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

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CA 14-01104

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND DEJOSEPH, JJ.

KEITH HAGENBUCH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VICTORIA WOODS HOA, INC., CROFTON ASSOCIATES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (JENNIFER B. TAROLLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

E. MICHAEL COOK, P.C., ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered November 21, 2012 in a personal injury action. The judgment and order, among other things, denied the motion of defendants-appellants for summary judgment dismissing the complaint and all cross claims against them.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by granting in part the motion of defendants-appellants and dismissing the complaint against them to the extent that the complaint, as amplified by the bill of particulars, alleges that they created or had actual notice of the allegedly dangerous condition, and as modified the judgment and order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell on a patch of ice at a complex owned by Victoria Woods HOA, Inc. and managed by Crofton Associates, Inc. (defendants). Supreme Court erred in denying that part of defendants' motion for summary judgment dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendants were negligent because they created or had actual notice of the allegedly dangerous condition, and we therefore modify the judgment and order accordingly. Defendants met their initial burden with respect thereto (*see generally Sweeney v Lopez*, 16 AD3d 1174, 1175), and plaintiff did not oppose the motion to that extent, thus implicitly conceding that defendants were entitled to summary judgment to that extent (*see Adams v Autumn Thoughts*, 298 AD2d 945, 946).

The court properly denied the motion, however, to the extent that

the complaint, as amplified by the bill of particulars, alleges that defendants were negligent based on their constructive notice of the allegedly dangerous condition. Defendants failed to meet their initial burden of establishing that the ice was not visible and apparent, or "that the ice formed so close in time to the accident that they could not reasonably have been expected to notice and remedy the condition" (*Jordan v Musinger*, 197 AD2d 889, 890; *see Gwitt v Denny's, Inc*., 92 AD3d 1231, 1231-1232; *Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1128-1129).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court