SHORT FORM ORDER

INDEX No. 05-24053
CAL. No. 07-00186-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 4-23-07
ADJ. DATE 5-7-07
Mot. Seq. # 001 - MD

MICHAEL PARKER,	:	NILS HUNTER BERLIN, P.C.
	:	Attorneys for Plaintiff
Plaintiff,	:	130 West Main Street
	:	East Islip, New York 11730
- against -	:	
	:	PURCELL & INGRAO, P.C.
THOMAS BREGARTNER and BARBARA	:	Attorneys for Defendant
BREGARTNER.	:	204 Willis Avenue
Defendants.	:	Mineola, New York 11501

Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 12 - 15 ; Replying Affidavits and supporting papers 16 - 17 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants, Thomas Bregartner and Barbara Bregartner, for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Michael Parker, on November 10, 2004, as a result of a slip and fall at the defendants' premises, located at 228 Sherry Street, East Islip, County of Suffolk, New York. Plaintiff arrived at the defendant's home on November 9th at approximately 9 pm and accessed the home by walking up the stone walkway located on the right side of the home. At approximately 5:25 am on the date of the subject accident, plaintiff exited the home on his way to have breakfast at a nearby café. Plaintiff had walked approximately 10 feet down the same stone walkway that he used the prior evening when he slipped and fell on ice. Plaintiff was caused to suffer a broken left wrist.

Defendants now move for summary judgment on the basis that plaintiff has failed to prove a prima case of negligence for which the defendants are liable. Defendants assert that the plaintiff is unable to establish that the defendants caused or created the hazardous condition or that the defendants had notice of the defective condition in existence on their premises. Defendants submit, the pleadings, defendants' affidavits and copies of the deposition testimony of plaintiff and defendants.

Plaintiff opposes the instant motion on the grounds that an issue of fact exists as to whether ice formed from the operation of the defendants' sprinkler system. Plaintiff also asserts that defendants created the icy condition in existence on the premises by allowing their sprinkler system to operate overnight in below freezing weather. Plaintiff further contends that defendants had constructive notice of the condition because they had knowledge of their sprinkler system's overnight operation and should have known that ice would form as a result of its operation in below freezing temperatures. Plaintiff submits, plaintiff's affidavit and climatological data for Islip, Long Island MacArthur Airport, New York.

Plaintiff testified at his examination before trial that he arrived at the defendants' house on November 9, 2004 and stayed overnight. Plaintiff testified there is a stone walkway on the right side of the defendants' home that connects with the driveway and provides a means of access to the home. Plaintiff stated that the stone walkway is light reddish in color and is not smooth but has "a little crown to it." He stated that he entered the home on November 9th via the stone walkway. Mr. Parker testified that he exited the home at about 5:25 am on the day of the accident to have breakfast at a nearby diner before going to volunteer at his church. Mr. Parker stated that he walked approximately 10 feet down the walkway when he slipped and fell on ice. He stated that he did not see the ice prior to his fall, but after his fall he noticed that the walkway was very slick and the entire lawn was all white "like crystals." Plaintiff stated that it had not rained the day before and nor was it raining when he exited the home on the morning of the accident. Plaintiff testified that the ice came from the water from the sprinkler system, although he never saw the sprinkler system operating while he was there and he is unaware of the location of the sprinkler heads. He also stated that he was unable to see the heads of the sprinkler system as he walked on the walkway or after he fell. Mr. Parker stated that he did not know how long the ice had been on the walkway. Plaintiff further testified that when he informed the defendants that he fell on the walkway and hurt his wrist, the defendants stated "the ice came from the sprinkler system."

Defendant Barbara Bregartner testified at her examination before trial that her husband held title to the house in his name only and that she lived there with him and their two sons. Mrs. Bregartner stated that the plaintiff, who is her father, visits their home every six weeks and stays for one or two days. She stated that the plaintiff arrived at their home the evening of November 9th and that the plaintiff slipped and fell on ice located on the walkway to their home when he went out the next morning to go to church. Mrs. Bregartner testified that the ice formed on the walkway because they had not turned off their sprinkler system from the summer season. Mrs. Bregartner stated that the sprinklers were automatic, on a timer and were still operational at the time of the plaintiff's injury. She also stated that she and her husband never intended to turn the sprinkler system off before the date of the subject accident because they did not know how to turn the system off. Mrs. Bregartner stated that she and her husband were unaware that they needed to turn the sprinkler system off. She stated that she was unaware that ice had formed on the walkway prior to her father's fall and only became aware of the fact that there was ice on the walkway when her father told her he slipped and fell. Mrs. Bregartner further testified that her husband, after being informed of the plaintiff's fall, stated "we left the sprinklers on. That is what must have done it."

Defendant Thomas Bregartner testified as his examination before trial that he is the sole owner of the subject premises and has been for the past 10 years. Mr. Bregartner testified that the plaintiff is his father-in-law and that when the plaintiff left the house in the early morning of November 10th, he slipped and fell on ice on the walkway. Mr. Bregartner stated that he believes the ice that formed on the walkway

was from their sprinkler system. He stated that at the time of the plaintiff's accident, the sprinkler system had just been installed that year and he and his wife were unaware of the fact that they needed to shut the sprinkler system off or that they even had the ability to turn the system off. He stated that they were waiting for the company that installed the system to shut it off and winterize it. Mr. Bregartner further testified that the ice formulated because the sprinkler system went off in the middle of the night and the cold weather caused the water from the sprinkler system to freeze.

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]). Landowners are generally under a duty to maintain their 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]). A landowner's liability will only result if after receiving actual or constructive notice of such defective condition, the landowner 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]).

Therefore, 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]). Furthermore, the fact that the defendant may have a general awareness that a defective condition may exist is not legally sufficient to constitute notice of the particular condition that caused the plaintiff's injuries (***Kennedy v Wegmans Food Markets, Inc.***, 90 NY2d 923, 664 NYS2d 259 [1997]; ***Gordon v American Museum of Natural History***,67 NY2d 836, 501 NYS2d 646 [1986]). 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]).

Applying the foregoing principles of law to the instant matter, establishes that defendants have failed to show their entitlement to judgment as a matter of law (***Winegrad v New York Univ. Med. Center***, *supra*; ***Zuckerman v City of New York***, *supra*). Defendants have not sustained their burden in demonstrating that they did not create nor have notice of the defective condition on their property (***Piacquadio v Recine Realty Corp.***, *supra*; ***Gordon v American Museum of Natural History***, *supra*). The adduced evidence raises a question of fact as to whether or not the ice that the plaintiff slipped on

was formed from the water emitting from the defendants' sprinkler system, which had not been turned off and the defendants admitted that it operated on an automatic timer, including overnight. Defendants also explained that they were unaware that they were able to shut the sprinkler system off because it was the first year that the system had been installed and did not fully understand how to operate the system. In addition, plaintiff testified that the entire walkway was slick and the lawn was completely covered with a "white crystal like" matter. Plaintiff also stated that it had not rained nor snowed either the day of or the day before his accident and that the overnight temperature was about 23 degrees Fahrenheit. Thus, it cannot be said that the defendants did not have notice of the fact that their sprinkler system was still active and secreting water at a time when the temperatures were between 41 degrees and 22 degrees Fahrenheit, which resulted in the existence of an icy condition being present on their property (***Curran v Esposito***, 308 AD2d 428, 764 NYS2d 209 [2003]).

Furthermore, the affidavits submitted by the defendants are an attempt 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]). Defendants testified at the time of their depositions that upon learning of the plaintiff's fall on ice, they stated that the ice formed because the sprinkler system was operational. Consequently, defendants' statements in their affidavits constitute self-serving contradictory statements that are an insufficient basis to grant a motion for summary judgment (***Gavin v Rosenberg***, 204 AD2d 388, 614 NYS2d 190 [1994]). Therefore it cannot be said that the defendants have shown that all material issues of fact have been resolved such that summary judgment would be appropriate (***Martin v Wagner***, 30 AD3d 733, 816 NYS2d 243 [2006]; ***Schlisser v Athens Assoc.***, 19 AD3d 979, 798 NYS2d 175 [2005]; ***Hilsman v Sarwill Assoc., LP***, 13 AD3d 692, 786 NYS2d 225 [2004].

Given the fact that defendants have failed to meet their burden of demonstrating that there are no material issues of fact, the sufficiency of plaintiff's submissions in opposition need not be considered (*see*, ***Winegrad v New York University Medica Center***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Accordingly, defendants' motion for summary judgment is denied.

Dated: AUG 2 3 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION