SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. DAVID P. SULLIVAN,
Supreme Court Justice.

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LAURA KASHIMER and JONATHAN K. KASHIMER,

Plaintiff,

Index No. 604160/2019
Motion Seq. No. 001
Motion Submitted: 06/16/2021

-against-

INCORPORATED VILLAGE OF GARDEN CITY,

Defendant.

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The following papers read on these motions:

Notice of Motion.....1
Opposition.....2
Reply.....3

Defendant moves this Court for an order, pursuant to CPLR §3212, awarding it summary judgment dismissing Plaintiffs' complaint and any cross-claims as and against it. Plaintiff has opposed the motion, and the Court has received timely reply. Based upon the following, the motion is hereby denied as stated hereafter.

Plaintiffs are homeowners and residents in Defendant's village. On March 7, 2018, there was a snow event that took place in which there was snow accumulation within Defendant's village. It appears undisputed that the snow event ceased at approximately 10:00pm that evening. The following morning at approximately 5:53am, Plaintiff Laura exited her home in order to walk to the nearby train station to go to work, as she had allegedly done every weekday

morning for over four (4) years. As she traversed through the snow down her driveway and into the street in order to cross to the other side, she slipped and fell on ice that had formulated overnight in the middle of the roadway, causing injury to her left ankle.

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. Alvarez v. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). To make a prima facie showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

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 that caused the accident or had actual or constructive notice of its existence. Vozzo v. Fairfield Westlake Square, LLC, 152 AD3d 815, 59 NYS3d 125 (2nd Dept., 2017). Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case. Richardson v. JAL Diversified Management, 73 AD3d 1012, 901 NYS2d 676 (2nd Dept., 2010).

Defendant's moving papers assert four separate arguments to support its request for dismissal of the complaint, none of which it has tendered sufficient evidence to satisfy its burden on the motion given the facts and circumstances surrounding this case. For example, Defendant asserts that it has enacted a prior written notice ordinance, Village Ordinance §132-2, and since

it did not receive any written notice of the hazardous condition that caused Plaintiff Laura's accident previously, it cannot be held liable. Dibble v. Village of Sleep Hollow, 156 AD3d 602, 66 NYS3d 26 (2nd Dept., 2017). However, this statute cannot be used to block Plaintiffs' claim herein, since it would be unreasonable to require her, or any other potential plaintiff, to first provide written notice of a hazardous condition created by weather in less than twenty-four hours from its creation.

The second argument advanced by Defendant is that the condition that caused Plaintiff Laura's injury was open and obvious, an argument that also fails given the facts and circumstances surrounding the happening of this incident. While it is true that a landowner has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it, proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition but does not preclude a finding of liability against a landowner for failure to maintain the property in a safe condition. Commender v. Strathmore Court Homeowners Association, 151 AD3d 1014, 58 NYS3d 108 (2nd Dept., 2017); Cupo v. Karfunkel, 1 AD3d 48, 767 NYS2d 40 (2nd Dept., 2003). Here, while the snow and ice condition may have been readily apparent, there is not anything in the record put forth by Defendant in the moving papers to indicate that there was a safer option available to Plaintiff for her to be able to cross the street. Thus, even though Plaintiff's testimony indicates that she was aware the street was covered in a sheet of ice before she attempted to cross over it, Defendant may still be held liable for this incident.

The remaining two arguments advanced by Defendant are that it did not create the hazardous condition in the roadway and that the storm was still in progress. A defendant may

satisfy its burden to show it is free from liability by presenting evidence that there was a storm in progress when the plaintiff allegedly slipped and fell. Ryan v. Taconic Realty Associates, 122 AD3d 708, 997 NYS2d 143 (2nd Dept., 2014). Under the storm in progress rule, a landowner generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter. Id at 709, 144. Here, Defendant has not submitted any evidence to demonstrate either that the snow event was either still ongoing or that a reasonable time after its cessation had not passed yet. It has not submitted any certified climatological data, nor does the deposition testimony definitively indicate when the storm ended that began on March 7 such that this Court may determine that a reasonable time had not yet passed for Defendant to treat its roadways. Moreover, while the deposition testimony submitted in support of the motion, including testimony from its highway supervisor and a machine equipment operator, speaks to general snow clearing and road treatment that would occur during and after a snow event, it has not demonstrated that its snow removal efforts on March 7 and March 8 neither created nor exacerbated the icy roadway that caused Plaintiff Laura to slip, fall, and injure herself on. *See* Kantor v. Leisure Glen Homeowners Association, Inc., 95 AD3d 1177, 944 NYS2d 640 (2nd Dept., 2012). Therefore, the storm in progress rule cannot be properly applied herein, and Defendant has not satisfied for this Court that it did not create or exacerbate the roadways in its clearing efforts.

Simply put, for all the foregoing reasons, Defendant has not met its burden on the motion. The Court need not address the sufficiency of Plaintiff's opposition papers given Defendant's failure to establish its entitlement to judgment as a matter of law. *See* Bonilla v. Calabria, 80 AD3d 720, 915 NYS2d 615 (2nd Dept., 2011). Accordingly, Defendant's motion is hereby denied in all respects.

Defendant shall file and serve a copy of the within order with notice of entry upon Plaintiffs within thirty (30) days from the date of this order. Thereafter, the parties shall appear as scheduled in the DCM Trial Part of Supreme Court, Nassau County, on February 8, 2022.

This hereby constitutes the Decision and Order of this Court.

Dated: September 23, 2021
Mineola, New York

ENTER

David P. Sullivan
HON. DAVID P. SULLIVAN, J. S. C.

ENTERED
Sep 29 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE