

<b>Marion v CA Kaplan Park Dr., LLC</b>
2021 NY Slip Op 33249(U)
February 18, 2021
Supreme Court, Oneida County
Docket Number: Index No. EFCA2018-000207
Judge: Erin P. Gall
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a Regular Term of the  
Supreme Court, held in and  
for the County of Oneida, at  
Utica, New York, on the 3<sup>rd</sup>  
day of December, 2020.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ONEIDA

-----X  
ROBERT MARION,

Plaintiff,

Index No. EFCA2018-000207  
RJN No. 32-18-0883

-vs-

DECISION  
AND ORDER

CA KAPLAN PARK DRIVE, LLC, RIDGE STREET,  
WAREHOUSE, INC., MILLER TOWNHOUSE, d/b/a  
RIDGE STREET WAREHOUSE, CA KAPLAN REAL  
ESTATE, LORI KAPLAN AND CHARLES KAPLAN,  
a/k/a C.K. KAPLAN PARK DRIVE, LLC, C.A.  
KAPLAN, JOHN DOE CORPORATION, d/b/a and/or  
OWNER and/or MANAGER OF F-1 MUSTANG DRIVE,  
MUSTANG DRIVE TOWNHOUSE, ROME, NY,  
JOHN ROE CORPORATION, d/b/a and/or OWNER and/or  
OWNER and/or MANAGER OF 1904 N. GEORGE STREET,  
ROME, NY, JAMES LAMPHIER,  
LAMPHIER CONTRACTING,

Defendants.

-----X  
Appearances: Stephanie Palmer, Esq.  
Attorney for Plaintiff  
Law Offices of Robert F. Julian, Esq.  
2037 Genesee St.  
Utica, NY 13501

Maria Mastriani, Esq.  
126 N. Salina Street, Suite 215  
Syracuse, NY 13202

Gall, J.:

The instant matter relates to a slip and fall on snow and /or ice on two separate occasions. Defendant moves for summary judgment seeking dismissal of the Complaint. Plaintiff opposes Defendant's motion and cross-moves to amend the pleadings, seeking an order *nunc pro tunc*, permitting Plaintiff to correct the pleadings.

The plaintiff, Robert Marion, alleges that he slipped and fell on March 4, 2015, and March 12, 2015, injuring himself, at two different locations. Plaintiff alleges that he slipped and fell on March 4, 2015 at F-1 Mustang Drive, Rome, New York and on March 12, 2015 at N. George Street, Rome, New York. The locations of the alleged falls are allegedly owned and/or managed by Defendants. Plaintiff alleges that he sustained injuries and has had 4 surgeries to address injuries to his right knee and wrist. Plaintiff alleges that he is a sign language interpreter and right hand dominant. Plaintiff claims that the defendants had failed to salt, sand or address the hazard and danger posed by the ice. Plaintiff's complaint alleges negligence against Defendants for failure to maintain the safety of the property and for creating a dangerous condition at the property.

Defendants move for summary judgment on the grounds that there are no triable issues of fact before this Court. Defendants claim that Plaintiff has failed to provide admissible proof that Defendants created or had actual or constructive notice of the alleged defective conditions which allegedly caused plaintiff to fall. Defendants argue that they had a robust snow and ice removal system which included the removal of snow if there were two or more inches, and that the properties were checked every weekday morning on or about 6:00 am. Defendants claims that there was no evidence that an icy/dangerous condition existed and that if there was black ice, that is insufficient to constitute constructive notice. Finally, Defendants claim that Plaintiff has

named several entities as defendants in this action that have no relevant connection to the alleged incidents and should not be sued individually.

In support of their motion, Defendants submit the deposition testimony of Lori Felice, Kaplan Master property manager, and Charles Kaplan, Kaplan Master part owner and supervisor. Defendants also submit the deposition testimony of James Lamphier, Kaplan Master maintenance worker, and Charles Michael Rowe, Kaplan Master Chief of Maintenance. With respect to the March 4, 2015 incident, Defendants submit Snow/Ice Logs maintained by Defendants which recorded that Kaplan Master's employees plowed and salted the subject location at approximately 7:00 a.m. on the subject morning. The logs also indicate that Kaplan Master shoveled and salted all sidewalks at the subject properties between 7:30 a.m. and 9:00 a.m. Defendants assert that there were no observable icy/dangerous conditions on the subject date nor did they received notice or complaints of any dangerous conditions. With respect to the March 12, 2015 fall, Defendants allege that the subject area was visually inspected for snow and ice at or around 6:00 am on the date of the fall and that none of the employees were aware of any snow/ice conditions nor had any dangerous conditions been reported. Defendants also claim that there are multiple defendant entities in this case that have no relevant connection to the alleged incidents and should not be sued individually and seeks to have the complaint dismissed as to those individuals.

Plaintiff opposes Defendants' motion and argues that he has set forth evidence that snow and ice conditions existed days and hours before his falls on both fall down incidents. Plaintiff also alleges that under the ice/slush there was packed snow and that if and when Defendants plowed, they packed the snow and ice and created the condition in the manner they plowed the premises and stockpiled the snow next to the driveway. In addition to Plaintiff's deposition testimony, he relies on the meteorological reports along with an affidavit from Meteorologist

Wayne Mahar which opines that there was no new snow/ice conditions and that the condition lasted hours and days before Plaintiff's falls. Plaintiff alleges that there was black ice present on the day of the second fall.

Plaintiff cross-moves for an order *nunc pro tunc* correcting the name of the defendant or in the alternative for leave to file and serve an amended complaint.

The proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. See, Alvarez v. Prospect Hosp., 68 NY2d 320 (1986); Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557 (1980). Once such a showing is made, the burden shifts and the party opposing the motion must tender evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which would require a trial or tender an acceptable excuse for his or her failure to do so. See, Greenberg v. Coronet Prop. Co., 167 AD2d 291 (1<sup>st</sup> Dept., 1990); Zuckerman, supra at 557. If the existence of an issue of fact is even arguable, summary judgment must be denied. Museums at Stony Brook v. Vil. of Patchogue Fire Dept., 146 AD2d 572 (2<sup>nd</sup> Dept., 1989).

The party opposing a motion for summary judgment is entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties. Nicklas v. Tedlen Realty Corp., 305 AD2d 385 (2<sup>nd</sup> Dept., 2003); see also, Akseizer v. Kramer, 265 AD2d 356 (2<sup>nd</sup> Dept., 1999); Henderson v. City of New York, 178 AD2d 129 (1<sup>st</sup> Dept., 1991).

A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice thereof. Haberman v. Meyer, 120 AD3d 1301 (2<sup>nd</sup> Dept., 2014); Cuillo v. Fairfield Prop. Servs., L.P., 112 AD3d 777 (2<sup>nd</sup> Dept., 2013); Smith v. Hariri Realty

Assoc., Inc., 109 AD3d 897 (2<sup>nd</sup> Dept., 2013). Thus, a defendant who moves for summary judgment in a slip-and-fall case 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. Castillo v. Silvercrest, 134 AD3d 977, 977 (2<sup>nd</sup> Dept., 2015); McBryant v. Pisa Holding Corp., 110 AD3d 103 (2<sup>nd</sup> Dept., 2013); Feola v. City of New York, 102 AD3d 827 (2<sup>nd</sup> Dept., 2013).

“Whether a dangerous or defective condition exists ... is generally a question of fact for a jury.” Trincare v. County of Sussex, 90 NY2d 976 (1997). “To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover it and remedy it.” Gordon v. American Museum of Natural History, 67 NY2d 836, 837 (1986).

This Court finds that Defendants have met their burden of establishing that it neither created nor had actual notice of the icy condition alleged to have caused the plaintiff’s fall and that the plaintiff has failed to raise a triable issue of fact to support his claim. A weather report describing no recent precipitation is not sufficient to establish knowledge even if it suggests that the condition had existed for more than 24 hours. “[A]ny finding as to when the ice patch developed, and consequently, whether there was adequate time to discover and remedy the situation, could only be based on speculation.” Spinoccia v. Fairfield Bellmore Ave., LLC, 95 AD3d 993, 994 (2<sup>nd</sup> Dept., 2012); Makaron v. Luna Park Hous. Corp., 25 AD3d 770 (2<sup>nd</sup> Dept., 2006); Murphy v. 136 N. Blvd. Assoc., 304 AD2d 540, 540–541 (2<sup>nd</sup> Dept., 2003); Lillie v. Wilmorite, Inc., 92 AD3d 1221 (4<sup>th</sup> Dept., 2012). Plaintiff conceded that he never contacted Defendants’ emergency maintenance line, to give notice of the alleged black ice, even after his first fall. Finally, Plaintiff submitted no evidence to support his claim that Defendants’ plowing

“packed down the snow and ice” and that its plowing methods created the dangerous condition.


As such, the Court finds in favor of Defendants, and Plaintiff’s cross motion is moot.

Now, therefore, based on the foregoing, it is hereby

ORDERED and ADJUDGED that Defendants’ Motion for Summary Judgment is GRANTED and Plaintiff’s complaint is dismissed; and it is hereby

ORDERED and ADJUDGED that Plaintiff’s Cross Motion is DENIED.

ENTER: February 18, 2021

  
\_\_\_\_\_  
Hon. Erin P. Gall  
Supreme Court Justice