13

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 13-02934

CATHERINE ERICKSON

vs.

ROSALIE A. CUNIO & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (PAPER #9)

INTRODUCTION

This action arises out of a slip and fall accident, which occurred on February 21, 2013, when the plaintiff, Catherin Erickson ("Erickson"), slipped and fell on ice that had formed in the driveway of property she rented in Watertown, Massachusetts, from the defendants, Rosalie A. Cunio ("Cunio"), Jason Cunio, and Christopher Cunio. On July 9, 2013, Erickson filed the current suit asserting claims for negligence (Count I) and for breach of the implied warranty of habitability (Count II). This matter is currently before the court on Cunio's Motion for Summary Judgment (Paper #9).[2] For the reasons explained below, the Motion for Summary Judgment will be **DENIED**.

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[1] Jason J. Cunio and Christopher J. Cunio

[2] Jason Cunio and Christopher Cunio do not appear to have joined in Rosalie Cunio's Motion for Summary Judgment.

BACKGROUND

The undisputed facts, and the disputed facts viewed in the light most favorable to Erickson, as the non-moving party, are as follows. See *Attorney Gen. v. Bailey*, 386 Mass. 367, 371 (1982).

Rosalie Cunio, Jason Cunio, and Christopher Cunio each own an undivided one-third interest in a two-unit rental property located at 40-42 Fuller Road, in Watertown, Massachusetts (the "Property"). In September 2007, Erickson and Leigh Dalton ("Dalton") rented the Property's second floor unit while Laurie Phoenix ("Phoenix") rented the first floor unit. Throughout Erickson's tenancy, Cunio retained responsibility for maintaining the Property's common areas and for paying the Property's water usage charges. At various times during Erickson's tenancy, she and/or Dalton complained to Cunio about driveway drainage problems, gutter downspout issues, and snow and ice removal concerns.

The Property's driveway has a long, steep, downward slope from the street, which is located up grade. At the bottom of the driveway, there is a drain, a two-car garage, and a water faucet/spigot attached to the house near the garage. The driveway is pitched so that water runs towards the drain. In August 2011, Erickson told Cunio the drain was not working properly. Erickson told Cunio that, after rain events, a large puddle of water (approximately ten by eight feet) would regularly form on the low-lying part of the driveway in front of the garage for 40 Fuller Road and that, it usually took days for this puddle to drain.

In August 2012, Cunio hired Richard S. Carbone ("Carbone") of Sunshine Landscaping to replace the drain in the area where the puddle of water formed. He had more than twenty-five

years of experience working on drainage projects. Cunio asked Carbone to "look at and give . . . his opinion on how to fix the drain problem." *J.A., Ex. 5, Carbone Depo., p. 13.*

When Carbone dug up the old drain, he noticed that there was a broken clay pipe attached to the drain and that the soil in the area contained a lot of clay. He showed Cunio the clay under the driveway and advised Cunio that the safest way to fix the drain to run underground piping to direct the water to an exit point somewhere away from the problem area. Instead of following this recommendation, Cunio chose to have Carbone remove the existing drain and replace it with a bigger drywell. Carbone dug a large hole (approximately six by four feet) and filled it with an inch and a half of stone; the hole was sufficient to hold five hundred or a thousand gallons of water. Carbone testified that this was "overkill" for a homeowner, *J.A., Ex. 5, Carbone Depo., p. 20*; however, Cunio did not tell him that the Property had two sump pumps running to keep water out of the basement. Carbone testified that, if he had known about the sump pumps, he would have addressed the drain problem "differently." He testified he would have recommended building the drain to exit into the backyard and, further, that he "wouldn't have done the work," if Cunio chose not to follow his recommendation. *J.A., Ex. 5, Carbone Depo., pp. 131-133.*

A few weeks after Carbone finished replacing the drain, in early September 2012, Dalton notified Cunio the work performed did not fix the drainage problems. Dalton told Cunio that water was still collecting at the bottom of the driveway. Cunio did nothing more about the drain.[3]

[3] Cunio disputes this assertion. Cunio claims that, after Dalton complained about the drain still not working, she called Carbone and asked him to address the issue. According to Cunio, Carbone went to the Property, looked at the drain, and reported it was working fine. *J.A., Ex. 4, Cunio Depo., p. 100.* Carbone states that, after he was

Erickson reported other water-related concerns to Cunio. First, prior to February 2013, Cunio had not cleaned the gutters since spring 2011. When Erickson complained about the way the downspouts faced, Cunio asked Gary Rizzuto ("Rizzuto"), the handyman Cunio typically hired, to reconnect at least one disconnected downspout.[4] In addition to the disconnected downspout, at least one downspout specifically discharged water from the roof onto the base of the driveway.[5] *J.A., Ex. 2, Erickson Depo., pp. 200-201.* Finally, before winter 2012-2013, Cunio did not shut off the exterior water supply or drain the exterior pipes and pipe connections at the Property. Nor did Cunio ask the tenants to shut off the outside water supply for the winter.

