

**Vaz v Galileo Cortlandt, LLC**

2013 NY Slip Op 31147(U)

May 23, 2013

Supreme Court, New York County

Docket Number: 102739/2010

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

*Justice*

SEBASTIANA VAZ AND PERPETUO VAZ,

Plaintiff,

- v -

GALILEO CORTLANDT, LLC, CENTRO GA  
CORTLANDT, LLC, CORTLANDT TOWN  
CENTER, INC., CORTLANDT TOWN CENTER  
LTD., PARTNERSHIP, NEWPLAN EXCEL  
REALTY TRUST AND MAPLE LEAF ASSOCIATES,

Defendant.

INDEX NO. 102739/2010

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

GALILEO CORTLANDT, LLC, CENTRO GA  
CORTLANDT, LLC, AND NEWPLAN EXCEL REALTY  
TRUST.

Defendants/Third-Party  
Plaintiff,

-v-

MAPLE LEAF ASSOCIATES, INC.,

Third-Party Defendant.

**FILED**

MAY 29 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answer – Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2, 3, 4

5

**Cross-Motion: X Yes    No**

Sebastiana Vaz and Perpetuo Vaz (collectively “Plaintiffs”) bring this action to recover for personal injuries allegedly sustained by Sebastiana Vaz when she

tripped and fell in the parking lot of a shopping center located at Route 202, Mohegan Lake, Westchester, New York (“the Cortlandt Town Center”). The complaint alleges common law negligence as well as a loss of consortium cause of action on behalf of her husband, Perpetuo Vaz. Defendants Galileo Cortlandt, LLC (“Galileo”) and Maple Leaf Associates (“Maple Leaf”) move for summary judgment. Defendants Centro GA Cortlandt, LLC (“Centro”) and Newplan Excel Realty Trust (“Newplan”) (collectively “Defendants”) oppose the motion, insofar as it seeks dismissal of cross-claims against Maple Leaf.

Defendants Centro and Newplan cross move for leave to file a summary judgment motion approximately six months after the Note of Issue was filed. Where there is a timely motion for summary judgment, other parties who move for summary judgment by way of cross-motion brought after the deadline has passed are subject to the requirements showing a good cause. (*Bejarano v. City of New York*, 18 AD3d 681, 795 NYS2d 732 [2<sup>nd</sup> Dept 2005]). Here, Centro and Newplan maintain that the late filing was due to Hurricane Sandy. However, it is noted that the Note of Issue was filed more than three weeks before Hurricane Sandy, and there were five months in between Hurricane Sandy and Defendants’ filing of this cross-motion in March of 2013. As Centro and New Plan failed to provide good cause for their late filing, leave to file a cross motion for summary judgment is denied. (*See, Bejarano v. City of New York*, 18 AD3d 681, 795 NYS2d 732 [2<sup>nd</sup> Dept 2005]; *Miceli v. State Farm Mut. Ins. Co.*, 3 NY3d 725, 819 NE2d 995, 786 NYS2d 379 [2004])).

The Cortlandt Town Center is owned and maintained by Centro, Galileo and Newplan. Maple Leaf was retained pursuant to a contract to perform snow and ice removal at the premises.

Plaintiff Sebastiana Vaz alleges that around 7:30 p.m. on January 24, 2008, after she and her husband had completed a brief shopping trip at Walmart, she was “caused to slip, trip and fall and become injured while walking in an icy, snowy, slushy and/slippery parking lot of the shopping center on the defendant’s premises”. Plaintiff’s complaint alleges that Defendants were negligent in the operation, management, maintenance and control of the parking lot and for allowing and permitting the premises to remain in a dangerous and/or hazardous condition.” Additionally, Plaintiff asserts that Defendants had both actual and constructive notice of the dangerous condition.

In support of their motion for summary judgment, Galileo and Maple Leaf provide: the summons and complaint; Defendants Newplan, Galileo, and Centro's verified answer and discovery demands; the third party summons whereby Galileo, Centro and Newplan impleaded Maple Leaf as a Third-Party Defendant; the supplemental summons which adds Maple Leaf as a Defendant; Maple Leaf's verified answer and discovery demands; Plaintiff's bill of particulars; a consent to change attorneys for Galileo; the deposition testimony of Plaintiff Sebastiana Vaz; the deposition testimony of Plaintiff Perpetuo Vaz; the deposition testimony of the President of Maple Leaf, Andrew M. Tumolo; the deposition testimony of Regional Property Manager of Acadia Realty Thomas C. Eikhof; the deposition testimony of a foreman for Maple Leaf, Milton Merino; photographs of the area where the incident allegedly occurred; the Note of Issue filed on October 3, 2012; the "Snow Removal Agreement" between Galileo and Maple Leaf; the weather conditions for Mohegan Lake, New York for January 2008; and Galileo's response to Plaintiff's notice for discovery and inspection.

In opposition, Defendant provides: the Verified Bill of Particulars; Plaintiff Sebastiana Vaz's "Correction Sheet" of her deposition testimony; photographs of the area where the incident allegedly occurred; Plaintiff Perpetuo Vaz's "Correction Sheet" of his deposition testimony; the deposition testimony of John Fogarty of Galileo; the deposition testimony of Thomas C. Eikhof; a "Report of the Incident Form"; and the affidavit of James V. Bria a Forensic Meteorologist by CompuWeather.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

A defendant may be held liable for a slip-and-fall incident involving snow

and ice on its property only when it created the dangerous condition that caused the accident, which is not alleged here, or had actual or constructive notice thereof. (*See, Buroker v Country View Estate Condominium Assn, Inc.*, 54 AD3d 795, 864 NYS2d 468 [2008]). To prove 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 to discover and remedy it. (*See, Gordon v. American Museum of Natural History*, 67 NY2d 836, 492 NE2d 774, 501 NYS2d 646 [1986]).

Plaintiff testifies that on the date of the accident, her husband drove her to the Cortlandt Shopping Center. He parked their vehicle in a row of spaces right near Walmart, just past a set of handicap parking spaces. They spent about ten minutes inside the store. When she left the store she walked along a grassy median between two rows of parked cars to get to her car. Plaintiff states that as she stepped off the grassy median back onto the parking lot surface to get into her car, she tripped on a “chunk of ice” that was larger than three feet wide and greater than eighteen inches in length. It was “white” and inside the ice she saw a “paper plate” and a “white Styrofoam cup” and “napkins”.

Plaintiff testifies in her deposition that it was not snowing on the date of her accident and there was no precipitation on that day. While she did not notice any icy conditions in the parking lot, she did notice snow on the roads as she was crossing the roadway on the way back from the store to her car. Plaintiff did not know how long the alleged ice patch had been there and had not seen it any other time before she fell. However, she did note that the area where her car was parked was dark.

Mr. Tumolo, President of Maple Leaf, indicates that in the winter of 2007-2008, Maple Leaf had a policy and procedure whereby it went to Cortlandt Town Center on a regular basis to inspect the parking lot for snow and ice conditions. Specifically, in the mornings, around 5 or 6 AM, a supervisor would go to view the site and check for melting and refreezing conditions. This task was the responsibility of employee Milton Merino. Mr. Tumolo says that if Mr. Merino observed a snow or ice condition on any paved surface in the parking lot he would “treat it” using backhoes, front loaders, snowblowers and snow shovels. Mr. Merino also says that on days that it snows, “[d]uring regular business hours we move snow as efficiently as we can, and then generally everyone stays on site

during the overnight hours and then we remove snow curb to curb.”

Mr. Merino testified that he was employed as a foreman and performed snow plowing during the winter. He states that on the date of the incident, he arrived at the premises in a salting truck at 3 a.m. and distributed salt throughout the parking lot of the premises. He administered the salt by truck and also by hand. He left the Cortlandt Town Center around noon after having administered six tons of salt on the site that day. He does not recall whether he returned on that day.

Defendants assert that they have shown proof of regular inspection and maintenance of the area in which the accident occurred, including earlier in the day on the date of the accident.

In opposition, Plaintiff provides the expert testimony of James V. Bria, a forensic meteorologist, who opines with a “reasonable degree of meteorological certainty”, that

[o]n January 24, 2008, approximately one (1) inch of snow and ice cover was present throughout the day on untreated, undisturbed and exposed outdoor surfaces. Precipitation in the form of light snow occurred between 12:25 PM EST and 12:45 PM EST; between 5:50 PM EST and 6:10 PM EST; between 6:40 PM EST and 6:50 PM EST; and between 7:25 PM EST and 7:45 PM EST. The effect of these brief periods of light snow produced a trace (less than 0.1 inch) of snow. On January 24, 2008, the day’s high temperature was near 30 degrees F and the low was near 15 degrees F. That means that for the entirety of this day, from midnight on January 24, 2008 to the time of the incident, some nineteen (19) hours later, the temperature never rose above the freezing point.

The snow and ice in the days before the accident was sufficient to produce slippery and icy conditions at the accident location, and based on the subfreezing temperatures for the entirety of the day in question, any ice which had existed at 7:30 PM on the evening of January 24, 2008 would have been present through the entirety of the day.

The expert testimony provided by Plaintiff raises a triable question of fact as to whether the dangerous condition existed before Plaintiff's accident for a sufficient length of time to permit Defendants to discover and remedy it. It is for the finder of fact to decide whether a thorough inspection of the grounds in the days leading up to the incident, or in the hours between Mr. Merino's last inspection around 12 PM and the incident which occurred around 7:30 PM, could have disclosed the dangerous condition.

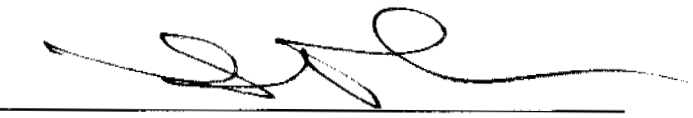
Wherefore, it is hereby,

ORDERED that Defendants Cortlandt Town Center Ltd., and Maple Leaf Associates' motion for summary judgment is denied; and it is further.

ORDERED that Defendant's Centro GA Cortlandt LLC and Newplan Excel Realty Trust's cross-motion for summary judgment is denied as untimely.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 23, 2013



**HON. EILEEN A. RAKOVER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**FILED**  
MAY 29 2013  
NEW YORK  
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