

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 2

ALISON SALOMON,

Plaintiff,

-against-

Index No.: 616341/22
Motion Sequence...01 & 02
Motion Date...05/1/24
XXX

ROBERT FISSE, THE VILLAGE WEST HOME
OWNERS ASSOCIATION, INC. and ACCREDITED
PROPERTY MANAGEMENT, LLC,

Defendant(s).

Papers Submitted:
Notice of Motion (Seq. 01).....X
Notice of Motion (Seq. 02).....X
Memo of Law in Support.....X
Memo of Law in Support.....X
Affirmation in Opposition to Seq. 01 & 02.....X
Reply Affirmation.....X
Reply Affirmation.....X

Upon the foregoing papers, the motion (Seq. 01) by the Defendant, ROBERT FISSE, and the motion (Seq. 02) by the Defendants, THE VILLAGES WEST HOME OWNERS ASSOCIATION, INC. and ACCREDITED PROPERTY MANAGEMENT, LLC, seeking an Order, pursuant to CPLR §§ 3116 and 3212, striking the Plaintiff's errata sheet dated December 5, 2023, and granting summary judgment in their favor dismissing the Plaintiff's complaint, are decided as hereinafter provided.

On February 13, 2021 at approximately 11:00 p.m., the Plaintiff left the Defendant Robert Fisse's residence located at 233 Riverdell Court, Melville, after enjoying a pleasant evening with her friends. As she walked down the driveway towards her car she fell (*See* Plaintiff's Deposition Transcript, annexed to Mot. Seq. 01 as Exhibit "3" at p. 27); *see also* Plaintiff's Deposition Photograph Exhibits, annexed as Exhibit "4"). Thereafter, on November 21, 2022, the Plaintiff commenced this personal injury action alleging that Mr. Fisse and Accredited Property, which managed the homeowner's association, negligently failed to remove an accumulation of snow and ice (*See* Bill of Particulars, annexed to Mot. Seq. 01 as Exhibit "2" at ¶ 7). Issue was joined by Mr. Fisse and Accredited Property Management on April 4, 2023 and February 29, 2023, respectively. Upon the completion of discovery, the case was certified on November 14, 2023¹.

During the Plaintiff's deposition held on October 11, 2023, the Plaintiff testified, *inter alia*, that when she arrived at the house for dinner, there was snow on the ground (*See* Plaintiff's Deposition Transcript, annexed as Exhibit "3" at p. 22). When she departed, at approximately 11:00 p.m. (*Id.* at p. 26), she walked down the driveway and fell (*Id.* at p. 27). The Plaintiff specifically denied knowing what caused her to fall (*Id.* at p. 28) or, indeed, whether she slipped (*Id.* at pp. 28 and 79). However, after she fell, the bottom of her coat was wet (*Id.* at p. 92).

¹ The Court notes that, although this matter was marked certified last November, the Plaintiff neglected to file a Note of Issue to date. Pursuant to the Certification Order dated November 14, 2023, a Note of Issue was due to be filed within 90 days thereof.

In direct contrast to the foregoing deposition testimony, the Plaintiff's December 5, 2023 errata sheet affirmatively states "I slipped" upon what "I believe...was ice" (*See* Plaintiff's Errata Sheet, annexed to Mot. Seq. 01 as Exhibit "3A").

"CPLR 3116(a) provides that a witness may make 'changes in form or substance' to his or her deposition testimony as long as such changes are accompanied by 'a statement of the reasons given by the witness for making them'. A correction will be rejected where the proffered reason for the change is inadequate" (*Torres v. Board of Educ. of City of New York*, 137 AD3d 1256, 1257 [2d Dept., 2016]). Here, the correction sheet contains no statement of reasons for making the changes which materially alter the Plaintiff's testimony (*See Lylan Pham v. Lee*, 219 AD3d 601 [2d Dept. 2023]; *Garcia-Rosales v. Bais Rochel Resort*, 100 AD3d 687 [2d Dept. 2012]). As such, the branches of the Defendants' respective motions, pursuant to CPLR 3116, seeking to strike the Plaintiff's December 5, 2023 errata sheet are granted.

"A property owner has a duty to maintain its premises in a reasonably safe condition (*See Basso v. Miller*, 40 NY233, 241 [1976]). 'The scope of that duty is defined by the foreseeability of the possible harm'" (*Kerr-Inniss v. Williams*, 2024 NY App. Div. LEXIS 4510 [2d Dept. August 28, 2024] quoting *Tagle v. Jacob*, 97 NY2d 165, 168 [2001]).

Moreover, "[u]nder the storm-in-process rule, a property owner or a tenant in possession will not be held responsible for accidents caused by snow or ice that accumulates during a storm until an adequate time has passed following the cessation of

the storm to allow an opportunity to ameliorate the hazards caused by the storm” (*Corlette v. SN Auto Repairs, Inc.*, 227 AD3d 858, 859 [2d Dept. 2024]).

The November 27, 2023 affidavits of the Defendant Fisse’s expert meteorologists, John Lombardo and Kyle Gravlin, and accompanying local climatological documentary evidence confirm that a winter storm caused sleet, freezing drizzle and rain to fall in the area, with occasional lulls, from approximately 6:44 p.m. through 10:55 p.m. (See Lombardo and Gravlin’s Affidavits, annexed as Exhibit “7”; see also Certified Weather Records and Raw Weather Records, annexed as Exhibits “7C – 7D4”; see also Lombardo and Gravlin’s Affidavits, annexed as Exhibit “7” at ¶ 37). The Defendants have therefore established their prima facie entitlement to judgment as a matter of law on the grounds that they did not create the condition and because the storm ceased almost contemporaneously with the Plaintiff’s 11:00 p.m. accident (*Id.* at pp. 859, 860). The speculative assertion of the Plaintiff’s expert, Mark L. Kramer, that the icy condition may have thawed and refrozen prior to the February 12, 2021 is insufficient to raise a triable issue of fact (See Affirmation of Mark Kramer, annexed to Plaintiff’s Opposition as Exhibit “B” at ¶ 9) (See *Cavetano v. Port Authority of New York and New Jersey*, 165 AD3d 1223, 1224 [2d Dept. 2018]). The mere fact that the driveway was wet, by itself, is inadequate to establish the existence of a dangerous condition (See *Smith v. 3173 Gas Corp.*, 216 AD3d 1192 [2d Dept. 2023]).

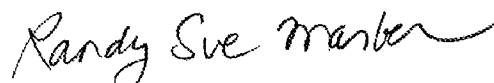
Accordingly, the branches of the Defendants’ respective motions, pursuant to CPLR 3212, seeking summary judgment and dismissing the Plaintiff’s complaint as asserted against them, are granted.

Accordingly, it is hereby

ORDERED, that the motion (Seq. 01) by the Defendant, ROBERT FISSE, and the motion (Seq. 02) by the Defendants, THE VILLAGES WEST HOME OWNERS ASSOCIATION, INC. and ACCREDITED PROPERTY MANAGEMENT, LLC, seeking an Order, pursuant to CPLR §§ 3116 and 3212, striking the Plaintiff's errata sheet dated December 5, 2023, and granting summary judgment in their favor dismissing the Plaintiff's complaint, are **GRANTED**, and the Plaintiff's complaint is hereby **DISMISSED**.

This decision constitutes the Order of the Court.

DATED: Mineola, New York
September 19, 2024



HON. RANDY SUE MARBER, J.S.C.

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ENTERED

Sep 20 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE