

**Sherman v Aspen Knolls Estates Homeowners'
Assoc.**

2012 NY Slip Op 32433(U)

September 13, 2012

Supreme Court, Richmond County

Docket Number: 102211/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:102211/09
Motion No.:002,003
004**

**JASON SHERMAN and
DENISE SHERMAN,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**ASPEN KNOLLS ESTATES HOMEOWNERS' ASSOCIATION,
WENTWORTH PROPERTY MANAGEMENT CORP., and
COMMERCIAL MAINTENANCE SERVICE,**

Defendants

The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed (002)	1
Notice of Cross-Motion and Affidavits Annexed (003)	2
Notice of Motion and Affidavits Annexed (004)	3
Answering Affidavits	4
Replying Affidavits	5, 6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions and Cross-Motion is as follows:

The defendant, Commercial Maintenance Service, Inc. ("Commercial") moves for summary judgment dismissing the plaintiffs' complaint and any and all cross-claims against it. The defendants, Aspen Knolls Estates Home Owners Association, Inc. ("Aspen Knolls") and Wentworth Property Management Corp. ("Wentworth") move for summary judgment dismissing the plaintiffs' complaint as well as any cross-claims against them. Aspen Knolls and Wentworth cross-move for summary judgment in their favor for their cross-claim for contractual indemnity and attorneys' fees. The motions are denied.

Facts

It is alleged that plaintiff Jason Sherman fell on December 24, 2008 as a result of snow covered ice located on a road owned by Aspen Knolls in front of his home at 38 Bianca Court, State Island, New York. Aspen Knolls and Wentworth contracted with Commercial to remove

the snow from the common areas controlled by Aspen Knolls. Records indicate that Commercial was engaged to remove snow which accumulated at Aspen Knolls beginning on December 19, 2008 and continuing until December 23, 2008. Jason Sherman testified that on December 24, 2008 after dropping his sister-in-law off at home at approximately 10:15 a.m. he slipped and fell on a sheet of ice which extended approximately 3-4 feet into the roadway owned by Aspen Knolls. It was the testimony of the Sherman plaintiffs that the Commercial had not done a thorough job of removing the snow from the road in front of their house and they had complained to Wentworth and Commercial. And that it was a common occurrence for Commercial to leave accumulated snow and ice on the roadway in front of their home. Furthermore, the non-party witnesses, Jaime Anzel, Denise Sherman's sister, and Meredith Gamble, each observed the icy condition in the roadway where Jason Sherman allegedly fell.

In support of their motion for summary judgment dismissing the plaintiffs' complaint, Aspen Knolls and Wentworth submit the affidavit from a meteorological expert George Wright. Wright argues that the meteorological data compiled from Newark-Liberty International Airport does not support the plaintiffs contention that ice could have existed on the roadway.

In support of its motion for summary judgment, Commercial annexes work orders which purportedly demonstrate that it removed snow and salted the community in the days prior to Jason Sherman's fall.

The plaintiff filed their note of issue on October 31, 2011. The defendants, Aspen Knolls and Wentworth cross-move seeking summary judgment on its cross-claims for contractual indemnity against Commercial on January 13, 2012 which is beyond the sixty days post note of issue permitted by the Thirteenth Judicial District to move for summary judgment. Consequently, this court will not consider the relief requested in that cross-motion.¹

¹ *Brill v. City of New York*, 2 NY3d 638 [2004]

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.² Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.³ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁴ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁵ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁶

“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.”⁷ “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

² *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

³ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁴ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁵ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁶ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁷ *Simon v. Maimonides Medical Center*, 52 AD3d 683 [2d Dep't. 2008]

permit defendant's employees to discover and remedy it."⁸

The moving defendants have come forward with sufficient evidence in the form of Wright's meteorological report and Commercial's work orders to shift the burden to the plaintiffs to raise a triable issue of fact.

The plaintiffs oppose the motions for summary judgment by submitting the expert affidavit of James Bria who states that Wright's interpretation of the meteorological data is not scientifically sound. In pertinent part, Bria avers that Wright could not conclude that ice could not have accumulated on the roadway based on weather data taken from Newark Liberty International Airport in Newark, New Jersey, because "a roadway is a location that is affected by human activity (a treated and disturbed surface) and subject to local conditions." Consequently, the motion for summary judgment made by Aspen Knolls and Wentworth is denied and an issue of fact exists as to what, if any ice was present at the location of Jason Sherman's alleged fall.

Similarly, while Commercial's work records purportedly show that it responded to all requests to remove icy conditions, the affidavits of the non-party witnesses as to the existence of substantial icing conditions on the date of the accident raise and issue of fact. Consequently, Commercial's motion for summary judgment is denied.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment dismissing the plaintiffs' complaint and any and all cross-claims made by Aspen Knolls Estates Homeowners Association and Wentworth Property Management Corp., is denied; and it is further

ORDERED, that the motion for summary judgment dismissing the plaintiffs complaint

⁸ *Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986].

with any and all cross claims made by Commercial Maintenance Service, Inc. is denied; and it is further

ORDERED, that the cross-motion made by Aspen Knolls Estates Homeowners Association and Wentworth Property Management Corp. for summary judgment on its cross-claims for contractual indemnity and attorneys' fees was not considered as it was untimely; and it is further;

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Friday, October 5, 2012 at 11:00 a.m.** for a pre-trial conference

ENTER,

DATED: September 13, 2012

Joseph J. Maltese
Justice of the Supreme Court