SHORT FORM ORDER

INDEX No. 04-22174
CAL. No. 08-01372-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 10-8-08
ADJ. DATE 2-9-09
Mot. Seq. # 001 - MD

RICHARD GENNARIO, Plaintiff, - against - HEATHERWOOD COMMUNITIES and SPRUCE POND CO., LLC., Defendants.	BARTLETT, McDONOUGH, et al. Attorneys for Plaintiff 300 Old Country Road Mineola, New York 11501 BRODY, O'CONNOR & O'CONNOR Attorneys for Defendants 7 Bayview Avenue Northport, New York 11768

Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 -11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 20 ; Replying Affidavits and supporting papers 21-23 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants, Heatherwood Communities, Inc. and Spruce Pond Co., LLC, pursuant to CPLR 3212 for summary judgment dismissing the complaint, opposed by plaintiffs, is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Richard Gennario, while he was walking from his residence and slipped and fell in the parking lot between buildings 7 and 8 at the Heatherwood Communities apartment complex located at 811 Spruce Drive, Holbrook, New York, on January 8, 2003. Plaintiff alleges there was an icy and slippery condition which the defendants created by piling the snow in the adjacent area, that the defendants failed to warn of the icy conditions, permitted the same to remain, and failed to remedy the condition.

The defendants now move for summary judgment on the basis that the evidence fails to establish that they created the alleged icy condition, or had actual or constructive notice of it, that the plaintiff fell while a storm was in progress, and that plaintiffs cannot establish a prima facie case of negligence

against them. In support of the motion, the defendants submit, inter alia, an attorney's affirmation; copies of the pleadings and bill of particulars; copies of the transcripts of the examinations before trial of Richard Gennario and Edward Ciervo; affidavits of Edward Ciervo; and a certified copy of surface weather observations. In the Reply, a further affidavit of Edward Ciervo has been submitted.

In opposing this application, the plaintiff has submitted, inter alia, an attorney's affirmation; affidavit of Richard Gennario; copy of local climatogical data; copy of an accident report; response to a Notice to Produce dated October 31, 1006 and supplement.

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 issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]. The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers, Winegrad v N.Y.U. Medical Center, *supra*. Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]. The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2nd Dept 1979] and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established, Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]. Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979].

At his examination before trial, Richard Gennario testified that on Wednesday, January 8, 2003, he had been renting an apartment at the Spruce Pond address for about four years pursuant to a lease agreement. He worked as an executive vice president at Bank of America on Madison Avenue. He usually drove his car to the train station and usually took the 7:06 train to work from Oakdale. On January 7, 2003, on the evening before the accident, after returning home from work between 7:00 p.m. to 10:00 p.m., he walked from the parking lot to his apartment and noted there was significant snow on the ground but it had stopped snowing. The following morning at 6:30 a.m. he walked to his car from his building, building 8, wearing wing tipped shoes and carrying a soft leather attache case. His car was parked facing building 8 and to the rear of his car was building 7. It was dark out, but the light on his stoop was lit. There was no snow on his porch as someone had shoveled. He exited his building, turned right, went to the end about eight to ten feet, made another right onto the walkway and walked about fifteen feet on a generally cleared path. He did not recall seeing any sand or ice melt. As he continued walking to his car, his right foot slipped, he lost his balance and fell backwards. He then used his cell phone to call 911 as he was totally unable to get up as his left ankle was going out at an angle. As he lay there, he saw ice on the ground and saw a neighbor walk by and get into a car. He believed his neighbor did not see him. In his opposition affidavit, Mr. Gennario set forth that he had no difficulty proceeding from his apartment to the nearest parking lot where his vehicle was parked where the ice was

located upon which he slipped.

Edward Ciervo testified that at the time of the accident he lived at Heatherwood Communities, a twenty two acre complex with three hundred sixty units and four hundred twenty parking spots, and worked there as a superintendent-property manager. He had an assistant, Gary Morgan, who no longer works there, and six other workers on staff. It was his and Mr. Morgan's responsibility to oversee everything on the complex property including landscaping, apartment maintenance, snow and ice removal, and overall maintenance. He was supervised by Vinnie Suttera, the district manager for Heatherwood Communities which had an human resources office in Islandia. He was provided with a policy manual which provided for a truck with a plow to be kept at the premises, three snow blowers, a Kobata which is used as a lawn mower in the summer and a plow in the winter, shovels and ice scrapers. Sand and salt is kept on site to use in the winter. He testified that he did not keep a log concerning what work was performed and stated it was common sense to use a shovel for a little snow and everything comes out if there is a lot of snow, but then later testified that he kept a log like a diary and wrote a daily work list for each day and weather, but not temperatures. His day started at 8:00 a.m. and ended at 5:00 p.m. and during the winter he checked, inter alia, walkways for water runoffs which freeze at night, gutters and drainage from the roofs for ice dams which may cause ice on the walkways or parking lots. He testified that he filled out an accident report concerning Mr. Gennario's accident from information he received about twelve days after the accident from Margie, an office manager in the main office, but he did not speak to Mr. Gennario himself.

By way of an affidavit dated March 23, 2007, Mr. Ciervo set forth that he conducted a search for the procedural manual for snow and ice removal but could not locate the manual.

In his affidavit submitted with the moving papers, Mr. Ciervo set forth that he inspected the sidewalks and walkways on January 7, 2003 during the late afternoon and did not make any observations of any ice conditions located on the walkway leading to the parking lot between buildings 7 and 8, nor was he informed of any ice conditions attributable to water run off from piled snow or blocked storm drains on the walkway leading to the parking lot. Although he testified that he kept a daily log, such log for the date at issue has not been submitted by the defendants in support of his conclusory testimony and there is no testimony to advise this court why the same has not been provided.

The climatologic records submitted by the defendants indicate snowfall on January 1st, 2nd, 3rd, 4th, 5th and 6th in the respective amounts of 0.92, 0.34, 0.41, 0.01, 0.09, and 0.06 inches. There was only a trace of precipitation in the nature of rain /snow/or mist on January 7th and 8th, 2003, but the time is not indicated. Therefore, it is determined that the defendants' claim that there was a storm in progress at the time of the accident has not been supported by any of the admissible evidence or testimony.

Plaintiff has submitted a partial copy of the log provided to them for this court to review. The entry of January 2, 2003 indicates storm clean up was done by the crew and the walks were blown. There are no entries for January 3rd, 4th, or 5th. It is indicated on the January 6, 2003 entry that snow removal was performed on the walks. The walks were shoveled on January 7, 2003 and ice melt was used. Further snow removal was performed on January 8, 2003 before lunch and the plow was removed from the truck.

By way of an affidavit submitted in the reply, Mr. Ciervo set forth that he conducted daily inspections of the property within the Spruce Pond complex, including the parking lot to ensure that there was not any water runoff during the day and freezing at night to ensure that no ice dams or similar conditions built up on the parking areas. On January 7, 2003, he did an inspection of the parking lot during the late afternoon on January 7, 2003 and did not observe, nor was he informed, of any ice conditions attributable to water run off from piled snow or blocked storm drains on the walkway leading to the parking lot between buildings 7 and 8.

The defendants argue that the above evidence demonstrates that they did not create the icy condition and that they had no actual or constructive notice of it, the incident occurred during a storm, and are therefore entitled to an order granting summary judgment.

The storm in progress doctrine includes the principle that a landowners' duty is suspended during a lull in the storm, *see*, Zone v State of New York, 2008 NY Slip Op 28285, 21 Misc3d 183, and that a landowner has a reasonable opportunity to clear accumulated snow from the property/parking lot, *see,* Schuster v Dukarm et al, 2007 NY Slip Op 2374, 38 AD3d 1358. Although climatogical data has been submitted by the defendants in support of the motion, the data does not indicate that a storm was in progress, and no expert testimony establishing the same has been submitted by the defendants. Accordingly, the defendants have not established prima facie entitlement to summary judgment on the issue that there was a storm in progress at the time of the accident.

"Analysis of a case involving a slip and fall in winter conditions starts with the well-settled principle that a party who possesses or controls real property is under a duty to exercise reasonable care under the circumstances. A necessary precondition to the imposition of liability is a showing that the defendant had actual or constructive notice of the hazardous condition. In slip and fall cases, the plaintiff is often aware of the presence of a slippery surface caused by snow or ice. While perhaps relevant to the issues of notice and comparative negligence, the obviousness of this type of hazard does not ordinarily preclude a finding of liability on the part of the property owner," Stern v Ofori-Okai, 246 AD2d 807 [3rd Dept 1998].

It is well settled that in order for a plaintiff in a slip and fall case to establish a prima facie case of negligence, the plaintiff is required to prove that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of such condition, *see*, Golding v Powell & Dempsey, Inc., 247 AD2d 510 [2nd Dept 1998]; Kraemer v K-Mart Corporation, 226 AD2d 590 [2nd Dept 1996]. To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it," Gordon v American Museum of Natural History, 67 NY2d 836 [1986]. Moreover, a general awareness that a dangerous condition might exist is legally insufficient to constitute notice of the specific condition which caused the injury, Baumgartner v Prudential Insurance Company of America, 251 AD2d 358 [1998]). A landowner's responsibility is to assure that the conditions on his property are reasonably safe, Perkins v Gervis et al, 2006 NY Slip Op 50335U, 11 Misc.3d 1061A. Landowners are under a duty to maintain their premises in a reasonably safe condition in view of the circumstances, including the likelihood of injury to others, Comeau v Wray, 241 AD2d 602 [1997]. This duty

encompasses warning others of the danger, including obvious ones, or take reasonable steps to protect others from the dangers, Comeau v Wray, supra).

In this case, the Court concludes that the defendants have failed to establish their prima facie burden on their motion for summary judgment and finds issues of facts concerning whether defendants used reasonable care in preventing an ice accumulation from run off from piled snow or from ice dams. Although the defendants were aware of those same conditions forming at the premises and inspected for their presence, there has been no testimony or evidentiary support to show whether ice melt or sand was applied to the parking areas or walkway to prevent ice formation or ice dams on or about the date of the accident from the melting snow piles or other sources mentioned. It is noted that Mr. Ciervo does not comment on the condition of the accident site on the date of the accident shortly after it occurred in light of his inspections which he stated he performed on a daily basis, and most recently the afternoon prior to the accident.

As such, the defendants' own proof creates issues of fact also as to whether they had actual or constructive notice of the icy condition of the walkway/driveway before the plaintiff's fall, *see*, Dawson v Raimon Realty Corp., 303 AD2d 708 [2003], and what measures were taken to prevent ice formation from snow pile run off or ice dams in light of knowing those conditions occurred and for which they performed inspections.

On a motion for summary judgment to dismiss a complaint based upon lack of notice, a defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law. Defendants have not met their burden of demonstrating entitlement to an order granting summary judgment as a matter of law on the issue of whether or not they were aware that ice existed on the parking lot by the walkway at the time plaintiff claims to have slipped on ice in their driveway. Since Mr. Ciervo could only testify to his custom and practice, unsupported by his log or other admissible evidence, defendants have failed to establish as a matter of law that their snow removal activities in piling snow in the area of the walkways and parking lot allowing for run off and ice formation did not create a dangerous condition which caused plaintiff's injuries, *see*, Giamboi v Manor House Owners Corp., 277 AD2d 201 [2000]. Therefore, defendants have not demonstrated prima facie entitlement to an order granting summary judgment, and the burden therefore has not shifted to plaintiff to come forward with admissible evidence to demonstrate the existence of factual issues to preclude an order granting summary judgment (CPLR 3212[b]; Zuckerman v City of New York, supra).

Accordingly, defendants' motion (001) for an order granting summary judgment on the issue of liability is denied.

Dated: March 23, 2009

Ralph J. Costello
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION