Frisone v Post Rd. Dev. Equity LLC
2019 NY Slip Op 34520(U)
November 22, 2019
Supreme Court, Dutchess County
Docket Number: Index No. 51390/17
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

ERIC FRISONE,

Plaintiff,

-against-

POST ROAD DEVELOPMENT EQUITY LLC, TCD MANAGEMENT CORPORATION , STOP AND SHOP SUPERMARKET COMPANY, LLC, d/b/a STOP AND SHOP,

Defendants.

DECISION AND ORDER

Index No. 51390/17

ERIC FRISONE,

Plaintiff,

-against-

ALLT EXCAVATING, INC. ALLT EXCAVATING AND CONSTRUCTION and SETH ALT d/b/a ALLT EXCAVATING AND CONSTRUCTION,

Defendants.

Index No. 51508/18

The following papers were read on Defendants' motions for summary judgment:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - P
MEMORANDUM OF LAW IN SUPPORT

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
MEMORANDUM OF LAW IN SUPPORT
EXHIBITS A - Q

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - N
MEMORANDUM OF LAW IN SUPPORT
EXPERT AFFIDAVIT
EXHIBITS A - C
EXPERT AFFIDAVIT OF JOHN PARKER
AFFIDAVIT OF SETH ALLT
EXHIBIT A

AFFIRMATION IN OPPOSITION
AFFIDAVIT IN OPPOSITION
AFFIDAVIT IN OPPOSITION
MEMORANDUM OF LAW IN OPPOSITION

REPLY AFFIRMATION
REPLY AFFIRMATION

Before the court are two separate actions involving common issues of law and fact. Both are negligence actions in which Plaintiff Eric Frisone ("Plaintiff") seeks damages for injuries allegedly sustained in a slip-and-fall accident in a shopping center parking lot. While the parties assert that they stipulated to consolidate the actions, there has been no motion seeking such relief and the court has not issued an order of consolidation. Because an adjudication of the defendants' summary judgment motions in both actions involve the same issues of law and fact, the court deems it appropriate to issue one decision for all motions.

On March 14, 2017 Plaintiff drove from his residence in Poughkeepsie to the Stop and Shop supermarket located on 254 South Road, Poughkeepsie, New York. Stop and Shop is located in a shopping center owned by Defendant Post Road Development Equity, LLC ("Post Road"). Post Road entered into a contract with Defendant Allt Excavating, Inc. to perform snow removal services for the shopping center parking lot for the 2016/2017 winter season and had a contract with TCD Management Corporation ("TCD") to manage the shopping center. On March 14, 2017 there was a severe snow storm in Poughkeepsie, New York and the broader region, Two days earlier, on March 12, 2017, the National Weather Service in Albany, New York, issued a "winter storm warning" that was in effect from 12:00 a.m. on March 14, 2017 through 8:00 p.m. on March 15, 2017. The following day, the National Weather Service upgraded the "winter storm warning" to a "blizzard warning" to be in effect from 12:00 a.m. on March 14, 2017 through 12:00 a.m. on March 15, 2017. The warning asserted that snow fall rates of two to four inches per hour and total snow accumulations of 18 to 24 inches were predicted to fall during the day on March 14, 2017. The warning further stated "falling and blowing snow with strong winds and poor visibilities are likely. This will lead to white out conditions...making travel extremely dangerous...do not travel...if you must travel...have a winter survival kit with you...if you get stranded...stay with your vehicle."

Later in the day on March 13, 2017 the National Weather Service updated the "blizzard warning" to be in effect through 12:00 a.m. on March 15, 2017. Based on the projected severity of the storm, the New York State Governor declared a state of emergency across all 62 counties in New York. The Dutchess County Executive subsequently issued a state of emergency for Dutchess County which included an order "prohibiting travel on all county roadways except for emergency personnel...." Official weather records Defendants have submitted in support of their motions indicate that snow began falling at approximately 12:20 a.m. on the morning of March 14, 2017 and continued throughout the day until 10:13 that evening. Throughout that time temperatures remained below freezing never reaching above 28° fahrenheit. Wind gusts in excess of 25 miles per hour and as high as 40 to 45 miles per hour occurred from the late morning through the late afternoon on March 14, 2017.

At approximately 1:30 p.m. on March 14, 2017, Plaintiff drove from his home in Poughkeepsie to Stop and Shop. He acknowledged that it had been snowing that day but claims that the snow had tapered off at the time he decided to drive to Stop and Shop. Weather records indicate, however, that as of 1:30 p.m. approximately 17 inches of new snow had accumulated thus far with gusty winds and snow fall causing drifting and blowing snow. Plaintiff testified at his deposition that after he parked his car he took a photograph from his car of the Stop and Shop building and sent it to his girlfriend to let her know he "got there safe." He states he took the photograph through his car window. The photograph depicts precipitation on the window with what appears to be an area of cleared pavement and significant snow accumulation in front of the store. Plaintiff stated that he was wearing sneakers and had no difficulty as he walked toward the store because the snow on the ground in the area he was walking did not even cover his sneakers. He stated that when he got closer to the travel roadway running in front of the store he stepped down and slipped. He was unable to recall whether there was any compacted snow at the location where he fell but did not identify anything else about the roadway that caused him to fall.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of triable issues of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion." Yelder v. Walters, 64 AD3d 762, 767 (2nd Dept 2009).

Each of the moving Defendants asserts that Plaintiff's claims are barred under the storm in progress rule. Under that rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice until an adequate period of time has passed following the cessation of a storm to allow the owner an opportunity to ameliorate the hazards caused by the storm. Marchese v. Skenderi, 51 AD3d 642 (2nd Dept 2008). To maintain a negligence cause of

action for a slip and fall during or shortly after a storm a plaintiff must demonstrate that he or she fell as a result of something other than accumulated snow or precipitation. Id.

Plaintiff identifies nothing other than compacted snow or ice as the cause of his fall. In an affidavit he asserts that as he walked towards Stop and Shop the roadway looked plowed but it was covered with what he describes as snow compacted by the front end loaders and plow vehicles that were in the process of clearing the parking lot. He further states he observed no salt or sand on this compacted snow. As Plaintiff asserts that accumulated compacted snow was the cause of his fall and it is undisputed that there was a severe winter storm in progress at the time, the defendants have made a *prima facie* showing of an entitlement to summary judgment based on the storm in progress rule.

In opposition, Plaintiff fails to raise a triable issue of fact. Plaintiff's assertions that the defendants were negligent for not removing all snow and ice from the roadway or failing to salt and sand does not constitute an affirmative act that would be an exacerbation of a dangerous condition. See Glover v. Batsford, 109 AD3d 1182, 1184 (4th Dept 2013); Ali v. Vill. Of Pleasantville, 95 AD3d 796, 797 (2nd Dept 2012). Nor is Plaintiff's claim that Allt's snow removal methods actually increased the natural hazards of the snow sufficient to create a defense to the motions. The mere fact that residual snow remained in certain locations while plowing efforts were being undertaken during a storm does not constitute an act of negligence. It is undisputed that plowing efforts were ongoing in the parking lot at the time Plaintiff fell. Based upon the meteorological records and deposition testimony describing the conditions at the time of Plaintiff's fall, it is clear that there was an active snow storm in progress. The defendants may not be held liable and negligent for failure to remove all snow during an active storm.

Allt Excavating is further entitled to summary judgment as it owed Plaintiff no duty. Its presence at the location was due entirely to a contractual relationship with Defendant Post Road and Plaintiff falls to allege or demonstrate the applicability of any of the exceptions under Espinal v. Melville Snow Contrs., 98 NY2d 136 (2002). As there was a snow storm in progress, Allt Excavating did not launch a force or instrument of harm. Defendant Stop and Shop has also demonstrated its further entitlement to summary judgment through unrefuted documentary evidence that it did not own or have any responsibility for maintaining the parking lot location where Plaintiff fell. Under such circumstances it did not owe a duty to Plaintiff.

The court rejects Plaintiff's assertion that Stop and Shop's decision to remain open during the storm constituted contributory negligence because it helped create the dangerous situation which caused Plaintiff to fall. This court is not aware of, and Plaintiff does not cite any, precedent in support of this contention. Plaintiff chose to violate a county-wide state of emergency and travel to Stop and Shop during a winter storm after approximately a foot and a half of snow had already fallen. Under such circumstances, his attempts to impose liability on a third party must fail.

Wherefore, it is

ORDERED that the motions for summary judgment of Defendants Post Road Development Equity, LLC, TCD Management Corporation, Stop and Shop Supermarket Company, LLC and the Allt Excavating defendants are granted and this action is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: November 22, 2019
Poughkeepsie, New York

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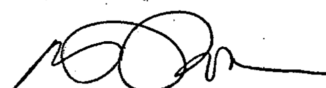

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §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.

Rusk, Wadlin, Heppner & Martuscello, LLP
255 Fair Street, PO Box 3356
Kingston, NY 12402

Kelly & Meenagh, LLP
135 North Water Street
Poughkeepsie, NY 12601

Ahmuty, Demers & McManus, Esqs.
634 Plank Road, Suite 203A
Clifton Park, NY 12065

O'Connor, O'Connor, Bresee & First, P.C.
20 Corporate Woods B lvd.
Albany, NY 12211