E
4.22.10

# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 19

Index Number : 112822/2005
HAN,CHANG
vs.
CVJ CORPORATION
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision/order.

FILED
APR 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/20/10

Salvatore Capella J.S.C.
SALVATORE CAPELLA J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

---------- X

CHANG HAN,

Plaintiff,

- against-

Index No.:112822/05
Submission Date: 3/17/2010

CVJ CORPORATION, THE CITY OF NEW YORK, AND THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

**DECISION AND ORDER**

Defendants.

---------- X

For Plaintiff:
Schlemmer & Maniatis LLP
111 Broadway, Suite 701
New York, NY 10006

For Defendants:
McMahon, Martine & Gallagher, LLP
55 Washington Street
Brooklyn, NY 11201

Papers considered in review of this motion for summary judgment:

Notice of Motion . . . . . 1
Aff in Opp . . . . . .2
Reply . . . . . 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants CVJ Corporation, The City of New York, and The New York City Department of Parks and Recreation (collectively referred to as "CVJ")[1] move for summary judgment dismissing the complaint.

[1] CVJ Corporation has assumed the defense and indemnity of the City of New York defendants in this action.

On January 23, 2005 at 8:40 a.m., plaintiff Chang Han ("Han") was sledding in an area approximately 375 feet west of the 106th Street and Fifth Avenue entrance to Central Park when his sled and right hand suddenly struck something. The object into which his sled collided was not visible due to the snow accumulation of approximately one foot in Central Park. He wiped snow away with his foot and saw that his sled had collided with a black edge of the base of what was to become part of the "The Gates" public art exhibit. The Gates exhibit was being installed by CVJ pursuant to an agreement with the City of New York. Han commenced this action in or about September 2005 seeking to recover damages for the injuries he sustained to his right hand as a result of the accident.

CVJ now moves for summary judgment dismissing the complaint, arguing that pursuant to the "storm in progress" theory, it can not be held liable for Han's injuries. CVJ maintains that according to the official precipitation records produced by the National Climatic Data Center, snowfall began at 1:00 p.m. on January 22, 2005 and continued unabated until 10:00 a.m. on January 23, 2005 with an accumulation of 13.8 inches of snow. CVJ contends that because there was a storm in progress at the time of the accident, it can not be held liable for any injuries resulting from Han's fall on the accumulated snow.

CVJ further argues that even if the storm was not in progress at the time of Han's accident, it is still entitled to summary judgment because it had no notice of any dangerous snow condition and no reasonable opportunity to correct any purportedly dangerous snow condition.

In opposition, Han argues that CVJ's motion for summary judgment must be denied because its reliance on the storm in progress theory is misplaced. He explains that his accident did not occur as the result of a fall on accumulating snow during an ongoing storm, rather, it occurred when he struck an object, specifically the base of The Gates exhibit which was obstructed from view, while sledding. He maintains that his action is not premised on an allegation of negligent failure to remove accumulated snow, rather, his action is comprised of allegations that CVJ was aware that the object had been placed in an area where sledding took place and was negligent in failing to place adequate barricades around a known hazard, in improperly placing bales of hay around the area, in failing to warn of a hazardous condition, in creating an attractive nuisance, and in failing to properly demarcate areas of land open and closed for recreation.

**Discussion**

Summary judgment is an extraordinary remedy and is only appropriate where the movant has established that there is no question of fact on any issue which would require a trial. *See Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The court may grant summary judgment upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact. CPLR 3212(b); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985).

Here, CVJ fails to meet its burden of showing entitlement to judgment as a matter of law. It seeks summary judgment based on the theory that it can not be held liable due to the storm in progress theory, however, the storm in progress theory is not applicable to the facts of this case. Pursuant to the storm in progress theory, an owner of property is not liable for injuries relating to falling on snow or ice while there is an ongoing storm to allow a reasonable amount of time to clear the affected walkways. *See Powell v. MLG Hillside Assocs.*, L.P., 290 A.D.2d 345 (1st Dept. 2002). While CVJ maintains that a dangerous condition would not have existed but for the accumulated snow, that fact does not bring this action within the ambit of the storm in progress theory. Han does not allege that he fell on snow and ice and that his fall was caused due to CVJ's failure to remove accumulating snow. Rather, he alleges that his accident occurred as the result of CVJ's failure to warn him of the presence of a dangerous condition obstructed from view and the potential dangers he could encounter by sledding on that hill on that day and CVJ's failure to maintain its premises in a reasonably safe condition.

As landowners, defendants have a duty to maintain their premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others. Encompassed therein is the duty to warn those lawfully on the premises of potentially dangerous conditions that are not readily observable. *See Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69 (1st Dept. 2004); *Comeau v. Wray*, 241 A.D.2d 602 (3rd Dept. 1997). Here, CVJ has presented no evidence to establish that it maintained the area

of Han's accident in a reasonably safe condition. Furthermore, issues of fact exist as to whether CVJ owed a duty to warn Han of the presence of a dangerous condition obstructed from view on the sledding hill and if so, whether it breached that duty.

In accordance with the foregoing, it is

ORDERED that defendants CVJ Corporation, The City of New York, and The New York City Department of Parks and Recreation's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties are directed to appear for a status conference on June 16, 2010 at 2 p.m..

This constitutes the decision and order of the court.

Dated: New York, New York
April 20, 2010

ENTER:

J.S.C.