On February 8, 2013, there was a snow storm that dropped a significant amount of snow on the Property. Snow from this storm piled up at the end of the driveway.[6] A few weeks later, it started to melt. Around this time, there was also some rainfall. Both the melting snow and the rain moved down the driveway toward the drain.

During the day on February 21, 2013, the outside faucet/spigot at the Property started spraying water. When Erickson returned to the Property at about 6:15 p.m. that night, she pulled into the driveway and saw water spraying from where the hose was connected to the faucet/spigot. Erickson did not know who turned the water on or how long the hose had been leaking. She did not recall seeing the spraying water when she left for work that morning.

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finished building the new drywell, he was never asked to return to the Property. *J.A., Ex. 5, Carbone Depo., pp. 20-21, 24.*

[4] Erickson testified Rizzuto was "unreliable," stating he did not perform the work Cunio requested he complete. *J.A., Ex. 2, Erickson Depo., pp. 95-96.*

[5] Cunio disputes this assertion, stating the downspouts do not spill onto the driveway. *J.A., Ex. 4, Cunio Depo., pp. 73-74.*

[6] Throughout her tenancy, Erickson made various complaints about the quality of snow and ice removal at the Property.

Erickson parked about five feet from the drain and exited her vehicle. She took a few steps towards the faucet/spigot, planning to shut the water off. Within approximately two steps, Erickson slipped and fell on ice and water located at the bottom of the driveway. When Erickson's neighbor, Jason Corsino ("Corsino"), went to assist her, he noticed water spraying from the faucet/spigot and he observed black ice in the area of the misting water. Corsino turned the water off from inside the Property.

Cunio did not own the hose, but she had observed the hose hooked up to the faucet/spigot prior to Erickson's accident. Cunio did not observe the leaking faucet/spigot on the day of Erickson's accident. Cunio did not know who turned the water on or how long the faucet/spigot was leaking prior to Erickson's fall.

DISCUSSION

I. Standard of Review

Summary judgment is proper when, "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." *Augat, Inc.* v. *Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). It is, however, "seldom sought or granted in negligence action[s]." *Manning* v. *Nobile*, 411 Mass. 382, 388 (1991) (internal citations omitted). This is because, in most cases, the question of negligence is a question of fact for the jury. *Mullins* v. *Pine Manor Coll.*, 389 Mass. 47, 56 (1983). Resolving a negligence claim as a matter of law is only appropriate "'when no rational view of the evidence permits a finding of negligence.'" *Patterson* v. *Christ Church*, 85 Mass. App. Ct. 157, 159 (2014), quoting *Roderick* v. *Brandy Hill Co.*, 36 Mass. App. Ct. 948, 949 (1994).

II. Analysis

A. Negligence

Cunio contends there is no evidence that Erickson's accident was caused by anything but the leaking hose, i.e., no evidence Erickson's accident was caused by the drainage, downspout, and/or snow and ice removal concerns about which she had previously complained. Banking on the court accepting this contention, Cunio argues she is entitled to summary judgment because a landowner only has a duty to protect against dangerous conditions the landowner knows or reasonably should know about and she did not and could not have reasonably known about the spraying faucet/spigot prior to Erickson's accident.

Erickson claims Cunio places too much emphasis on the leaking faucet/spigot while ignoring the dangerous conditions the defective drain created. Erickson argues Cunio knew or reasonably should have known that, by failing to properly fix the defective drain and by failing to winterize the Property, it was foreseeable that water would accumulate and, during the winter months, freeze, causing her tenants and other lawful visitors to slip and fall. Erickson contends a jury could reasonably infer Cunio's failure to winterize the Property combined with the defective drain to cause her injuries.

To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relationship between the breach of the duty and the resulting damage. Jupin v. Kask, 447 Mass. 141, 146 (2006); see also J.R. Nolan & L.J. Sartorio, Tort Law § 11.1 (3d ed. 2005). "[W]hether a defendant exercised reasonable care, the extent of the damage caused, and whether the defendant's breach and the damage were causally

related" are generally the "province of the jury." *Jupin*, 447 Mass. at 147. The existence of a duty of care, however, is a question of law. *Remy* v. *MacDonald*, 440 Mass. 675, 677 (2004); *Cottam* v. *CVS Pharmacy*, 436 Mass. 316, 320 (2002).

In *Papadopoulos* v. *Target Corp.*, 457 Mass. 368, 383 (2010), the Superior Judicial Court abolished the "natural accumulation" doctrine and adopted a "reasonable care" standard for accidents involving slip and falls on snow and ice. According to the Supreme Judicial Court, under the new standard, property owners owe lawful visitors the same obligation for snow and ice hazards as they owe with respect to other hazards: "a duty to 'act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.'" *Id.* (internal citations omitted). As the Supreme Judicial Court explained:

> This introduces no special burden on property owners. If a property owner knows or reasonably should know of a dangerous condition on its property, whether arising from an accumulation of snow or ice, or rust on a railing, or a discarded banana peel, the property owner owes a duty to lawful visitors to make reasonable efforts to protect lawful visitors against the danger.

Id. (internal citations omitted).

