SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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COREEN PALMERO AND JEFFREY PALMERO,

Plaintiff,

- against -

FORGE GATE CONDOMINIUM ASSOCIATION, METROPOLITAN HUDSON MANAGEMENT GROUP, INC. and CEDAR HILL PROPERTY MAINTENANCE, LLC,

Defendants.

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DECISION and ORDER

Index No. 52855/2016

Motion 1 and 2

McLOUGHLIN, EDWARD T., AJSC

The following papers were considered in connection with defendants' motions for summary judgment seeking to dismiss the complaint:

Motion 1	
Defendant's (Cedar Hill) Motion/Affirmation /accompanying exhibits	36-58
Plaintiff's affirmation in opposition /accompanying exhibits	77-83
Reply affirmation	91-92
Motion 2	
Defendant's (Forge Gate and Metropolitan Hudson) Motion/Affirmation/accompanying exhibits	60-74
Plaintiff's Affirmation in Opposition /accompanying exhibits	84-90
Reply Affirmation	94-95

On February 2, 2015, the plaintiff (Coreen Palmero) fell in the parking lot owned by defendant Forge Gate Condominium Association, managed by defendant Metropolitan Hudson Management Group, Inc. and maintained by Cedar Hill Property Maintenance, LLC. Plaintiff sustained injuries as a result of her fall and commenced the instant action on November 29, 2016.

Defendants have now moved for summary judgment seeking dismissal of this action. In addition, defendants move to dismiss cross-claims brought amongst the defendants. Defendants claim that there are no triable issues, as the defendants were not negligent in their maintenance of the property in question due to a storm being in progress at the time of the plaintiff's accident. The defendants also claim that they did not have actual or constructive knowledge of the alleged icy condition which is purported to be the cause of the plaintiff's fall. The plaintiff opposes the summary judgment applications and requests the Court deny the same.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits. See Vega v. Restani Construction Corp., 18 NY3d 499; Millerton Agway Co-Op v. Briarcliff Farms, Inc., 17 NY2nd 57. It is not the Court's function to determine credibility. See Chimbo v. Bolivar, 142 AD3d 944 (2nd Dept. 2016). Issue finding, rather than issue determination, is the key to the procedure. Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395.

Initially, the proponent must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. However, once the movant makes such a sufficient showing, 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. Alvarez v. Prospect Hospital, 68 NY2d 320. In making this determination, the Court must view the evidence in a light most favorable to the opposing party and must give that party the benefit of every inference which can be drawn from the evidence. Nash v. Port Washington Union Free School District, 83 AD3d 136 (2nd Dept. 2011).

It is well settled that a land owner or tenant in possession of the premises must act reasonably in maintaining the premises in question in a safe condition in view of all the circumstances. Basso v. Miller, 40 NY2d 233.

However, a landowner does not have a duty where the alleged hazardous condition is a claim of the presence of snow or ice where it can be shown that there was a storm in progress at the time of the accident. Pankratov v. 2935 OP LLC, 160 AD3d 757 (2nd Dept. 2018). The "storm in progress" rule provides that a property owner will not be held responsible for accidents that are the result of the accumulation of snow and/or ice on their premises until an adequate period of time has passed following the cessation of the storm to permit the owner the opportunity to remove the hazards caused by the storm. Aronov v. St. Vincent's Housing Development Fund Co., Inc., 145 AD3d 648 (2nd Dept. 2016).

All of the deposition testimony, as well as the documentation submitted acknowledge that there had been a winter storm occurring over the last several hours before the victim fell. While the snow had abated within the hour preceding the plaintiff's fall, the storm resumed shortly thereafter and continued for several hours after her fall. While is well settled that a property owner has a reasonable time after the cessation of the winter storm to correct hazardous snow and ice related conditions created while the storm was in progress, the storm in question had not concluded. Again, viewing the facts in a light most favorable to the plaintiff, it is clear that while the storm had experienced a lull, this was merely a break in the storm and not the conclusion of the same. Wexler v. Ogden, Cap. Props., LLC, 154 AD3d 640 (1st Dept. 2007) lv. den. 31 NY3d 909.

The evidence reveals a lull in the storm, not a cessation of the same. Grinnell v. Fill Rose Apartment, LLC, 60 AD 3d 1256 (3rd Dept. 2009). Because there was a lull or break in the storm

and not the cessation of the same, the defendant was not provided a reasonable time after a cessation of the storm to correct any hazardous snow or ice related conditions. Krautz v. Betz Funeral Home, 236 AD2d 704 (3rd Dept. 1997).

Where the defendant has established, by prima facie evidence, that the "storm in progress" doctrine is applicable, the motion for summary judgment must be granted. Sherman, supra; Krautz, supra.

Accordingly, it is hereby

ORDERED that the defendants' motions for summary judgment dismissing the complaint are granted. Further, based upon the Court's dismissal of the plaintiff's complaint, the cross-motions are deemed dismissed as moot.

The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
December 21, 2018

HON. EDWARD T. McLOUGHLIN
Acting Justice Supreme Court

TO: Lindsey M. Goldstein, Esq.
Goldstein & Goldstein, LLP
One Civic Center Plaza, Suite 541
Poughkeepsie, NY 12601

Adrienne Odierna, Esq.
Lynch, Schwab & Gasparini, PLLC
1441 Route 22, Suite 206
Brewster, NY 10509

Melissa J. Smallacombe, Esq.
Burke, Scolamiero, Mortati & Hurd. LLP
437 East Allen Street
Hudson, NY 12534