Short Form Order

Index Number: 29529-2004

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

Hon. Emily Pines
Justice Supreme Court

Original Motion Dates:	11-20-2006
Motion Submit Date:	02-22-2007
Motion Sequence No's.:	001 MG 002 MD CASEDISP

_____X

JOHN GAETA, JR.,

Plaintiff,

-against-

MICHAEL GOLDBERG and LAURA E. BONGIORNO a/k/a LAURA E. GOLDBERG,

Defendants .

_____X

Attorney of Plaintiff
Lite & Russell
212 Higbie Lane
West Islip, New York 11795-2897

Attorney of Defendants
Breen & Clancy
50 Route 111
Smithtown, New York 11787

ORDERED AND ADJUDGED, that the motion (motion sequence number 001) by Defendants for summary judgment dismissing the complaint is granted; and it is further

ORDERED AND ADJUDGED, that the cross-motion (motion sequence number 002) by Plaintiff to strike Defendants' answer and/or to compel discovery is denied.

This is an action by Plaintiff to recover for personal injuries sustained as a result of a slip and fall on snow and ice on the Defendants' property located at 24 Asbury Drive, Smithtown, County of Suffolk, State of New York (the "subject premises"). At the time of the accident, on January 15, 2004, at approximately 10:00 a.m., Plaintiff was delivering mail to the Defendants at the subject premises. Plaintiff commenced the instant action by the filing of a Summons and Verified Complaint on or about December 23, 2004 and issue was joined by Defendants' service of a Verified Answer on or about January 8, 2005. In the Verified Bill of Particulars, Plaintiff alleges, among other things, that Defendants were negligent in failing to properly remove the snow and ice that had accumulated in the driveway of the subject premises.

Defendants now move for summary judgment on the ground that no issues of fact exist and that the "storm in progress" doctrine bars Plaintiff's recovery. In support of the motion, Defendants annex a copy of the pleadings, the bill of particulars, the transcripts of the examinations before trial of Plaintiff and efendant Michael Goldberg and certified meteorological records.

Plaintiff appeared for an examination before trial on December 15, 2005 and testified that on the date of the accident he was an employee of the United States Postal Service as a mail carrier, and that his regular hours of work were 7:00 a.m. to 3:30 p.m. Plaintiff testified that on January 15, 2004, it was already snowing when he arrived at work at a little before 7:00 a.m., he arrived at the subject premises at approximately 10:00 a.m. and that he had a 30-40 pound package to deliver to Defendants, together with three or four flyers and three or four first-class pieces of mail. Specifically, he stated that it was snowing, windy and the temperature was approximately 15-20 degrees. Plaintiff testified that he got out of his mail vehicle and retrieved from the back of the truck the package to be delivered to Defendants and saw that the driveway, which is approximately 25-35 feet, had not been cleaned (of snow) in probably a week. He said he saw that the driveway was totally covered, he saw footprints and ice prints and it was "blizzard conditions" at this point. Plaintiff states that he proceeded approximately halfway up the driveway, walking through snow and ice when he slipped and fell; although he states he observed frozen footprints, he claims that he did not walk on these footprints. Plaintiff testified that he got up after he fell, picked up the package and proceeded to the front door, where he knocked on the door and when answered by a man, purportedly the Defendant, told him he fell. He stated that the man said he was sorry and that he hadn't cleaned the driveway for a couple of days. Plaintiff delivered the mail and the package and left the subject premises.

Defendant Michael Goldberg also testified at an examination before trial on December 15, 2005. He testified that he did not recall any accident that occurred on the subject premises on January 15, 2004, that he did not remember the weather conditions on that date, did not recall talking to Plaintiff and that he was not home on the date in question. Defendant stated that he was working on that date as a teacher in Queens and that he would have left the subject premises around 6:00 a.m. and did not return until about 5:30 p.m. Defendant stated that he did not remember if there was a snowstorm the week of January 15, 2004 and that the first he learned of Plaintiff's accident was when he got a notice in the mail. He stated that he did not have any

independent recollection of when the last time he had shoveled his driveway prior to January 15, 2004.

The certified meteorological records indicate that it was snowing from 9:46 a.m. through 10:56 a.m., wind gusts were as strong as 22 miles per hour and that the conditions were snow, mist and blowing snow. Additionally, the records reveal that 3.3 inches of snow fell on January 15, 2004 and the temperature on the date of the accident was between 1 and 17 degrees Fahrenheit. Thus, Defendants argue that the "storm in progress" doctrine precludes them from being liable to Plaintiff for his injuries.

In opposition to the motion, Plaintiff also cross-moves to either strike Defendants' answer and/or compel them to provide certain discovery. Specifically, Plaintiff seeks to compel Defendants to furnish an authorization for Defendant Michael Goldberg's school/employment records on the date of the accident, pursuant to a Demand for Discovery and Inspection dated May 4, 2006. Plaintiff seeks such records to resolve the conflict between Plaintiff's testimony that he spoke to Defendant on the date of the accident, and Defendant's testimony that he was working and not home on the date of the accident.