Here, even if the court accepts Cunio's assertion that Erickson's slip and fall was caused by ice that formed as a result of the water spraying from the faucet/spigot and not the faulty drain, summary judgment is not warranted. While neither Erickson nor Cunio can say exactly when the faucet/spigot started spraying water, how or why it started spraying, or for how long it was spraying prior to Erickson's accident, if Cunio had winterized the Property, i.e., if she had shut off the outside water supply and drained the pipes in preparation for winter, the faucet/spigot could not have leaked and caused ice to form across the base of the driveway.

Cunio was aware that the driveway drain did not always perform properly and that it tended to back up, allowing water to accumulate at the base of the driveway. Given this knowledge, the court cannot say as a matter of law that she had no duty to winterize the Property. In fact, the court concludes a jury could reasonably infer that failing to winterize the Property combined with the faulty drain to cause Erickson's accident. The Motion for Summary Judgment will be **DENIED** as to Count I (negligence).

B. Breach of the Implied Warranty of Habitability

Cunio alleges there is no evidence she breached the implied warranty of habitability by failing to identify and rectify the dangerous condition created by the spraying faucet/spigot, since she had no notice of the dangerous condition prior to the accident. Even if failing to stop the spraying faucet/spigot could be considered a breach of the implied warranty, Cunio argues such a breach would not be material. Erickson contends a jury should be allowed to determine whether Cunio's maintenance of the defective drain was a breach of the implied warranty of habitability. The court concludes Erickson is correct.

At the start of every tenancy, the landlord warrants that there are no defects in the facilities vital to the use of the premises and that the facilities will remain, during the entire lease term, in a condition that makes the property livable. *Boston Hous. Auth.* v. *Hemingway*, 363 Mass. 184, 199 (1973); see also *Doe* v. *New Bedford Hous. Auth.*, 417 Mass. 273, 280-281 (1994). Any condition in a rental unit that "may endanger or materially impair the health or safety and well-being" of an occupant may violate the implied warranty of habitability. See *Hemingway*, 363 Mass. at 200 & n.15. Not every minor code violation rises to the level of a material breach of warranty. *Id.* at 200-201 & n. 16; see also *McKenna* v. *Begin*, 5 Mass. App.

Ct. 304, 308 (1977). The protection provided under the common law warranty extends only to significant or material defects in the physical facilities. See, e.g, *Cruz Mgt. Co.* v. *Thomas*, 417 Mass. 782, 787 (1994) (apartment lacked adequate hear, hot water, and fire escape; was infested with cockroaches, mice, and rats; had unsanitary common areas; and had defective smoke detector, windows, and wiring); *Simon* v. *Solomon*, 385 Mass. 91, 93 & 96 (1982) (water and sewage repeatedly flooded apartment); *Berman & Sons* v. *Jefferson*, 379 Mass. 196, 201-202 (1979) ("A dwelling afflicted with a substantial Sanitary Code violation is not habitable[.]"); and *Crowell* v. *McCaffrey*, 377 Mass. 443, 451 (1979) (defective railing on third-floor porch).

The question of materiality is a factual inquiry that rests on several factors, including: (1) the seriousness of the defect and its effect on the dwelling's habitability; (2) the length of time the defect persists; (3) whether the landlord received written or oral notice of the defect; (4) the possibility that the residence could be made habitable within a reasonable amount of time; and (5) whether the tenant's conduct caused the defect. *Hemingway*, 363 Mass. at 200-201. The fact-finder has considerable discretion in determining whether the "special circumstances of each case" amount to a material breach of the implied warranty. *Id.* at 200-201 & n.16; see also *Jablonski* v. *Clemons*, 60 Mass. App. Ct. 473, 475 (2004). Ultimately, to be actionable as a violation of the implied warranty, the violation must relate to the provision, maintenance, and repair of the physical facilities of the property. *Doe*, 417 Mass. at 282.

Here, Erickson offers the testimony of premises safety expert, Peter F. Depresa, to support her contention that the defective drain located so close to the garage, which was a means of egress out of the Property, created an unnecessarily dangerous condition in violation of the State Building Code, §§ R311.1, R105.8.1, P3301, and P3302. While the accumulation of

snow and ice are likely not defects under the implied warranty, *McAllister* v. *Boston Hous. Auth.*, 429 Mass. 300, 305-306 (1999), overruled on other grounds, *Sheehan* v. *Weaver*, 467 Mass. 734, 741 (2014); here, Erickson complains not about the accumulation of the ice which she slipped on, but about the state of the driveway drain, which may have contributed to the formation of the ice. There is record evidence that this drain was defective, allowing water to accumulate and puddle at the base of the driveway, even after it had been replaced by Carbone. There is also record evidence that this allegedly defective drain was located very near one of the primary entrances into and out of the Property. Given these facts, the court cannot say as a matter of law that there was no violation of the implied warranty of habitability. The Motion for Summary Judgment will be **DENIED** as to Count II (implied warranty of habitability).

CONCLUSION/ORDER

For the reasons explained above, it is hereby **ORDERED** that Rosalie Cunio's Motion for Summary Judgment (Paper #9) be **DENIED**.

SO ORDERED.

Dated: January 17, 2017

Maynard M. Kirpalani
Justice of the Superior Court