SHORT FORM ORDER

INDEX No. 05-13581
CAL. No. 07-00886-OT

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7-10-07
ADJ. DATE 8-31-07
Mot. Seq. # 001 - MG

KEVIN C. O'LENAHAN, Plaintiff, - against -	:	FABER & TROY Attorneys for Plaintiff 180 Froehlich Farm Boulevard Woodbury, New York 11797
MID-ISLAND RESTAURANT ASSOCIATES, L.P., BURGER KING CORPORATION, ALFONSO TONELLI & CHRISTINA ANGORI, Defendants.	:	ROBERT J. PASSARELLI & ASSOCIATES Attorneys for Defendants 122 West Main Street, Suite 202 Babylon, New York 11702

Upon the following papers numbered 1 to 14 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 10 - 13 ; Replying Affidavits and supporting papers 14 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for summary judgment dismissing the complaint against them, is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Kevin C. O'Lenahan in a slip and fall accident on February 5, 2005, on defendants' property at approximately 9:30 a.m. The plaintiff was walking on a sidewalk which runs across the grass in front of Burger King and which leads from the sidewalk on Route 110 to the drive-thru driveway directly in front of the Burger King building. Plaintiff claims that as he was stepping from the sidewalk to the drive-thru driveway, he stepped on some ice which caused him to fall.

The defendants now move for summary judgment dismissing the complaint. In support of their motion, the defendants submit, *inter alia*: the pleadings, the deposition testimony of the plaintiff, the deposition testimony of Kevin Patera, and copies of six photographs of the scene of the accident.

At his deposition, plaintiff testified in pertinent part that on the morning of the accident he was initially at auto glass shop having his car repaired and he then needed to walk to an ATM machine

which was located on Route 110. He stated that he cut through the parking lot of one business establishment, but since the sidewalk in front of Burger King was covered with snow, he decided to take a pathway that connects the sidewalk in front of Burger King to Burger King's parking lot. The plaintiff testified that the parking lot of Burger King was fairly clear, and that this pathway was partially cleared of snow and ice. He stated that at the end of the pathway was a mound of snow, that he took one step over the snow, and when he put his one foot down, his feet went out from under him. He further testified: that he could not see the area of the driveway immediately in front of the mound of snow; that he did not walk on any part of the mound of snow; that before crossing over the mound, he did not recall seeing any moisture or ice in the driveway portion of the drive-thru which was immediately in front of the mound; and that he did not recall seeing any snow in that area. When asked if he knew exactly where he placed his foot, the plaintiff answered, "No, I don't know exactly where." In addition, when asked if he could place an "X" on a photograph where he believed his foot landed on the driveway, the plaintiff could only give an approximation.

The plaintiff also stated at his deposition that after he fell to the ground he did not recall feeling any moisture or having any snow or wetness on any part of his body. When questioned if, as he got up, he noticed the area where he had fallen, the plaintiff answered, "As I got up, I was -- again, I was in kind of shock. I really don't remember." When then asked if he looked to see what caused him to fall, the plaintiff responded, "I don't remember." The plaintiff testified to the effect that after this fall, he walked to the ATM machine and withdrew money, walked back to the auto glass shop, picked up his car, drove to Burger King, went inside, and called 911 from his cell phone. Lastly, he stated that he filled out an accident report and he took some pictures with his cell phone.

The defendants argue that based upon his testimony, the plaintiff cannot definitively say what caused his fall. They contend that the plaintiff's testimony clearly does not describe a single negligent act on the defendants' part which caused his injury. They assert that the plaintiff did not testify that any snow mound, snow, ice, or moisture caused him to fall. The defendants maintain that the cause of the accident is extremely vague and uncertain.

The defendants also point to the deposition testimony Kevin Patera, an employee of the entity who manages this Burger King franchise. Mr. Patera testified to the effect that snow removal had been done at the property approximately a week or two before the date of the accident, and that the contractor plowed and sanded the parking lot, the drive-thru lane, and the egress. Mr. Patera further testified that the managers and staff were responsible for addressing snow or ice on the sidewalks, and that he did not recall the last time the walkway was inspected for snow and ice prior to the date of the accident.

The defendants argue that based upon Mr. Patera's testimony there is no evidence that if snow clearing was done by the restaurant staff that it was not done correctly with respect to the plaintiff, as plaintiff's testimony shows he does not know what caused him to fall. They contend that their actions prior to the incident cannot be construed as being negligent, and that there are no facts which would entitle the plaintiff to defeat their motion for summary judgment.

In opposition, the plaintiff contends that the defendants were negligent in failing to remove the snow on the sidewalk adjacent to Route 110, and in failing to address a snow/ice condition where the walkway meets the drive-thru driveway, the location of his fall. The plaintiff submits color copies of

the same photographs submitted by defendants which he alleges depict the subject walkway and the drive-thru road surface. The plaintiff argues that his uncontroverted testimony, together with these photographs, establish that a dangerous condition existed at the end of the walkway, *to wit*, a mound of snow, which caused or contributed to the accident. The plaintiff asserts that he placed an "X" on the photograph on the approximate spot where his foot landed, where the drive-thru surface appears to be a darker color and presumably, is black ice. The plaintiff also argues that Mr. Patera, when shown a photograph, did admit that snow and ice appeared to be covering part of the walkway, and that he did not know when the walkway was last inspected or cleared of snow. The plaintiff claims that in light of Mr. Patera's testimony that there had been no snow fall in at least one week, the snow and ice condition existed for sufficient time to be discovered and corrected and, thus, defendants had constructive notice of the snow and ice condition. Further, the plaintiff points to §191-1.A of the Code of the Town of Babylon, and alleges that pursuant to this local law, the defendants were responsible for clearing the sidewalk adjacent to the street and keeping it clear of snow, and that they are liable for personal injuries by their failure to do so. Finally, the plaintiff maintains that although he admittedly testified that he did not know what caused him to fall, such does not negate the reasonableness of the inference that he slipped and fell on ice which the defendants failed to remove.

In this case, the defendants have met their burden of establishing prima facie entitlement to summary judgment by demonstrating that the plaintiff was unable to identify the cause of the accident (***Pluhar v Town of Southampton***, 29 AD3d 975, 816 NYS2d 176 [2006]). "Although the absence of direct evidence of causation would not necessarily compel a grant of summary judgment in favor of the defendant[s], as proximate cause may be inferred from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone" (***Hartman v Mountain Valley Brew Pub, Inc.***, 301 AD2d 570, 754 NYS2d 31, 32 [2003]). Mere speculation as to the cause of a fall, where there can be numerous causes, is fatal to a plaintiff's cause of action (***Garvin v Rosenberg,*** 204 AD2d 388, 614 NYS2d 190 [1994]). "Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon pure speculation (***Teplitskaya v 3096 Owners Corp.***, 289 AD2d 477, 478; 735 NYS2d 585, 586 [2001])

In opposition, the plaintiff failed to raise a triable issue of fact. Although, the plaintiff points to the photograph on which he put an "X" at the "approximate" spot where he placed his foot on the driveway, and argues that the darker color is "presumably" black ice, his deposition testimony clearly indicates that he did not know exactly where he placed his foot. Moreover, since this same photograph appears to show that some of the driveway surface where the plaintiff fell was totally dry, this evidence is insufficient to permit a reasonable inference that ice was present on the part of the driveway surface where he stepped (*see*, ***Fishman v Westminster House Owners, Inc.***, 24 AD3d 394, 806 NYS2d 550 [2005]; ***Pianforini v Kelties Bum Steer***, 258 AD2d 634, 685 NYS2d 804 [1999], *lv denied* 93 NY2d 814). As to the plaintiff's argument that the defendants violated the Babylon Town Code by failing to remove snow from the sidewalk adjacent to Route 110, the Court notes that the plaintiff's complaint does not allege any code violation and, in fact, that the plaintiff's verified bill of particulars specifically states that the "[p]leadings do not allege violation of any statutes, laws, etc."(*see*, ***Pinn v Baker's Variety***, 32 AD3d 463, 820 NYS2d 129 [2006]). However, even permitting such argument to be made in opposition to this summary judgment motion, in the absence of any evidence connecting the alleged

violation to the plaintiff's fall, no reasonable inference as to causation can be drawn (*see*, ***Reed v Piran Realty Corp.***, 30 AD3d 319, 818 NYS2d 58 [2006], *lv denied* 8 NY3d 801). Furthermore, the walkway which was partially covered with snow and ice and the mound of snow at the end of the walkway, are irrelevant to the issue of proximate cause, since the plaintiff maintained that it was black ice on the drive-thru road surface which caused his fall.

Accordingly, the defendants' motion for summary judgment on the issue of liability dismissing all claims against them is granted.

Dated: DEC 13 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION