SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU
PRESENT:

HON. ROY S. MAHON

Justice

JOYCE WHITE, **TRIAL/IAS PART 3**

Plaintiff(s), **MOTION SUBMITTED: 2/25/2020**

-against-

MOTION SEQ. 001

WESTERN BEEF, INC., WESTERN BEEF RETAIL, INC. AND WESTERN BEEF PROPERTIES, INC. **INDEX NO. 608698/2016**

Defendant(s).

X

Papers read on motion:

Notice of Motion/Supporting Exhibits……..X

Affirmation in Opposition/Supporting Exhibits……X

Reply Affirmation……. X

Defendants, Western Beef, Inc., Western Beef Retail, Inc., and Western Beef Properties, Inc. (collectively, "defendants") move (mot. seq. 001) pursuant to CPLR § 3212 for an order granting summary judgment and dismissing the complaint, with prejudice. Plaintiff Joyce White ("plaintiff") opposes the motion.

Plaintiff commenced this slip and fall action by summons and complaint dated November 9, 2016. Issue was joined by service of an answer on November 23, 2016. The case certified for trial on January 16, 2019 and a note of issue was filed on April 15, 2019.

Defendants move for summary judgment claiming that, based on the facts, the "storm in progress" doctrine requires summary judgment in favor of the defendants and dismissal of the complaint with prejudice.

It is well settled that in making a motion for summary judgment, the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law (*see Sillman v Twentieth Century Fox Film Corp*, 3 NY2d 395 [1957]; *Zuckerman*

v City of New York, 49 NY2d 557 [1980]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman* at 560).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action, the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*Anderson v Bee Line*, 1 NY2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding, not issue determination, *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v Pomeroy*, 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that such injury would be of a serious nature, and the burden of avoiding the risk" (*Guilini v Union Free School District #1*, 70 AD3d 632 [2d Dept 2010]). "To impose liability upon a defendant landowner for plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition and that the defendant either created the condition or had actual notice of and failed to remedy it within a reasonable time" (*Morrison v Apolistic Faith Mission of Portland,* 111 AD3d 684 [2d Dept 2013]; *see Winder v Executive Cleaning Servs., LLC,* 91 AD3d 865 [2 Dept 2012]); *Gonzalez v Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]). The law is clear that it is not to make a credibility determination on a summary judgment motion (*Schwartz v Gold Coast Rest. Corp*., 139 AD3d 696 [2d Dept 2016] citing *Ferrante v American Lung Ass'n,* 90 NY2d 623 [1997]).

A defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition, nor had actual or constructive notice of its existence (*see Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006]).

Here, the Court has considered the documentary evidence submitted, including, but not limited to, deposition transcripts and expert reports regarding weather conditions. The defendants have failed to meet their burden of establishing that there are no triable issues of fact. The storm in progress defense does not apply here. Even if it were snowing at the time of plaintiff's incident, the plaintiff has raised issues of fact as to whether the incident was caused by ice that existed prior to the storm, rather than from precipitation from the storm in progress, and that the defendants had actual or constructive notice of the preexisting condition (*Spicer v Estate of Ondek*, 60 AD3d 1234, 1235 [3d Dept 2009]. In the present action, a reasonable inference can be made that the cause of plaintiff's incident was a preexisting condition, hazardous ice, and not the ongoing storm. According to the plaintiff's expert, on the day prior to the incident (January 25, 2015), a trace amount of snow and ice was present throughout the day, and there was no precipitation. As of 12:00 a.m. on the day of the incident (January 26, 2015), there was still a trace amount of snow and ice on the ground. It began snowing at about 4:10 a.m. The incident occurred at about 10:15 a.m. There were no salt or snow-moving services performed on January 25th or the early morning hours of January 26th, prior to the incident. Plaintiff has raised issues of

fact as to whether she slipped on ice from a preexisting condition and whether this dangerous condition existed for a sufficient length of time for the defendants to discover the condition.

Accordingly, it is hereby

ORDERED that defendant's motion (mot. seq. 001) is **DENIED** in its entirety.

The Court has considered the other arguments raised by the parties and finds them to be without merit.

Any relief requested herein, and not granted, is denied.

This constitutes the decision and order of the Court.

DATED: May 11, 2020 _____/s/

Roy S. Mahon, J.S.C.