants' original offer. Berberian v. Lynn, 355 N.J. Super. 210, 216-17 (App. Div. 2002), aff'd in part, modified in part, 179 N.J. 290 (2004); 1 Williston on Contracts § 5.3 (4th ed. 2007). The parties never reached a meeting of the minds and therefore did not enter into a contract to settle the case.

Finally, we reject without discussion plaintiff's argument that defendants should be estopped under the doctrines of equitable or quasi-estoppel from withdrawing their offer to settle the matter because settlements are favored by the courts. R. 2:11-3(e)(1)(E).

Affirmed.

LEONE, J.S.C. (temporarily assigned), concurring.

In joining in the court's well-reasoned opinion, I find important the nature of the sidewalk on which plaintiff fell. The sidewalk runs alongside Warren Street, near the intersection with Monmouth Street. Photographs show the sidewalk has houses and yards on one side. On the other side, the sidewalk is separated only by a narrow strip of ground from the roadway, which is marked with street signs and a pedestrian crossing sign. The street and sidewalk look like the public streets and public sidewalks that run through innumerable residential neighborhoods.

In this instance, however, the sidewalk and streets were constructed by Toll Brothers within forty acres of private property owned by that private developer. Toll Brothers deeded to the Association Warren Street, Monmouth Street, and other streets within the development as private roads. It is undisputed that the Association privately owns the sidewalk on which plaintiff fell. It is conceded that the Association is obligated to maintain the sidewalk both because it is part of the common property under the Association's declaration and bylaws, and because it is a common element under the Condominium Act, N.J.S.A. 46:8B-1 to -38. N.J.S.A. 46:8B-14(a). The Association similarly was required to and did obtain liability

insurance covering those common areas and elements under the bylaws and N.J.S.A. 46:8B-14(e). See N.J.S.A. 46:8B-3(d)(viii) (providing that elements designated as common elements in the master deed are common elements under the Condominium Act).

Plaintiff contends those facts distinguish this case from Luchejko v. City of Hoboken, 207 N.J. 191 (2011). In Luchejko, our Supreme Court addressed whether a "condominium complex is liable in tort for injury sustained by a pedestrian on its abutting public sidewalk." Id. at 195. The Court noted that "at common law, property owners had no duty to clear the snow and ice from public sidewalks abutting their land." Id. at 201 (citing Davis v. Pecorino, 69 N.J. 1, 4 (1975)). The Court stressed that this common law rule, "which survives today for residential property owners, reflects the societal interest in encouraging people to clear public sidewalks and the inequity of imposing liability on those who voluntarily do so." Ibid. By contrast, the Court had "held that it would be fair for commercial landowners to be held responsible for maintaining abutting public sidewalks." Id. at 195 (citing Stewart v. 104 Wallace St., Inc., 87 N.J. 146 (1981)).

In rejecting liability for a public sidewalk abutting a public highway and a condominium building, the Court in Luchejko declined to depart from "a line of decisions that has promoted

settled expectations on the part of residential property owners." Id. at 208. That line of decisions, including Davis, Stewart and Luchejko, involved public sidewalks. E.g., Brown v. Saint Venantius Sch., 111 N.J. 325, 327 (1988); Cogliati v. Ecco High Frequency Corp., 92 N.J. 402, 404 (1983); Mirza v. Filmore Corp., 92 N.J. 390, 392 (1983); Yanhko v. Fane, 70 N.J. 528, 534 (1976); Nash v. Lerner, 311 N.J. Super. 183, 187 (App. Div. 1998), rev'd on dissent, 157 N.J. 535 (1999); see Norris v. Borough of Leonia, 160 N.J. 427, 443-46 (1999); id. at 449 (O'Hern, J. concurring). Indeed, the Court traced the source of the rule to the common law doctrine that "the primary responsibility for the maintenance of [public streets and] sidewalks was placed on the government." Stewart, supra, 87 N.J. at 153-54.[1]

Of course, the law recognizes a difference between "individuals who have been injured due to the conditions on the public sidewalk as opposed to private property." Cogliati, supra, 92 N.J. at 415 n.6. "The status of the injured as trespasser, licensee, social invitee or business invitee has been a determinant in defining the owner's duty on private

[1] Cf. Twp. of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 77 (App. Div. 2011) ("A municipality has no maintenance obligation with respect to private roads.").

property; such delineation is irrelevant with respect to the pedestrian on the public sidewalk." Ibid.

Here, we have a sidewalk that is on private property. Plaintiff urges that this sidewalk is not a public sidewalk, but merely an interior walkway.

We need not decide whether a condominium association's interior walkway which abuts neither a public street nor a private road is treated as a public sidewalk or as private property.[2] This case instead involves a sidewalk adjacent to a roadway, which is substantially similar to the public sidewalk adjacent to a public street involved in Luchejko. Defendants certify that the sidewalks and streets within the development are used by the public, including non-residents. Further, the developer's public offering statement indicated that Toll Brothers had made a request to the township that "the internal streets of the Common Property upon their completion" become "subject to an easement for the enforcement of [the] motor

[2] It is interesting to note that Condominium Act requires that "walkways . . . [not] specifically reserved or limited to a particular unit or group of units" be treated as common elements, like an association's "yards, gardens, . . . parking areas and driveways," and indeed like its land, "roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access," all of which the association is required to maintain and insure. N.J.S.A. 46:8B-3(d)(i)-(iii), -14(a), -14(e).

vehicle and traffic regulation under Title 39," N.J.S.A. 39:1-1 to 9-4.[3]

Unlike Luchejko, here the sidewalk is the Association's property, and is adjacent to an apparently private road. These differences may implicate the applicability of the traditional common law duties of private property owners. However, given our Supreme Court's unequivocal reaffirmation of the "commercial/residential dichotomy," Luchejko, supra, 207 N.J. at 208-11, I agree with my colleagues that it is not for this court to disturb that dichotomy here.

[3] It was suggested at oral argument that the streets subsequently may have been deeded to the township, but no evidence of deeding or dedication of the streets to the township was before us or the Law Division.