SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

GERALDINE H. WARFIELD and LESTER WARFIELD,

Plaintiff,

SUBMISSION DATE: 3/28/08
INDEX No.: 7640/06

-against-

SHAN ASSOCIATES OF SYOSSET, LLC, ROSEMARY GLOVER and SYOSSET PIZZA, INC. d/b.a MARIO'S PIZZA

MOTION SEQUENCE # 2

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	X
Defendant's/Respondent's.....	

Upon the foregoing papers, defendant's motion for summary judgment dismissing the action is granted.

The instant action stems from a slip and fall accident that occurred on February 5, 2005 in the parking lot of Mario's Pizza at 326 Jericho Turnpike, Syosset, New York. The plaintiff and her husband had parked their car in the parking lot and went into Mario's Pizza for approximately one (1) to one and half (1.5) hours. Plaintiff made no observation concerning the condition of the parking lot as she made her way to Mario's. Further, neither she nor her husband made any complaints to anyone in Mario's concerning the condition of the parking lot. When she stepped out of the vehicle, she did not observe any snow or ice on the ground in the area she traversed. Upon existing Mario's Pizza at around 9:30pm and returning to the vehicle, plaintiff allegedly slipped on ice. She states she did not notice the ice prior to her fall and testified that she had

no idea how long the ice condition existed at the location. She believes the ice came from the mound of snow because there was water under the mound which turned to ice. Furthermore, plaintiff contends that the ice formed while she was in the restaurant.

The instant action was commenced on May 10, 2006 by the plaintiff's filing of a Summons and Complaint against Shan Associates of Syosset, LLC. Issue was joined as to Shan by service of its Answer on or about July 5, 2006 and service of its Verified Answer in which it answered for both defendants, Shan Associates, and Rosemary Glover on or about July 27, 2007. Shan commenced a third party action against Syosset Pizza, Inc. by the filing of a Third Party Summons and Third Party Complaint on or about August 15, 2006. Syosset Pizza served its Answer on or about November 8, 2006. Plaintiff served an Amended Complaint naming Syosset Pizza as a direct defendant. Both defendants served an Amended Answer to the plaintiffs' Amended Complaint. Plaintiff served a Bill of Particulars.

Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). The goal of summary judgment is to issue find, rather than to issue determine. Hantz v. Fleischman, 155 A.D.2d 415, 457 N.Y.S.2d 350 (2d Dept. 1989). A motion for summary judgment should be granted if the evidence presented demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Nassau Diag. Imag. & Radiation Oncology Assoc. v. Winthrop-University Hosp., 197 A.D.2d 563, 602 N.Y.S.2d 650 (2d Dept. 1993).

It is well settled that defendant, as the proponent of the motion, is required to make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact". Jones-Barnes v. Congregation Agudat Achim, 12 A.D.3d 875, 784 N.Y.S.2d 371 (3d Dept. 2004). The moving party needs to establish, prima facie, that it did not have prior written notice of any defective or dangerous condition in its parking lot. Lopez v. Town of Hempstead, 2008 N.Y. Slip Op 2971, 2008 N.Y. App. Div. LEXIS 2934 (2d Dept. 2008). It is not in dispute that landowners and business proprietors have a duty to maintain their properties in reasonably safe condition. Sangiacomo v. State of New York, 2006 N.Y. Slip

Op 52362u, 831 N.Y.S. 2d 362 (Court of Claims, 2006). The duty of a landowner or other tort defendant, however, is not limitless. It is an elementary tenet of New York law that "[t]he risk reasonably to be perceived defines the duty to be obeyed". Di Ponzio v. Riordan, 89 N.Y.2d 578, 679 N.E.2d 616, 657 N.Y.S.2d 377 (1997). Along with having the duty to maintain, the defendant had to establish that it neither created a dangerous or defective condition nor had actual or constructive notice thereof. Babbie v. Boisvert, 281 A.D.2d 845, 722 N.Y.S. 2d 612 (3d Dept. 2001).

To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury. Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S. 2d 606 (1980). According to the Restatement of Torts § 435, Subdivision 2, plaintiff need not demonstrate, however, the precise manner in which the accident happened, or the extent of injuries, was foreseeable.

Although the absence of direct evidence of causation would not necessarily compel a grant of summary judgment in favor of defendants, as proximate cause may be inferred from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone. Schneider v. Kings Highway Hosp. Ctr., 67 N.Y.2d 743, 490 N.E.2d 1221; 500 N.Y.S.2d 95 (1986). In this case the evidence adduced established nothing more than a possibility that plaintiff's fall was caused by the ice that the defendants knew of. Under these circumstances, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation. Dapp v. Larson, 240 A.D.2d 918, 659 N.Y.S.2d 130 (3d Dept. 1997).

It is well settled that in a snow and ice situation, a property owner may not be held liable unless he or she has notice of the defect, or, in the exercise of due care, should have had notice, and the owner has had a reasonably sufficient time from the end of the storm to remedy the condition caused by the elements. Simmons v. Metropolitan Life Ins. Co., 84 N.Y.2d 972, 646 N.E.2d 798, 622 N.Y.S.2d 496. Wall v. Village of Mineola, 237 A.D.2d 511, 656 N.Y.S.2d 883 (2d Dept. 1997). Under the circumstances presented herein, the plaintiffs failed to establish, as a matter of law, that the defendant had notice of the icy

condition or a reasonable opportunity to remedy it. Arcuri v. Vitolo, 196 A.D.2d 519, 601 N.Y.S.2d 173 (2d Dept. 1993).

In support of its motion for summary judgment, the defendant has established, as a matter of law, that it did not create the ice condition nor did it have actual or constructive notice of the condition. Voss v. D&C Parking, 299 A.D.2d 346, 749 N.Y.S.2d 79 (2d Dept. 2002). There were no visible ice patches in the parking lot, and the plaintiff did not see the ice patch on which she slipped prior to her fall. This evidence is sufficient to establish the defendant's prima facie entitled to judgment as matter of law. In opposition, the injured plaintiff's claim that she slipped on pre-existing ice was speculative and failed to rebut the appellants' showing on the motion. Russo v. 40 Garden St. Partners, 6 A.D.3d 420, 775 N.Y.S.2d 327 (2d Dept. 2004). Since the plaintiffs failed to raise a triable issue of fact in opposition, the Supreme Court properly granted the motion. Simmonds v. Long Island R.R. Co., 296 A.D.2d 487, 745 N.Y.S.2d 555 (2d Dept. 2002).

Accordingly, it is hereby ordered that defendant is awarded summary judgment and the action is dismissed.

This decision constitutes the order of the court.

Dated: APR 25 2008

KENNETH A. DAVIS J.S.C.

ENTERED

APR 29 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE