SHORT FORM ORDER

INDEX No. 05-8757
CAL. No. 06-01660-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11/14/06
ADJ. DATE 12/28/06
Mot. Seq. # 001 - MG; CASEDISP

MICHELLE TRAYLOR,

Plaintiff,

- against -

JACQUELINE JONES,

Defendant.

SEIDNER, ROSENFELD & GUTTENTAG
Attorneys for Plaintiff
403 Deer Park Avenue
Babylon, New York 11702-2352

BAXTER & SMITH, P.C.
Attorneys for Defendant
125 Jericho Turnpike, Suite 302
Jericho, New York 11753

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 17 - 19; Replying Affidavits and supporting papers 20 - 21; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant, Jacqueline Jones, for an order pursuant to CPLR 3212, granting her summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Michelle Traylor, on March 9, 2005, as a result of a slip and fall on the defendant's premises, located at 221 Claywood Drive, Brentwood, County of Suffolk, New York. Plaintiff, at the time of the accident, was a tenant in the basement apartment of the defendant's home; while walking to her vehicle to retrieve something, slipped and fell on snow and ice in the driveway of defendant's residence.

Defendant now moves for summary judgment on the basis that plaintiff has failed to establish a prima facie case of negligence because defendant did not create nor have notice of the alleged dangerous condition existing on her property. Defendant submits the pleadings, copies of the deposition transcripts of plaintiff, defendant and non-party witnesses Marvin Jones, Jr. and Ezra Kerr and photographs of defendant's residence.

Plaintiff opposes the instant motion on the ground that defendant created the hazardous condition by reversing out of the driveway after it had been shoveled, causing the snow to become packed and icy, resulting in the plaintiff's injuries. Plaintiff submits plaintiff's affidavit.

Plaintiff testified at her examination before trial that her accident occurred in the driveway of the defendant's home where she resided as a tenant, at approximately 8 p.m., when she was coming from her

apartment and walking towards her vehicle. Plaintiff stated that her vehicle was parked in the street in front of the house, so she exited the house through the front door and walked down the pathway towards the driveway. Ms. Traylor testified that she fell on a patch of snow and ice that was located in the driveway. Plaintiff testified that she did not see the snow and ice mix that she slipped on before her accident occurred because of the driveway's incline and the poor lighting condition in that portion of the driveway. Ms. Traylor testified that it had snowed earlier that morning and she had left the house at approximately 10 a.m. to go to work and returned from work at approximately 7:45 p.m. She stated that when she left the house that morning she did not notice whether the driveway had been shoveled because she did not exit from the front entrance, instead she exited from the right side gate entrance, closest to her apartment and walked across the front lawn. Ms. Traylor further testified that she also did not observe the driveway when she returned from work that evening because once again she walked across the front lawn to gain access to the gate leading to her apartment.

Defendant testified at her examination before trial that she has owned the subject property for two and half years, that it has three entrances–one in the front, one in the rear and one on the right side of the house– and the plaintiff was her tenant at the time of the plaintiff's accident. Defendant stated that the plaintiff was able to use any entrance she wished in order to gain access or exit the premises. Ms. Jones explained that there is a walkway that leads from the front of the house to the driveway, which is completely cemented at the bottom and contains two cement strips with gravel in between them at the top of the driveway. Ms. Jones stated that when she left the house on her way to work around 3 or 4 a.m., there was light snow on the ground and the front lawn was covered with about three inches of snow. She stated that there was about an inch of snow behind her car and she shoveled in front and behind her vehicle before leaving. Ms. Jones testified that after returning home, she then left the house again at 5:30 p.m. to take her son to his doctor's appointment. She stated that she did not remove any snow from her driveway when she left the house at 5:30 p.m. She stated that she returned from her son's doctor's appointment between 8:30 and 8:45 p.m. and there was no snow in the driveway when she pulled into the driveway, she only saw a police car and an ambulance. Ms. Jones testified that once she arrived inside of her home, she was informed that the plaintiff had fallen in the driveway. Ms. Jones testified that the following day, the plaintiff informed her that she had slipped and fell on snow and ice. She also stated that the plaintiff was not responsible for removing snow or ice from the property. Ms. Jones stated that after the snow was cleared earlier that morning in order for her to go to work, salt was also put down in the driveway and the walkway. Ms. Jones further testified that her son and her friend, Ezra Kerr, re-shoveled and re-salted the driveway and walkway later that morning.

Nonparty witness Ezra Kerr testified at his examination before trial that he and the defendant have been friends for approximately 15 to 16 years and he has been friends with the plaintiff for about 3 years. Mr. Kerr stated it snowed the day before plaintiff's accident and on the day of the subject accident, he helped the defendant shovel and put salt down when the defendant left for work. He stated that he shoveled from the front door to the road, but did not shovel the bottom of the driveway and put salt "all the around"– from the right side gate to the driveway. Mr. Kerr testified that it was still snowing when the defendant went to work at approximately 3 a.m. and there was about one to two inches of snow on the ground. Mr. Kerr testified that at about 10 a.m., it had stopped snowing, there was about six inches of snow on the ground and he and the defendant's son shoveled and salted the entire driveway, including the gravel area and walkway from the right side gate to the driveway. Mr. Kerr stated that after they finished shoveling and salting the driveway, some snow was left in the gravel area of the driveway, which is at the

top of the driveway because he could not shovel any deeper without removing the gravel in the driveway. Mr. Kerr testified that he was downstairs in the plaintiff's apartment when he heard her screaming his name, so he ran upstairs, looked out the window and saw the plaintiff laying on the lawn. He stated that the plaintiff informed him that "she was walking in the driveway, lost her balance, she slipped, she slid." Mr. Kerr stated that the plaintiff was laying on the lawn approximately a foot and a half from the driveway and the plaintiff was not touching the driveway. Mr. Kerr testified that the plaintiff was sitting up on the lawn, which was covered with a foot of snow and he could see the plaintiff's footprints in the snow on the lawn, leading from the front door towards her car, that was parked in the street in front of the house. Mr. Kerr stated that he had walked on the driveway at about 5 p.m. and there was no ice on it, nor was there any ice on the driveway when he returned from the hospital after plaintiff's accident at about 3 a.m.. the next morning. Mr. Kerr stated that there are lights by the front door of the house that illuminate the driveway. Mr. Kerr further testified that the plaintiff when she first arrived home from work parked her car in the driveway, walked up the driveway to the side door and she did not mention any ice being on the driveway when she first arrived home.

Nonparty witness Marvin Jones, Jr. testified at his examination before trial that he is the father of the defendant's children and he was at the defendant's house on the day of the accident to watch their daughter while the defendant took their son to a doctor's appointment. Mr. Jones testified that there are spotlights on the house that illuminate the driveway and walkway. He stated that when he arrived at the house between 6:30 and 7 p.m., it was not snowing and the driveway and walkway were shoveled, but there was snow on the lawn. Mr. Jones stated that his son and Ezra Kerr had shoveled the driveway and walkway and before he arrived he had called to ensure that his son had shoveled those areas. Mr. Jones stated that upon his arrival he walked up the driveway through the walkway and did not observe any ice in these areas, but he did notice the salt that had been put down. He stated that prior to the plaintiff's accident, she had come up and through the house and a few seconds after she exited the front door he heard her screaming. He stated that he observed the plaintiff lying in the grass, but did not observe any footprints in the lawn when he went outside to help her. Mr. Jones further testified that the plaintiff was laying on the lawn about two to three feet from the driveway and the plaintiff informed him that she fell and twisted her ankle.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see,* ***Alvarez v Prospect Hospital***, 68 NY2d 320 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]).

