SUPREME COURT OF THE STATE OF NEW YORK **Index No. 104311/08**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 1**

MITCHELL EILENBERG, and
JEANNETTTE EILENBERG, his wife

Plaintiffs

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

SHARROTS ESTATES HOMEOWNERS ASSOCIATION, INC.

Defendant

The following items were considered in the review of a motion for Summary Judgment:

Papers	Numbered
Defendant's Notice of Motion and Affidavits Annexed	**1**
Plaintiff's Answering Affidavits	**2**
Defendant's Replying Affidavits	**3**
Plaintiff's Supplemental Answering Affidavits	**4**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, Sharrots Estates Homeowners Association, Inc. ("Sharrots") moves for Summary Judgment against the plaintiffs, Mitchell Eilenberg and his wife Jeannette Eilenberg. Summary Judgment is denied.

Facts

This is an action founded upon the defendant's alleged negligence when Mr. Eilenberg slipped on roadway ice and suffered injuries. The plaintiffs allege that about 5:30 AM, before dawn on March 21, 2007, Mr. Eilenberg crossed the private roadway in front of his home at 215 Pembrook Loop, Staten Island, New York 10309. He intended to enter his vehicle, which was parked across the street from his home in an off-road parking area. Instead, he fell in the street, allegedly slipping on a patch of ice, three to five feet from his car. At the time of the incident,

Mrs. Eilenberg was inside her home and was called to her husband's side by her son. There were other people present when she arrived on the scene, but emergency medical services arrived later.

Both plaintiffs state they noted the presence of ice on the road surface at the scene of the incident immediately after the fall. The plaintiffs allege that this was "black ice", meaning it was not readily visible on the road surface. The plaintiffs state that there were patches of snow that melted over the course of several days. There were freezing temperatures over the night and into the early morning that preceded the incident, although the day time temperatures were above freezing. The plaintiffs further allege that the roadway lighting was deficient because street lamps were not working and had not been repaired. Other household outdoor lights were available, but whether they were on is uncertain. The plaintiffs could not say they informed the defendant of the non-functioning street light, but they believe others had complained about poor snow clearance. The defendants do not say they reported the presence of roadway ice or standing water to the defendant prior to the accident.

The defendant states the roadway of Pembrook Loop is a common area of the homeowners' association and clearing snow and street light maintenance were among the defendant's responsibilities. The defendant states it had no actual or constructive notice of ice accumulation or non-functioning street lighting.

Discussion

The defendant moves for Summary Judgment. Under CPLR § 3212, a motion for summary judgment requires that "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."[1] "[S]ummary judgment is a drastic remedy and should not be granted when there is any doubt as the to the

[1]CPLR § 3212 (b).

existence of a triable issue."[2] Notwithstanding facts presented by any party, "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."[3] All evidence must be examined in the light most favorable to the non-moving party;[4] and the non-movant must be given the benefit of every favorable inference.[5]

The proponent of a motion for summary judgment has the burden of tendering sufficient evidence to show the absence of competing material issues of fact.[6] Once a moving party has made a showing of sufficient evidence, the burden shifts to the opposing party to put forth evidence in admissible form to establish a triable issue for the fact finder.[7] Mere conclusory assertions do not support the required burden of evidence.[8] Here, it is the defendant that has the initial burden of providing adequate evidence to show the absence of competing material issues of facts. The plaintiff must rebut the defendants' claims.

The defendant has not demonstrated the absence of constructive notice.

"To establish a *prima facie* case of negligence in a premises liability action, a plaintiff

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[2]*Rotuba Extruders, Inc. v. Ceppos,* 46 NY 2d 223, 231 [1978], *itself quoting Moskowitz vs. Garlock, 23 AD 2d 943, 944 [1965]; see Gilson vs. Metropolitan Opera*, 5 NY 3d 574, 578 [2005]; *citing* Siegel, NY Practice § at 459 - 460 [4th Ed.]; *see Herrin v. Airborne Freight Corp.*, 301 AD 2d 500, 500-501 [2d Dept 2003]; *and see also American Home Assurance Co. v. Amerford International Corp.*, 200 AD 2d 472 [1st Dept 1994].

[3]*Rotuba Extruders, Inc. v. Ceppos,* 46 NY 2d at 231.

[4]*Nicklas v. Tedlen Realty* Corp., 305 AD 2d 385, 386 [2d Dept 2003].

[5]*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]; *and Perez v. Exel Logistics, Inc.*, 278 AD 2d 213, 214 [2d Dept 2000].

[6]*Wasserman v. Carella*, 307 AD 2d 225, 226 [1st Dept 2003].

[7]*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980]; *see also Judith M. v Sisters of Charity Hosp.,* 93 NY 2d 932, 933 - 934 [1999].

[8]*Winegrad v. New York Univ. Med. Ctr.*, 64 NY 2d 851, 853 [1985]; *and see also Zutt v. State of New York*, 80 AD 3d 758, 759 [2d Dept 2009].

must demonstrate the existence of a dangerous or defective condition that caused his or her injuries, and that the defendant either created or had actual notice or constructive notice of the condition."[9] The plaintiff alleges that the presence of a patch of ice upon which Mr. Eilenberg slipped, and the inability to see the ice, were proximate causes of the plaintiff's injuries. The defendant states it had no notice of either condition. Here, the plaintiffs have stated their belief that complaints had been made of inadequate snow removal and poor lighting. However, the plaintiffs had not complained to the defendant, and did not concretely know of complaints. Consequently, the plaintiffs have failed to rebut, with admissible evidence, the assertion by the defendant that they had no actual notice.

"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 the defendant's employees to discover and remedy it. [*citations omitted*]"[10] The Appellate Division, Second Department previously noted that where plaintiffs had walked through an area without seeing ice on the previous day, there was no constructive notice when the plaintiff slipped on ice the following day.[11] If ice forms only a couple of hours before an accident, without precipitation and overnight, there is no constructive notice.[12]

Here, there was snow on the ground, even though it was said not to be on the roadway. The defendant provides certified listings of temperature highs and lows for several days before and on the day of the accident. Daytime temperatures rose above freezing on each of several days before and also on the day of the accident, allowing snow to melt. However, nighttime temperatures regularly dipped below freezing on the days before the accident. On the day of the accident, the low temperatures were only one degree above freezing. Since hourly temperatures

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[9]*Robert v. Mahopac Central School District*, 38 AD 3d 514, 515 [2d Dept 2007].

[10]*Gordon v. American Museum of Natural History*, 67 NY 2d 836, 837-838 [1986].

[11]*Abbattista v. King's Grant Master Assoc., Inc.*, 39 AD 3d 439, 441 [2d Dept 2007].

[12]*Bonney v. City of New York*, 41 AD 3d 404 [2d Dept 2007].

were not provided, one may not state with certainty the temperatures during the times immediately preceding and at the time of the accident. Giving the benefit of favorable inference to the non-moving plaintiff, the low temperature of the day before still allowed for the persistence of ice. Here, there were successive courses of melting and freezing temperatures over the course of several days. The preceding days with freezing conditions may give rise to an inference that there was ice on the day of the accident. Whether this represents constructive notice of free standing water with subsequent ice formation is in the province of a finder of facts to determine.[13]

The defendant had a duty to reasonably provide lighting to keep the parking area safe.

"A defendant stands liable in negligence only for a breach of duty owed to the plaintiff. The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for the courts. Regardless of the status of the plaintiff, the scope of the duty owed by the defendant is defined by the risk of harm reasonably to be perceived. [*citations deleted*]"[14]

Generally, a municipality has no *per se* duty to provide streetlights, but instead, the duty relates to avoiding dangerous and hazardous conditions.[15] Here, the roadway and parking area were common areas of the homeowner's association, not of a municipality. In careful distinction, the Court of Appeals specifies there is a duty to illuminate a parking area to provide adequate lighting given the use and design of the area.[16] It remains to a finder of fact to "determine if defendants knew or should have known that the existing lighting was adequate given the use and design of the lot."[17] Here, there is a duty to provide adequate lighting of the

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[13] *Amabile v. City of Buffalo*, 93 NY 2d 471, 475 [1999].

[14] *Sanchez v. State*, 99 NY 2d 247, 252 [2002].

[15] *Thompson v. City of New York*, 78 NY 2d 682, 684 [1991].

[16] *Peralta v. Henriquez*, 100 NY 2d 139, 144 [2003].

[17] *Peralta v. Henriquez*, 100 NY 2d at 145.

roadway and parking areas. Whether the amount of lighting available on the night of the accident met that duty, must be decided by a finder of facts.

Consequently, there are issues of fact that remain to be determined and Summary Judgment must be withheld.

Accordingly, it is hereby

ORDERED, that the motion made by the defendant Sharrots Estates Homeowners Association, Inc..for Summary Judgment against the plaintiffs Mitchell Eilenberg and Jeanette Eilenberg is denied in its entirety; and it is further

ORDERED, that the parties shall return for a conference to **DCM Part 3, 130 Stuyvesant Place, Third Floor** at **9:30 AM on Friday, September 16, 2011.**

ENTER,

DATED: August 16, 2011

Joseph J. Maltese
Justice of the Supreme Court