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SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

PAULA RYAN and DONALD RYAN, her husband,

Plaintiffs,

DECISION AND ORDER

-against-

Index No: 5270/10

TACONIC REALTY ASSOCIATES and PAGE PARK ASSOCIATION, LLC,

Defendants.

TACONIC REALTY ASSOCIATES and PAGE PARK ASSOCIATES, LLC,

Defendants/Third-Party Plaintiffs,

-against-

L&L ENTERPRISES, 123, LLC and HOSPICE, INC.,

Third-Party Defendants.

The following papers were read and considered:

NOTICE OF MOTION FOR SUMMARY JUDGMENT
AFFIDAVIT IN SUPPORT OF MARC D. ORLOFF, ESQ.
EXHIBITS A-I

NOTICE OF CROSS-MOTION
AFFIRMATION IN SUPPORT OF YADIRA RAMOS-HERBERT, ESQ.
EXHIBITS A-D

NOTICE OF CROSS-MOTION
AFFIRMATION IN SUPPORT OF JEFFREY B. SILER, ESQ.
EXHIBITS A-J

AFFIRMATION IN OPPOSITION TO CROSS-MOTION BY HOSPICE, INC.
EXHIBITS A&B

AFFIDAVIT IN RESPONSE TO CROSS-MOTION OF MARC D. ORLOFF, ESQ.

AFFIRMATION IN OPPOSITION OF DEREK J. SPADA, ESQ.
AFFIDAVIT OF PAULA RYAN
EXHIBITS A&B

REPLY OF YADIRA RAMOS-HERBERT, ESQ.

REPLY AFFIDAVIT OF MARC D. ORLOFF, ESQ.

REPLY AFFIRMATION OF JEFFREY B. SILER, ESQ.

Plaintiff commenced this action seeking to recover damages for personal injuries allegedly sustained on December 31, 2008 due to a slip and fall on a snow/ice condition in the parking lot of premises located at 374 Violet Avenue, Hyde Park, New York. Defendants, Taconic Realty Associates and Page Park Associates, LLC, the owners of the premises, commenced a third-party action against L&L Enterprises, 123, LLC, the snow removal company hired to service the parking lot, and Hospice, Inc., a tenant occupying commercial space at the location. L&L Enterprises has asserted a counter claim for contribution against Taconic Realty Associates and Page Park Associates, LLC, and Hospice, Inc. has asserted cross-claims against L&L Enterprises.

Third-party defendant, L&L Enterprises, 123, LLC ("L&L Enterprises") now moves for summary judgment to the dismiss the third-party complaint and all defendant Hospice, Inc.'s cross-claims. Defendants Taconic Realty Associates and Page Park Associates, LLC cross-move for summary judgment. Both motions are premised on the theory that plaintiff's causes of action are barred under the "storm in progress" rule. Third-party defendant Hospice, Inc., also moves for summary judgment dismissing the indemnification claims set forth in the third-party summons and complaint.

In support of the motions, the parties have submitted plaintiff's deposition testimony, the deposition testimony of Darin Page, manager of Page Park Associates and Taconic Realty Associates, the deposition testimony of William Liguori, Jr., former owner of L&L Enterprises and the individual who plowed the premises in December 2008 and on the date of plaintiff's fall, the deposition testimony of Michael Murphy, an employee of Hospice, Inc., maintenance records reflecting salting, sanding and plowing at the fall location for the month of December 2008, and a certified copy of meteorological records of the climatological data for December 2008.

Plaintiff testified at her deposition that on Wednesday December 31, 2008, she was driving to work at 8:15 a.m. when it started snowing. She had not been to work since the previous Friday, December 26th, five days earlier. Plaintiff testified that her normal commute takes 12 to 15 minutes. She turned on her windshield wipers and defrost while driving and by the time she got to work enough snow had accumulated so that she could not see the parking space markings. Plaintiff did not park in the parking lot where she usually parks because it was a holiday. Instead she parked in a

different parking lot closer to her workplace. There was a snow mound from a previous storm or storms next to where she parked, but plaintiff had no knowledge as to how long that snow mound had been present. Plaintiff exited her car and observed that the ground was covered with snow and was slippery. While walking to her trunk her feet slipped out from under her and she fell backwards, hitting her head on the ground. She was disoriented and unsure whether or not she lost consciousness. Plaintiff initially had difficulty getting up because she was injured and the ground was slippery but eventually rolled over, crawled forward and stood up. While attempting to get up plaintiff testified that she felt snow and ice on the ground and ice under the snow. Shortly after the fall a co-worker attempted to examine the fall location but was unsure where it was because snow had covered the area.

Darin Page of Page Park Associates testified that he was responsible for managing the property located at 374 Violet Avenue. Page indicated that Page Park Associates had an oral agreement with L&L Enterprises to perform winter maintenance on the parking lot. The agreement included sanding, salting, shoveling and plowing. It was Page's understanding the L&L would plow, sand and salt after each snowfall. Page further identified an invoice from L&L Enterprises indicating that on December 31, 2008 L&L invoiced him for plowing, sanding and shoveling at 374 Violet Avenue. The invoice did not reflect at what time such services were performed. Page Park Associates also had a hotline that tenants could call to register snow removal complaints. Call logs revealed no complaints in the winter of 2008 regarding winter maintenance or the condition of the parking lot at 374 Violet Avenue.

William Liguori, Jr., former owner of L&L Enterprises, plowed the parking lots at 374 Violet Avenue on December 31, 2008. Liguori testified he had a verbal agreement with Jason Page of Page Park Associates, LLC that L&L Enterprises would plow, salt and sand when there was one inch or more of snow accumulation. Liguori testified that on December 31, 2008 L&L Enterprises plowed, salted and sanded the parking lot at 374 Violet Avenue but had no recollection as to what time such services were performed.

Michael E. Murphy, Vice President of Facilities of Hospice Inc., testified that Hospice Inc. leases commercial space from Taconic Realty Associates. Pursuant to that lease, Hospice Inc. paid Taconic Realty Associates to take care of snow removal in the parking lot. Murphy had no recollection of the lot conditions on December 31, 2008.

The certified meteorological records reveal that on December 31, 2008 in Poughkeepsie, New York it began snowing at 7:45 a.m. with accumulations that day totaling one eighth of an inch. The last date of any prior snowfall was December 24th, with accumulations of less than one inch.

A proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position. Zuckerman v. City of New York, 49 NY2d 557 (1980).

A defendant/owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. See Arzola v. Boston Props. Ltd. Partnership, 63 AD3d 655 (2nd Dept. 2009). To provide 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 (1986).

The "storm in progress" rule holds that a property owner will not be held to have notice and thus will not be held liable for an accident occurring as a result of the accumulation of snow or ice in a parking lot "unless a reasonable amount of time has elapsed, subsequent to the cessation of the storm, for taking protective measures." Chapman v. City of New York, 268 AD2d 498 (2nd Dept. 2000). Smith v. Leslie, 270 AD2d 333, 334 (2nd Dept. 2000). In addition to having to demonstrate a storm in progress, to meet its initial burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell. Birnbaum v. New York Racing Assn., Inc., 57 AD3d 598, 598–599 (2nd Dept. 2008).

Here, defendants have met their burden of demonstrating both a storm in progress and produced evidence that the parking lot was inspected and maintained prior to that storm. Plaintiff's deposition testimony that snow began coming down "pretty good" while she was driving to work, that she activated her windshield wipers and defrost, and that upon arriving at work it was still snowing and that she could not see the lines depicting the parking spaces is sufficient to establish a storm was in progress and that defendants did not have a reasonably sufficient time to remedy the alleged dangerous condition. See Taylor v. New York City Tr. Auth., 266 AD2d 384 (2nd Dept. 1999). See also Prince v. New York City Hous. Auth., 302 Ad2d 285 (1st Dept. 2003) (finding trace precipitation sufficient to constitute storm in progress). Moreover, L&L Enterprises's snow maintenance records and William Liguori, Jr.'s testimony reflect that the parking lot was inspected, plowed and maintained on a regular basis, including sanding and shoveling on December 24th, the date of the last storm, and moving accumulated snow on December 26th. This activity and the meteorological records demonstrating a lack of precipitation between December 24th and December 31st are sufficient to show when the parking lot was last cleaned and inspected.