Fundamental to a plaintiff's recovery in a negligence action, plaintiff must establish that defendant owed plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see*, ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). A landowner is generally under a duty to maintain her property in a reasonably safe condition (***McCord v Olympia & York Maiden Lane Company***, 8 AD3d 634, 779 NYS2d 542 [2004]; ***Backiel v Citibank, N.A.***, 299 AD2d 504, 751 NYS2d 492 [2002]; ***Zelonka v Town of Schodack*** 245 AD2d 795,

665 NYS2d 757 [1998]). In order to prove a prima facie case of negligence in a slip and fall case, plaintiff is required to present evidence that defendant either created or had actual or constructive notice of the defective condition that caused the injury (***Robinson v Lupo***, 261 AD2d 525, 690 NYS2d 640 [1999]; ***Kuchman v Olympia & York, USA, Inc.***, 238 AD2d 381, 656 NYS2d 323 [1997]). Although direct evidence of causation is not required "the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone" (***Jones-Barnes v Congregation Agudat Achim***, 12 AD3d 875, 784 NYS2d 731 [2004]). A defendant's liability will only result if after receiving actual or constructive notice of such defective condition, defendant failed to remedy such danger (***Placquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]); ***Kasner v Pathmark Stores, Inc.***, 18 AD3d 440, 794 NYS2d 418 [2005]).

Based upon the adduced evidence, defendant has established her entitlement to judgment as a matter of law (***Alvarez v Prospect Hospital***, *supra*; ***Zuckerman v City of New York***, *supra*). No real evidence has been presented to prove that the defendant created or had actual or constructive notice of the alleged defective condition existing in her driveway (***Murphy v 136 Northern Blvd. Assoc.***, 304 AD2d 540, 757 NYS2d 582 [2003]; ***McKeown v Stanan Mgmt. Corp.***, 274 AD2d 460, 710 NYS2d 633 [2000]). More importantly, plaintiff has failed to demonstrate that a hazardous condition was even in existence on the defendant's property (***Galgan v Allied Staten Is. Co.***, 248 AD2d 585, 670 NYS2d 515 [1998]; ***Earle v Channel Home Ctr., Inc.***, 158 AD2d 507, 551 NYS2d 271 [1990]). The record establishes that the defendant's property had been shoveled and de-iced on more than one occasion prior to plaintiff's accident as well as the fact that more that one person, including the plaintiff had used the driveway without incident. Moreover, plaintiff's excessive correction of her deposition testimony is an attempt to raise a feigned issue of fact in an effort to correct or avoid the consequences of dismissal (***Tejada v Jonas***, 17 AD3d 448, 792 NYS2d 605 [2005]; ***Novoni v La Parma Corp.***, 278 AD2d 393; 717 NYS2d 379 [2000]; ***Capraro v Staten Island Univ. Hosp.***, 245 AD2d 256, 664 NYS2d 826 [1997]; ***Miller v City of New York***, 214 AD2d 657, 625 NYS2d 271 [1995]). Plaintiff testified at the time of her deposition that the driveway and pathway were shoveled but when asked to review the transcript of her deposition, approximately two months later, she changed her definitive answer to "I don't remember." Plaintiff also corrected her deposition testimony regarding where she was looking as she headed towards her car that evening. Plaintiff testified that she was looking down at the driveway in certain areas that were shoveled as she was walking, but, upon review, changed that testimony on her correction sheet and in the deposition transcript, to an incomprehensible response of "the areas that." Plaintiff, when first deposed stated that she fell on "snow on top of ice, then in her correction sheet, she changed her testimony to "snow and ice mix" and in her affidavit she states she fell on "snow and ice which had been compressed with tire tracks." Thus, plaintiff's statements in her deposition testimony as well as her affidavit constitute self-serving, contradictory statements that are insufficient to defeat a motion for summary judgment (***Gavin v Rosenberg***, 204 AD2d 388, 614 NYS2d 190 [1994]). Therefore, plaintiff has failed to raise a triable issue of fact warranting a trial (***Moorman v Huntington Hosp.***, 262 AD2d 290, 691 NYS2d 548 [1999]; ***George v Big V Supermarket***, 258 AD2d 438, 684 NYS2d 609 [1999]).

Accordingly, defendant's motion for summary judgment is granted.

Dated: APR 10 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**