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SHORT FORM ORDER

INDEX NO. 08-19520

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-31-09 (#001)
MOTION DATE 4-21-09 (#002,#003,#004 & #005)
ADJ. DATE 5-19-09
Mot. Seq. # 001 - MG # 002 - MG
003 - MG # 004 - XMG
005 - XMG

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JOSE FRANCISCO ESCOBAR,

Plaintiff,

- against -

WILLIAM AHERN, FLORENCE AHERN, DOUBLE J. CORPORATION, CHRISTOPHER SIMMONS, KAREN SIMMONS, ISLAND JET SKI & MOWER DOCTOR, KINGS PARK KUTS, THE COUNTY OF SUFFOLK and THE TOWN OF SMITHTOWN,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants Christopher Simmons, Karen Simmons & Mower Doctor Island Jet & Ski, Inc s/h/a Island Jet Sk & Mover Doctor, dated March 6, 2009, and supporting papers (including Memorandum of Law dated _____); and Notice of Motion/Order to Show Cause by the defendants William Ahern & Florence Ahern, dated March 18, 2009, and supporting papers; Notice of Motion/Order to Show Cause by the defendant Town of Smithtown, dated March 27, 2009, and supporting papers; (2) Notice of Cross Motion by the defendant County of Suffolk, dated March 26, 2009, and supporting papers; and Notice of Cross Motion by the defendant Kings Park Kuts, dated March 30, 2009, and supporting papers (3) Affirmation in Opposition by the plaintiff dated April 15, 2009, and supporting papers; Affirmation in Opposition by defendant Double J. Corporation, dated April 23, 2009, and supporting papers, Affirmation in opposition by the plaintiff dated April 15, 2009, and supporting papers; Affirmation in opposition by Defendant Double J. Corporation dated April 24, 2009, and supporting papers; Affirmation in Opposition by plaintiff dated April 15, 2009, and supporting papers; Affirmation in Opposition by defendant Double J. Corporation, dated April 23, 2009, and supporting papers Affirmation in Opposition by plaintiff dated April 15, 2009, and supporting papers; Affirmation in Opposition by defendant Double J. Corporation, dated April 24, 2009 (including a Memorandum of Law by defendant County of Suffolk dated March 30, 2009); Affirmation in Opposition by plaintiff dated April 15, 2009, and supporting papers; Affirmation in Opposition by the defendant Double J. Corporation dated April 24, 2009, and supporting papers (4) Reply Affirmation by the defendants William Ahern & Florence Ahern, dated May 5, 2009, and supporting papers; Reply Affirmation by the defendants Kings Park Kuts, dated April 22, 2009, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendants Christopher Simmons, Karen Simmons and Mower Doctor Island Jet & Ski Inc. is granted; and it is further

ORDERED that the motion by defendants William Ahern and Florence Ahern is granted; and it is further

ORDERED that the motion by defendant Town of Smithtown is granted; and it is further

ORDERED that the cross motion by defendant County of Suffolk is granted; and it is further

ORDERED that the cross motion by defendant Kings Park Kuts is granted.

By their motion, defendants Christopher Simmons, Karen Simmons and Mower Doctor Island Jet & Ski Inc., s/h/a Island Jet Ski & Mower Doctor ("Mower Doctor"), seek summary judgment granting dismissal of plaintiff Jose Francisco Escobar's ("plaintiff") underlying complaint against it and provide, among other things, copies of the pleadings, plaintiff's General Municipal Law Section 50-h testimony, photographs, and affidavits of Christopher and Karen Simmons. Plaintiff opposes the motion and submits his own affidavit, a copy of a notice of claim against defendants Suffolk County ("Suffolk") and the Town of Smithtown ("Smithtown"), climatological reports, and excerpts from his testimony. Defendant Double J. Corporation ("Double J") also opposes. By their motion, defendants William Ahern and Florence Ahern (the "Aherns") ask that plaintiff's complaint and any cross claims against them be dismissed and provide, in support, copies of the pleadings, plaintiff's deposition testimony, a copy of an emergency room record, a copy of an order of this court dated December 16, 2008, a letter from counsel dated February 9, 2009, and a climatological report. Plaintiff opposes the Aherns' motion and submits his own affidavit, a notice of claim, photographs and a climatological report. Double J also opposes the Aherns' motion and provides a copy of its verified answer and an excerpt from plaintiff's testimony. The Aherns have replied. Defendant Smithtown moves for summary judgment dismissing plaintiff's complaint against it and any cross claims asserted against it and provides in support, the pleadings, the notice of claim, and plaintiff's testimony. Plaintiff opposes and submits his own affidavit, the notice of claim, photographs, a climatological report, and an excerpt from his deposition. Double J also opposes. Suffolk cross-moves for an order dismissing the complaint against it and any cross claims asserted against it and submits, in support, the notice of claim, correspondence from counsel dated June 20, 2007, the pleadings, and affidavits from various county employees including the Chief Deputy of the Suffolk County Legislature. Suffolk has also suppled a memorandum of law. Both plaintiff and Double J oppose. Defendant Kings Park Kuts ("Kuts") cross-moves for summary judgment and provides in support, the pleadings, an excerpt from plaintiff's testimony, photographs, plaintiff's emergency room record, this court's December 16, 2008 order, a letter from counsel dated February 10, 2009, an affidavit from Helen Dierna, owner of Kuts, and a climatological report. Plaintiff and Double J oppose, and Kuts has replied.

