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

PRESENT: Hon. Shlomo S. Hagler *Justice* PART: 17

DAVID L. STANFORD, SR.,

Plaintiff,

INDEX NO.: 116605/2008

- against -

HUA DA INC., HAO CHENG CHINESE EATIN & TAKEOUT INC., QING ZHONG LIN, WAN PING LIN, and SZE LEUNG KWOK,

Defendants.

DECISION and ORDER

MOTION SEQ. NO.: 002

Motion by Defendants for summary judgment, pursuant to CPLR § 3212, dismissing Plaintiff's complaint in its entirety.

	Papers Numbered
Notice of Motion, with Affirmation of Defendants' Counsel Jason I. Gomes, Esq., in Support of Defendants' Motion and Exhibits "A" through "L"	1, 2, 3
Affirmation of Plaintiff's Counsel Nicholas E. Tzaneteas, Esq., in Opposition to Defendants' Motion with Exhibit "A" and Affidavit of Plaintiff David L. Stanford, Sr., dated January 31, 2013 attached as Exhibit "B"	4, 5, 6
Reply Affirmation of Defendants' Counsel Jason I. Gomes, Esq., in Further Support of Defendants' Motion	7
Transcript of Oral Argument of March 18, 2013	8
Defendants' Submitted Case Law, dated April 9, 2013, as requested by Court	9
Plaintiff's Submitted Case Law, dated April 9, 2013, as requested by Court	10

Cross-Motion: ☑ **No** ☐ **Yes** **Number of Cross-Motions:** Ø

Upon the foregoing papers, it is hereby ordered that this Motion is granted as set forth in the attached separate written Decision and Order.

Dated: July 12, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one: ☑ **Final Disposition** ☐ **Non-Final Disposition**

Motion is: ☑ Granted ☐ Denied ☐ Granted in Part ☐ Other

~~Cross-Motion is: ☐ Granted ☐ Denied ☐ Granted in Part ☐ Other~~

Check if Appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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DAVID L. STANFORD, SR.,

Plaintiff,

-against-

HUA DA INC., HAO CHENG CHINESE EATIN & TAKEOUT INC., QING ZHONG LIN, WAN PING LIN and SZE LEUNG KWOK,

Defendants.

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Index No. 116605/08

DECISION and ORDER

Motion Sequence No.: 002

Hon. Shlomo S. Hagler, J.S.C.:

Defendants Hua Da Inc., Hao Cheng Chinese Eatin & Takeout Inc., Qing Zhong Lin, Wan Ping Lin and Sze Leung Kwok, (collectively, "defendants") move under motion sequence number 002, for an order, pursuant to CLPR § 3212, granting them summary judgment dismissing the complaint. Plaintiff David L. Stanford, Sr. ("Stanford" or "plaintiff") opposes the motion.

Factual Background

This is an action for personal injuries sustained by plaintiff in a slip and fall in front of defendants' restaurant located at 130 Ninth Avenue, New York, New York. On the night of February 11, 2006 through the early morning hours of February 12, 2006, plaintiff spent an evening in New York City, where he visited a restaurant and at least two bars. (Examination Before Trial of David L. Stanford, Sr., dated December 13, 2011, ["Stanford EBT"], at pp. 20, 25, 29) During that time period, it was snowing and several inches had accumulated on the ground. (Stanford EBT, at p. 36.) On his way back from a bar to a subway station to return to his hotel, plaintiff slipped in front of defendants' restaurant, fell and broke his ankle, which resulted in hospitalization and surgery. (*Id.*, at p. 34.) Plaintiff also claims his injuries required extended bed rest, physical therapy, and an inability to

return to work for a long period of time. (*Id.*, at pp.59-96.) Plaintiff is seeking recompense for these injuries.

Defendants are seeking summary judgment to dismiss plaintiff's complaint arguing that they were under no obligation to remove the snow until a reasonable time after the snow had stopped falling. (Affirmation of Defendants' Counsel in Support of Defendants' Motion, at ¶5.) Plaintiff contends that the defendants removed snow during the day, which resulted in a even more dangerous condition, precluding "snow in progress" from being a prima facie defense. (Affirmation of Plaintiff's Counsel in Opposition to Defendants' Motion, at ¶17.) While neither plaintiff nor defendants mention in their pretrial depositions anything regarding whether or not there actually was snow removal on the day in question, plaintiff has submitted an affidavit supplementing his deposition testimony, which avers that he saw evidence of snow removal. (Affidavit of David L. Stanford, Sr., dated January 31, 2013 ["Plaintiff's Aff."], at Exhibit B to Plaintiff's Affirmation in Opposition, at p. 1.)[1]

Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment. (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985].) Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." (CPLR § 3212[b]; *Zuckerman v City*

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1. At oral argument an issue was raised regarding the admissibility of this affidavit. Under CPLR § 3212, an affidavit submitted after deposition testimony is only admissible when it is submitted to **supplement** the deposition testimony and not to **contradict** it. (*Compare Harty v Lenci*, 294 AD2d 296, 297-298 [1st Dept 2002] *with Castro v. New York City Tr. Auth.*, 52 AD3d 213, 214 [1st Dept 2008].) While there may be a question whether this affidavit contradicts or supplements plaintiff's deposition testimony, this Court declines to resolve this issue because, as discussed later on, this motion is decided on other grounds.

of New York, 49 NY2d557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 [1977]; *Spearmon v Times Square Stores Corp.*, 96 AD2d 552 [2d Dept 1983].) "It is incumbent upon a [party] who opposes a notion for summary judgment to assemble, lay bare and reveal his proof, in order to show that the matters set up in his [complaint] are real and are capable of being established upon a trial." (*Spearmon*, 96 AD2d at 553, quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 [1st Dept 1959].) If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of facts exists. (*See Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539 [1975].)

Discussion

It is well settled law that while a snowstorm is in progress, and for a reasonable time after it concludes, a landowner or possessor is under no obligation to remove the snow from his or her property. (*See Kinberg v New York City Tr. Auth.*, 99 AD3d 583-584 [1st Dept 2012].) However, if a landowner or possessor does undertake to remove the snow while the storm is in progress and the snow is removed in a negligent manner that creates an even more hazardous condition, the landowner or possessor will be liable for damages suffered as a result of that negligent snow removal. (*See Marrone v Verona*, 237 AD2d 805 [3d Dept 1997].) When a plaintiff brings suit for negligent snow removal that occurred while a storm is in progress, the defendant need not prove anything other than that it was snowing at the time in order to shift the burden of proof to the plaintiff that the defendant removed the snow negligently or created the dangerous condition. (*See Pippo v City of New York*, 43 AD3d

303, 304 [1st Dept 2007].) Once the burden shifts, it is incumbent upon the plaintiff to show that there was snow removal, and that that snow removal was negligent. (*See Kinberg*, 99 AD3d at 583-584 [1st Dept 2012]; *Gleeson v New York City Tr. Auth.*, 74 AD3d 616, 617 [1st Dept 2010].)

In the instant case, there is no dispute that there was a storm in progress at the time of the accident, thereby shifting the burden to the plaintiff. However, even if plaintiff's affidavit is admissible, and snow removal was performed by the tenant/possessor during the storm, the plaintiff has still failed to show that the alleged snow removal was performed negligently. Inasmuch as plaintiff, in opposition to defendant's motion, failed to present sufficient evidence that defendants created or exacerbated a dangerous condition through negligent snow removal, defendants cannot be held liable for the dangerous condition on the sidewalk. As a result summary judgment must be granted to defendants.

Conclusion

Accordingly, it is hereby

ORDERED, that this Court grants defendants' motion for summary judgment dismissing the complaint as to Hua Da Inc., Hao Cheng Chinese Eatin & Takeout Inc., Qing Zhong Lin, Wan Ping Lin and Sze Leung Kwok. The clerk of the court is hereby directed to enter judgment dismissing the complaint.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: July 11, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.