CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

WALID MORAD , SC13-66

Plaintiff,

-against- DECISION AND ORDER

FRANK BERTE, BOARD OF MANAGERS OF THE GABLES AT RYE, CHARLES ROSABELLA, and ROSEBELLA REALTY AND MANAGEMENT COMPANY,

Defendant.

Appearances:
Plaintiff *Pro Se*
Defendants *by Anthony Carbone, Esq., Berlingo & Carbone, Port Chester, NY*

These are cross motions for summary judgment in a small claims action. Claimant, a unit owner of a condominium complex located in Rye, New York brought this action against the condominium corporation and two of its officers or agents. In a recent, prior civil action, the condominium corporation was awarded a judgment against the claimant for several months common charges. *See, The Gables at Rye v. Morad*, Rye City Court CV275-12 [March 14, 2013]. This action seeks damages for injury to claimant's property, to wit, damages to his vehicles and damages to his unit due to flooding. Defendant The Gables at Rye (hereinafter "The Gables") seeks payment of common charges accrued since the judgment in the prior case.

At its April 22, 2013 conference on this case, the claimant asserted that he was seeking damages based upon damages caused to his automobile while it was parked on common areas of the condominium. The Court invited the submission of authority as to what the legal basis for this asserted liability was. The claimant made this motion for summary judgment.

Claimant alleges his minivan was struck by a snow plow and his Land Rover vandalized while parked on the condominium's common area parking spots and that Rosabella Management Company and the condominium board were notified and urged to act but failed to take action.

The condominium consists of several two-story buildings each containing several units. There are some internal garage spaces for each building and several outdoor parking spots.[1]

The claimant alleges that on February 9, 2013, his minivan was hit while parked in an area designated for snow time parking. A police report was filed three days later and stated that damage was done in a hit and run by an unknown party. There was no mention of the slashed tires. Claimant, relying on a hearsay statement by "the auto body shop," claims the damages were consistent with damage by a snow plow. Claimant also asserts that the tires of his Range Rover were slashed but does not identify who slashed the tires or when they were slashed.

On February 12, 2013, after the damage to the minivan already occurred, and some undetermined time after the tires were slashed, claimant filed a report with the Rye Police Department reporting damage to his minivan and, nine days later sent an email to Charles Rosabella advising him of both incidents with the claimant's vehicles.

The claimant argues the defendants should be liable for the damages since the location of the parking was mandated by condominium rules, that damages by the snow plow were the defendants' responsibility, that light fixtures were inadequate for safety, especially considering a bad relationship claimant had with a neighbor, and the defendants had a duty to protect his property from criminal acts.

Here, claimant's motion is supported only by a notice of motion. There is no affidavit or affirmation. There is no support in any proper evidentiary form. A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (*see*

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[1] The Court is aware of the layout of the condominium having been on the Rye City Planning Commission when the condominium's site plan was approved.

Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *& Zuckerman v. City of New York,* 49 NY2d 557, 562, 427 NYS2d 595 [1980]. Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. In *Seidman v. Industrial Recycling Properties, Inc.,* 52 AD3d 678, 861 NYS2d 692 [2nd Dept 2008], the plaintiff's unsworn affidavit was not in admissible form and could not support plaintiff's motion for summary judgment. Here too, the claimant's motion is supported by only an unsworn "motion" not in admissible form and could not properly support his motion. On this basis alone, the claimant's motion must be denied.

Even if there was a proper evidentiary proffer, there may exist triable issues of material fact that preclude the grant of summary judgment. The function of the Court on a motion for summary judgment is issue finding, not issue determination. *E.g., Sillman v. Twentieth Century Fox Film Corp*., 3 NY2d 395, 404 [1957].

Even if there were no triable issues of fact, the party moving for summary judgment must be entitled to judgment as a matter of law to prevail. Here, several issues of law stand in the way of judgment for the claimant as a matter of law.

With respect to alleged damage caused by a snow plow, there is no allegation that any snow plow was owned or operated by any defendant. Claimant raises no basis for any contractual liability of any defendant. There is no asserted special relationship between a condominium and a unit owner. There is no lessor-lessee relationship. This was simply an automobile accident. The authorities claimant quotes applies only to injuries brought about by slip and falls. "[The landlord is liable when the snow plow] negligently removes snow or ice in order to be liable for a plaintiff *slipping and falling* on a public sidewalk in front of the premises." *Blum v. City of New York*, 267 AD2d 341, 700 NYS2d 65 [2nd Dept 1999]. The case law on snow clearing and lessor liability only applies to slip and falls, not to collisions. *See, Castro v. Maple Run Condo. Ass'n*, 41 AD3d 412, 837 NYS2d 729 [2nd Dept 2007]; *Mennes v. Syfeld Mgmt., Inc.*, 75 AD2d 936, 428 NYS2d 87 [3rd Dept 1980]; *& Murphy v. M.B. Real Estate Dev. Corp.*, 280 AD2d 457, 720 NYS2d 175 [2nd Dept 2001]. There is good reason for this. A landowner is responsible for the condition of his land. The accumulation of snow or ice becomes a condition of the land itself. If the owner knows of an accumulation of snow or ice, he owes a duty to properly remove the snow or ice so as to prevent

injury to passersby. On the other hand, the operations of motor vehicles is not at all related to, or a condition of the land. The owner cannot know or vouch for the actions of every motor vehicle that traverses his property nor is he an insurer for them. The person in the best position to satisfy the damages is the operator or owner of the vehicle. That is one of the reasons that New York mandates liability insurance for all registered motor vehicles. The claimant failed to allege, or even join as a party, any person or company that actually did the snow plowing. There was no admissible evidence offered that claimant's vehicle was actually struck by a snow plow, who operated the snow plow, or their relationship, if any to any defendant.

Claimant is left with either a claim for negligence or an intentional act. Applying the standard law of negligence, The Gables must either do or fail to do something that was a proximate cause of the damages, or be vicariously liable for another tortfeasor's action to be liable for any injury to claimant.

Claimant asserts that the injury to his minivan were caused by an unknown, unidentified hit and run driver operating a snow plow. No act or omission to act by The Gables is claimed to be a proximate cause of the accident. To be the proximate cause, the Gables would have had to commit a wrongful act, the foreseeable result of which, resulted in the damage to the claimant's car. *See* NY Jur. 2d Negligence A § 70. Any subsequent flight by the tortfeasor from the accident has no bearing on negligence. However, claimant has not alleged any such wrongful act by any defendant. He merely states that there was an area designated for snow parking in order to allow the plows to clear the parking lot. That does not suggest a negligent act on the part of The Gables. Claimant does not suggest that the snow parking area was inadequate or defective in some way that would lead to a collision with the snow plow.

However, The Gables might be vicariously liable for the actions of the snow plow operator. For there to be vicarious liability, claimant would have to show that the driver of the snow plow was working as The Gable's agent. Claimant must show that The Gables had control over the actions of the snow plow operator. Control is extremely important to vicarious liability as the person in a position to exercise some general authority or control over the wrongdoer must do so or bear the consequences. *L & L Plumbing & Heating v. DePalo*, 253 AD2d 517, 518, 677 NYS2d 153, 155 [2nd Dept 1998]. If the snow plow was under the control of The Gables, then it might be liable for any damage done to the claimant's car, while in

the process of plowing the parking lot. Claimant makes no such showing. He neither identifies the snow plow operator nor provides any evidence of his/her/its relationship to any defendant.

Nevertheless, The Gables might be liable for the tire slashing. A landlord must take steps to minimize foreseeable danger from criminal acts on its property. *Jacqueline S. v. City of New York*, 81 NY2d 288, 294, 598 NYS2d 160 [1993]. However this is not a general safeguard against crime in general. The landowner is not an insurer against all acts occurring on its property. There can be liability for criminal acts only when ambient crime has seriously infiltrated the premises or when the landlord is on notice of a serious risk of such infiltration. *Evans v. 141 Condo. Corp.*, 258 AD2d 293, 295, 685 NYS2d 191, 193 [1st Dept 1999]. Here, the notice to the defendants is alleged to have occurred after the incidents took place. If The Gables were put on proper notice that likely criminal conduct might occur in the future, or that crime was pervasive in the area, and the defendants did not take reasonable precautions to avoid its impact, then the claimant might be able to recover for vandalism if he can show that the failure to take the safety precautions is a substantial causative factor of the vandalism. The facts as presented by the claimant are insufficient to show that The Gables were put on any prior notice. The claimant gives no specific time line as to when the events took place, no indication as to whether he was specifically targeted or that they were general acts of vandalism. He provides no crime statistics as to whether vandalism could be expected and was a problem in the area. There are no police reports of any other similar incidents in the area offered. Even if there were such other incidents, the landowners has a duty to take minimal precautions to protect tenants. *Burgos v. Aqueduct Realty Corp.*, 92 NY2d 544 , 684 NYS2d 139 [1998]. There are triable issues of fact as to whether or not there was crime in the area; whether the defendants had notice of such crime, what reasonable steps The Gables might have taken that would have prevented any further criminal acts that injured the claimant and what steps were actually taken in light of the threat. There being such triable issues of fact, the claimant's motion for summary judgment would be denied even if there had been a proper evidentiary submission by the claimant.

With respect to the defendants' motion for summary judgment defendant's managing agent's affidavit together with the supporting documentary evidence makes out a case for the recovery of Common Charges for the months of March and April 2013 in the amount of $2,132.26. Plaintiff admits he stopped paying common charges in August 2012. Thus, there is no triable issue of fact concerning the defendant's counterclaim. Defendant's counterclaim is the same as

the claim was made in the prior action except for covering the period after the prior judgment.

Plaintiff's attempt to use the vehicle of a small claims action to redress his grievances against the condominium is woefully misplaced. In general, the City Courts have jurisdiction over actions for money judgments and possess no power to compel accountings or award equitable remedies, such as enforcing corporate duties. His reliance on a hit and run accident being a crime is also off the mark. Violation of VTL § 600 is not a crime (unless it is the result of a failure to exhibit a license and insurance information). It is a violation. Furthermore, to violate VTL § 600, the person operating a motor vehicle must have knowledge or cause to believe injury was caused. Absent identification of the operator, it is impossible to determine what if any knowledge that unidentified person had of any injury or accident and thus, whether VTL § 600 was violated. If the claim is based on vandalism caused by a neighbor, plaintiff's remedies lie against the neighbor, not the condominium corporation.

The Court notes that there is no claim by claimant of any liability on the part of Charles J. Rosabella, individually nor Frank Berte in the claimant's papers. Absent a motion to dismiss or for summary judgment, they shall remain in the case.

Accordingly, it is,

ORDERED and ADJUDGED that the plaintiff's motion for Summary Judgment is hereby denied, and it is further

ORDERED and ADJUDGED that the defendant The Gables' motion for Summary Judgment is hereby granted, and it is further

ORDERED and ADJUDGED that the defendant The Gables at Rye do recover from the claimant the sum of Two Thousand One Hundred and Thirty Two dollars and Twenty Six cents plus interest thereon from May 1, 2013 and its costs of this action and that defendant The Gables at Rye have execution therefor, and it is further

ORDERED that the parties shall appear for a pre-trial conference on July 15, 2013 at 9:00 a.m.

June 19, 2013

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JOSEPH L. LATWIN
Rye City Court Judge

The Court gratefully acknowledges the assistance of its Intern Paul McEvoy in the preparation of this decision.

ENTERED

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Mary Jo Garrity

Papers:

Affidavit of Charles Rosabella sworn to June 3, 2012;

Affirmation of Anthony A. Carbone dated, June 3, 2013 and the exhibits thereto; &

"Notice of Motion" of Walid Morad dated May 29, 2013 and the exhibits thereto. (Although this document was not properly sworn to and should not have been technically considered, the Court did consider it.)

"Notice of Motion" of Walid Morad dated June 17, 2013 and the exhibits thereto. (Although this document was not properly sworn to and should not have been technically considered, the Court did consider it.)

Appeals

--An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the Rye City Court Clerk's office. A notice shall designate the party

taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken. CPLR § 5515.

--Pursuant to UCCA § 1701 "Appeals in civil causes shall be taken to" the appellate term of the supreme court, 9th Judicial District.

-- An appeal as of right from a judgment entered in a small claim or a commercial claim must be taken within thirty days of the following, whichever first occurs:

1. service by the court of a copy of the judgment appealed from upon the appellant.

2. service by a party of a copy of the judgment appealed from upon the appellant.

3. service by the appellant of a copy of the judgment appealed from upon a party.

Where service as provided in paragraphs one through three of this subdivision is by mail, five days shall be added to the thirty day period prescribed in this section. UCCA § 1703(b).

Exhibits

Exhibits will be held for 30 days by the Clerk. After that time, they may be destroyed, if not picked up or arrangements for their return are not made.