SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

VIKTOR KOTELEVETS and RITA KOTELEVETS,

Plaintiff(s),

-against-

ELM FREIGHT HANDLERS, INC. and BRENTWOOD DISTRIBUTION COMPANY,

Defendant(s)

MOTION DATES: 10/23/08 & 12/03/08
INDEX NO.: 18085/06
SEQ. NO. 3-5

BRENTWOOD DISTRIBUTION COMPANY,

Third-Party Plaintiff,

-against-

RICHARD TUFARIELLO d/b/a CONCRETE CONNECTION LIMITED,

Third-Party Defendant.

ELM FREIGHT HANDLERS, INC.,

Third-Party Plaintiff,

-against-

RICHARD TUFARIELLO d/b/a CONCRETE CONNECTION LIMITED,

Third-Party Defendant.

The defendants/third-party plaintiffs and third-party defendant's respective motions, pursuant to CPLR 3212, for summary judgment are determined as hereinafter provided.

On Monday, February 28, 2005, at approximately 6:00 a.m. the plaintiff Viktor Kotelevets, an employee of Olympics Imaging America, arrived for work at 50 Emjay Boulevard in Brentwood. The premises are owned by the defendant/third-party plaintiff Brentwood Distribution Company (hereinafter Brentwood) and leased to the defendant/third-party plaintiff ELM Freight Handlers, Inc.

(hereinafter ELM) which is responsible, inter alia, for the maintenance and repair of the parking lot. ELM, in turn, engaged the third-party defendant Richard Tufariello d/b/a Concrete Connection Limited (hereinafter Concrete) to plow the lot whenever two or more inches of snow fell (see ELM's Exhibit M).

Mr. Kotelevets exited his vehicle and began walking slowly towards its trunk (see Brentwood's Exhibit D, March 4, 2008 deposition, p.66,L25-p.67,L2). It was "very, very dark" (p.68,L21). He therefore "did not see anything" (p.171,L11) either as he entered the lot or when he stepped out of the car and began walking (p.175,L25-p.176,L2). However, after approximately ten to twelve steps (p.173,L23), he slipped an fell on "black ice" (p.74,L13) which he did not observe until after he fell (p.178,L24). The ice was "smooth" (p.180,L10) located "between [him] and the car" (p.179,L23) and reportedly extended from the trunk underneath the rear half of his vehicle (p.180,L18).

Three days earlier, on Friday, February 25, 2005, 2.6 inches of snow had fallen, although it did not snow over the weekend (i.e., February 26, 2005 and February 27, 2005) while the offices were closed, and it was not snowing at the time of the accident (p.163,L25-p.164,L7; ELM's Exhibit O). Mr. Kotelevets did not see ice in the row where he parked at any time during the prior week (p.183,L19), was unaware of any complaints about ice (p.183,L24) and did not know how long it had been present on the day of the accident (p.184,L5).

On November 3, 2006 the plaintiffs commenced this personal injury action alleging that the defendants were negligent in the ownership, operation, maintenance, management and control of the parking lot. Following joinder of issue, the case was certified for trial on May 14, 2008 and on August 6, 2008 the plaintiff filed a note of issue. The defendants' (July 8, 2008 and October 31, 2008) and third-party defendant's (August 15, 2008) motions were therefore timely filed (see CPLR 3212[a]).

During a May 14, 2008 deposition, Paul F. Jerkovich, the Lessing Director and Property Manager of Brentwood's parent corporation, Mack Management and Construction Corp., testified, in pertinent part, that Brentwood leased the premises to ELM (see Brentwood's Exhibit H, p.10,L5). Moreover, pursuant to the fourth and fifth amendments to the lease (see Brentwood's Exhibit J), ELM rather than Brentwood was obligated to repair and maintain the entire premises with the

exception of the roof (p.12,L13).

On April 10, 2008 ELM's Director of Security, Gilbert Montalvo, was deposed. Mr. Montalvo testified, inter alia, that ELM had contracted with Concrete for snow removal (see ELM's Exhibits M & N) and that he was unaware of any prior complaints about the condition of the parking lot (see Brentwood's Exhibit F, p.29,L12). Moreover, inspections by ELM's security personnel over the weekend (i.e., between February 25, 2005 when Concrete plowed and February 28, 2005 when the accident occurred) did not reveal the presence of any icy patches (p.10,L4-p.11,L9;p.15,L8-p.16,L23).In addition, Joseph Drozada, ELM's Director of Engineering, testified on May 13, 2008. His responsibilities include maintaining the interior and exterior of the building as well as the parking lot (see Brentwood's Exhibit G, p.7,L23;p.8,L5). The agreement with Concrete required it to plow and, if necessary, salt or de-ice the lots when there was two or more inches of snow (p.13,L25-p.14,L3,p.15,L3). He was unable to recall receiving any complaints about Concrete's work (p.32,L12).

Finally, Concrete's proprietor, Richard Tufariello, was deposed on May 8, 2008. He testified, in pertinent part, that the contract with ELM required Concrete to plow the lot whenever there was two or more inches of snow (see Brentwood's Exhibit I, p.13,L20). Conversely, it was allegedly obligated to spread salt only upon request (p.15,L2). He noted, upon review of Concrete's February 25, 2008 invoice (see ELM's Exhibit N), that it did not include a fee for spreading salt (p.29,L24-p.30,L3) and therefore opined that either ELM had performed that service or that the circumstances did not warrant it (p.30,L10).

"To make out a prima facie case of negligence in a slip-and-fall case involving an accumulation of snow and ice, the plaintiff must demonstrate that the defendant created the condition which caused the accident or that it had actual or constructive notice thereof (see Voss v DLC Parking, 299 AD2d 346). To give rise to constructive notice, a defect must be visible and apparent, and exist for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy it" (Teodorescu v Resnick & Binder, P.C., __AD3d__ [2nd Dept; October 14, 2008]). Alternately stated, "[a] defendant will only be held liable in a slip-and-fall accident involving snow and ice when it created a dangerous condition or had actual or constructive notice thereof" (Zambia v Westwood, LLC, 18 AD3d 542,544).

Here, the defendant/third-party plaintiff Brentwood has established a prima facie entitlement to summary judgment dismissing the complaint as against it on the ground that it did not maintain the premises as the time of Mr. Kotelevets' accident. Indeed, the plaintiffs have not opposed its motion.

Similarly, ELM has met its burden by submitting evidence, i.e., Mr. Montalvo's deposition testimony, that inspections of the lot by its security personnel after Concrete had plowed on February 25, 2005 and prior to the February 28, 2005 accident did not locate any patches of ice (see Brentwood's Exhibit F, p.11,L5-9;p.15,L10-p.16,L23) (see Werny v Roberts Plywood Co., 40 AD3d 977). Moreover, ELM did not receive any prior complaints about the condition of the lot (see Kristal v Ramapo Cirque Homeowners Assoc., 51 AD3d 846,847). In opposition, the plaintiffs have failed to raise a triable issue as to ELM's purported constructive notice of the condition. Mr. Kotelevets admitted, inter alia, that he did not see the patch of ice at any time before falling (see Brentwood's Exhibit D, p.175,L25-p.176,L2). Therefore, any finding as to when it developed must be speculative (see Kaplan v DePetro, 51 AD3d 730,731; Robinson v Trade Link America, 39 AD3d 616,617; Zambia supra at 544 cf. Walters v Costco Wholesale Corp., 51 AD3d 785,786; Santoliquido v Roman Catholic Church of the Holy Name of Jesus, 37 AD3d 815).

"General awareness that snow or ice may be present is legally insufficient to constitute notice of the particular condition that caused the plaintiff's fall" (Kaplan supra at 731). Otherwise stated, "[t]he mere presence of ice does not establish negligence on the part of the entity responsible for maintaining the property. Rather, plaintiff must present evidence from which it may be inferred that the ice on which he slipped was present ... for a long enough period of time before the accident that the party responsible for the [property] would have had time to discover and remedy the dangerous condition (see Simmons v Metropolitan Life Ins. Co., 84 NY2d 972 [1994]). Speculation that the ice patch on which he slipped had remained there from the snowfall of the week before will not suffice" (Lenti v Initial Cleaning Services, Inc., 52 AD3d 288,289; Teodorescu supra). The plaintiffs also failed to establish a triable issue of fact as to their conclusory claims that the condition was created by Concrete's improper snow removal (see Kristal supra at 846; Robinson supra at 617).

Accordingly, the defendant/third-party plaintiffs' respective motions, pursuant to CPLR 3212, for summary judgment dismissing the

plaintiffs' complaint are granted. The third-party defendant Concrete's motion for summary relief is therefore dismissed as academic.

Dated: 12-12-08

A.J.S.C.
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