Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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GERALD MANDLER,
Plaintiff,

Index No.: 25564/06
Motion Date: 2/27/08
Motion Cal. No.: 31 & 32

-against-

ALEXANDER'S REGO SHOPPING CENTER, INC., KINNEY SYSTEM CENTRAL PARKING OF NEW YORK, INC. and KINNEY PARKING SYSTEM OF NEW YORK, INC.,
Defendants.

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ALEXANDERS' REGO SHOPPING CENTER, INC.
Third-Party Plaintiff,

-against-

METRO CONSTRUCTION OF NEW YORK,
Third-Party Defendants.

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The following papers numbered 1 to 29 read on this motion by defendant Central Parking System of New York, Inc. i/s/h/a Kinney System Central Parking of New York, Inc. And Kinney System, Inc. i/s/h/a Kinney Parking System of New York, Inc., (hereinafter, "Central") for an order granting summary judgment in its favor pursuant to CPLR § 3212 and dismissing the plaintiff's complaint, all cross-claims, and any counterclaims as against it; and motion by defendant/third-party plaintiff Alexander's Rego Shopping Center, Inc. (hereinafter, "Alexanders") for an order, inter alia, granting summary judgment in its favor pursuant to CPLR § 3212 and dismissing the plaintiff's complaint, as against it and for an order, of indemnity or against third party defendant Metro Construction of New York (hereinafter, "Metro") For purposes of disposition, motions numbered 31 and 32 have been consolidated.

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Upon the foregoing papers it is ordered that the motions for summary judgment are granted for the following reasons:

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987). Finally, as stated by the court in Daliendo v. Johnson, 147 AD2d 312, 317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

According to the complaint, the action herein stems from an incident on December 26, 2004, in the parking lot of the Circuit City Store in the Rego Park Shopping Center, Queens New York. It is alleged that plaintiff slipped and fell on an icy condition as he was walking in the parking lot. Thereafter, he brought the instant action, claiming Defendants were negligent in the ownership, operation management, maintenance and control of the parking lot and permitted a dangerous, defective, and slippery condition to exist. Specifically, the complaint mentions Defendants failure to remove snow and ice in the subject area caused a more dangerous condition and allowed water and/or ice to remain. This caused his fall and injuries therefrom and he brought this action to recover damages.

Regarding both motions, Defendants Central and Alexanders have now moved for summary judgment on the grounds that Plaintiff's incident happened while snow was falling, and as such, there was no duty to clear any snow or ice from the parking lot. Defendants have submitted, *inter alia*, Plaintiff's deposition testimony which indicates that on December 26, 2004, he parked his car on the top floor of the parking lot and walked to his job at the Circuit City Store, located at the premises of the Rego Park Shopping Center. At this time - about 10:00 a.m.- Plaintiff did not see any snow or ice in the area around his car or anywhere on the top floor. He finished working at about 10:00 p.m. and noticed it was snowing as he walked back to his car - about one inch had accumulated on the ground. While cleaning the outside of his car with an ice scraper, plaintiff walked past a lamppost and fell. After falling, he saw an area on the floor cleared of snow, but, with ice. Defendants have also submitted a copy of a

report from the National Oceanic & Atmospheric Administration that indicates on December 26, 2004, at LaGuardia Airport, it began to snow at 7:51 and ended at 10:51. It also indicates that the last precipitation had taken place on December 23, 2004, when it rained in the afternoon. Defendants have also submitted copies of the deposition testimony of Norman McFoy, Manager with Central, Ronald Johnson, employed by Vornado, the property Manager, and George Herbert, with Metro, contracted to do cleaning and snow removal at parking lot. Their testimony indicates that they had never received, or knew about, any complaints of a person slipping in the lot or that water accumulated as a result of rain or melting snow.

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 demonstrate the absence of any material issues of fact. Ayotte v Gervasio, 81 NY2d 1062, 1063 (1993.) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 562 (1980.) A property owner will be held liable for snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of it. Olivieri v GM Realty Co., LLC, 37 AD3d 569 (2d Dept 2007); Nielsen v Metro-North Commuter R.R. Co., 30 AD3d 497, 497 (2d Dept 2006) Further, under the "storm in progress" doctrine, a party in possession or control of real property may be held liable for a hazardous condition created on its premises as the result of the accumulation of snow or ice during a storm only after the lapse of a reasonable time for taking protective measures subsequent to the cessation of the storm. Lotenberg v Long Is. R.R., 34 AD3d 435, 435 (2d Dept 2006); Coyne v Talleyrand Partners, L.P., 22 AD3d 627, 629 (2d Dept 2005); Perlicz v Redeemer Lutheran Church, 229 AD2d 378, 379 (2d Dept 1996.) Even a lull or a temporary break in a storm does not impose a duty on the owner to immediately remove the accumulation of snow. Ioele v Wal-Mart Stores, Inc., 290 AD2d 614, 616 (2d Dept. 2002.)

On this motion, Defendants have the initial burden of establishing their entitlement to judgment as a matter of law (*see*, Kyung Sook Park v Caesar Chemists, 245 AD2d 425 (2d Dept 1997.) Defendants have satisfied that burden with evidence of the injured plaintiff's own observations as testified at his deposition. Aguilar v. Reckson Associates Realty Corp. 26 AD3d 449 (2d Dept 2006.) DeMasi v Radbro Realty, 261 AD2d 354 (2d Dept 1999.) As such, it became Plaintiff's burden to show the existence of a factual issue sufficient to warrant a trial. Plaintiff has failed to meet that burden.

In opposition, the Plaintiff does not dispute that at the time he slipped, it was snowing. Moreover, he does not dispute the "Storm in Progress" rule as set forth above. However, Plaintiff does claim that the ice patch on which he fell was not caused by the snow on the day of the accident, but rather was caused by the rain three days before or even prior thereto. The

theory that the Plaintiff is apparently alleging is that the Defendants had more than adequate time to remove the "puddled" water that was on the ground from the rain three days before the accident. Moreover, the Plaintiff alleges that this case is unique and not subject to the "Storm in Progress" rule since Defendants had created an unsafe drainage system in the area of the accident. This was due to the lack of a floor drain at the area of the accident and the consequential build-up of water in the area.

Plaintiff has submitted an affidavit of Scott Silberman, an Engineer, wherein he states that there was a raised expansion joint in the subject area and it acted as a dam that prevented water from being drained. The Engineer stated that this condition violated industry guidelines. He also claimed it violated New York City Building Cod 27-466, which states that all floors shall be pitched to provide adequate drainage. The Engineer's report indicates that the floors at the parking lot were pitched, however there were insufficient drains. The Engineer also stated that the subject lot violated New York City Building Cod 27-901, which states that the disposal of storm water at buildings shall be according to other regulations and requirements. These regulations require the disposal of storm water into the sewer system. Plaintiff has also submitted an affidavit of Dr. Sobel, a Meteorologist, who stated that the last rainfall in the area was on December 23, 2004, and it amounted to .64 inches. Doctor Sobel opined that this rainfall caused the puddles of water to form in areas that drained poorly.

The Court finds that contrary to Plaintiff's arguments, Defendants have established their burdens of proof and Plaintiff has failed to raise an issue of fact regarding whether his fall resulted from a prior rainfall. Plaintiff's testimony indicates that he did not see any ice or snow in the area prior to his fall and there is only speculative evidence that there was any water in the area for a sufficient length of time to have permitted the Defendants to remedy the condition. The Meteorologist's conclusion that there was water in the subject area three days after it had rained is merely speculation and surmise since it is not supported by any scientific evidence. *See,* Romano v Stanley, 90 NY2d 444 (1997.) In fact, this Court is dumbfounded at the temerity of such conclusion being made by a Meteorologist. According to Webster's Ninth New Collegiate Dictionary, a meteorologist is one who deals with the atmosphere and its phenomena and especially with weather and weather forecasting. This does not include the study of water buildup on concrete surfaces and its evaporation rates. As such, the conclusion of Dr. Sobel is being given no probative force. *Id*. Consequently, the conclusion of the Engineer is neither probative nor relevant since there is no evidence that water was present in the subject area prior to the accident that would have accumulated as a result of poor drainage, and thereafter freeze and form ice that Plaintiff slipped upon. Additionally, neither expert refutes the likely theory that Plaintiff slipped due to conditions created by the snowfall in progress as he walked to his car.

The Engineer's conclusion is also insufficient to raise an issue of fact since he provides

no specific violation of industry wide standards or accepted practices pertaining to acceptable requirements for drains. Trojahn v O'Neill, 5 AD3d 472 (2d Dept 2004.) Additionally, the Building Code provisions he cites to are not clearly applicable to the instant case since they do not contain specific requirements for existing drainage. *See*, Lee v Oh, 3 AD3d 473 (2d Dept 2004.) The Court notes that one cited provision refers to the need for particular pitch to allow drainage, yet the Engineer acknowledges there was sufficient pitch.

Moreover, *assuming arguendo* that there was water accumulation in the area, there is no evidence to establish Defendants were aware that either this condition existed or that the specific ice condition would recur as a result of the poor drainage. *See*, Voss v D&C Parking 299 AD 2d 346 (2d Dept 2006.) Consequently, Plaintiff has failed to raise an issue of fact that the ice condition was a product of the prior rainfall. Therefore, since the Plaintiff fell while snow was falling, Defendants cannot be held liable for any failure to remove the snow or ice in the parking lot. Aguilar v. Reckson Associates Realty Corp., *supra*. The Court notes that plaintiff's claim that additional discovery is needed for his Engineer to render an opinion is belied by the fact that the Engineer does not claim to need any additional information. Moreover, the Engineer has rendered a report with a conclusion that would not be materially enhanced with additional discovery. Finally, any additional conclusion from the Engineer would not be able to raise an issue of fact regarding the presence of water on the parking lot floor prior to the snow fall on December 26, 2006.

Accordingly, summary judgment is granted to the moving defendants and the plaintiff's complaint is dismissed as asserted against them. Based upon this dismissal, the branch of the motions regarding the third party action are rendered academic.

Dated: March 4, 2008 **.....**

ORIN R. KITZES, J.S.C.