IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

THOMAS BEAUFORD	NO. 2016-8925
v.	
SECOND NATURE LANDSCAPING and CONSTRUCTION, INC.	

THOMAS BEAUFORD	NO. 2017-9544
v.	
DEFINITIVE PROPERTIES, LLC d/b/a DANIEL SCOTT COMMON and NEMEX LANDSCAPING AND DESIGN, INC.	

Marc I. Simon, Esquire	Counsel for Appellant/Plaintiff Thomas Beauford
Andrew B. Adair, Esquire	Counsel for Appellee/Defendant Definitive Properties, LLC d/b/a/ Daniel Scott Commons
Bryan A. George, Esquire	Counsel for Appellee/Defendant Second Nature Landscaping & Construction, LLC

GREEN, J. DATE: November 19, 2018

OPINION

By two separate Orders dated August 16, 2018, the Motion for Summary Judgment of Defendant Definitive Properties, LLC d/b/a/ Daniel Scott Commons (hereinafter "Definitive") and the Motion for Summary Judgment of Defendant Second Nature Landscaping & Construction, LLC

(hereinafter "Second Nature") were each granted. Plaintiff Thomas Beauford filed the instant appeals.

PROCEDURAL AND FACTUAL HISTORY

This negligence action arises from an alleged slip and fall accident occurring at approximately 10:30 p.m. on March 10, 2015 outside of an apartment building owned by Definitive and located at 1426 West Congress Street, City of Chester, Delaware County, Pennsylvania (the "Property"). The Property is a two-story apartment building accessible from a concrete walkway that leads to four (4) concrete steps up to a concrete landing. At the time of Plaintiff Beauford's incident, Definitive contracted with Second Nature to provide snow removal services at the Property. The contract required Second Nature to automatically respond within twenty-four (24) hours when snowfall amounts reached a certain depth. The scope of the services provided by Second Nature included the removal of snow from, and salting of walkways, steps and landings appurtenant to the Property.[1]

On March 5, 2015, five days prior to the alleged incident, there was sufficient snowfall in the Chester area to automatically trigger a response by Second Nature. (Definitive, 6/14/18 MSJ, Exh. D.) After the snow stopped

[1] By Order dated December 5, 2017, the trial court consolidated separate liability actions brought against each named Defendant.

falling on March 5, 2015, Second Nature cleared snow from walkways and also spread thirty 50-pound bags (1,500 lbs. total) of rock salt to remove any residual snow and prevent the formation of ice. (Definitive 6/14/18 MSJ, Exhs. D and E.). Following the snowfall on March 5, 2015, there was no precipitation of any kind in the Chester area until a rain began to fall between 1:54 p.m. and 2:04 p.m. on the afternoon of March 10, 2015, the date of the alleged accident. (Definitive 6/14/18 MSJ, Exh. F.)

On March 10, 2015, the temperature remained above freezing except for a brief drop to 30.9° F at 6:51 a.m. (Definitive 6/14/18 MSJ, Exh. F, G, H). The temperature rose to a high of 55° F by 12:51 p.m. Id. Rain began to fall between 1:54 p.m. and 2:04 p.m., and continued before ending at approximately 12:48 a.m. on March 11, 2015. (Definitive 6/14/18 MSJ, Exh. F). Once the rain started to fall, the temperature remained in the mid-40s for the remainder of the day. Id. At the time of Plaintiff's alleged accident - 10:30 p.m. - the temperature was between 44° F and 46° F. (Definitive 6/14/18 MSJ, Exhs. F, G, H).

Plaintiff Beauford maintains he slipped and fell on an "ice puddle" which formed at some point after his 11:00 a.m. arrival at the Property on March 10, 2015 and his 10:30 p.m. departure. (Definitive 6/14/18 MSJ, Exh. B, p. 73-74.). At deposition, Plaintiff Beauford testified he arrived at the

Property at approximately 11:00 a.m. on the morning of March 10, 2015 to visit his girlfriend who lived in a ground floor apartment designated as 1426-A. (Definitive 6/14 /18 MSJ, Exh. B., p. 40). As he walked toward the Property, Plaintiff Beauford noticed the walkway had been cleared of snow and salt had been applied to the walkway and steps. (Id. at pp. 41-42 and 113-114.). Plaintiff Beauford walked up the steps and entered the apartment 1426-A without any difficulty and remained inside for the remainder of the day. (Id. at pp. 40, 116-17.)

Plaintiff Beauford acknowledged the temperature was warmer during the day, rising into the mid-40s, and it began to rain at around noon. (Definitive 6/14/18 MSJ, Exh. F. pp. 49, 74,120). At approximately 10:30 p.m., Beauford left apartment 1426-A. (Id. at pp. 34-35.) It was still raining, but the temperature had dropped "[e]nough to freeze the water." (Id. at p. 124.) Plaintiff Beauford testified he stepped out of the door and onto the landing, turned and said goodbye to his girlfriend, and slipped on an "ice puddle" at the top of the steps. (Id. at 60, 73-74.). Plaintiff Beauford testified the "ice puddle" was not present upon his arrival at the Property that morning. (Id. at 74.). Rather, Plaintiff Beauford claims that the "ice puddle" formed during the evening of March 10, 2015, when a combination of falling rain and

rainwater dripped from a gutter and froze on the landing and steps. (Definitive 6/14/18 MSJ, Exh. B p. 74, 123.)

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

The issues raised in Appellants' Concise Statements of Matters Complained of on Appeal[2] are as follows:

1. The trial court abused its discretion and/or otherwise committed an error of law in granting Defendants' Motion for Summary Judgment.

2. The trial court abused its discretion and/or otherwise committed an error of law in granting Defendants' Motion for Summary Judgment against Plaintiff where genuine issues of material fact exists in violation of Pa R.C.P. 1035.2(1).

3. The trial court abused its discretion and/or otherwise committed an error of law in ruling that the condition or defect was one that Defendants had no knowledge of the condition or defect.

4. The trial court abused its discretion and/or otherwise committed an error of law by granting Defendants' Motions for

[2] Plaintiff Beauford filed two separate yet identical Concise Statements of Matter Complained of on Appeal on September 21, 2018 and September 24, 2018.

Summary Judgment when Defendant failed to instruct and failed to warn Plaintiff of the dangerous conditions of the premises.

5. The trial court abused its discretion and/or otherwise committed an error of law by granting Defendants' Motions for Summary Judgment by deciding that Plaintiff assumed a risk of potential danger and thereby absolved the Defendants of any duty owed to Plaintiff, a business invitee.

6. The trial court abused its discretion and/or otherwise committed an error of law when it granted summary judgment in favor of the Defendants when the Motions were filed in violation of the so-called "Nanty-Glo" rule; as the Motions relied on the self-serving testimony of Defendants expert who relies upon data not even remotely close to the incident site. *Nanty-Glo v. American Surety Co.,* 309 Pa 236, 238, 163 A. 523 (1932). *Nanty-Glo* precludes dismissal as a matter of law where the moving party relies solely upon testimonial affidavits and depositions of his witnesses to resolve material issues of fact." *Dudley v USX Corp.,* 414 Pa. Super. 160, 169, 606 A.2d 916, 920 (1992). More specifically, oral testimony alone, either through testimonial affidavits or depositions, of the moving party

or the moving party's witnesses, even if contradicted, is generally insufficient to establish the absence of a genuine issues of material fact. *Id., see also Penn Center House, Inc. v. Hoffman,* 520 PA. 171, 553 A.2d. 900 (1989); Pa. R. Civ. P. 1035.2, note (emphasis added). Thus, there remains genuine issues of material fact as to liability for the incident which precludes summary judgment.

7. The trial court abused its discretion and/or otherwise committed an error of law in granting the Defendants' Motions for Summary Judgment by not allowing the jury to make a determination as to the credibility of Defendants' Expert's testimony, as "the fact finder is free to accept or reject the credibility of expert witnesses, and to believe all, part or none of the evidence." *Philadelphia Bd. of Pensions v. Clayton,* 987 A.2d 1255, 1262 (Pa. Commw. 2009).

8. The trial court abused its discretion and/or otherwise committed an error of law in granting the Defendants' Motions for Summary Judgment when a genuine issue of material fact exists as to whether the Defendants created the condition and/or

allowed the condition to remain on the premises thereby causing the incident.

9. The trial court abused its discretion and/or otherwise committed an error of law in granting the Defendants' Motion for Summary Judgment when a genuine issue of material fact exists as to whether the Defendants should have had notice of the condition that caused the incident.

10. The trial court abused its discretion and/or otherwise committed an error of law in granting the Defendants' Motion for Summary Judgment when a genuine issue of material fact exists as to whether the Defendants should have had persons specifically tasked with properly and adequately maintaining the premises to be free of the type of hazardous conditions that caused the incident.

11. The trial court abused its discretion and/or otherwise committed an error of law by granting Defendants' Motion for Summary Judgment by failing to apply the applicable law regarding rendering services to others.

12. The trial court abused its discretion and/or otherwise committed an error of law by granting Defendants' Motions for

Summary Judgment by failing to apply applicable law regarding exercising due care.

13. The trial court abused its discretion and/or otherwise committed an error of law by granting Defendants' Motion for Summary Judgment by failing to properly apply the legal standard in reviewing motions for summary judgment.

DISCUSSION

For a party to prevail in a negligence action, a plaintiff must prove the defendant owed a duty of care to the plaintiff, that duty was breached, the breach resulted in the plaintiff's injury, and the plaintiff suffered an actual loss or damages." Merlini ex rel. Merlini v. Gallitzin Water Authority, 980 A.2d 502, 506 (Pa. 2009). A land possessor is subject to liability for physical harm caused to an invitee only if the following conditions are satisfied:

> "[the land possessor] knows of or reasonably should have known of the condition and the condition involves an unreasonable risk of harm, [the possessor] should expect that the invitee will not realize it or will fail to protect [himself] against it, and the [possessor] fails to exercise reasonable care to protect the invitee against the danger."

Estate of Swift v. Northeastern Hosp. of Philadelphia, 690 A.2d 719, 722 (Pa. Super. 1997) (citation omitted). An invitee must present evidence proving

either the [possessor] of the land had a hand in creating the harmful condition, or had actual or constructive notice of such condition. Id. What constitutes constructive notice depends on the circumstances of the case, but one of the most important factors to consider is the time that elapsed between the origin of the condition and the accident. Neve v. Insalaco's, 771 A.2d 786, 791 (Pa.Super. 2001).

Moreover, the hills and ridges doctrine, "as defined and applied by the courts of Pennsylvania, is a refinement or clarification of the duty owed by a possessor of land and is applicable to a single type of dangerous condition, i.e., ice and snow." Wentz v. Pennswood Apartments, 518 A.2d 314, 316 (Pa.Super. 1986). *See* Williams v. Shultz, 240 A.2d 812, 813–14 (Pa. 1968) (indicating the doctrine of hills and ridges applies to preclude liability where "the accident occurred at a time when general slippery conditions prevailed in the community as a result of recent precipitation"). In order to recover for a fall on an ice or snow covered surface, a plaintiff must show:

> (1) snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians travelling thereon;
>
> (2) the property owner had notice, either actual or constructive, of the existence of such condition; [and]
>
> (3) it was the dangerous accumulation of snow and ice which caused the plaintiff to fall.

The only duty upon the property owner or tenant is to act within a reasonable time after notice to remove [the snow and ice] when it is in a dangerous condition. Biernacki v. Presque Isle Condominiums Unit Owners Assoc., 828 A.2d at 1114, 1177 (Pa.Super. 2003). "[T]the hills and ridges doctrine may be applied only in cases where the snow and ice complained of are the result of an entirely natural accumulation following a recent snowfall[.]" Harvey v. Rouse Chamberlin, Ltd., 901 A.2d 523, 526 (Pa.Super. 2006).

In concluding there were no genuine issues of material fact and Defendants were entitled to judgment as a matter of law in the instant case, the trial court viewed as relevant the following. Rain began to fall between 1:54 p.m. and 2:04 p.m. on March 10, 2015 and continued throughout the remainder of the day before ending at approximately 12:48 a.m. on March 11, 2015. (Definitive 6/14/18 MSJ, Exh. F). According to Plaintiff Beauford's own deposition testimony, he first noticed it was raining around noon and agreed it was raining when he left the apartment at 10:30 p.m. (Id. at pp. 34-35, 124). As such, the weather conditions before and at the time of the incident are uncontested.

The hills and ridges doctrine requires an owner or occupier of land, after notice of a dangerous condition of hills and ridges of natural

accumulations of snow or ice, to act within a reasonable amount of time to eliminate the dangerous condition. Under the hills and ridges doctrine, a landowner does not have a general affirmative legal duty to salt or sand a sidewalk prior to a winter storm. Collins v. Philadelphia Suburban Dev. Corp., 179 A.3d 69 (Pa. Super. 2018). An invitee who suffers physical harm on the premises must present evidence proving either the possessor of the land had a hand in creating the harmful condition, or he had actual or constructive notice of such condition. Id. At no time, did Plaintiff Beauford establish any facts to sustain a viable cause of action against Defendant Definitive. Plaintiff Beauford failed to present any facts indicating Definitive possessed actual or constructive notice of the purported condition. Additionally, there is no factual dispute that Plaintiff Beauford slipped and fell on the purported ice puddle during an active weather event; that is, at a time when "generally slippery conditions" prevailed in the community. Under prevailing Pennsylvania law, a landowner has no obligation to correct the conditions until a reasonable time after the winter storm has ended. Collins v. Philadelphia Suburban Dev. Corp., 179 A.3d 69, 75 (Pa. Super. 2018).

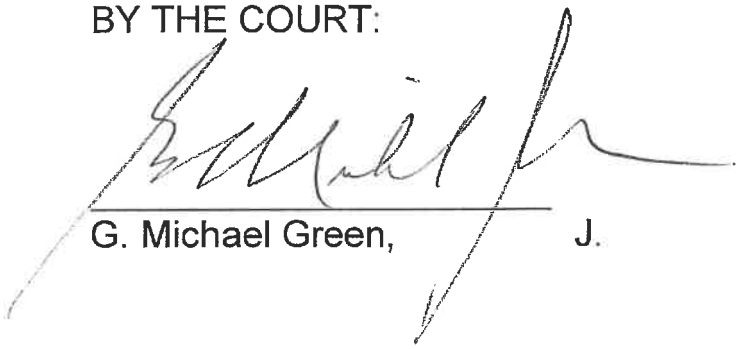
Likewise, no evidence was presented that once Second Nature had responded to clear the snow and apply the salt or de-icing materials on or

about March 5, 2015 they had any obligation to return to the Property, unless called, by Defendant Definitive.

CONCLUSION

For the foregoing reasons, the August 16, 2018 Orders should not be disturbed on appeal.

BY THE COURT:



G. Michael Green, J.