Having established a prima facie case, it is incumbent on the plaintiff to raise a triable issue of fact. Where, as here, a plaintiff alleges that "the icy surface was created some time before the storm, it is plaintiff's burden to establish that the precipitation from the storm in progress was not the cause of the incident." Parker v. Rust Plant Servs., 9 AD3d 671 (3rd Dept. 2004). Plaintiff's contention that she slipped on ice that was present from either a prior storm or from snow melting from prior storms that re-froze based on the location of nearby snow banks is insufficient to defeat the defendants' motions for summary judgment. . See Reagan v. Hartsdale Tenants Corp., 27 AD3d 716 (2nd Dept. 2006); Small v. Coney Island Site 4A-1 Houses, Inc., 28 AD3d 741 (2nd Dept. 2006) ("to say that old ice caused the subject ice patch as opposed to the storm in progress would require

a jury to result to conjecture and speculation in order to determine the cause of the incident"); Devito v. Harrison House Assoc., 41 AD3d 420 (2nd Dept. 2007).

Plaintiff's testimony that after falling she felt ice on the ground under the snow is insufficient to create a material issue of fact about whether there was ice under the snow at the location where she fell. To raise a triable issue of fact, plaintiff must produce evidence that the slippery condition at the *location* where she fell existed prior to the storm. See Meyers v. Big Six Towers, Inc., 85 AD3d 877 (2nd Dept. 2011)(emphasis added). Here, plaintiff testified that after falling she was disoriented, rolled over and crawled away from the fall location before attempting to stand up. Thus, her testimony that she felt snow on top of ice is insufficient to raise an issue of fact about whether there was snow on top of ice in the location where she lost her footing and fell. In addition, plaintiff further acknowledged that she had not been at work for five days prior to the incident, and that she rarely parked in the location where she fell. Thus her general claims as to poor parking lot maintenance, awareness of other individuals falling in the parking lot due to snow and ice, and recollections of seeing ice in the parking lot in the week preceding her fall fail to create an issue of fact as to whether the defendant had notice of a dangerous condition at the location where plaintiff fell. In sum, the evidence plaintiff presents that there may have been ice in the general vicinity prior to the storm is insufficient to raise a triable issue of fact as it does not specifically address the location where plaintiff fell nor directly refute the notion that plaintiff fell due to conditions created by the storm in progress. See Parker v. Rust Plant Services, Inc., 9 AD3d 671 (3rd Dept. 2004); Kaplan v. DePetro, 51 AD3d 730 (2nd Dept. 2008).

Meteorological evidence of a prior precipitation event on December 24, 2008, seven days prior, in and of itself, is also insufficient to establish an issue of fact as to constructive notice of a visible and apparent icy condition at the location where plaintiff fell. To surmise that the ice plaintiff testified to feeling after her fall resulted from that or a prior storm is simply too speculative. Similarly, her attorney's allegations that the piles of plowed snow in the vicinity of where plaintiff fell was sufficient to give the defendant notice of a dangerous condition is also without merit. The contention that the melting and re-freezing of the snow mound likely created or contributed to an icy condition in the parking lot is conjecture.

Wherefore, it is hereby

ORDERED that the motions for summary judgment of third-party defendant L&L Enterprises, 123, LLC dismissing the third-party complaint and the motion of defendants Taconic Realty Associates and Page Park Associates, LLC dismissing the complaint are granted. In light of this determination, this court need not address third-party defendant Hospice, Inc.'s cross-motion dismissing the third-party summons and complaint.

The foregoing constitutes the decision and order of this court. The court's file is closed.

Dated: January 25, 2013
Poughkeepsie, New York

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Rosa's Chambers, please do not submit any copies. Submit only the original papers.