

**Nigro v Mountain Shadows Home Owners Assn.,  
Inc.**

2020 NY Slip Op 35150(U)

December 3, 2020

Supreme Court, Rockland County

Docket Number: Index No. 031710/2019

Judge: Robert M. Berliner

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SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND  
HON. ROBERT M. BERLINER, J.S.C.

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.

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ANTHONY NIGRO,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 031710/2019

MOUNTAIN SHADOWS HOME OWNERS  
ASSOCIATION, INC., TRIAM REALTY CORP.,  
and LANDSCAPE MD INC.,

Motion Sequence # 1

Defendants.

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The following papers, numbered 1 to 5, were read on the motion for summary judgment, pursuant to CPLR § 3212, by Defendants Mountain Shadows Home Owners Association Inc. and Triam Realty Corp.:

Notice of Motion/Affirmation in Support/Memorandum of Law in Support/	
Exhibits(A-M).....	1-3
Affirmation in Opposition.....	4
Reply Affirmation.....	5

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

This action arises out of a slip and fall accident, wherein Plaintiff Anthony Nigro allegedly sustained damages after slipping and falling in a parking lot of his residential complex located at 774 Foltim Way, Congers, New York (“the Premises”) on February 13, 2019 at 12:15 am. Plaintiff alleges that he slipped on an ice patch on the ground that emanated from a snow pile, which existed for 4-6 weeks prior to his accident. Prior to his accident, on February 12, 2019 at approximately 12:00 pm, Plaintiff walked from his residence to his car parked in a parking spot across his residence. Plaintiff returned to his residence around 1:15 pm. He stated that he did not slip on any ice on the ground when he walked to and from his car at that time.

Then, he left his residence again on February 13, 2019 at 12:15 am, which is when he allegedly fell, as he traversed the same area as he did earlier to get to his car. He maintains that the ice patch he slipped on came from a snow pile located behind his car, in the parking spot where he parked his car. Plaintiff maintains that the snow pile was the height of the bed of his truck and was about 4-6 weeks old. Meteorological reports show that a winter weather advisory was in effect from the morning of February 12 through the morning of February 13. Plaintiff filed his Complaint for negligence against Defendants Mountain Shadows Home Owners Association, Inc. (“Mountain Shadows”), Triam Realty Corp. (“Triam Realty”), and Landscape MD, Inc. (“Landscape MD”). Mountain Shadows owns the Premises and Triam Realty manages the Premises. Further, Mountain Shadows contracted with Landscape MD to provide various services of snow removal and landscaping on the Premises (“Service Agreement”).

Now, before the Court is Mountain Shadows’s and Triam Realty’s motion for summary judgment seeking to dismiss Plaintiff’s Complaint as against them. They allege that they are entitled to judgment as a matter of law because: (1) they did not breach a duty owed to Plaintiff because they did not create, nor did they have any actual or constructive notice of, the alleged dangerous condition; and (2) they cannot be liable for Plaintiff’s injuries because the alleged defective condition was open and obvious. First, the Court addresses their argument regarding breach of duty.

“As we have stated frequently, the proponent of a summary judgment motion 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]. “Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact.” *Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]. Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011].

“A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case 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.” *Przywalny v New York City Tr. Auth.*, 69 AD3d 598, 598 [2d Dept 2010][internal citations omitted]. “A movant cannot satisfy its initial burden merely by pointing to gaps in the plaintiff’s case.” *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909, 910 [2d Dept 2011][internal citations omitted].

The Court finds that Defendants Mountain Shadows and Triam Realty established their prima facie burden that they did not create the alleged ice condition and that they did not have any actual or constructive notice of such condition. They submitted, *inter alia*, the affidavit of Certified Consultant Meteorologist (“CCM”) Thomas Else,<sup>1</sup> meteorological reports, and the depositions of the parties. Defendants established that they did not create the alleged ice condition as the president of Mountain Shadows testified at her deposition that neither Mountain Shadows nor Triam Realty themselves perform snow or ice removal in the parking lot, including the location of Plaintiff’s fall. Rather, they relied on Defendant Landscape MD for snow removal services. They further established that they did not have any actual notice of the alleged ice condition. They also established that they did not have constructive notice of the alleged condition. Specifically, Defendants’ expert witness reviewed the meteorological reports for four weeks prior to Plaintiff’s accident, as well as the deposition testimonies of the parties. He concluded that:

“7. A combination of unseasonably mild weather from February 3 – 5 and rain from February 6 – 8, resulted in exposed, undisturbed and untreated ground surfaces to be clear of any residual snow and ice cover, which included man-made snow piles from the post clean-up of all prior storms.

8. Immediately prior to the onset of the February 12, 2019 winter storm, exposed, undisturbed and untreated ground surfaces were clear of any naturally precipitated

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<sup>1</sup> Plaintiff alleges that the Court should not consider Else’s affidavit because it fails to conform with CPLR § 2309 as it is notarized outside of New York State and does not include a certificate of conformity. However, this argument is without merit because “the absence of a certificate of conformity for an out-of-state affidavit is not a fatal defect.” *Fredette v Town of Southampton*, 95 AD3d 940, 842 [2d Dept 2012]; *Mack-Cali Realty, L.P. v Everfoam Insulation Sys., Inc.*, 110 AD3d 680, 682 [2d Dept 2013].

snow and ice from all past snow events, which included man-made snow piles form the post clean-up of all prior events.”

Affirmation in Support, Ex. G, at 11 ¶¶ 7-8. Based on this, Mountain Shadows and Triam Realty established that immediately prior to the snowfall on February 12, 2019 the Premises were clear of any residual snow or snow piles due to the unseasonably mild weather and rain several days prior to February 12, 2019. As such, any ice or snow condition on the ground was due to the snow and freezing rain from February 12, 2019 into February 13, 2019. Consequently, Defendants established, prima facie, that “the alleged icy condition had not existed for a sufficient length of time such that they should be charged with notice of it.” *Wylie v Brooks/Eckerd Pharmacy*, 49 AD3d 533, 534-35 [2d Dept 2008]; *Penny v Pembroke Mgmt., Inc.*, 280 AD2d 590, 590-91 [2d Dept 2001].

In opposition, Plaintiff cites to his own EBT transcript, in which he testified that although it snowed during the day of February 12, 2019, it was not snowing at the time of his fall. However, his testimony standing alone fails to controvert Defendants’ proof, such as its meteorological data and snow logs, that it was snowing and freezing rain near Plaintiff’s fall, specifically the day/night of February 12, 2019. Furthermore, in light of the meteorological data documenting unseasonably mild weather and rain clearing any snow piles from the Premises prior to February 12, 2019, Plaintiff’s contention that he slipped on 4-6 weeks old ice is based on mere speculation and insufficient to raise a triable issue of fact. *See Bonney v City of New York*, 41 AD3d 404, 404 [2d Dept 2007][finding that plaintiff’s allegation that the ice she slipped on was longstanding was based on sheer speculation and was insufficient to raise a triable issue of fact where meteorological data documented intervening thaw from the last snowstorm prior to plaintiff’s fall]; *see also Katz v Pathmark Stores, Inc.*, 19 AD3d 371 [2d Dept 2005].

Based upon the foregoing, it is

ORDERED that Defendants Mountain Shadows Home Owners Association Inc’s and Triam Realty Corp’s motion for summary judgment dismissing the Complaint as against them is granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York  
December 3, 2020

ENTER

  
HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF