

**Darden v Surrey Carlton Preserv., L.P.**

2021 NY Slip Op 33577(U)

August 16, 2021

Supreme Court, Rockland County

Docket Number: Index 032530/2019

Judge: Thomas P. Zugibe

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This opinion is uncorrected and not selected for official publication.

To commence the statutory period for appeals as of right under CPLR § 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
ROCKLAND COUNTY

-----X  
KHALIAH DARDEN,

Plaintiff,

Index: 032530/2019

-against-

**DECISION & ORDER**

SURREY CARLTON PRESERVATION, L.P., and  
METROPOLITAN REALTY GROUP, LLC,

Defendants.

-----X  
Zugibe, J.

Upon consideration of all papers related to motion sequence two (NYSCEF 44-61), the Defendants’ motion for summary judgment is denied.

Summary Judgment Standard

The Court notes that the remedy of summary judgment is a drastic one and it should only be granted when it is clear no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Once such a showing has been made, the burden of proof shifts such that

an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez, supra*.

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dep't 1986); *Gitlin v. Chirkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 (2d Dep't 2012); *Mauriello v. Port Auth. of New York & New Jersey*, 8 A.D.3d 200, 200, 779 N.Y.S.2d 199, 200 (2d Dep't 2004). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arguable", the motion must be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982); *Andre, supra*.

#### Sidewalk Area

Defendants have submitted evidence establishing that the allegedly unsafe sidewalk was cleared, specifically through the deposition testimony of the assistant director of compliance, Maria Salinas. Thus, Defendants' made a *prima facie* showing of entitlement to summary judgment.

In rebuttal, however, the Plaintiff raises triable issues of fact regarding whether the ice had been left over from the day prior to her accident. In response to a question from the Defendant's attorney, Plaintiff stated that the area appeared to have been cleared. However, she also testified that regardless of that, she had seen what she believed was the same ice the day prior, thus creating a factual issue of whether Defendants' cleared out all of the ice that was on the walkway, or just a portion thereof. No evidence was submitted regarding any additional

precipitation. The Plaintiff also testified she fell on ice measuring between three inches and a foot, which dispersed upon her fall.

To the extent photographs exist, the photographs are not of sufficient quality to assist the court in determining the issue “as a matter of law” *Deviva v. Bourbon St. Fine Foods & Spirit*, 116 A.D.3d 654, 655, 983 N.Y.S.2d 295, 297 (2d Dep’t 2014). The photographs submitted as part of the record are too close to the ground to provide a view of the scene. To the extent arguments are raised regarding the contributory negligence of the Plaintiff’s use of her cell phone, factors of comparative negligence is not relevant to the Defendant’s liability. The Court notes that

[A] plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence and culpable conduct on the part of the plaintiff.

*Sapienza v. Harrison*, 191 A.D.3d 1028, 142 N.Y.S.3d 584, 587 (2d Dep’t 2021).

Issues of icy conditions typically involve questions of fact within the Second Department. “[T]he mere fact that the icy condition which allegedly caused the plaintiff to fall was open and obvious does not preclude a finding of liability, but rather raises an issue of fact regarding comparative negligence” *Baines v. G & D Ventures, Inc.*, 64 A.D.3d 528, 529, 883 N.Y.S.2d 256, 257 (2d Dep’t 2009); *Ettari v. 30 Rampasture Owners, Inc.*, 15 A.D.3d 611, 790 N.Y.S.2d 540, 540 (2d Dep’t 2005). Factual issues exist which preclude the court from determining these issues as a matter of law.

#### Conclusion

Therefore, based on the foregoing, Defendants’ summary judgment motion is denied.

The parties are directed to appear for a pre-trial conference on *September 29, 2021, at 10:00am*. The pre-trial conference shall be conducted virtually, and the Clerk of the Court shall send out invites to the attorneys of record.

Jury Selection in this matter has been scheduled to commence on *October 12, 2021, at 9:30 a.m.* The trial shall take place in-person in the courtroom of the undersigned.

Dated: August 16, 2021  
New City, New York

ENTER

  
THOMAS P. ZUGBE  
J.S.C.