To commence the 30-day statutory time period 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 DUTCHESS

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JOSEPH VENA,

Plaintiff,

-against-

CHRISTOPHER MARCELLIN AND JESSICA MARCELLIN,

Defendants.

----------x

DECISION AND ORDER

Index No.: 2019-51100

ACKER, J.S.C.

The following papers numbered 1-15 were considered on the motion of Defendants Christopher Marcellin and Jessica Marcellin (hereinafter "Defendants") for an Order pursuant to CPLR 3212 seeking summary judgment dismissing Plaintiff's Complaint:

Notice of Motion-Affirmation of Rose M. Cotter, Esq.-Exhibits A-E-
Memorandum of Law in Support..... 1-8
Affirmation in Opposition of Michael G. Radigan, Esq.-Exhibits 1-3..... 9-15

Plaintiff Joseph Vena (hereinafter "Plaintiff") commenced the instant action on or about March 15, 2019, alleging that he was injured at Defendants' property at 4318 Route 44 in Millbrook, New York ("Subject Property") on December 29, 2016. Plaintiff maintains that he was injured when he slipped and fell on ice on the Defendants' driveway soon after he arrived at the property in the course of his employment with non-party Craig Thomas Pest Control.

Defendants move for summary judgment contending that their duty of care to Plaintiff was suspended because the fall occurred while there was a storm in progress. In support of the motion, Defendants submit, *inter alia*, the pleadings, Plaintiff's Verified Bill of Particulars, the

deposition transcripts of Plaintiff and Defendant Christopher Marcellin and a climatological expert report from Forensic Weather Consultants.

The movant for summary judgment "bears the initial burden of demonstrating its prima facie entitlement to the requested relief" *Roos v. King Constr.*, 116 NYS3d 344, 346 [2nd Dept. 2020], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853. Failure to make the initial showing "requires denial of the motion, regardless of the sufficiency of the opposition papers" *Junger v. John V. Dinan Assoc., Inc.*, 164 AD3d 1428, 1429 [2nd Dept. 2018], *citing Winegrad, supra*. Only when the movant has met its *prima facie* entitlement "does the burden then shift to the party opposing summary judgment to tender evidence, in a form admissible at trial, sufficient to raise a triable issue of fact" *Roos, supra, citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].

In opposition, "the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact." *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], *citing Alvarez, supra*. "The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist." *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept. 2019]. Summary judgment should be granted only where there are no material and triable issues of fact and the papers shall be scrutinized in the light most favorable to the party opposing the motion. *Id*. Such relief is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as to the absence of triable issues. *Castlepoint Ins. Co. v. Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept. 2016].

Facts

On December 29, 2016, Plaintiff was working as a Pest Control Technician and had been sent to Defendants' property for service call. It was his first appointment of the day and he arrived at approximately 8:00 am. As he was driving to the Subject Property, snow flurries had just started to fall, and Defendant Marcellin confirmed that the snow had started 15-20 minutes before Plaintiff arrived. When he arrived, Plaintiff pulled his truck into the driveway and when he was walking to the back of the truck to retrieve tools and materials, he slipped and fell on ice at the back of the truck. Plaintiff noticed ice on the driveway when he exited the truck and described the ice on which he fell as "pretty thick."

Discussion

"'A defendant moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, prima facie, that it neither created the snow or ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition' [citation omitted]." *Brito v. New York City Hous. Auth.*, 189 AD3d 1155, 1156 [2d Dept. 2020]. "This burden may be satisfied by 'presenting evidence that there was a storm in progress when the injured plaintiff allegedly slipped and fell' [citation omitted]." *Id*. Under the "storm in progress" rule, "a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm [citations omitted]." *Id*.

In the instant matter, both Defendant Christopher and Plaintiff testified that snow flurries had begun just 15-20 minutes before Plaintiff's accident. However, Plaintiff testified that he fell

as a result of ice that was present on the driveway, not the light snow that had just started. The existence of this condition is supported by Defendants' climatological experts, who opine that melting and refreezing processes occurred on the two days prior to the accident, which caused new areas of ice to form in addition to the snow and ice that was already on the ground from the original storms. Exhibit E, p. 8.

Accordingly, although Defendants have established that a storm had started at or around the time of Plaintiff's fall, they fail to establish that Plaintiff fell as a result of accumulations resulting from that storm. *See Brito, supra*. Rather, the record demonstrates that Plaintiff fell on ice that likely existed prior to the commencement of the storm on the day of the accident. Therefore, Defendants have not demonstrated their entitlement to the storm in progress doctrine and their motion on that ground is denied.

Finally, although Defendants argue in passing that they had no actual or constructive notice of the condition, they fail to provide an affidavit or sworn testimony supporting this position. Instead, they assert that Plaintiff cannot come forward with evidence of such notice. However, "[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." *L & D Serv. Station, Inc. v. Utica First Ins. Co.*, 103 AD3d 782, 783 [2d Dept. 2013]. Moreover, Defendants submissions fail to establish *prima facie* that it neither created the snow or ice condition that allegedly caused the plaintiff to fall, nor had actual or constructive notice of that condition. *Brito, supra*. As Defendants failed to meet their initial burden as the movants, it is not necessary to review the sufficiency of Plaintiff's opposition papers. *Edmund-Hunter v. Toussie*, --- NYS3d ---, 2021 WL 262347, at *1 [2d Dept. Jan. 27,

2021].[1]

Therefore, it is hereby

ORDERED that Defendants' motion for summary judgment is denied; and it is further

ORDERED that as the attorneys were previously advised, a further settlement conference is scheduled for **February 4, 2021 at 10:30 am**.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
February 2, 2020

CHRISTI J. ACKER, J.S.C.

To: All Counsel Via ECF

[1] Even were the Court to consider Plaintiff's opposition, Plaintiff's affidavit and his climatological expert raise triable issues of material facts which further warrant the denial of Defendants' motion.