Demonte v Chestnut Oaks at Chappaqua
2014 NY Slip Op 32870(U)
March 25, 2014
Supreme Court, Westchester County
Docket Number: 50864/2011
Judge: James W. Hubert
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To commence the statutory time period for appeals as of right (CPLR §5513[a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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STEPHANIE DeMONTE,

Plaintiff,

-against-

CHESTNUT OAKS AT CHAPPAQUA, a/k/a CHAPPAQUA MEWS CONDOMINIUM and BARHITE & HOLZINGER, INC.,

Defendants.

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CHESTNUT OAKS AT CHAPPAQUA, a/k/a CHAPPAQUA MEWS CONDOMINIUM and BARHITE & HOLZINGER, INC.,

Third-Party Plaintiffs,

-against-

HUDSON VALLEY LANDSCAPE DESIGN, INC.,

Third-Party Defendant.

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DECISION & ORDER

Index No. 50864/2011

Hubert, A.J.S.C

Before the Court is the motion of the third-party defendant Hudson Valley Landscape Design, Inc. (Hudson Valley), and cross-motion of the defendants Chestnut Oaks at Chappaqua and Barhite & Holzinger, Inc. (Chestnut Oaks, and collectively, the moving defendants). The motion and cross motion seeks summary judgment against the plaintiff on her claim that she was injured after she slipped and fell on ice in the parking lot area of the defendant's condominium property. The plaintiff claims that Chestnut Oaks ". . . negligently caus[ed] and permitt[ed] . . . a

dangerous condition to exist and remain for an unreasonable length of time, in and around the walkway and parking lot . . . area . . . traversed by the plaintiff . . . lawfully on the premises." Complaint at ¶ SEVENTH. The plaintiff opposes the motion and cross-motion by affirmation in opposition.

The property is located at 332 North Greely Avenue in Chappaqua. Chestnut Oaks is the owner of the property and parking lot in question; Barhite & Holzinger is the managing agent; and Hudson Valley Landscape is the snow removal contractor. The incident is alleged to have occurred on January 19, 2011 at approximately 7:30 a.m.

In support of their respective motions, the moving defendants argue that the plaintiff's cause of action must be dismissed because the plaintiff's injuries occurred during a "storm in progress," i.e, the ice and/or snow, upon which plaintiff slipped, was still in the process of accumulating (or falling) on the property when she was injured. Under those circumstances, by law, liability cannot attach to the moving defendants. See *Coyne v. Talleyrand Partners, L.P.*, 22 A.D.3d 627, 802 N.Y.S.2d 513, (2d Dep't 2005); *Ali v. Village of Pleasantville*, 95 A.D.3d 796, 943 N.Y.S.2d 582, (2d Dep't 2012).

Annexed to the motion of third-party defendant Hudson Valley (exhibit H) is a report from a meteorological expert, Howard Altschule. The report, in summary, states that from the period beginning January 18, 2011 through the date and time of the incident, snow, freezing rain, and rain fell in the area of the property. The precipitation was briefly interrupted around midnight, January 18th into the 19th, 2011, resumed around 4:30 a.m., January 19th and continued past the time of the accident.

Also annexed to the motion of third-party defendant Hudson Valley (as exhibit G) is a

report from James V. Bria, a meteorologist retained as an expert by the plaintiff. Mr. Bria's report does not differ materially from the report of Mr. Altschule (precipitation in the form of rain and drizzle, occasionally mixed with sleet and light snow, occurred frequently between approximately 4:30 AM - 12:50 PM EST [on January 19, 2011]). Report of Bria at p.5. Both experts agree that there was accumulated snow on the ground that predated the weather event of January 18-19, 2011. The plaintiff's deposition testimony (exhibit D) regarding the weather conditions on the morning of the incident was that it was not snowing. She did not say, one way or another, whether there was any other form of precipitation.

In order to prevail on a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986)(citations omitted). Once this showing has been made, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" on which the party rests his or her claim, or must demonstrate an "acceptable excuse" for failing to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1981); see, also, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324.

Given the testimony of the plaintiff, coupled with the expert evidence proffered by both the plaintiff and the third-party defendant Hudson Valley, the Court concludes that at the time of the accident, there was, indeed, a "storm in progress." Thus, the moving defendants have made a prima facie showing of entitlement to judgment on the motion. The burden, therefore, shifts to the plaintiff opposing the motion to "produce evidentiary proof in admissible form sufficient to

require a trial of material questions of fact" on which the plaintiff rests her claim. *Zuckerman v. City of New York, supra.*

In opposition, the Plaintiff, as a threshold matter, interposes a legal argument. The plaintiff asserts that the cross-motion of the defendant Chestnut Oaks may not be considered by the court because it was filed outside of the sixty day time frame imposed administratively by the court at the filing of the Note of Issue. See *Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004). While the "storm in progress" argument was raised on the motion by the third-party defendant Hudson Valley, plaintiff contends it cannot be raised by Chestnut Oaks on the cross motion because it is untimely. Therefore, because the untimely cross-motion cannot be considered by the Court, Chestnut Oaks cannot make a prima facie showing of entitlement to judgment on its cross motion. Moreover, it is argued that because the plaintiff did not (and does not) plead negligence against the third-party defendant Hudson Valley, the storm in progress argument raised by Hudson Valley may only be considered by the Court on the question of third party liability between Hudson Valley and Chestnut Oaks. The argument may not be considered on the cross-motion by Chestnut Oaks.

The Court will not expend significant time on this point, other than to say it has no merit. *Brill, supra*, addresses the issue of the failure of a moving party to abide by the statutory time limit of 120 days set forth in CPLR § 3212 (a). There is no contention by the plaintiff that the cross-motion of the defendant Chestnut Oaks exceeded the 120 day time limit under CPLR § 3212 (a). However assuming, arguendo, the administrative time limit of sixty days must be accorded the same weight and consideration as the time limits under CPLR § 3212 (a), the instant application of the Chestnut Oak defendants clearly merits consideration under this Court's

discretionary powers as articulated in *Ellman v. Village of Rhinebeck*, 41 A.D.3d 635, 636, 838 N.Y.S.2d 641 (2d Dep't 2007)("[A]n untimely . . . cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds [because] the nearly identical nature of the grounds may provide the requisite good cause [see CPLR 3212 (a)] to review the untimely motion or cross motion on the merits"). Thus, on the motion and cross motion, the moving defendants, have made a prima facie showing that at the time of the accident there was a storm in progress.

This shifts the burden to the plaintiff who must produce evidence in admissible form demonstrating that material questions of fact exist as to whether, indeed, there was a storm in progress. The plaintiff, has produced no such evidence. The plaintiff's own expert confirms that there was a storm in progress during the period of time beginning January 18, 2011 and extending into January 19, 2010, for at least five hours after the plaintiff slipped and fell.

The alternative argument, raised by the plaintiff in opposition to the motion and cross-motion, is that the moving defendants have not met their respective prima facie showings on the question of negligent snow removal. The plaintiff avers that ". . . without affirmative proof in admissible form regarding what was done and what was not done by Landscape on the 18th with respect to snow and/or ice removal, Landscape cannot meet its requisite burden of demonstrating . . . that its snow removal activities on the . . . 18th did not create or exacerbate a natural hazard brought about by the 'storm-in-progress."

In stating that "Landscape [the third-party defendant Hudson Valley] cannot meet its requisite burden" the plaintiff apparently overlooks the fact that she has pleaded no cause of action against "Landscape." Hudson valley is not being sued by the plaintiff and the Court

questions whether the negligent snow removal claim is adequately pleaded against Chestnut Oaks, give the fact that Chestnut Oaks employed Hudson Valley but did not directly supervise them.

There is also a basic problem with how the plaintiff articulates and allocates the "requisite burden" in the instant motion as it pertains to the argument that there was negligent snow removal by the defendant Chestnut Oaks during the "storm in progress." The defendant does not have a burden to show it did or did not undertake to remove snow during the affected time period. The absence of evidence as to "what was done and what was not done by Landscape on the 18th with respect to snow and/or ice removal" does not alter Chestnut Oaks claim on its cross motion of no responsibility due to a "storm in progress."

In opposition to the cross-motion, the plaintiff has proffered no facts that the defendant Chestnut Oaks, or third-party defendant Hudson Valley, engaged in snow removal (negligently or otherwise) during the period of time at issue. There can be no presumption of snow removal by the moving defendants, during the storm, in the absence of any facts that snow removal occurred. Therefore, to rebut the prima facie showing by the moving defendants that the "storm in progress" rule applies, the plaintiff must raise a triable question of fact on the issue of whether the defendant Chestnut Oaks created or exacerbated a dangerous condition, by negligently engaging in snow removal efforts during the storm. See *Smith v. County of Orange*, 51 A.D.3d 1006, 858 N.Y.S.2d 385 (2d Dep't 2008) *citing, Knee v. Trump Vil. Constr. Corp.*, 15 AD3d 545, 546, 791 N.Y.S.2d 576 (2d Dep't 2005)(triable issue of fact is raised regarding whether the ice upon which the plaintiff slipped was formed when snow piles created by the County's snow removal efforts melted and refroze).

When questioned on this issue - "do you recall seeing anybody engaged in snow removal in the area in the parking area [approximately two days before the accident]" - the plaintiff replied: "I don't recall." Deposition of Plaintiff at page 41. Similarly, no evidentiary proof was elicited from the testimony of the moving defendants that suggests snow removal was undertaken during the relevant time periods. While there was testimony that third-party defendant Hudson Valley had records which could show whether or not they had plowed and/or salted during the storm, there was no affirmative testimony that they in fact plowed, and no records were put forth showing such activity during the critical times.

But assuming, arguendo, that it is possible to infer that snow removal during the storm was undertaken by the defendants, the plaintiff would still have to come forward with evidence in admissible form raising a material issue of fact on the question of whether previously cleared ice and snow caused or exacerbated a dangerous condition. *Smith, supra.* The plaintiff has not come forward with such evidence.

Accordingly, the cross- motion of the defendant Chestnut Oaks for summary judgment is granted. The motion of the defendant Hudson Valley is thereby rendered moot. The complaint is dismissed. The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York
March 25, 2014

James W. Hubert
Acting Supreme Court Justice