To commence the statutory time for appeals as of right (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
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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VERONICA MOYA MONTALVO,

Plaintiff,

-against-

DECISION & ORDER
Index No. 63724/2018
Motion Sequence 2

CROMWELL TOWERS APARTMENTS LIMITED PARTNERSHIP and METROPOLITAN REALTY GROUP, LLC,

Defendants.

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The following papers were received and considered in connection with the above-captioned matter:

Notice of Motion/Affirmation/Exhibit A
Affirmation in Opposition
Reply Affirmation

Factual and Procedural Background

The plaintiff, Veronica Moya Montalvo ("Montalvo/plaintiff"), commenced this action on August 31, 2018, to recover for alleged personal injuries she sustained on February 17, 2018, at approximately 10:30 p.m., as a result of a slip and fall on snow and ice on the sidewalk abutting the premises owned by the defendants, Cromwell Towers Apartments Limited Partnership ("Cromwell") and Metropolitan Realty Group, LLC ("Metropolitan") (collectively the "defendants"), located at 77 Locust Hill Avenue, Yonkers, New York (the "premises").

This Court previously granted the defendants' motion for summary judgment pursuant to CPLR 3212 and dismissed the complaint. The plaintiff now files the instant motion, arguing that the Court erroneously overlooked and/or misunderstood the underlying facts and misapplied the controlling legal authority. The plaintiff's attorney contends that the Court made factual determinations in violation of review standards for summary judgment motions and misinterpreted and ignored significant pieces of evidence.

Specifically, the attorney argues that the Court misinterpreted and ignored facts about snow shoveling of the sidewalk where the plaintiff fell and misinterpreted evidence regarding eye-witness observations about snow removal. The attorney asserts that the conflicting affidavits submitted by both sides dictated that the motion for summary judgment should have been denied.

In opposition, the defendants' attorney argues that the plaintiff's counsel did not annex the prior motion papers as an exhibit to the motion to reargue, nor did he provide the NYSCEF document numbers for the previously e-filed documents referenced in the motion, as required by CPLR 2214[c] and therefore, the motion to reargue should be summarily denied for this reason alone.

The defendants' attorney further argues that the plaintiff failed to present any admissible evidence, other than speculation and conjecture, which is insufficient to raise a triable issue of fact. The attorney contends that the Court did not overlook or misinterpret any facts nor misapply the law in deciding the motion for summary judgment, but correctly granted the motion.

The defendants' attorney argues that it is undisputed that the snow, ice and slush that the plaintiff alleges to have slipped on, were entirely formed by the snow that developed between 5:15 p.m. and 5:30 p.m. on the date of the plaintiff's alleged accident and was part of an ongoing storm, which was in progress and producing accumulating snow on the subject sidewalk at the time of the plaintiff's alleged accident.

The attorney further argues that the admissible evidence established that the defendants did not shovel the sidewalks while the storm was in progress, nor did they do anything to cause, create or exacerbate the condition that the plaintiff alleges caused her accident. Therefore, the storm in progress doctrine and Article II, Section 103-8 of the City of Yonkers Code, both bar the plaintiff's claim and prevent the defendants liability.

In reply, the plaintiff's attorney submitted the documents from the previously e-filed summary judgment motion[1] and argues that the defendants did not address any of the specific arguments raised by the plaintiff, in that, the plaintiff submitted affidavits from eye-witnesses. He states that Lorenzo Garcia ("Garcia"), the plaintiff's neighbor, testified that he previously observed people who were identified to him as Cromwell Towers employees shoveling snow in the area where the plaintiff fell and Tyrone Barner ("Barner"), the plaintiff's friend, specifically observed an individual shoveling snow in the area where the plaintiff fell and also testified that the door to the storage room, where Cromwell Towers personnel testified that they kept their snow removal equipment, was open during the shoveling.

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[1]Since the plaintiff's attorney submitted the reference to the underlying motion papers with his reply papers, the Court does not deny the motion on such grounds.

The plaintiff's attorney further argues that the defendants' attorney did not address his argument that the Court failed to consider that three maintenance workers, superintendent, Rafael Medina ("Medina") and additional maintenance workers, Eberton Gibbedon ("Gibbedon") and Mariano Suazo ("Suazo"), all lived on the premises, would be involved in the snow removal process and that it was entirely possible that any or all of these individuals could have been the one who was observed shoveling snow. He also argues that there is no testimony that a Cromwell representative would only be wearing the Cromwell coat, but simply that the coats were supplied by the defendants. The attorney contends that the defendants do not contest that the subject sidewalk was shoveled and barely addresses the testimony of three eyewitnesses who testified that the sidewalk area where the plaintiff slipped, was shoveled.

Discussion

A motion for reargument must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion," (CPLR 2221[d][2]). Such motions are addressed to the sound discretion of the Supreme Court, (*see Deutsche Bank Nat. Trust Co. v Ramirez*, 117 AD3d 674 [2d Dept 2014]). A motion for leave to reargue is thus not one which provides an unsuccessful party with successive opportunities to reargue the very questions previously decided; nor is it one that provides a platform for the presentation of arguments different from those already presented; or the taking of a position inconsistent from that assumed initially, (*see V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]; *Woody's Lumber Co., Inc. v Jayram Realty Corp.*, 30

AD3d 590 [2d Dept 2006]; *Williams v Board of Educ. of City School Dist. of New York City*, 24 AD3d 458 [2d Dept 2005]; *Simon v Mehryari*, 16 AD3d 543 [2d Dept 2005]).

Upon a review of the arguments made on the motion to reargue, the Court now denies the plaintiff's motion. There is no dispute that the plaintiff's alleged slip and fall accident occurred during an ongoing storm in progress. The defendants submitted an affidavit of a meteorologist, George Wright, CCM ("Wright"), who reviewed the relevant documentation and stated that snow developed between 5:15 p.m. and 5:30 p.m., and the temperature was 35°, or 3° above freezing. The temperature cooled to 33° by 6:00 p.m. and remained steady at that temperature through midnight. As a result of the freezing temperature, the snow that fell formed slush on the sidewalk, since a portion of the snow that had accumulated melted. Wright stated that the snow fell from 5:15/5:30 p.m. through midnight, until approximately 1:15 a.m., on February 18, 2018. He states that between 6 and 6/5 inches of snow fell at the premises through the time of the plaintiff's alleged accident.

In addition, the defendants' property manager, John Carollo ("Carollo"), testified that the building's maintenance staff is on duty from 7:00 a.m. until 4:00 p.m. and that the building's snow removal policy and procedure is that if it first starts snowing after 4:00 p.m., on any given day, the maintenance staff does not stay overtime to remove the snow, but they come to the premises early the following morning to remove the snow. In the reply papers, Carollo also submitted copies of the Time/Attendance Detail, showing the times that the employees' shift ended on the day of the plaintiff's alleged accident.

Medina, the superintendent for the premises, confirmed that if it starts snowing after the maintenance staff's shift ends, neither he nor the maintenance staff remove the snow on the sidewalks abutting the premises that day, but they remove the snow early the following morning. Similarly, Aldolfo Diaz ("Diaz"), one of the porters on duty at the premises that day, testified that if it starts snowing after the maintenance staff's shift ends, the maintenance staff does not stay overtime to remove the snow on the sidewalks abutting the premises that day, but they remove the snow early the following morning.

The defendants tendered sufficient evidence to make a prima facie showing of entitlement to judgment as a matter of law. In opposition, the plaintiff failed set forth evidentiary proof in admissible form to establish the existence of a material issue of fact. The plaintiff''s opposition is based upon speculation and conjecture and not upon any admissible evidence, since there is no admissible evidence that the defendants caused, created or exacerbated the condition, which the plaintiff alleges caused her accident.

Neither the plaintiff, nor her neighbor Garcia observed anyone shoveling the premises prior to the plaintiff's alleged fall. The plaintiff claims that it appeared to her that the sidewalk had been shoveled prior to her accident, but at her deposition, she admitted that she did not see anyone shoveling the sidewalk on the day of her accident. Garcia also states that when he went to assist Montalvo, it appeared to him that the sidewalk had been shoveled. However, at his deposition, Garcia admitted that he did not see anyone shoveling the sidewalk on the day of Montalvo's alleged accident.

Barner's affidavit is also based on speculation and insufficient to create an issue of fact to defeat the defendant's motion. He averred that after 5:00 p.m. and still daylight on

the day of the plaintiff's alleged accident, he saw an individual shoveling the rear sidewalk of the premises, with the rear garage door open. However, Barner does not describe or identify the individual nor does he state that the person was wearing the "Cromwell Towers" patch on a heavy-duty dark blue coat, as the maintenance staff wear when they perform snow removal, as attested to by Carollo.

Further, the defendants testified that only the building porters use shovels to remove snow on the sidewalks abutting the premises and Medina testified that he did not plow nor shovel the sidewalk on the day of the plaintiff's alleged accident. The defendants' time records show that Diaz and Suazo, the only porters who were on duty the day of the plaintiff's alleged accident, left work by 1:02 p.m. and 3:15 p.m., long before the snow even started. The plaintiff's assertion that Medina, Suazo and another maintenance worker living on the premises creates a question of fact, is speculation and is not sufficient to create an issue of fact.

In addition, as per the meteorologist, the snow fell continually from between 5:15 p.m. and 5:30 p.m. until after the plaintiff's alleged fall. Therefore, any shoveling that Barner observed would have been covered over by a significant amount of snow following the time Barner observed the individual shoveling and the storm in progress rule would still be applicable, since the plaintiff failed to present any admissible evidence to show that the defendants shoveled the premises subsequent to Barner's observation, which was when the storm first began, some four or more hours before the plaintiff's alleged fall. Therefore, the Court finds that there is no evidence that the defendants attempted to remove snow or ice and did so negligently, thereby creating a dangerous condition.

Accordingly, based on the foregoing, it is

ORDERED that the defendants' motion for is DENIED.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
December 21, 2020

HON. SAM D. WALKER, J.S.C.