SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 157447/2016

ANDREW PAGET,

Plaintiff,

MOTION SEQ. NO. 002

- v -

PCVST-DIL, LLC, ST-DIL, LLC, CW CAPITAL ASSET MANAGEMENT, LLC, COMPASS ROCK REAL ESTATE, LLC,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 86, 87, 88, 89, 90, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for SUMMARY JUDGMENT.

In this trip and fall action, plaintiff Andrew Paget moves, pursuant to CPLR 3212, for partial summary judgment on liability as against defendants PCVST-DIL, LLC and Compass Rock Real Estate, LLC, as well as to dismiss the first affirmative defense, comparative negligence, as asserted by defendants PCVST-DIL, LLC ("PCVST"), ST-DIL LLC ("ST-DIL"), CWCapital Asset Management LLC ("CWC") and Compassrock Real Estate, LLC ("Compass") i/s/h/a PCVST-DIL, LLC, ST-DIL, LLC, CW Capital Asset Management, LLC and Compassrock Real Estate, LLC. PCVST, Compass, and CWC oppose the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted in all respects.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on March 20, 2015 in which plaintiff was allegedly injured when he tripped and fell on snow covered fence posts which had been laying on a grassy area adjacent to his apartment building at 350 First Avenue, New York, New York. The building was part of Peter Cooper Village ("PCV"), a housing complex owned by PCVST and managed by Compass.

Plaintiff commenced this action by filing a summons and complaint against PCVST, ST-DIL, CWC, and Compass on September 6, 2016. Doc. 1. In the complaint, plaintiff alleged, inter alia, that defendants were negligent in their ownership, operation and maintenance of the premises. Doc. 1. Defendants joined issue by their verified answer filed October 4, 2018. Doc. 39.[1]

In his bill of particulars, plaintiff alleged that he was injured when he tripped on buried "metal posts/pipes on the lawn adjacent to the exterior paved path near the entrance to [his] building. Doc. 43 at par. 15.

In February of 2017, plaintiff served a demand for a bill of particulars as to affirmative defenses, including the affirmative defense of culpable conduct. Doc. 65. On or about March 20, 2017, defendants served a bill of particulars as to affirmative defenses in which they alleged that plaintiff's culpable conduct consisted, inter alia, of failing to use reasonable care, failing to appreciate open and obvious conditions, as well as assumption of risk. Doc. 66.

At his deposition, plaintiff testified that, on March 20, 2015, he tripped over steel fence posts which had been "removed from [their] upright position" months before, "scattered on the ground" in a pile, and buried under snow on the grass adjacent to an asphalt pathway next to his

[1] During a conference call with this Court on May 15, 2019, the parties advised that, although named as defendants, ST-DIL, which owns Stuyvesant Town, a housing complex adjacent to PCV, and CWC, an entity involved in the purchase of PCV, are not interested parties in this action and that counsel may thus stipulate that the claims against those entities be discontinued.

building. Doc. 46 at 39-41, 46, 53. According to plaintiff, it had snowed approximately three inches earlier that day. Doc. 46 at 39-40. Plaintiff, who was wearing snow boots, had gone out to walk his dog and was on his way back to the building when he fell. Doc. 46 at 46, 48. Specifically, plaintiff "was walking on the pathway and as [he] approached [the] grassy area, there were [PCV] vehicles blocking the pathway that would have led [him] to [his] door." Doc. 46 at 55. The vehicles were a "salt and sand truck" and what he believed were "public safety SUVs." Doc. 46 at 55. Despite the presence of the vehicles, the pathway was still covered with snow. Doc. 46 at 44-45. Since the vehicles were blocking the path, he turned onto the grass in order to reach his building. Doc. 46 at 56. As he walked across the grass, he fell on the fence posts. Doc. 46 at 40, 56, 66-67. He did not see the fence posts prior to his fall. Doc. 46 at 41, 63.

Plaintiff identified two photographs of the fence posts at his deposition. Doc. 37; Doc. 46 at 63-65, 80-81. The photographs were taken by Michelle Wang, who lived with him on the date of the incident. Doc. 46 at 5-6, 54. Wang also took a video of the accident site. Doc. 46 at 54; Doc. 72 Since Wang did not know exactly where plaintiff fell, he gave her a general idea and, after she went outside, he directed her through his window as to exactly where the fence posts were located. Doc. 46 at 54-55.

After he fell, plaintiff reported the incident to a PCV public safety officer, who prepared an incident report. Doc. 46 at 73-74; Doc. 69. Wang went with the officer to the location of the accident, where the officer admitted to her that the fence posts were "not supposed to be there." Doc. 78 at par. 4.

