

**Wahab v Walt Whitman Mall, LLC**

2017 NY Slip Op 32359(U)

October 20, 2017

Supreme Court, Suffolk County

Docket Number: 11-13306

Judge: Sanford Neil Berland

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK  
IAS PART 6- SUFFOLK COUNTY

**PRESENT:****Hon. Sanford Neil Berland, A.J.S.C.**

\_\_\_\_\_  
GULGHATI WAHAB, as Executrix for the  
Estate of MOHAMMED WAHAB,

Plaintiff(s),

-against-

WALT WHITMAN MALL, LLC, COLLINS  
BUILDING SERVICE, INC., SIMON  
PROPERTY GROUP, ALLIED BARTON  
SECURITY SERVICES and AAA  
MAINTENANCE, LLC,

Defendant(s).  
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**ORIG. RETURN DATE:** May 9, 2017  
**FINAL RETURN DATE:** September 12, 2017  
**MOT. SEQ. #:** 004 MD

**ORIG. RETURN DATE:** May 9, 2017  
**FINAL RETURN DATE:** September 12, 2017  
**MOT. SEQ. #:** 005 MD

**ORIG. RETURN DATE:** June 13, 2017  
**FINAL RETURN DATE:** September 12, 2017  
**MOT. SEQ. #:** 006 MD

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants, Walt Whitman Mall, LLC, Simon Property Group and Allied Barton Security Services, dated April 13, 2017, and supporting papers (including a Memorandum of Law); (2) Answering Affidavits made by plaintiff, dated April 27, 2017, and supporting papers; (3) Replying Affidavits made by defendants Walt Whitman Mall, LLC, Simon Property Group and

Allied Barton Security Services, dated June 12, 2017, and supporting papers; (4) Notice of Cross- Motion by defendant Collins Building Services, Inc., dated April 28, 2017, and supporting papers; (5) Answering Affidavits made by plaintiff, dated May 5, 2017, and supporting papers; and (6) Replying Affidavits made by defendant Collins Building Services, Inc., dated June 1, 2017, and supporting papers; (7) Notice of Motion made by defendant AAA Maintenance, LLC, dated June 2, 2017, and supporting papers; (8) Answering Affidavits made by plaintiff, dated July 25, 2017, and supporting papers; (9) Answering Affidavits made by defendants Walt Whitman Mall, LLC, Simon Property Group and Allied Barton Security Services, dated July 26, 2017; (10) Answering Affidavits made by defendant Collins Building Services, Inc., dated July 28, 2017; and (11) Replying Affidavits made by defendant AAA Maintenance, LLC, dated September 7, 2017, and supporting papers; it is,

**ORDERED** that these motions (mot. seq. #004, 005, 006) are hereby consolidated for purposes of this determination; and it is further

**ORDERED** that the motion made by defendants Walt Whitman Mall, LLC, Simon Property Group and Allied Barton Security Services pursuant to CPLR 3212 seeking summary judgment is hereby denied; and it is further

**ORDERED** that the motion made by defendant Collins Building Services Inc., pursuant to CPLR 3212 seeking summary judgment is hereby denied; and it is further

**ORDERED** that the motion made by AAA Maintenance, LLC pursuant to CPLR 3212 seeking summary judgment and dismissal of the cross-claims as asserted against them is hereby denied; and it is further

**ORDERED** that the parties are to appear for a compliance conference on **Wednesday, November 29, 2017 at 9:30 a.m.** in Part 6 of the Cromarty Court Complex located at 210 Center Drive, Riverhead, New York.

This is an action to recover damages for personal injuries sustained by Mohammed Wahab when he slipped and fell in a parking garage/lot at the Walt Whitman Mall located at 160 Walt Whitman Road in Huntington Station, New York on the evening of January 4, 2011. As evidenced by his verified bill of particulars, plaintiff alleged that he was caused to fall due to the "wet, slippery, snow covered, icy condition" at the premises and that the defendants were negligent in allowing, causing and further creating this dangerous condition to exist. Plaintiff further alleged a fracture to his right hip resulting in a surgical procedure as a result of his fall. Subsequent to his alleged accident, Mohammed Wahab died on July 16, 2014 without having been deposed in this action. His death certificate listed an acute respiratory arrest as his immediate cause of death. On March 7, 2016, the parties to the instant action stipulated that decedent's daughter Gulghati Wahab be substituted as the plaintiff herein.

#### **Motion Sequence #004**

Defendants Walt Whitman Mall, LLC, Simon Property Group and Allied Barton Security Services (hereinafter collectively "Walt Whitman") now move for summary judgment pursuant to CPLR 3212 based upon the deposition testimony of plaintiff, decedent's Executrix, wherein she was unable to determine the cause of decedent's fall without resorting to speculation. Walt Whitman further alleges that prior to the accident of January 4, 2011, the decedent had both a

propensity for falling, as well as poor eyesight/some blindness. In support of their motion, Walt Whitman submits, *inter alia*, a copy of the pleadings, the deposition transcript of Gulghati Wahab, as well as an affidavit of Deborah J. Weber, an employee of Simon Property Group, wherein she avers that Allied Barton did not own, occupy or make special use of the parking garage where the subject accident was alleged to have occurred.

Plaintiff opposes the motion arguing that triable issues of fact remain as to the cause and location of decedent's fall. Plaintiff further argues that summary judgment is premature as discovery still remains outstanding. In support of her opposition, plaintiff submits, *inter alia*, a copy of the "Personal Accident-Injury" report dated January 4, 2011 which appears to have been prepared by defendant Simon Property Group, as well as an affidavit of Gary Teicher, a private investigator retained by plaintiff's counsel, who avers that he accompanied both decedent and plaintiff to the alleged location of decedent's fall at the Walt Whitman Mall on February 21, 2011 and took twenty (20) photos, which Mr. Teicher avers, depict the accident location confirmed by decedent on that day.

#### **Motion Sequence #005**

Defendant Collins Building Services Inc. (Collins) also moves for summary judgment relying upon the same deposition transcript of plaintiff wherein she testifies that she is unable to specifically locate the site of decedent's fall nor the cause of same. Collins further argues that they had no duty to perform snow removal at the purported accident site pursuant to their contract with Walt Whitman Mall, LLC. In addition to Collins' reliance upon the arguments and exhibits annexed thereto in the Walt Whitman motion for summary judgment (mot.seq.#004), Collins further relies upon a purported copy of the aforementioned contract between Collins and Walt Whitman Mall, LLC which the Court finds to be illegible and as such gives it little weight in its determination herein.

Plaintiff opposes Collins' motion arguing that it is procedurally improper and otherwise premature as discovery still remains outstanding.

#### **Motion Sequence #006**

Defendant AAA Maintenance LLC (AAA) now moves pursuant to CPLR 3212 seeking dismissal of plaintiff's complaint and granting summary judgment as there remains no triable issues of fact. AAA further seeks dismissal of the cross-claims as against them by arguing that AAA never owed a duty to decedent/plaintiff. AAA's motion is supported by, amongst other things, an affidavit of Anthony Farina, President of AAA, wherein he avers that AAA performs snow removal on an "as-needed basis" at the request of management from the Mall. Mr. Farina further avers that no such work was conducted by AAA at the Mall on January 4, 2011 or on the days immediately prior. It was not until January 7, 2011 that AAA first conducted snow removal from the Mall that year.

Plaintiff partially opposes AAA's motion, taking no position as to the portion of AAA's

motion seeking dismissal of the cross-claims asserted against them, arguing rather that triable issues of fact still remain and that the motion is premature as discovery is not yet completed. Plaintiff relies on the same aforementioned accident report and photographs and affidavit of Gary Teicher to evidence the remaining issues of contention.

The Walt Whitman defendants oppose AAA's portion of the motion seeking dismissal of the cross-claims as asserted against them, namely indemnification, contribution and breach of contract, as material issues of fact remains in dispute. In support of their partial opposition to AAA's motion, Walt Whitman submits a copy of the service agreement as entered into by AAA and Walt Whitman Mall, LLC for their snow removal services.

Collins also opposes the branch of AAA's motion seeking dismissal of the cross-claims as asserted against them as questions of fact remain as to the scope of work performed by AAA at the alleged accident location just prior to decedent's accident.

On a motion for summary judgment, the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To impose liability upon one who owns or was in control of the premises where the plaintiff allegedly was injured, there must be evidence showing the existence of a dangerous or defective condition there that was a proximate cause of the plaintiff's injuries and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time (*see Winder v Executive Cleaning Servs., LLC*, 91 AD3d 865, 936 NYS2d 687 [2d Dept 2012]; *Drago v DeLuccio*, 79 AD3d 966, 913 NYS2d 747 [2d Dept 2010]; *Penn v Fleet Bank*, 12 AD3d 584, 785 NYS2d 107 [2d Dept 2004]; *Christopher v New York City Tr. Auth.*, 300 AD2d 336, 752 NYS2d 76 [2d Dept 2002]). "In a slip-and-fall case, the defendant moving for summary judgment has the burden of demonstrating, prima facie, that it did not create the alleged hazardous condition or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Zerilli v Western Beef Retail, Inc.*, 72 AD3d 681, 681, 898 NYS2d 614 [2d Dept 2010]; *see Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 868, 44 NYS3d 141 [2d Dept 2016]). A defendant also may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that a plaintiff cannot identify the cause of his or her fall without engaging in speculation (*see Belton v Gemstone HQ Realty Assoc., LLC*, 145 AD3d 840, 841, 43 NYS3d 499 [2d Dept 2016]; *Hahn v Go Go Bus Tours, Inc.*, 144 AD3d 748, 749, 40 NYS3d 549 [2d Dept 2016]; *Korn v Parkside Harbors Apts., LLC*, 134 AD3d 769, 769, 22 NYS3d 99 [2d Dept 2015]). "That does not mean

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that a plaintiff must have personal knowledge of the cause of his or her fall. Rather, it means only that a plaintiff's inability to establish the cause of his or fall—whether by personal knowledge or by other admissible proof—is fatal to a cause of action based on negligence” (*Izaguirre v New York City Tr. Auth.*, 106 AD3d 878, 878, 966 NYS2d 122 [2d Dept 2013]; *see Andersen v El Triunfo Laundromat Corp.*, 151 AD3d 921, 54 NYS3d 166 [2d Dept 2017]; *Pol v Gjonbalaj*, 125 AD3d 955, 955-956, 5 NYS3d 186 [2d Dept 2015]).

Here, the movants, individually and as a whole, established their prima facie entitlement to judgment as a matter of law by their submission of and reliance upon the Executrix-plaintiff's deposition transcript (*see Babitskaya v Mosvideofilm Russia, Inc.*, 98 AD3d 639, 950 NYS2d 275 [2d Dept 2012]; *Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 909 NYS2d [2d Dept 2010]). Plaintiff admitted that there were no eyewitnesses to decedent's fall. Plaintiff testified that when she arrived at the purported location of decedent's fall, she observed both “ice and snow there” and that decedent had remained on the ground. Plaintiff further testified that decedent “was screaming a lot because of the pain” and did not provide any specific details as to how he fell. She further testified that at no time prior to his death did decedent ever specifically indicate to her where he fell or what had caused him to fall. In opposition to the motions, however, plaintiff raised triable issues of fact (*see Stanojevic v Scotto Bros. Rest. Enters., Inc.*, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). In light of the disclosed “Personal Accident-Injury” report prepared by defendant Simon Property Group, Inc., dated January 4, 2011 and pictures taken by Gary Teicher, a private investigator retained by plaintiff's counsel, on February 21, 2011, a finding that the snow or icy condition of the parking area caused the decedent to slip and fall would not be based on pure speculation (*see Morgan v Windham Realty, LLC*, 68 AD3d 828, 890 NYS2d 621 [2d Dept 2009]). In further reliance upon the report and photographs, the Court agrees that the subject motions are premature as discovery remains outstanding (*see CPLR 3212[f]*; *Marrone v Miloscio*, 145 AD3d 996, 998, 44 NYS3d 502 [2d Dept 2016]; *Brown v County of Nassau*, 226 AD2d 492, 492, 641 NYS2d 554 [2d Dept 1996]; *see e.g. McGovern v St. Cyril & Methodius R.C. Church*, 52 AD3d at 788, 859 NYS2d 386 [2d Dept 2008]).

Accordingly, the pending motions before the Court (Mot. Seq. #004, 005, and 006) are denied as triable issues of fact exist.

The parties are reminded of the compliance conference on **Wednesday, November 29, 2017** at 9:30 a.m. in Part 6 of this Court.

Dated: 10/20/17

Riverhead, New York

  
HON. SANFORD NEIL BERLAND, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION