NNH CV20-6100150-S	:	SUPERIOR COURT
KELSEY VITANZA	:	JUDICIAL DISTRICT OF
	:	NEW HAVEN
V.	:	AT NEW HAVEN
SUSO 4 WATERBURY LIMITED PARTNERSHIP, ET AL	:	MAY 29, 2024

MEMORANDUM OF DECISION ON MOTIONS FOR SUMMARY JUDGMENT
Nos. 175.00 AND 178.00

The two defendants, Suso 4 Waterbury Limited Partnership and Naugatuck Valley Lawn Maintenance, Inc., move for summary judgment in their favor on the two counts of the revised complaint no.115.00 filed by the plaintiff, Kelsey Vitanza. The plaintiff alleges that on February 12, 2017 at approximately 6:00 p.m., she exited her vehicle and began to cross Suso 4 Waterbury Limited Partnership's parking lot when she slipped and fell on a "layer of snow and/or ice." The defendants each move for summary judgment on the grounds that at the time the plaintiff allegedly fell, there was an ongoing storm.

Summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Practice Book § 17-49; *Provencher* v. *Enfield,* 284 Conn. 772, 790-91, 936 A.2d 625 (2007). "A 'genuine' issue has been variously described as a 'triable,' 'substantial' or 'real' issue of fact; ... and has been defined as one which can be maintained by substantial evidence." (Citations omitted.) *United Oil Co.* v. *Urban Redevelopment Commission,* 158 Conn 364, 378, 260 A.2d 596 (1969). A "material fact" is

one that would make a difference in the outcome of the case. *Hammer* v. *Lumberman's Mutual Casualty Co.,* 214 Conn. 573, 578, 573 A.2d 699 (1990).

This court must view the evidence in the light most favorable to the nonmoving party. *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 312, 77 A.3d 726 (2013). "[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way ... [A] summary disposition ... should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party ... [A] directed verdict may be rendered only where, on the evidence viewed in the light most favorable to the nonmovant, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." (Citations omitted; internal quotation marks omitted.) *Dugan* v. *Mobile Medical Testing Services, Inc.,* 265 Conn. 791, 815, 830 A.2d 752 (2003).

"[I]t is only [o]nce [the moving party]'s burden in establishing [its] entitlement to summary judgment is met [that] the burden shifts to [the non-moving party] to show that there is a genuine issue of fact exists justifying a trial .... Accordingly, the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment .... [I]f the party moving for summary judgment fails to show that there are no genuine issues of material fact, the nonmoving party may rest on mere allegations or denials contained in his pleadings." (Citations omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. at 320-21.

Once the moving party has made out a prima facie case for summary judgment, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. *Maffucci* v. *Royal Park Ltd. Partnership,* 243 Conn. 552, 554-55, 707

A.2d 15 (1998). It is not enough for the opposing party to assert the existence of a disputed issue of fact. Id. The opposing party must demonstrate that it has sufficient counterevidence to raise a genuine issue of material fact as to each of the essential elements of its cause of action. See *Stuart* v. *Freiberg,* 316 Conn. 809, 822-23, 116 A.3d 1195 (2015).

The two defendants argue that they did not owe the plaintiff a duty of care relating to snow and ice on the parking lot because there was an ongoing storm at the time of her fall. "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." *RK Constructors, Inc. v. Fusco Corp.,* 231 Conn. 381, 384, 650 A.2d 153 (1994). "The existence of a duty is a question of law and [o]nly if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand." (Internal quotation marks omitted.) Id., 384, 650 A.2d 153, 155. "[T]he issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." (Internal quotation marks omitted.) *Mozeleski v. Thomas,* 76 Conn. App. 287, 290, 818 A.2d 893, cert. denied, 264 Conn. 904, 823 A.2d 1221 (2003). Here, the defendants here argue that they owed no duty to the plaintiff because of the ongoing storm doctrine.

The ongoing storm doctrine was adopted by our Supreme Court in *Kraus* v. *Newton*, 211 Conn. 191, 558 A.2d 240 (1989). In that case, the court stated:

> "[I]n the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps. To require a landlord or other inviter to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is inexpedient and impractical."

Id. at 197-98. The court qualified that statement as follows: "Our decision, however, does not foreclose submission to the jury, on a proper evidentiary foundation, of the factual determinations of whether a storm has ended or whether a plaintiff's injury has resulted from new ice or old ice when the effects of separate storms begin to converge." Id. at 198. The court affirmed the trial court's charge to the jury that the property owner could wait until a reasonable time after the storm had ended before removing the snow and ice. Id.

Our Appellate Court has explained how the ongoing storm doctrine is affected by the burden shifting for a summary judgment motion. In *Belevich* v. *Renaissance I, LLC*, 207 Conn. App. 119, 127-28, 261 A.3d 1 (2021), that court adopted the approach of the New York Appellate Division in *Meyers* v. *Big Six Towers, Inc.*, 85 App. Div. 3d 877, 925 N.Y.S.2d 607 (2011):

> "As the proponent of the motion for summary judgment, the defendant ha[s] to establish, prima facie, that it neither created the snow and ice condition nor had actual or constructive notice of the condition .... [T]he defendant [may sustain] this burden by presenting evidence that there was a storm in progress when the plaintiff fell .... [Upon the defendant meeting its burden], the burden shift[s] to the plaintiff to raise a triable issue of fact as to whether the precipitation from the storm in progress was not the cause of his accident .... To do so, the plaintiff [is] required to raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition ...."

Under this burden-shifting approach, the two defendants are required to demonstrate that there is no genuine issue of material fact that at the time the plaintiff allegedly fell, there was an ongoing storm. *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. at 128-29.

The sole basis of the defendants' motions for summary judgment is the report of the plaintiff's expert witness, Robert B. Cox, a meteorologist. The defendants have provided the court with a February 3, 2021 letter from Cox sent to plaintiff's counsel, but they have not provided the data on which Cox relied for the conclusions he reaches in that letter. See no. 176.00 at Exhibit A; no. 178.00 at Exhibit A. They quote from that letter as follows in their memoranda:

> "Snow began to fall again around 7:20 A.M. on the morning of the 12th. The snow accumulated to 4.0" in Waterbury before changing to freezing rain by the late afternoon. The freezing rain ended by about 9:00 P.M. that night. The high temperature reached 32 degrees during the night of the 12th. At the time in question (approximately 6:00 P.M. on February 12, 2017), weather conditions in Waterbury included a cloudy sky with light freezing rain falling, [and] a temperature of 29 degrees ...."

The plaintiff also concedes in her opposition memorandum no. 179.00 that at the time of her fall, there was ongoing snowfall.

Based on the burden shifting analysis of *Belevich* v. *Renaissance I, LLC*, supra, this court holds that the defendants have met their initial burden of establishing a prima facie case that there was a storm in progress when the plaintiff fell. 207 Conn. App. at 127-28. Therefore, to avoid the entry of summary judgment, the plaintiff must "raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition."[1] Id.

[1] At oral argument on April 8, 2024, the defendants argued several times that the plaintiff is obligated to "prove" these elements to overcome this motion for summary judgment. As set forth above, the plaintiff's obligation once a defendant has made out a prima facie case for summary judgment is to "demonstrate that it has sufficient counterevidence to raise a genuine issue of material fact as to each of the essential elements

The plaintiff responds with (1) additional information from Cox's report, (2) an affidavit from the plaintiff, and (3) excerpts from the plaintiff's deposition. As to the existence of the slippery condition prior to the storm, the plaintiff states in her affidavit that "at the time I fell, there was a layer of ice in the parking lot concealed by fresh snow ... the fresh snow did not contribute to my fall ... I had difficulty standing up due to the concealed ice." No. 179.00, Exhibit B. Her deposition testimony also contained numerous references to ice. Id., Exhibit A.

The full Cox report begins with weather conditions three days earlier, on February 9, 2017. It states that 13 inches of snow fell on February 9, and that an additional 1.25 inches of snow fell between 10 p.m. on February 10 and 5 a.m. on February 11. Cox then states in the sentences leading up to the portion relied upon by the defendants:

> "The predawn low temperature on the morning of the 11th was 23 degrees. The high temperature rose to 43 degrees during that afternoon. Total snow depth on untreated, undisturbed surfaces in Waterbury was about 13.0" during the 11th. Any standing water or slush would have commenced freezing into ice around that time. The low temperature in Waterbury fell to 21 degrees during the morning of February 12, 2017. Any standing water or slush would have frozen solid during the night of the 11th into the morning of the 12th."

Nos. 176.00 and 178.00, Exhibit A. This evidence is more substantial than the evidence that the Appellate Court held was insufficient in *Belevich* where there was no expert report or weather reports. *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. at 129 132.

The defendants here argue that this plaintiff's evidence is still not sufficient to raise a genuine issue of material fact that the ice predated the storm because the report is too

---

of its cause of action." See *Stuart* v. *Freiberg*, supra, 316 Conn. at 822-23. The Appellate Court's decision in *Belevich* v. *Renaissance I, LLC*, did not change this standard.

general and not specific to the location where the plaintiff fell. In one of the cases they cite, *Carty v. Merchant 99-111 Founders, LLC*, the superior court held that although the plaintiff's certified meteorological records supported the notion that ice could have formed before his fall, they "do not raise a genuine issue of material fact that ice had in fact formed, was present in the area on the day he fell, establish its thickness, or when it formed." Superior Court, judicial district of Hartford, Docket No. CV21-6136904-S (April 28, 2023, *Rosen, J.*). Citing *Belevich*, that court went on to hold that evidence that there was ice in the general vicinity of where the plaintiff fell was not sufficient to raise a genuine issue of material fact as to whether the defendant had constructive notice. Id.

The Appellate Court in *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. at 127-31, relied heavily on a New York Appellate Division decision, *Meyers v. Big Six Towers, Inc.*, 85 App. Div. 3d 877, 925 N.Y.S.2d 607 (2011). In *Meyers*, the appellate division held that the plaintiff did not raise a genuine issue of material fact that the ice predated the ongoing storm, even though he presented a sworn statement from a nonparty witness that referred to the existence of icy patches elsewhere in the parking lot where the plaintiff fell. Id. at 608-09. "Evidence that there was ice in the general vicinity of the accident prior to the storm is insufficient to raise a triable issue of fact as to whether the defendant had actual or constructive notice of the condition of the specific area within the parking lot where the plaintiff fell." Id. at 609 (quoted in *Belevich*, supra, 207 Conn. App. at 131). The Appellate Court in *Belevich* also cited other New York decisions that held that expert testimony and meteorological data for the general area were insufficient to raise an issue of material fact that the particular ice patches on which plaintiffs fell existed prior to the ongoing storm. Id. at 130-31.

At oral argument, the plaintiff attempted to distinguish *Carty* because the plaintiff here has testified that there was ice directly beneath the snow where she fell. In *Carty*, the plaintiff stated in his affidavit that a few days earlier, he saw ice on the sidewalk in the area where he fell. *Carty v. Merchant 99-111 Founders, LLC*, supra, Superior Court, Docket No. CV21-6136904-S. However, he could not recall whether there was ice there on the day before he fell, he could not conclusively state that the ice had not formed during the ongoing storm, and he did not know when the ice first appeared, how it formed, or how long it had been on the ground. Id. That court held that that evidence was insufficient. Although the plaintiff here was very definitive that there was ice the day she fell, like the *Carty* plaintiff, she did not provide evidence that there was ice in that exact spot before the storm.

In the Connecticut appellate cases that permitted plaintiffs' claims to proceed, the plaintiffs provided evidence that there was ice in the exact location where they fell prior to the new storm. In *Warren v. Stancliff*, 157 Conn. 216, 251 A.2d 74 (1968), the plaintiff testified that there was ice on the driveway for ten days prior to his fall, but snow fell on the evening before his fall, obscuring the ice. Id. at 219. The Supreme Court held that that evidence would be "sufficient" to support a finding of constructive notice. Id. Similarly, in *Berlinger v. Kudej*, 120 Conn. App. 432, 435-36, 991 A.2d 716 (2010), the Appellate Court reversed a trial court for granting summary judgment where the plaintiff testified that he saw ice on the driveway where he fell prior to the day of his fall.

Because the plaintiff has not come forward with non-speculative evidence that the ice in the exact location of her fall predated the ongoing storm, she also cannot raise a genuine issue of material fact as to constructive notice. "[T]he notice, whether actual or

constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it...." (Citation omitted.) *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 117, 49 A.3d 951 (2012).

The defendants' motions for summary judgment are granted.

BY THE COURT,

Hon. Elizabeth J. Stewart