

**Clarke v Pacie**

2007 NY Slip Op 30902(U)

April 19, 2007

Supreme Court, Suffolk County

Docket Number: 0019742/2004

Judge: Robert W. Doyle

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

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 12-8-06  
ADJ. DATE 2-7-07  
Mot. Seq. #002 - MD  
003 - XMD

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	:		
	:	O'CONNOR, O'CONNOR, HINTZ, et al.	
	:	Attys for Deft Murder Mystery, Inc.	
	:	One Huntington Quadrangle, Suite 3C01	
	:	Melville, New York 11747-4415	
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Upon the following papers numbered 1 to 21 read on this motion for summary judgment and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12-14; Answering Affidavits and supporting papers 15 - 16; Replying Affidavits and supporting papers 17-19; 20-21; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by the defendant Murder Mystery, Inc. for summary judgment dismissing the complaint and all cross claims is denied; and it is further

**ORDERED** that the cross motion by the defendants Ron Pacie and Joni Pacie for summary judgment dismissing the complaint and all cross claims is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Donald Clarke, on December 16, 2003 at approximately 10:00 a.m. as a result of a slip and fall on the driveway to a house owned by defendants Ron Pacie and Joni Pacie and partially leased by defendant Murder Mystery, Inc. ("Murder Mystery") in Huntington, New York. Plaintiff alleges in his verified complaint that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition which caused him to fall and sustain permanent serious physical injury.

Murder Mystery now moves for summary judgment in its favor on the grounds that it did not create the alleged dangerous condition and that it had no actual or constructive notice of the condition. In support, Murder Mystery submits, *inter alia*, the pleadings, a bill of particulars, the transcripts of the deposition testimony given by plaintiff, defendant Ron Pacie and non-party witness Dawn Tropeano.

At his examination before trial, plaintiff testified to the effect that he had been working for Sir Speedy Printing from July 1984 until July 2004 and that his job was not a full-time job but “basically when needed.” At approximately 10:00 a.m. on the day of the accident, plaintiff went to the defendants’ house to make delivery of a Christmas gift from Sir Speedy Printing to defendant Ron Pacie. Plaintiff parked his vehicle on the road and, while walking to the house carrying the gift under his left arm, he observed around 10 patches of ice on the driveway where defendants’ two vehicles were parked. Although, having noticed the downward slope of the driveway, he walked carefully, his right foot slipped out from under him and he fell about three feet behind the defendants’ vehicles. He slipped on an “oval” patch of ice approximately one and a half feet inches in diameter, but he did not see the patch before he fell. He was unable to get up by himself and began screaming for help.

At her deposition, non-party witness Dawn Tropeano testified that she has been employed as a regional administrator by the American Red Cross Huntington Smithtown Regional Office. After Ms. Tropeano heard, in her office, plaintiff’s screaming for help, she walked out of her building, approached the driveway of the defendants’ house, and “saw somebody was lying in the driveway.” Ms. Tropeano testified that “[plaintiff] said he was hurt so [she] immediately went and knocked on the door of the [defendants’ house]”. Ms. Tropeano told defendant Joni Pacie that “there is somebody in the driveway who looks like he is hurt, call 911 cause I didn’t have my phone on me.” After the conversation, Ms. Tropeano “went back out to see if [plaintiff] was okay.” Having noticed that somebody had come out of the house, Ms. Tropeano ran back to her office and brought a blanket back. Ms. Tropeano testified that, on the day of the accident, there was no precipitation, snow, ice, water, liquid, sand or salt on the subject driveway and that the driveway was “clear” and “completely dry.”

At his deposition, defendant Ron Pacie testified that he and his wife, defendant Joni Pacie, own Murder Mystery, a theatrical company, whose place of business is in Manhattan, New York. Defendant Ron Pacie has been using his home as a home office for Murder Mystery. He had a business relationship with Sir Speedy Printing for printing material for Murder Mystery. On the day of the accident, defendant Ron Pacie “walked by a window” and “saw some commotion in [his] driveway.” When he went outside, he saw plaintiff lying the driveway and Ms. Tropeano. Defendant Ron Pacie testified that it had snowed two days prior to the subject accident; as a result of the snow, there were accumulations of snow on his driveway; and he “cleaned the driveway because [he] know that it was absolutely clean [because] it was extremely cold and sunny for the next couple of days.”

While, to prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see, Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [1995]), the defendant, as the movant in this case, is required to make a prima facie showing affirmative establishing the absence of notice as a matter of law (*see, Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 758 NYS 2d 133 [2003]; *Dwoskin v Burger King Corp.*, 249 AD2d 358,

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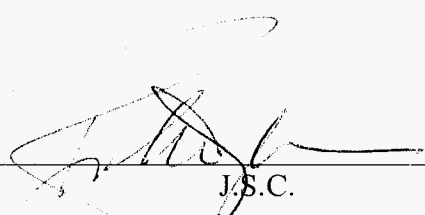
671 NYS2d 494 [1998]). Liability can be predicated only upon failure of the defendants to remedy the danger after actual or constructive notice of the condition (*Piacquadio v Recine Realty Corp.* 84 NY2d 967, 622 NYS2d 493 [1994]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see, Moons v Wade Lupe Constr. Co.*, 24 AD3d 1005, 805 NYS2d 204 [2005]; *Fasano v Green-Wood Cemetery*, 21AD3d 446, 799 NYS2d 827 [2005]).

Here, defendant Murder Mystery failed to establish its entitlement to judgment as a matter of law. Contrary to the testimony of defendant Ron Pacie and Ms. Tropeano that the driveway was clean and dry, plaintiff testified that he observed approximately 10 patches of ice on the driveway prior to the accident. Under these circumstances, there are questions of fact as to whether a dangerous condition existed on the subject driveway so as to create liability on the part of defendants and whether they exercised reasonable care under the circumstances (*see, McCummings v New York City Tr. Auth.*, 81 NY2d 923, 597 NYS2d 653 [1993]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). Accordingly, the motion by defendant Murder Mystery for summary judgment dismissing the complaint and all cross claims against it is denied.

Defendants Ron Pacie and Joni Pacie cross-move for summary judgment in their favor dismissing the complaint on the grounds that they did not create the alleged dangerous condition and that they had no actual or constructive notice of the condition. In support, the aforementioned defendants submit only an affidavit of one of their attorneys which attempts to incorporate by reference all "exhibits" submitted in the motion by defendant Murder Mystery.

Pursuant to CPLR 3212 (b), a motion for summary judgment "shall be supported by \*\*\* a copy of the pleadings." Defendants Ron Pacie and Joni Pacie failed to submit their pleadings, without which it is not possible to determine whether summary judgment is warranted. In any event, even assuming that all of the papers submitted on the motion by defendant Murder Mystery were referred and incorporated, the cross motion by defendants Ron Pacie and Joni Pacie is denied because, as noted, *supra*, there remains a triable issue of fact as to whether there existed dangerous icy conditions on the subject driveway which were the proximate cause of plaintiff's fall.

Dated: APR 19 2007

  
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J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION