SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. HAL B. GREENWALD
Justice.

SUPREME COURT: DUTCHESS COUNTY

RODNEY PIERRE-SAINT,

Plaintiff(s),

-against-

JACKSON ST. DEVELOPMENT, LLC,

Defendant(s).

DECISION AND ORDER
Index No. 2017-51416
Motion Seq. No. 3

The following papers were reviewed and considered by the Court in determining Defendant's Motion.

NYSCEF Doc. No. 51-63, 66-67, 72-85

PROCEDURAL HISTORY

The within action arises from a slip and fall accident that occurred on February 13, 2017 at 17 Yellen Drive, Fishkill, New York (The Subject Property). The Summons and Verified Complaint were filed on June 14, 2017. (NYSCEF Doc. No. 1). Defendant JACKSON ST. DEVELOPMENT, LLC (JACKSON ST.) interposed its Answer on August 2, 2017 along with various discovery demands (NYSCEF Doc. Nos. 5-7). Depositions of Plaintiff RODNEY PIERRE-SAINT (PIERRE SAINT) (NYSCEF Doc. No. 56) 77 & 78); of Defendant JACKSON ST. by Victor Martinez (NYSCEF Doc. No. 57 & 80) and of non-party Jeanine Hoffman (NYSCEF Doc. No.58) were all completed in 2018. Defendant JACKSON ST. moves for Summary Judgment seeking to dismiss Plaintiff PIERRE-SAINT's Complaint.

SUMMARY JUDGMENT

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [Court of Appeals, 1957], summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of triable issues of fact (*see Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 [Court of Appeals, 1978] *Di Menna & Sons v. City of New York*, 301 N. Y. 118 [Court of Appeals, 1950]; *Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210 [Court of Appeals, 1968]; *Barrett v. Jacobs*, 255 N. Y. 520 [Court of Appeals, 1931]). Issue finding not issue-determination is the key to the procedure. When the court reaches the conclusion that a genuine

and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." (*Esteve v. Abad*, 271 A.D. 725 [1st Dept, 1947]).

Generally, the basis for determining summary judgment is that: "[T]he proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material fact." (*Pullman v. Silverman*, 28 N.Y.3d 1060 [Court of Appeals, 2016], *quoting* *Alvarez v. Prospect Hosp.* 68 N.Y.2d 320 [Court of Appeals, 1986]. Further as stated in *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [Court of Appeals, 1985]). "Bare conclusory assertions... " are insufficient to cause the court to grant summary judgment.

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue .See e.g. *Piedmont Hotel Co. v. A.E. Nettleton Co.*, 263 N.Y. 25, [Court of Appeals, 1933]; If the opposition can show there are questionable issues of fact that require a trial of the action, than summary judgment must be denied (*Cattonar v. Edward Ermold Co*, 277 A.D. 564 [1st Dept. 1951]). In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is.... even arguably any doubt as to the existence of a triable issue' (*Baker v. Briarcliff School Dist.*, 205 AD2d 652 [2nd Dept., 1994]).

"To demonstrate its entitlement to summary judgment in a slip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it'" (*Oliveri v. Vassar Bros. Hosp.*, 95 A.D.3d 973, 974–75 [2nd Dep't., 2012]; *Cummins v. New York Methodist Hosp.*, 85 A.D.3d 1082, 1083 [N.Y. Slip Op. 05650, 2nd Dep't, 2011]; *quoting* *Molloy v. Waldbaum, Inc.*, 72 A.D.3d 659, 659–660 [2nd Dep't., 2010]; *see* *Milano v. Staten Is. Univ. Hosp.*, 73 A.D.3d 1141[2nd Dep't, 2010]). Once a prima facie case has been made out for summary judgment, the burden then shifts to the party opposing the motion. (*Kosson v. Algaze*, 84 N.Y.2d 1019 [Court of Appeals, 1995]). To defeat the defendants' motion for summary judgment, plaintiff had the burden of showing facts sufficient to require trial of any issue of fact. In order to defeat defendants' motion for summary judgment, plaintiff had the burden of showing "'facts sufficient to require a trial of any issue of fact'" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; CPLR 3212[b]).

THE ARGUMENT FOR SUMMARY JUDGMENT

Movant, Defendant JACKSON ST., has several theories that lead to summary judgment and dismissal of the complaint. Defendant claims that there was a "storm in progress", at the time the Plaintiff slipped and fell. The burden of establishing entitlement to summary judgment in this case may be met by presenting evidence that there was a storm in progress when the plaintiff allegedly slipped and fell (*see* *Ryan v Taconic Realty Assoc.*, 122 A.D.3d 708 [2nd Dep't., 2014]; *Smith v Christ's First Presbyt. Church of Hempstead*, 93 A.D.3d 839 [2nd Dep't., 2012]).

As set forth in *Fisher v. Kasten*, 124 A.D.3d 714, (2nd Dep't 2015), "Under the so-called 'storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has

passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*Rabinowitz v Marcovecchio*, 119 A.D.3d 762 [2nd Dep't., 2015]) [*internal quotation marks omitted*]; *see* *Solazzo v New York City Tr. Auth.*, 6 N.Y.3d 734 [Court of Appeals, 2005]).

In support of its position for dismissal, Defendant., JACKSON ST. first seeks summary judgment be granted by reason that there was a "storm in progress', at the time Plaintiff allegedly slipped and fell. In support JACKSON ST. primarily offers an attorney affirmation premised on his interpretation of climatological data presented by Plaintiff's own expert. Additional support for the motion is alleged to come from testimony of the Plaintiff, a representative of Defendant and a non-party as well as an Urgent Care report.

Alternatively, if the Court disagrees with the "storm in progress" theory, then movant bases its application that JACKSON ST., did not have sufficient time to "...remedy the alleged condition." Similar supporting climatological information and deposition testimony is proffered in support of this alternative application.

The last two other arguments made by movant is that JACKSON ST. "...neither created nor exacerbated a hazardous condition through their snow removal efforts.". (NYSCEF Doc. No. 52, paragraph 39), or that JACKSON ST. did not have constructive or actual notice of the condition.

Based upon the foregoing, JACKSON ST. has made out a prima facie case for summary judgment. The burden now shifts to the Plaintiff to demonstrate to the Court, "facts sufficient to require a trial of any issue of fact" (*Zuckerman v. City of New York,* Supra.).

THE OPPOSITION TO SUMMARY JUDGMENT

Plaintiff opposes the instant application for summary judgment to dismiss the complaint., and has offered essentially the same climatological information, and deposition testimony as the movant. PIERRE-SAINT also offers an Affidavit of Howard Altschule, the undisputed weather expert offered by Plaintiff, his curriculum vitae, a report from Forensic Weather Consultants, LLC., certified records of meteorological data.

Defendant claims there was a "storm in progress", and therefore a property owner would not be held liable for accidents caused by ice or snow during the storm. The Affidavit of the undisputed climatological expert (NYSCEF Doc. No. 83) clarifies the "storm". He opines the storm ended at "2:30 a.m., on February 13, 2017 (approximately 7 ½ hours prior to the time of the incident) and was not ongoing at the time of the incident." (NYSCEF Doc. No. 83, paragraph 7. Continuing in the same paragraph, the undisputed climatological expert states in response to Defendant's assertion that "...it is undisputed there were sustained winds between thirty-five (35) and forty (40) mph.", that the wind was "...not a sustained wind, rather a wind gust.". Further Altschule states in the same paragraph: "In addition, even though blowing and drifting snow was occurring, this **does not constitute an ongoing winter storm since precipitation was not falling for at least 7 ½ hours prior to the time of the incident.** (*Emphasis added*). Accordingly, there are issues of fact concerning whether there was a 'storm in progress" at the time of the incident.

Defendant next claims that even if there was no storm in progress, JACKSON ST. did not have enough time to remedy the situation. Altschule refutes this argument, stating at paragraph 8-11 (NYSCEF Doc. No. 83) that his findings were "…pre-existing snow and ice was present on the ground prior to the onset of a storm system that affected the incident location on February 12th and 13h, 2017.". He further states at paragraph 10, after reviewing 65 color photographs that: "It is very evident that this snow and ice had been pre-existing well before the photographs were taken.". Lastly at paragraph 11 he links the icy conditions to the subject incident by stating: "Had the ice not been present, the slippery and icy conditions that caused the slip and fall accident to occur would not have existed." This argument raises issues of fact to be determined at trial.

The final arguments that JACKSON ST. neither caused, nor exacerbated the icy conditions, or that JACKSON ST. had any constructive or actual notice are easily defeated by the above. JACKSON ST's arguments are possibly faulty, potentially disingenuous, but certainly raise issues of fact that preclude granting summary judgment.

By reason of all the foregoing it is

ORDERED, that Defendant JACKSON ST. DEVELOPMENT, LLC Motion for Summary Judgment seeking to dismiss Plaintiff RODNEY PIERRE-SAINT's Verified Complaint is DENIED; and it is further

ORDERED that parties and counsel are reminded that jury selection in the within matter is scheduled to commence **Monday, December 2, 2019 at 9:30 a.m.**

The foregoing constitutes the decision and order of this Court.

Dated: October 22, 2019
Poughkeepsie, NY

ENTER:

Hon. Hal B. Greenwald, J.S.C.

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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 Greenwald's Chambers, please do not submit any copies. Submit only the original papers.