SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

GEORGE GOETTELMANN and DUDLEY GOETTELMANN

Plaintiff,

- against -

MANHASSET MEWS HOME OWNERS ASSOCIATION, INC., TOTAL COMMUNITY MANAGEMENT CORP. and BROMANTE LANDSCAPE & DESIGN, INC., ETAL

Defendants.

TRIAL/IAS PART 17

Index No. 95/05

Sequence No. 001 & 002
Motion Date: June 22, 2006
8-31-06

MANHASSET MEWS HOMEOWNERS ASSOCIATION and TOTAL COMMUNITY MANAGEMENT CORP.,

Third-Party Plaintiff,

-against-

BROMANTE LANDSCAPE & DESIGN, INC.,

Third-Party Defendant,

The following papers read on this motion:

Notice of Motion 1
Affirmation in Opposition 2
Reply Affirmation 3

Motion (seq. No. 1) by the attorneys for Bromante Landscape & Design, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint and the third-party complaint and all cross-claims or counterclaims against Bromante Landscape & Design, Inc. with prejudice; and cross-motion (seq. No. 2) by the attorneys for the defendants Manhasset Mews Home Owners Associations, Inc. and Total Community Management Corp. for an order pursuant to CPLR § 3212, granting the defendants Manhasset Mews Home Owners Association, Inc. and Total Community Management Corp., summary judgment and dismissing the plaintiff's summons and complaint and any and all cross claims or counter claims in its entirety as against said defendants are both denied.

This action involves a slip and fall accident that occurred on January 28, 2004 in front of the plaintiff's home in the development known as Georgetown Commons/Manhasset Mews. Plaintiff alleges a storm deposited several inches of snow over night, ending on the date of the accident. The plaintiff alleges that as he was attempting to walk down his walkway, he slipped on ice and snow, sustaining serious injuries.

The action was commenced by the filing of a summons and complaint naming Manhasset Mews Home Owners Association, Inc., "Manhasset Mews Home Owners Association, Inc. d/b/a Georgetown Commons Corp." and Total Community Management as defendants.

Issue was jointed by the defendants, by service of an answer.

Defendants, Manhasset Mews Home Owners Association, Inc. and Total Community Management Corp., a homeowners association and managing agent, respectively, commenced a third-party action against Bromante Landscape & Design, Inc., hired to perform snow removal at the subject premises.

Third-party defendant Bromante Landscape & Design, Inc. served its answer to the third-party complaint.

Plaintiff's counsel served an amended summons and amended verified complaint adding Bromante Landscape & Design, Inc. as a direct defendant and dropping "Manhasset Mews Home Owners Association d/b/a Georgetown Common Corp." and "Georgetown Commons Corp." from the caption.

The attorney for the plaintiff, citing *Brill v City of New York*,(2 NY3d 648) argues that the cross-motion by defendants Manhasset and Total Community is untimely and should not be considered by the Court. Since Manhasset Mews seeks dismissal of plaintiff's complaint on almost the same grounds as the timely motion made by Bromante, i.e., that the snow was still falling and there was no duty to clean the snow at the time of the accident, this Court shall dispose of Manhattan and Total Community's motion on the merits. In *DiMetteo v County of Nassau*, (8 Misc.3d 1013 (N.Y. Sup. May 9, 2005), 2005 N.Y. Slip Op. 51088), Justice Parga of the Supreme Court Nassau County noted, ". . . the Appellate Division, Second Department continues to adhere to a principle

it established in a line of cases prior to Brill that. . . stand for the proposition that even if there is no explanation for the late cross motion, 'good cause' can nevertheless be found by the Court to exist as a basis to entertain a belated motion or cross motion "in the interest of judicial economy . . . where another defendant has served a timely but nearly identical, and as yet undecided motion for summary judgment." Citing [*Miranda v Devlin*, 260 AD2d 451 (2nd Dept. 1999); *Boehme v A.P.P.L.E.*, 298 AD2d 540 (2ND Dept. 2002) and more recently affirming that proposition in *Bressingham v Jamaica Hospital Medical Center*, 17 AD3d 496 (2nd Dept., April 18, 2005)].

A property owner may not be held liable for a snow or ice condition unless it had actual or constructive notice of the allegedly dangerous condition and a reasonably sufficient time after the conclusion of the snowfall to remedy the situation. [*See Pepito v City of New York*, 262 AD2d 619].

Defendant Bromante contends its sole obligation was limited to snow removal services and not comprehensive maintenance. As the snow plowing contractor, Bromante further claims it did not assume any duty of care to the plaintiff. In addition, Bromante argues the plaintiff's accident occurred during an ongoing storm, and as a matter of law, none of the defendants are liable. Plaintiff testified that when he left his house at approximately 11:30 PM on the day of the accident, the weather was "misty" (George Goettelman transcript pg. 40). Plaintiff has submitted a January 2004 statement of Local Climatological Data from the National Climatic Data Center to demonstrate that the

snowstorm had stopped at approximately 4:00 A.M. on January 28, 2004 and that only trace amounts continued intermittently over the next two to three hours. CPLR 4528 **Weather Conditions** states that "Any record of the observations of the weather, taken under the direction of the United States weather bureau, is *prima facie* evidence of the facts stated." The attorney for defendant contends that the weather reports are "not authenticated in any manner" and as such are not admissible. Proof which might be inadmissible at trial may nevertheless be considered in opposition to a motion for summary judgment. *[See Zuilkowski v Sentry Insurance*, 114 AD2d 453; *Cohen v Herbal Concepts*, 100 AD2d 175].

In *Rapone v Di-Gara Realty Corp.* (22 AD3d 654, 656) summary judgment was denied where the property owner made a *prima facie* showing of its entitlement to judgment as a matter of law by submitting weather data indicating that 0.5 inches of snow fell throughout the day of the alleged accident, and in opposition the plaintiff claimed the snow had stopped several hours before the alleged accident, giving the property owner a reasonably sufficient time to remedy the situation.

In considering summary judgment, the Court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party; the Court's function is to decide whether there is a factual issue, not to resolve it. [*See Stillman v Twentieth Century-Fox Films Corp.*, 3 NY2d 395; *Alvarez v Prospect Hospital*, 66 NY2d 320]. The Court may not weigh the credibility of affiants on a motion for summary judgment unless

it clearly appears that issues are not genuine but feigned. [*See Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439]. There are questions of fact as to whether the storm had started before the accident and was continuing at the time of the accident.

An agreement dated January 30, 1993, between the Board of Managers of Manhasset Mews Homeowners Associations Inc. (d/b/a "Georgetown Commons"), one of the defendants, a homeowners association located in Manhasset, N.Y. and Total Community Management Corp., another defendant, provides for Total Community to serve as a managing agent for the homeowners association (*See* Exhibit J Bromante Landscape & Design, Inc. motion in support). The "Commercial Snow Removal Agreement" dated October 21, 2003 between Bromante Landscape & Design, Inc., and Manhasset Mews/Georgetown Commons referred to as the "customer" was entered into with the purpose of providing "commercial snow removal, sanding and salting services." The attorney for Bromante contends the snow removal agreement between Bromante Landscape and Manhasset Mews/Georgetown Commons, expressly identified "the customer" as being Manhasset Mews/Georgetown Commons, not Total Community Management Corp. or the Manhasset Mews Home Owners Association, Inc., the named defendants in the within action. The snow removal agreement was signed by John Bromante as President of defendant Bromante Landscape & Design, Inc. and Jennifer Nader, Managing Agent on behalf of "Manhasset Mews/Georgetown Commons." Jennifer Nader testified at her deposition that she is the property manager of Total

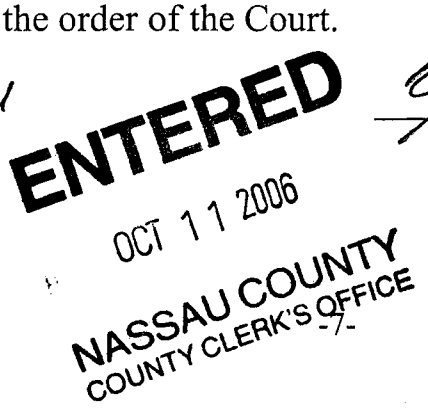
Community Management and was employed by them in January of 2004. As previously indicated, on or about April 26, 2006, plaintiff served an amended summons and amended verified complaint adding Bromante as a direct defendant. However, counsel have failed to amend the caption to reflect the fact that Bromante is now a direct party defendant. Plaintiff also dropped "Manhasset Mews Home Owners Association d/b/a Georgetown Commons Corp." and "Georgetown Commons Corp." from the caption. Based on the conflicting submissions as to what entity is a proper party to the action and who actually contracted with Bromante for the snow removal, both motions for summary judgment are denied. Indubitably, at the appropriate time counsel may move to conform the pleadings to the proof.

Further, should it be determined that Bromante assumed no duty to exercise reasonable care to prevent foreseeable harm to the plaintiff, by virtue of its contractual duty to remove snow from the subject premises, Bromante may be required to indemnify Manhasset Mews Home Owners Association, Inc. if the plaintiff is successful in establishing that Bromante was negligent. [*See Rapone v Di-Gara Realty Corp., supra; see also Coyle v Long Island Savings Bank*, 248 AD2d 350].

Both motions for summary judgment are denied.

This decision is the order of the Court.

Dated: 10/3/06



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