

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

924

CA 16-00223

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, AND SCUDDER, JJ.

DARYL A. HANIFAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

COR DEVELOPMENT COMPANY, LLC AND LAWN
TECH, INC., DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

DARYL A. HANIFAN, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 27, 2015. The order, insofar as appealed from, denied that part of the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in part and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on ice underneath snow in a parking lot owned by defendant COR Development Company, LLC and maintained pursuant to a snow removal contract by defendant Lawn Tech, Inc. Defendants, as limited by their brief on appeal, contend that Supreme Court erred in denying their motion insofar as they sought summary judgment dismissing the complaint. We agree.

It is undisputed that defendants met their initial burden on the motion "by establishing that a storm was in progress at the time of the accident and, thus, that they had no duty to remove the snow and ice until a reasonable time ha[d] elapsed after cessation of the storm" (*Gilbert v Tonawanda City Sch. Dist.*, 124 AD3d 1326, 1327 [internal quotation marks omitted]). In opposition, plaintiff failed to raise a triable issue of fact " 'whether the accident was caused by a slippery condition at the location where [she] fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant[s] had actual or constructive notice of the preexisting condition' " (*Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212). Even assuming, arguendo, that plaintiff was entitled to rely upon the theory that the icy condition formed prior to the storm upon the melting and refreezing of snow piles created by defendants' plowing practices (*cf. Scanlon v Stuyvesant*

Plaza, 195 AD2d 854, 855-856), we conclude that plaintiff's assertion is based on mere speculation and thus is insufficient to raise an issue of fact (see *Lima v Village of Garden City*, 131 AD3d 947, 948-949; *Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153, 1154). Indeed, in surmising that there must have been snow piles throughout the parking lot from prior accumulations, plaintiff relied upon inadmissible printouts from a weather data website (see *Morabito v 11 Park Place LLC*, 107 AD3d 472, 472), as well as defendants' general practices regarding snow removal as set forth in their contract (see *Nadel v Cucinella*, 299 AD2d 250, 252). The record is devoid of competent evidence that any such snow piles existed or, more specifically, that a pile of snow was located near the area of the parking lot where plaintiff fell that had melted and had then refrozen prior to the storm, resulting in the icy condition that caused plaintiff's accident (see *Harvey v Laz Parking Ltd, LLC*, 128 AD3d 1203, 1205; *Perales v First Columbia 1200 NSR, LLC*, 88 AD3d 1213, 1215). Finally, to the extent that plaintiff contends that defendants' snow removal efforts created the hazardous condition because they did not properly care for the area where she fell even though they had treated other areas of the parking lot during the storm, we note that it is well settled that "[t]he mere failure to remove all snow and ice from a . . . parking lot does not constitute negligence' and does not constitute creation of a hazard" (*Wheeler v Grande'Vie Senior Living Community*, 31 AD3d 992, 992-993; see *Glover v Botsford*, 109 AD3d 1182, 1184).