

Grossman v Bridgeview Holdings, LLC
2021 NY Slip Op 33546(U)
June 21, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 617323/2017
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 617323/2017
CAL. No. 202000608OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 1/28/21
ADJ. DATE 2/25/21
Mot. Seq. # 001 MG
Mot. Seq. # 002 MG; CASEDISP

-----X
ALAN GROSSMAN,

Plaintiff,

- against -

BRIDGEVIEW HOLDINGS, LLC ,

Defendant.
-----X

JORDAN & LEVERRIER, P.C.
Attorney for Plaintiff
257 Pantigo Road
East Hampton, New York 11937

HOFFMAN ROTH & MATLIN, P.C.
Attorney for Defendant/Third-Party Plaintiff
Bridgeview Holdings
505 8th Avenue, Suite 1704
New York, New York 10018

SMITH SOVIK KENDRICK & SUGNOT
Attorney for Third-Party Defendant
W.C.J.L., Inc.
50 Charles Lindbergh Blvd, Suite 200
Uniondale, New York 11553

BRIDGEVIEW HOLDINGS, LLC

Third-Party Plaintiff,

- against -

W.C.J.L., INC.,

Third-Party Defendant.
-----X

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Upon the following papers read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant Bridgeview Holdings LLC dated November 2, 2020(mot. seq. 001) and by third-party defendant W.C.J.L. Inc. dated November 6, 2020 (mot. seq. 002); Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers dated February 15, 2021(mot. seq. 001) and January 18, 2021 (mot. seq. 002); Replying Affidavits and supporting papers dated February 24, 2021 (mot. seq. 001 and 002). ; Other ____; it is

ORDERED that these motions are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Bridgeview Holdings for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the motion by third-party defendant W.C.J.L., Inc. for summary judgment dismissing the third-party complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Alan Grossman on February 2, 2015, at approximately 8:00 a.m., when he slipped and fell on ice while walking from a parking lot into an office building known as 1650 Sycamore Avenue, Bohemia, New York. The property is owned by defendant Bridgeview Holdings, LLC (Bridgeview). Prior to the accident, Bridgeview allegedly contracted with third-party defendant W.C.J.L., Inc., for snow removal at the premises. Plaintiff alleges that Bridgeview was negligent in failing to properly maintain, manage and control the subject premises, which created the alleged hazardous condition on the surface of the parking lot that caused plaintiff to slip and fall.

Bridgeview moves for summary judgment dismissing the complaint on the grounds that a storm was in progress at the time of the accident. In support, Bridgeview submits the pleadings, the plaintiff's deposition testimony, the deposition testimony of two of plaintiff's employees, and the deposition testimony of W.C.J.L.. Bridgeview also submits the certified weather records from the day of the accident and the expert affidavit of a meteorologist, James Bria. W.C.J.L. also moves for summary judgment dismissing the third-party complaint on the ground that there was a storm in progress at the time of the accident. In addition to the same submissions as provided by Bridgeview, W.C.J.L. submits the expert affidavit of a meteorologist, Wayne Mahar.

Plaintiff testified that when he drove to work on February 2, 2015 he did not recall if he used his windshield wipers. When he arrived, he did not recall if there was ongoing precipitation. He noticed there was ice all over the parking lot. He exited his car and walked slowly, looking at the ground due to the presence of ice. He slipped and fell. When asked for any further details about the cause of his fall he stated that it was awfully cold so it must have been ice.

Plaintiff's employee, Maria Davanzo, testified that she worked for plaintiff and that plaintiff called and texted her following his fall at approximately 8:00 a.m.. She left the house to go to the office and there was fresh snow on the ground and it was still snowing. When she arrived at the parking lot it was still snowing and she could see that snow plowing had occurred. Plaintiff's employee, Lisa Purchaki, also testified that it was snowing at the time of the accident.

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Patrick Caroleo testified on behalf of Bridgeview. He was the property manager for Bridgeview on the date in question and stated that Bridgeview had a contract with W.C.J.L. for snow removal on that date. He learned from plaintiff's employee that plaintiff had fallen. He recalled that there was an ongoing storm at the time of the accident. He contacted the owner of W.C.J.L., Wayne Cafariella, who advised that he was present removing snow and ice but did not see the accident.

Bridgeview also submits admissible weather data and the affidavit of its meteorological expert, James Bria. Mr. Bria opined, to a reasonable degree of meteorological certainty, that at the time of plaintiff's fall there was an ongoing winter storm that had been in progress since the start of the day and that the ice and snow plaintiff slipped on is consistent with the ongoing precipitation event that day considering the snow, sleet, freezing rain, rain and drizzle.

Wayne Cafariella of W.C.J.L. testified that, based on an invoice he kept from the day of the accident, he began snow removal at the premises at 6:00 a.m. and continued snow removal until 9:15 a.m. While there, the precipitation changed from snow to rain but never ceased. There were 3 inches or less when he arrived. He returned at 11:45 a.m. and 2:00 p.m. to address the ongoing conditions and additional 2 inches of snowfall.

W.C.J.L. has also submitted the affidavit of a meteorological expert, Wayne Mahar, who opines, within a reasonable degree of medical certainty, that the ice that plaintiff slipped on was the result of the ongoing precipitation of snow and rain that began the night before plaintiff's fall.

In slip and fall cases involving snow and ice, a property owner is not liable unless he or she created the defect, or had actual or constructive notice of it (*see Denardo v Ziatyk*, 95 AD3d 929, 943 NYS2d 591 [2d Dept 2012]; *Medina v La Fiura Dev. Corp.*, 69 AD3d 686, 895 NYS2d 98 [2d Dept 2010]). Liability can be predicated only upon the failure of the defendant to remedy the danger after having actual or constructive notice of the condition (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]).

It is well settled that a landowner's duty to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and for a reasonable time after it has ceased (*see Popovits v New York City Hous. Auth.*, 115 AD3d 657, 981 NYS2d 562 [2d Dept. 2014]; *Alers v La Bonne Vie Org.*, 54 AD3d 698, 863 NYS2d 750 [2d Dept. 2008]). Generally, there is no duty to warn of icy conditions during a storm in progress (*see Wheeler v Grande'Vie Senior Living Community*, 31 AD3d 992, 819 NYS2d 188 [3d Dept 2006]). A defendant employing the storm in progress defense on summary judgment must show a prima facie entitlement to judgment based on that defense, and, if that burden is met, the opponent of the motion must come forward with competent, admissible evidence establishing the existence of a triable issue of fact as to whether the precipitation from the storm in progress was not the cause of the accident (*see Baker v St. Christopher's Inn, Inc.*, 138 AD3d 652, 29 NYS3d 439 [2d Dept. 2016]; *Meyers v Big Six Towers, Inc.* 85 AD3d 877, 925 NYS2d 607 [2d Dept 2011]).

Here, Bridgeview and W.C.J.L. have each made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the storm was in progress at the time of plaintiff's

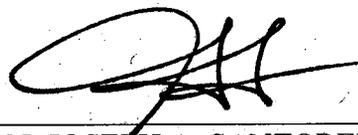
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fall. Testimony from Patrick Caroleo, Wayne Cafariella, Maria Davanzo, Lisa Purchacki and the expert affidavits of James Bria and Wayne Mahar indicate that the storm was in progress when plaintiff fell. The proof is sufficient to shift the burden to plaintiff as to the timing of the storm (*see* CPLR 3212[b]; *Baker v St. Christopher's Inn, Inc., supra*).

In opposition, plaintiff contends that there is a question of fact as to whether he slipped and fell on old ice. In support, plaintiff submits certified weather reports and the affidavit of its expert meteorologist, Harvey Sands. Mr. Sands opines that the ice upon which plaintiff fell formed as a result of the substantial snowfall on January 27, and that the ice "likely" formed because the snow was incompletely removed, "or" returned with drifting on the 28th, "or" the large snow piles melted and then refroze into ice.

Plaintiff has failed to raise a triable issue of fact as to whether precipitation from a storm other than the storm in progress was the cause of his fall (*see Alers v LaBonne Vie Org., supra*). The Court notes that the opinion of the plaintiff's expert is speculative. No testimony supports the contention that plaintiff slipped on ice that existed prior to the storm in question. Plaintiff and his employee, Maria Davanzo, both testified that they were last in the parking lot the Saturday before this Monday morning accident and neither recalled any pre-existing ice. Furthermore, plaintiff has not provided the Court with a further affidavit to indicate the presence of pre-existing ice to support his opposition. Accordingly, the motions by Bridgeview and W.C.J.L. for summary judgment dismissing the complaints against them are granted.

Dated: JUN 21 2021



HON. JOSEPH A. SANTORELLI
J.S.C.

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