Tage Bobby Ramharack appeared for deposition on behalf of defendants. As of March 2015, he was employed as a sanitation manager by Compass, which managed the PCV residential complex pursuant to a Property Management Agreement. Doc. 47 at 5-9; Doc. 51. In March of

2015, the fence posts plaintiff tripped over were used by defendants as part of a temporary barrier to "block off the grassy area so that way it can be seeded and aerated and fertilized." Doc. 47 at 78-81, 103. Defendants' landscaping department directed the landscaping project. Doc. 47 at 39. The landscaping team was responsible for inspecting the exterior areas of PCV for any dangerous conditions and its members were to remedy any such condition they observed. Doc. 47 at 47, 58-59. Compass would direct and inspect any work performed by an outside landscaping contractor. Doc. 47 at 90-91.

Ramharack directed the landscaping foreman as to when and where fencing needed to be removed and the said foreman and his team were responsible for removing the fencing. Doc. 47 at 87. Once fencing was removed from around a grassy area, people and dogs were permitted to walk there. Doc. 47 at 87, 94. Ramharack admitted that fence posts should not have been left unattended on the grass and he considered leaving them there a tripping hazard. Doc. 47 at 95; 108-109.[2] He further conceded that the posts should have been removed from the grassy area before it started snowing. Doc. 47 at 128, 130-131. He did not know how long the posts were on the grass prior to plaintiff's accident. Doc. 47 at 130. Ramharack admitted that, when fence posts were removed, they were supposed to be loaded onto a Bobcat or all-terrain vehicle and taken to a landscaping storage room at PCV. Doc. 47 at 82-84, 95-99, 107.

At his deposition, Ramharack identified defendants' "snow guidelines" addressing, inter alia, requirements for staff and equipment needed to prepare for snowstorms. Doc. 47 at 115; Doc. 56. However, he was unable to testify regarding any specific steps taken to prevent anyone from tripping on the fence posts. Doc. 47 at 128.

[2] Ramharack also testified that the snow-covered object depicted in photographs he was shown at his deposition "can be a tripping hazard" and that "[i]t should not [have] be[en] there." Doc. 47 at 128.

Although Ramharack identified "C & C Landscaping" as a landscaping contractor which worked at PCV, he was not certain whether they were on site as of March 2015. Doc. 47 at 89-90.

On March 9, 2018, plaintiff commenced a separate personal injury action arising from the incident. That action, styled *Andrew Paget v C & C Landscape Contractors, Inc.*, was filed in the Supreme Court, Nassau County under Index Number 603193/18 ("the Nassau County action"). Doc. 19. On June 8, 2018, plaintiff moved to consolidate the captioned action with the Nassau County action. Doc. 15. By stipulation so-ordered January 29, 2019 and entered January 31, 2019, the parties agreed to consolidate the captioned action and the Nassau County actions.[3]

On November 12, 2018, defendants in the captioned action commenced a third-party action against C & C Landscape Contractors, Inc. ("C & C") seeking contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 85. C & C joined issue by service of its third-party answer filed December 18, 2018. Doc. 93.

Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment on liability against defendants PCVST and Compass, as well as to dismiss the first affirmative defense, comparative negligence, asserted by defendants PCVST, Compass, ST-DIL, and CWC. PCVST, Compass, ST-DIL, and CWC oppose the motion.

In support of the motion, plaintiff argues that he is entitled to summary judgment because defendants created the allegedly dangerous condition and had actual and constructive notice of the same. Plaintiff further asserts that defendants' first affirmative defense, culpable conduct, must be dismissed since he has established that he committed no wrongdoing.

In an affidavit in support of the motion, plaintiff substantially corroborates his deposition testimony. Doc. 73. He also states that he "was walking on the grass where [he] fell only because

[3] Despite the so-ordered stipulation consolidating the actions, the parties advised this Court during a telephone conference on May 15, 2019 that the consolidation has yet to be effectuated.

there were two [PCV] vehicles blocking the pathway leading to [his] building." Doc. 73 at par. 2. Further, he represents that there were no signs warning people not to walk on the grass or that it was not safe to walk on the grass. Doc. 73 at par. 3. Although plaintiff also states that the fence posts were usually installed upright in the ground and were attached to fencing (Doc. 73 at par. 5), he represents that, on January 25, 2015, he saw defendants' employees removing the fence around the grassy area in preparation for a blizzard, although he never realized that the employees left the posts on the grass. Doc. 73 at pars. 10-11. Thus, maintains plaintiff, the posts remained on the grass for almost two months. Doc. 73 at par. 11.

In opposition, defendants argue that the motion must be denied as premature since outstanding discovery exists in this action as well as the Nassau County action.[4] They further assert that issues of fact exist regarding whether they were negligent. Specifically, they maintain that, even if the posts were left lying on the grass prior to the incident, this did not constitute the creation of a dangerous condition. Additionally, they urge that plaintiff failed to establish actual or constructive notice of a dangerous condition. They also maintain that they are not liable since the posts were an open and obvious condition which was not inherently dangerous. At the very least, urge defendants, a question of fact exists regarding whether the condition was open and obvious and/or inherently dangerous.