Regarding the motion for summary judgment, Plaintiff argues that Defendants' are responsible for his injuries because they failed to take reasonable and timely remedial action to keep the driveway free of snow and ice that had accumulated several days prior to the Plaintiff's accident. Specifically, he argues that a question of fact exists whether Defendants were on constructive notice of the dangerous condition of the driveway and whether Defendants had a reasonable time since the cessation of the prior snowfalls to clear the snow and ice from the driveway. Thus, Plaintiff argues that the motion for summary judgment must be denied.

In support of the motion, Plaintiff submits a copy of the pleadings, an affidavit, bill of particulars, deposition transcripts of Plaintiff and Defendant, Plaintiff's Discovery and Inspection Demand dated May 4, 2006, Plaintiff's Good Faith letter dated October 4, 2006 and Weather report from North Eastern Climate Bureau.

It is well established that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a material issue of fact or where the issue

is arguable. ***In the Matter of the Estate of Beckford***, 280 A.D.2d 472, 720 N.Y.S.2d 176 (2d Dept. 2001). Issue finding, rather than issue determination is the key to the procedure. ***St. Andrews Homeowners Association, Inc. v. Saint Andrews Golf Club***, 289 A.D.2d 388, 734 N.Y.S.2d 898 (2d Dept. 2001). In deciding the motion, the evidence must be viewed in the light most favorable to the opposing party. ***Akseizer v. Kramer,*** 265 A.D.2d 356, 696 N.Y.S.2d 849 (2d Dept. 1999). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Winegrad v. New York University Medical Center,*** 64 N.Y2d 85, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). However, once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. ***State Bank of Albany v. McAullife,*** 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983).

The law is well settled that under the "storm in progress" doctrine, a party in control of real property will not be held liable for accidents occurring as a result of a hazardous condition because of an accumulation of ice or snow "unless an adequate period of time has passed following the cessation of the storm to permit the party to remedy the situation." ***Reagan v. Hartsdale Tenants Corp.,*** 27 A.D.3d 716, 813 N.Y.S.2d 153 (2d Dept. 2006). ***See also, Dowden v. Long Island Railroad,*** 305 A.D.2d 631, 759 N.Y.S.2d 544 (2d Dept. 2003); ***Washington v. Community Mutual Savings Bank,*** 308 A.D.2d 444, 764 N.Y.S.2d 191 (2d Dept. 2003); ***Taylor v. New York City Transity Authority,*** 266 A.D.2d 384, 698 N.Y.S.2d 52 (2d Dept. 1999); ***Mangieri v. Prime Hospital Corp.,*** 251 A.D.2d 632, 676 N.Y.S.2d 207 (2d Dept. 1998). Moreover, any claim by a Plaintiff that the accident was caused by ice or snow that a Defendant failed to remove from a prior storm or snowfall must be based upon more than mere speculation or guesswork. ***Reagan, supra; Dowden, supra; Burgos v. City of New York,*** 289 A.D.2d 436, 735 N.Y.S.2d 436 (2d Dept. 2001); ***Pohl v. Sternberg,*** 259 A.D.2d 742, 687 N.Y.S.2d 431 (2d Dept. 1999). ***See also, Simmons v. Metropolitan Life Insurance Co.,*** 84 N.Y.2d 972, 622 N.Y.S.2d 496, 646 N.E.2d 798 (1994) (Court of Appeals

held that Plaintiff's testimony that it had snowed a week prior to the accident was insufficient because there was no evidence that the ice upon which Plaintiff fell was a result of that particular snow accumulation.).

Based upon the foregoing, Defendants have demonstrated *prima facie* entitlement to summary judgment under the "storm in progress" doctrine. The records reflect that it was snowing, windy and blowing at the time of Plaintiff's accident, temperatures were below freezing and more than 3 inches of snow fell on January 15, 2004. There is no evidence that there was a cessation in the storm sufficient to enable defendants to clear the subject premises of snow. In opposition to the motion, Plaintiff has failed to raise a triable issue of fact requiring a trial. Plaintiff admitted that it was a "blizzard" at the time of the accident and although he testified that he observed "frozen footprints", purportedly from an earlier storm, he specifically stated that he did not walk on those footprints. Moreover, even assuming as true Plaintiff's claim that he spoke to Defendant Michael Goldberg after the accident and that Defendant stated he hadn't cleaned the driveway in a couple of days, such, without more, is insufficient to demonstrate that he fell on pre-existing ice or snow. As required by the plethora of cases set forth above, to defeat the "storm in progress" rule, Plaintiff was required to demonstrate by more than sheer speculation that his accident was caused by snow and/or ice from a prior storm. Plaintiff has failed to meet this burden.

For the reasons set forth herein above, the motion for summary judgment dismissing the complaint is granted. In light of the determination herein, the cross-motion to compel discovery is denied.

The foregoing constitutes the ***DECISION*** and ***JUDGMENT*** of the Court.

Dated: April 18, 2007
Riverhead, New York

Emily Pines

Emily Pines
J. S. C.