According to plaintiff's testimony, on a Sunday in March 2007, between 6:30 and 7:00 in the morning, he fell on ice "in between the two houses" at a location in on Church Street in Kings Park, New York. The climatological data submitted to the court reveals that snow had fallen the evening before plaintiff's fall. Plaintiff testified that "it had snowed" on Saturday and when asked what caused him to fall, he replied, "The snow because what else?" Plaintiff further testified that he "slipped" and, in fact,

used that term several times to describe the manner in which he fell. Plaintiff was asked to mark on a photograph the location of "where this incident occurred." He did so. Plaintiff was taken to the hospital emergency room and, the next week, according to his testimony, was taken to Nassau University Medical Center where he underwent surgery on his left knee and ankle.

The Simmonses and the Aherns each, by their respective motions, contend, among other things, that they did not own the place where plaintiff is alleged to have fallen and, therefore, have no liability in this matter. Further, Helen Dierna, owner of Kuts, which leased space at 12 Church Street, contends that the location of plaintiff's accident was not in within the leased premises and that Kuts did not have a duty to maintain the property where plaintiff allegedly fell. Specifically, the Simmonses, by their affidavits, acknowledge an ownership interest in 16 Church Street and Mower Doctor, which is a tenant at the premises. The Aherns, by their affidavits, deny ownership of 14 Church Street. Each note that the mark placed on the photograph by plaintiff to indicate the spot where he fell is not on their property. Plaintiff opposes and argues that discovery has not been completed inasmuch as depositions of the parties have not been conducted and, in any event, both his verified bill of particulars and his notice of claim describe the area where the accident allegedly took place as between 12 Church Street and 16 Church Street. In addition, plaintiff contends that the amended bill of particulars states that "the accident took place at or near the snow-covered curb that separates the driveway adjacent to 16 Church Street and the parking lot of 12 Church Street." Double J, in its opposition, claims a question of fact exists as to which entity, if any, was responsible for maintenance and snow removal at the site of plaintiff's alleged accident. It also contends that defendants' failure to include a lease agreement or some other indicia of the boundaries of the leased premises or a copy of any agreement with respect to snow removal, precludes a summary determination in their favor.

It bears noting, as a threshold matter, that although the Simmones, the Aherns and Kuts voice several grounds for summary judgment, review of the papers makes clear that various procedural difficulties resulted in the motions now before the court. Kuts and the Aherns contend that a fair reading of the evidence indicates that plaintiff fell between 12 and 16 Church Street, more commonly known as 14 Church Street. Specifically, to date, plaintiff has not articulated a precise address for his mishap. In fact, his 50-h deposition testimony refers to a location between two addresses. Further, a notice to admit by Ahern served upon plaintiff sought an admission or denial of the statement: "The circle on the attached photograph herein was made by the plaintiff in this action and identifies the location where plaintiff alleges he slipped and fell on the date of loss." Counsel for the Aherns affirms that plaintiff failed to respond to the notice to admit served on October 7, 2008 nor was any request made to an extension of time within which to do so. The photograph submitted for admission was that on which plaintiff marked the site of his fall during the 50-h hearing. Additionally this court issued an order dated December 16, 2008 which, *inter alia*, directed counsel for plaintiff to serve, within 30 days, a supplemental bill of particulars "regarding the *specific* property address at which [plaintiff] fell (emphasis supplied)." Plaintiff belatedly filed a supplemental bill of particulars, which states that "the accident occurred at or near the snow-covered curb that separates the driveway adjacent to 16 Church Street and the parking lot of 12 Church Street, Kings Park, New York 11754." Subsequent conferences before the court concerning various pretrial directives were not productive inasmuch as plaintiff's counsel sent an attorney admittedly unfamiliar with the matter. Ultimately, the amended bill of particulars was rejected by counsel based on the alleged failure to comply with the order. Further, upon presentation of the photographed marked by plaintiff, the Aherns affirm that they neither own nor bear responsibility for the

location of the accident, which they describe as 14 Church Street. Similarly the Simmonses also disavow ownership or responsibility for the site.

Summary judgment is, of course, a drastic remedy and is to be applied sparingly (***Andre v Pomeroy,*** 35 NY2d 361 [1947]). The court's focus in making such determination is upon issue finding not issue solving, and all competent evidence must be viewed in the light most favorable to the parties opposing the motion (***Sillman v Twentieth Century Fox Corp.*** 3 NY2d 395 [1957]). To prevail on a motion for summary judgment, the movant must proffer sufficient evidence to eliminate all material issues of fact (***Winegard v New York University Medical Center***, 64 NY2d 851 [1985]).

By their motions, the Simmones, the Aherns and Kuts argue that the evidence adduced fails to establish that they owned or were responsible for the maintenance of the location of plaintiff's fall. They further argue that, in the event they are deemed to own the property, the evidence before the court demonstrates that none of the defendants had sufficient opportunity to rectify the defective condition inasmuch as plaintiff's accident took place very early in the morning after an evening snow fall. The Simmones, the Aherns and Kuts also contend that plaintiff failed to establish that any of the defendants created or exacerbated the hazardous condition or had actual or constructive notice of the alleged hazardous condition, or that a reasonable time had elapsed to permit the condition to be remedied prior to the accident. Plaintiff's testimony revealed that it had snowed the day before and that "there was all snowed" in the parking lot when he exited his car upon arrival at the parking lot. The climatological data submitted by plaintiff corroborated the fact that the unplowed snow was newly fallen despite plaintiff's description of the snow as "old." It appears it was a scant four hours between the cessation of the snow and the accident, which took place in an industrial area on a Sunday.

Plaintiff, by his opposition, does not address the issue as to whether defendants, assuming they owned the property where he is alleged to have fallen, had notice of, or created, the alleged dangerous condition (*see* ***DeVivo v Sparago***, 287 AD2d 535 [2001]). Nor has he presented evidence indicating how long the condition existed before he fell(*see* ***Dwulit v Walters,*** 19 AD3d 535 [2005]). Under the facts of this case, defendants cannot be held liable for plaintiff's accident even if it were found to have occurred on their properties, since the evidence shows that a reasonable time had not elapsed between the cessation of the snow storm and the fall within which the property owners would have had the opportunity to ameliorate the hazards caused by the snow (*see* ***Sfakianos v Big Six Towers, Inc.***, 46 AD3d 665 [2007]). The motions, therefore, by the Simmonses, the Aherns and Kuts are granted.

By its cross motion Suffolk contends, among other things, that plaintiff has failed to plead and prove compliance with the written notice requirement as a condition precedent for his claim against a municipality, and that it has provided uncontroverted evidence that no such prior notice has ever been lodged with the county. Suffolk further contends that such notice is a substantive element of plaintiff's cause of action against the county. Both plaintiff and Double J, by their respective oppositions, claim that the motion by Suffolk is premature and that the "self serving" affidavits by county employees that Suffolk did not own or maintain the site of the alleged accident is insufficient to serve as a basis for summary dismissal of plaintiff's complaint.

Suffolk has submitted proof that no written notice of any icy conditions on any of the areas described by plaintiff were filed with the appropriate county office prior to the date of the accident. Nor

has plaintiff pleaded or raised any issue of fact with respect to compliance with this condition precedent (*see* ***Gellos v Town of Hempstead***, 284 AD2d 370 [2001]). Such failure is fatal to his case with respect to the county (*see* ***Gorman v Town of Huntington***, 12 NY3d 275 [2009]). Plaintiff has also failed to establish that the county created or exacerbated the condition which caused the accident (*see* ***Gam v Pomona Professional Condominium***, 291 AD2d 372 [2002]). Nor has plaintiff or Double J demonstrated that further pretrial discovery might uncover proof that the county created or exacerbated the condition (*see* ***Gruska v City of New York***, 292 AD2d 498). The motion by Suffolk, therefore, is granted.

By its motion Smithtown contends, in essence, that it did not own the site of the accident. In support it has provided an affidavit of William Murphy, the town Director of Parks, Buildings and Grounds, who reviewed the documentation provided by plaintiff, including his 50-h testimony and the photograph marked by plaintiff. Based on his review, Murphy affirms that the town did not own the various sites articulated by plaintiff in his pleadings or during his examination.

Plaintiff and Double J counter that the motion by Smithtown is premature and that plaintiff's amended bill of particulars states that "the accident took place at or near the snow-covered curb that separates the driveway adjacent to 16 Church Street and the parking lot of 12 Church Street, Kings Park, New York 11754."

Counsel for Smithtown conducted the 50-h hearing. In determining whether plaintiff's law suit with respect to the town should be dismissed, the court may review the testimony adduced at the hearing (*see* ***Rutto v Westchester***, 298 AD2d 450 [2002]). The evidence here demonstrates that the town did not own the property where the accident took place. The motion by Smithtown, therefore, is granted.

Dated: 2/19/09

PETER H. MAYER, J.S.C.

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