Defendants also argue that the branch of plaintiff's motion seeking to dismiss defendants' first affirmative defense, comparative negligence, must be denied, since issues of fact exist regarding whether plaintiff's acts caused or contributed to the accident. Specifically, defendants maintain that an issue of fact exists regarding whether plaintiff could have used a safer alternative route to return to his building.

[4] This motion was filed before the captioned action was consolidated with the Nassau County action.

In reply, plaintiff argues that his motion is not premature. He further asserts that defendants failed to raise an issue of fact regarding whether they created the condition and/or whether the fence posts constituted a dangerous condition.

In an affirmation in partial support of plaintiff's motion, C & C states, in agreement with plaintiff's counsel, that defendants' argument that it (C & C) created the allegedly hazardous condition is based on sheer speculation.[5]

In responding to C & C's affirmation, defendants argue that C & C improperly seeks dismissal of the third-party action against it without cross-moving for such relief. Additionally, assert defendants, any such motion by C & C would be premature since there has been no discovery in the third-party action.

LEGAL CONCLUSIONS:

Partial Summary Judgment

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). Only if, after viewing the facts in the light most

[5] Defendants assert that C & C's affirmation is untimely since it was filed on December 19, 2018, after plaintiff's motion was submitted on December 14, 2018. Doc. 102. C & C explains in its affirmation that it could not submit its affirmation sooner since it did not file its answer to the third-party complaint until December 18, 2018. Docs. 93, 94. Since this Court considers the affirmation submitted by C & C, it also considers defendants' affirmation in response thereto (Doc. 99), an arrangement to which defendants are amenable. Doc. 102.

favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, will summary judgment be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). Where, as here, a plaintiff seeks partial summary judgment on liability, he or she is not obligated to demonstrate that he or she is free from comparative negligence. *Rodriguez v City of New York*, 31 NY3d 312 (2018).

Here, plaintiff has established his prima facie entitlement to partial summary judgment on liability against PCVST and Compass by submitting, inter alia: 1) his deposition transcript; 2) his affidavit; and 3) the deposition transcript of Ramharack; 4) Wang's affidavit; and 5) photos and videos of the accident site. This evidence established, prima facie, that defendants PCVST and Compass created and/or had notice of the dangerous condition which caused plaintiff's injuries. *See Derix v Port Authority of N.Y. and N.J.*, 162 AD3d 522 (1st Dept 2018). Specifically, after defendants' employees dismantled the fence around the grassy area, they left the fence posts on the grass for nearly two months instead of placing them in storage. As a result, the fence posts became covered with snow and presented a tripping hazard.

In opposition, defendants fail to raise an issue of fact. On the contrary, the evidence confirms that PCVST and Compass were liable for plaintiff's accident. Ramharack admitted that: defendants' employees were responsible for inspecting the exterior areas of PCV for any dangerous conditions and for addressing any such conditions; that defendants' landscaping foreman and his team were responsible for removing the fencing and that, once it was removed, it was supposed to be put in storage; that once a fence was removed from around a grassy area, people were permitted to enter that area; that fence posts should not have been left unattended on the grassy area; and that he considered the fence posts left on the grass to be a tripping hazard.

Nor did Ramharack contradict plaintiff's representation regarding how long the posts were present prior to the incident.

Contrary to defendants' argument, outstanding discovery in the captioned action and the Nassau County action does not warrant denial of plaintiff's motion. First, as noted previously, the consolidation of the captioned action and the Nassau County action has not been effectuated. Further, defendants do not specify what facts, if any, "essential to justify opposition may exist but cannot . . . be stated". CPLR 3212(f).

Although defendants maintain that they did not create the condition, Ramharack admitted that defendants' staff dismantled the fence posts and that they should have been put in storage. Defendants also had constructive, if not actual, notice of the presence of the fence posts, since they were removed in January 2015 and were still on the grass in March 2015.

Defendants' argument that the fence posts were an open and obvious condition which was not inherently dangerous fails as well. The fence posts were clearly not an open and obvious condition since they were covered in, and thus obscured by, snow. For the same reason, the covered fence posts were inherently dangerous, since one unaware of their presence, and who could not see them under the snow, was in a position to trip on them.

In opposing the motion, defendants rely on *Garcia v New York City Housing Authority*, 234 AD2d 102 (1st Dept 1996). In that case, plaintiff was injured when he went into an adjacent yard to retrieve a cat. As he was leaving the adjacent yard with the cat, he was injured when he slipped and fell on a mound covered by snow and ice. In reversing the IAS Court's denial of summary judgment to the owner of the premises, and directing that the complaint be dismissed, the Appellate Division, First Department reasoned that: 1) the condition of the area where plaintiff fell was open and obvious; 2) there was no indication that the snow and ice covered mound

constituted a latent condition; and 3) a landowner has no duty to remove snow and ice from a yard area not on a public walkway.

Garcia, however, is clearly distinguishable from the captioned action. As discussed previously, the fence posts laying beneath the snow were not open and obvious. Further, plaintiff's testimony that he tripped on the fence posts because they could not be seen renders them a latent condition by definition. Additionally, in contrast to the yard area in *Garcia*, which was "off and away from the public walkway" (*Garcia*, 234 AD2d at 103), the grassy area in this case was immediately adjacent to such a walkway, which plaintiff could not follow because it was blocked by defendants' vehicles.

Further, the Appellate Division stated in *Garcia* that "a landowner has no duty to erect barriers or fences in order to enclose natural geographical phenomena which do not in some way represent latent danger or conditions, so as to prevent persons coming upon the land from injuring themselves by entering onto the condition in question." *Garcia*, 234 AD2d at 103 (citations omitted). This implies that defendants had a duty to erect an enclosure around the grassy area, on which existed the latent defect they created. Thus, the *Garcia* case is clearly inapposite herein.

Dismissal of Affirmative Defense of Culpable Conduct

Plaintiff is also entitled to summary judgment dismissing defendants' affirmative defense of culpable conduct. Although comparative negligence is typically a jury question, the issue can be decided as a matter of law where, as here, "no valid line of reasoning" would permit the "fact finder to conclude rationally that plaintiff was negligent." *Perales v City of New York*, 274 AD2d 349, 350 (1st Dept 2000) citing *Rountree v Manhattan & Bronx Surface Tr. Operating Auth.*, 261 AD2d 324, 327 (1st Dept 1999), *lv denied* 94 NY2d 754 (1999).

Defendants' principal argument in opposing this branch of plaintiff's motion is that plaintiff was comparatively negligent insofar as he walked across the grass rather than taking a safer alternative route back to his building. Although it was defendants' burden to establish that there was a safer alternative route (*see Perales*, 274 AD2d at 350 citing *McGuire v Spence*, 91 NY 303, 305-306 [1883]), they failed to do so. Plaintiff never testified, and did not state in his affidavit, that there was a safer route back to his building. He merely testified that the asphalt path he had been taking back to his building was blocked by PCV vehicles. Although defendants assert that plaintiff testified that there was a safer route, they disingenuously mischaracterize his testimony. See, e.g., Doc. 86 at par. 95-96.[6]

Defendants also mischaracterize plaintiff's testimony regarding where he was looking at the time he fell (Doc. 86 at par. 85) which, they incorrectly assert, also gives rise to a question of fact regarding comparative fault. Moreover, they attempt to mislead this Court by stating that plaintiff knew that the fence posts were on the grass prior to the incident (Doc. 86 at par. 84), whereas he said that he saw the fence around the grass being removed before a blizzard in January of 2015, did not know that there were fence posts on the grass before he fell, and that he did not know that the posts were on the grass until his accident occurred in March of 2015. Given the foregoing, defendants' reliance on *Dillard v New York City Housing Authority*, 112 AD3d 504 (1st Dept 2013), in which a question of fact existed regarding plaintiff's comparative negligence, is misplaced.

In light of the foregoing, it is hereby:

[6] This Court further notes that, in their bill of particulars with respect to affirmative defenses, defendants do not specifically allege that plaintiff's act of cutting across the grass constituted culpable conduct. Doc. 66.

ORDERED that the branch of the motion by plaintiff Andrew Paget, pursuant to CPLR 3212, for partial summary judgment on liability as against defendants PCVST-DIL, LLC and Compass Rock Real Estate, LLC, is granted; and it is further

ORDERED that the branch of the motion by plaintiff Andrew Paget, pursuant to CPLR 3212, for summary judgment dismissing the first affirmative defense, culpable conduct, as asserted by defendants PCVST-DIL, LLC, ST-DIL LLC, CWCapital Asset Management LLC and Compassrock Real Estate, LLC, is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that the issue of damages shall be determined at trial; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff's counsel shall take all necessary steps to effectuate the transfer of the case styled *Andrew Paget v C & C Landscape Contractors, Inc.*, Supreme Court, Nassau County Index Number 603193/18, to New York County, in accordance with the so-ordered stipulation dated January 31, 2019 and entered February 2, 2019 (Docs. 103-105), which consolidated that action with the captioned action; and it is further

ORDERED that the parties are to appear for a previously scheduled discovery conference in this matter on June 11, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court

5/20/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE