SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55
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YOU HUA HUANG and FENG YANG,

Plaintiffs,

-against-

135 SULLIVAN REALTY, L.L.C., VINTAGE GROUP, LLC and ONCE UPON A TART, INC.,

Defendants.
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DECISION/ORDER
Index No. 156155/2014

HON. CYNTHIA KERN, J.:

Plaintiffs commenced the instant action seeking recovery for personal injuries plaintiff You Hua Huang ("Huang") allegedly sustained when she slipped and fell in front of a building located at 135 Sullivan Street, New York, New York (the "premises") during a snow storm. Defendant Once Upon a Tart, Inc. ("Once Upon a Tart") now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it. Defendants 135 Sullivan Realty, L.L.C. ("Realty") and Vintage Group, LLC ("Vintage") cross-move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against them and granting them summary judgment on their cross-claim for contractual indemnification against Once Upon a Tart. For the reasons set forth below, the portions of Once Upon a Tart's motion and Realty and Vintage's cross-motion for summary judgment dismissing plaintiffs' complaint are granted but the motion and cross-motion are otherwise denied.

The relevant facts are as follows. Huang alleges that on December 14, 2013 at approximately 5:30 p.m. she slipped and fell on the sidewalk in front of the premises ("the accident"). The premises is owned by Realty and managed by Vintage. Once Upon a Tart is a tenant of Realty in the premises. Plaintiff testified during her deposition that it was snowing lightly at the time of her accident, that it had been snowing "all day" and that there were approximately two inches of snow on the ground when she slipped

and fell. She further testified that her left foot slipped on ice underneath the snow, causing her to fall forward and thereby sustain injuries.

The court first considers the portions of Once Upon a Tart's motion and Realty and Vintage's cross-motion for summary judgment dismissing plaintiffs' complaint on the ground that there was a snow storm in progress on the date of the accident. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.* It is well-settled "that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while [a] storm is in progress, and does not commence until a reasonable time after the storm has ended." *Pippo v. City of New York*, 43 A.D.3d 303, 304 (1st Dept 2007).

In the present case, defendants have made a *prima facie* showing of their entitlement to summary judgment dismissing plaintiffs' complaint on the ground that there was a snow storm in progress throughout the date of the accident and thus that they had no duty to remove any snow or ice that accumulated on the sidewalk while this storm was in progress. Defendants have submitted the affidavit of Steve Roberts, a certified meteorologist, stating that snow continuously fell on December 14, 2013 from 8:30 a.m. to 10:00 p.m., accompanied by certified climatological data from that date as observed at La Guardia Airport, Central Park and Newark Liberty International Airport. Further, plaintiff testified that it had been snowing "all day" on December 14, 2013.

In opposition, plaintiffs have failed to raise an issue of fact. Plaintiffs' submission of a "Weather Underground" report allegedly showing that there was no snow in downtown Manhattan from approximately 11:55 a.m. to fifteen minutes before the accident is unavailing as the report is not accompanied by any certified weather records or admissible climatological reports. *See Morabito v. 11*

Park Place LLC, 107 A.D.3d 472, 472 (1st Dept 2013) ("Defendants['] additional submission of an unaffirmed report from a weather reporting company, not accompanied by any certified weather records or admissible climatological reports, cannot be considered").

To the extent that plaintiffs contend that the court should deny Realty and Vintage's cross-motion for summary judgment dismissing plaintiffs' complaint because Realty has refused to produce video surveillance showing the premises on the date of the accident and thus an adverse inference may be drawn against Realty due to its alleged spoliation of this evidence, this contention is unavailing as plaintiffs have not actually moved to compel production of this video surveillance or sought sanctions based on the alleged spoliation of evidence. As the court has determined that defendants are entitled to summary judgment dismissing plaintiffs' complaint on the ground that there was a snow storm in progress on the date of the accident, the court need not consider the other grounds set forth by Once Upon a Tart in support of its motion.

However, the portion of Once Upon a Tart's motion for summary judgment dismissing all cross-claims asserted against it is denied as it has failed to provide any analysis as to why the court should grant it summary judgment dismissing Realty and Vintage's cross-claims. To the extent that Once Upon a Tart raises specific arguments with regard to the cross-claims in its reply papers, this court will not consider such arguments as "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415 (1st Dept 1992).

The portion of Realty and Vintage's cross-motion for summary judgment dismissing all cross-claims asserted against them is also denied as they have failed to provide any analysis as to why the court should grant them summary judgment dismissing Once Upon a Tart's cross-claims.

Further, the portion of Realty and Vintage's cross-motion for summary judgment on their cross-claim for contractual indemnification against Once Upon a Tart is denied on the ground that Realty and Vintage have failed to submit any lease agreement between Realty and Once Upon a Tart for the period when the accident occurred, much less a lease agreement containing an indemnification provision.

Accordingly, the portions of Once Upon a Tart's motion and Realty and Vintage's cross-motion for summary judgment dismissing plaintiffs' complaint are granted but the motion and cross-motion are otherwise denied. Plaintiffs' complaint is hereby dismissed. This constitutes the decision and order of the court.

DATE: 3/21/17

CK
KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.