

**Schwartzman v Geral Assoc., Inc.**

2009 NY Slip Op 30374(U)

January 21, 2009

Supreme Court, Nassau County

Docket Number: 04-16469

Judge: Joseph P. Spinola

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**SHORT FORM ORDER**

SUPREME COURT, STATE OF NEW YORK  
COUNTY OF NASSAU

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**ALICE L. SCHWARTZMAN and  
LEON SCHWARTZMAN,**  
Plaintiff

**Trial/IAS Part 17  
Index No. 04-16469  
Sequence No. 01, 02  
Submit Date 9/25/08**

*against*

**GERAL ASSOCIATES, INC. and INDUSTRIAL  
AND RESEARCH ASSOCIATES, LLC.**  
Defendants

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**INDUSTRIAL AND RESEARCH  
ASSOCIATES, LLC. ,**  
Third-Party Plaintiff

*against*

**GERAL ASSOCIATES,**  
Third-Party Defendant

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**The following papers read on this motion:**

- Notice of Motion/Order to Show Cause..... X**
- Cross-Motions..... X**
- Answering Affidavits..... X**
- Replying Affidavits..... X**

**PRESENT: HON. JOSEPH P. SPINOLA**

Motion by defendant, Industrial and Research Associates, LLC ("Industrial"), and cross motion by defendant, Geral Associates, Inc. ("Geral"), each seeking, *inter alia*, an Order, pursuant to CPLR 3212, granting it summary judgment dismissal of plaintiffs' Alice L. Schwartzman and Leon Schwartzman complaint is granted.

This is an action in negligence by plaintiff, Alice L. Schwartzman, a 58 year old woman, to recover for personal injuries allegedly sustained on January 15, 2004 at about 9:20 a.m., when she slipped and fell on "a mixture of snow and ice" on the south side parking lot at the premises located at 100 Crossways Park Drive in Woodbury, New York. The subject premises is owned by defendant, Industrial and Research Associates, LLC. Defendant, Geral Associates, Inc. was the contractor responsible to remove snow and ice

from said parking lot. It is undisputed that among the defendants herein, there was no written agreement or contract as between them in effect on the date of plaintiff's accident. Accordingly, that part of defendant, Geral's cross motion seeking an order dismissing the third cause of action set forth in defendant/third party plaintiff, Industrial's complaint, seeking recovery for contractual indemnity is granted.

At the time of plaintiff's accident, she was employed by a company called Military Car Sales whose offices were located at the subject premises. At her examination before trial, plaintiff testified that when she arrived at the parking lot on the morning of January 15, 2004, the parking spaces in the lot had been plowed but that there was snow around the perimeter of the lot. She characterized the area as being "mostly cleared" or "partially cleared." She stated that the pavement was covered by "a skim coat of snow and ice." She stated that she took approximately eight steps from where she had parked her car and slipped on "a thin layer of snow and ice, about a half inch." Both defendants seek summary judgment dismissal of plaintiff's complaint on the grounds that the accident occurred during a "storm in progress" and as such they cannot be held liable for her accident.

It is well settled that "a property owner will not be held liable for accidents resulting from the accumulation of snow or ice on the premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazardous condition" (*Fahey v. Serota*, 23 AD3d 335, 336-337 [2<sup>nd</sup> Dept. 2005]).

Here, the defendants submitted, *inter alia*, the expert affidavit of William Sherman, a meteorologist, who states, that to a reasonable degree of meteorological certainty, it was snowing at the time and place of the alleged accident. Therefore, defendants, have established their *prima facie* entitlement to judgment as a matter of law by submitting proof of a storm in progress at the time of the fall (*DeVito v. Harrison House Assoc.*, 41 AD3d 420, 421 [2<sup>nd</sup> Dept. 2007]).

In opposition, plaintiff fails to submit her own affidavit; rather, the plaintiff relies upon the affirmation of her attorney, who is without personal knowledge of the facts. Clearly, this does not supply the evidentiary showing necessary to successfully resist the defendants' motions (CPLR 3212 [b]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 229 [1978]).

In opposition, plaintiff's counsel contends that plaintiff fell on "old" ice from a prior storm which was hidden under the new snowfall. Specifically, plaintiffs' counsel states that "the preceding weather conditions substantiates the presence of a pre-existing and unattended icy condition formed approximately 2 days prior" (*Aff. in Opp.*, ¶3). Plaintiff submits the affidavit of meteorologist, George Wright, who opines, in pertinent

part, as follows:

1. Snow began to fall during the late evening of January 11, 2004. The snow continued into the early morning hours of January 12, 2004. The snow began between 11:00 p.m. and 11:30 p.m. on January 11, 2004 and ended between 4:30 a.m. and 5:00 a.m. on January 12, 2004. A total of three-quarters to one and one-quarter inch (0.75-in. to 1.25-in.) of snow accumulated on exposed, undisturbed (i.e., not shoveled or walked upon) and untreated (i.e., not salted) portions of the parking lot in question at 100 Crossways Park West in Woodbury, New York during this time period. Prior to this storm there was no snow or ice on the ground from any previous storms.

2. The weather was cloudy for the remainder of the day on January 12, 2004. The temperature reached a high of 36° which produced some melting of the snow that had accumulated earlier in the day. A mixture of snow and freezing rain developed between 5:00 p.m. and 5:30 p.m. on January 12, 2004. The icy precipitation ended between 6:45 p.m. and 7:15 p.m. on this day. The sky remained cloudy through midnight on January 12, 2004.

3. The weather on January 13, 2004 began with cloudy skies at midnight. The temperature at this time was 36°. The sky remained cloudy through the morning hours and into the afternoon. Additional melting of a portion of the snow that had accumulated in the parking lot in question occurred on January 13, 2004 since the temperature remained above freezing throughout the day. Light rain developed between 2:30 p.m. and 3:00 p.m. during the afternoon of January 13, 2004. The rain quickly changed to snow before ending between 3:15 p.m. and 3:30 p.m. Sharply colder Arctic air moved into Woodbury after this time as the wind shifted to the northwest at average speeds of 10 to 15 mph with gusts to 25 to 30 mph. The temperature cooled to the freezing point (i.e., 32°) at 5:30 p.m. on January 13, 2004. The sky cleared by 7:00 p.m. in Woodbury. The temperature plunged into the teens later in the evening on this day resulting in a hard freeze of the rain and snow that had fallen between approximately 2:30 p.m. and 3:30 p.m. and the meltwater that was present in the parking lot that had formed from the snow that had fallen on January 11-12, 2004. The temperature at midnight on January 13, 2004 was 16°.

4. The snow continued to fall during the early morning hours of January 15, 2004. Since the ground was cold the snow rapidly accumulated in the parking lot in question. The snow accumulated on top of the ice that had formed during the evening of January 13, 2004. The snow continued to fall until the late morning of January 15, 2004. It ended between 10:45 a.m. and 11:15 a.m. A total of 6.0 to 7.0 inches of snow accumulated on exposed, undisturbed and untreated portions of the parking lot in question.

5. Based upon a review of all relevant records, climatological data, and all

conclusions reached thereto, I state within a reasonable degree of meteorological certainty that the ground surface conditions existing at the time of Mrs. Schwartzman's fall was comprised of pre-existing ice from a thaw and sudden freeze in the days prior to January 15, 2004, and accumulating snow from the snow fall" (*Aff in Opp.*, Ex. A [Wright Aff.]).

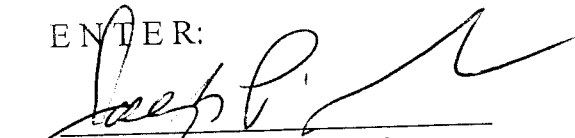
It is noted at the outset that plaintiffs concede - through the affidavit of meteorologist George Wright - a significant winter storm was in progress during the relevant period of time. Further, plaintiff's meteorologists's affidavit is clearly based upon speculation and unwarranted assumptions. Mr. Wright speculates that an insignificant amount of snow produced "meltwater" which was present in the parking lot approximately a day and half later during the late afternoon of January 13, 2004, that froze and remained in place until the time of the accident, over a day and a half later on January 15, 2004. He does not identify the part of the parking lot in which the hypothetical "meltwater" froze. He assumes that it was simultaneously located in all parts of the parking lot. Wright fails to offer any proof whatsoever to substantiate this attenuated theory and thus is rejected as rank speculation.

Plaintiff's meteorologist's opinion as stated in his affidavit does not withstand rational analysis. It is not referenced to the particular area of the parking lot where the accident allegedly occurred. It assumes that no remedial measures were taken by the defendants prior to the accident. Finally, it contradicts the plaintiff's own testimony that there was no storm in progress at the time of her fall. It is well settled that in opposing a motion for summary judgment, plaintiff must submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]) even if alleged by an expert (*Alvarez v Prospect Hospital*, supra; *Aghabi v. Sebro*, 256 AD2d 287 [2<sup>nd</sup> Dept. 1998]). Accordingly, defendants' motion for summary judgment dismissing of plaintiffs' complaint is herewith granted and the complaint is dismissed.

In light of the foregoing, that part of defendant, Industrial's motion seeking an order granting it common law indemnity from defendant Geral Associates because any liability would be imposed vicariously by reason of Geral's negligence or breach of contract is denied as moot.

This constitutes the decision and order of the Court.

ENTER:



**ENTERED** Joseph P. Spinola, Justice  
Supreme Court, Nassau County

FEB 11 2009

Dated: January 21, 2009  
Mineola, NY

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**