

**Russo v Great S. Bay Dev. Corp.**

2013 NY Slip Op 31542(U)

July 3, 2013

Sup Ct, Suffolk County

Docket Number: 11-24032

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

Mot. Seq. # 003 - MD

-----X  
LAUREN RUSSO,

Plaintiff,

GRUENBERG KELLY DELLA  
Attorney for Plaintiff  
700 Koehler Avenue  
Ronkonkoma, New York 11779

- against -

MCCABE, COLLINS, MCGEOUGH, &  
FOWLER, LLP  
Attorney for Defendant Great South Bay  
346 Westbury Avenue, P.O. Box 9000  
Carle Place, New York 11514

GREAT SOUTH BAY DEVELOPMENT CORP.,  
MITSUI JAPANESE RESTAURANT and TOWN  
OF ISLIP,

Defendants.

TROMELLO MCDONNELL & KEHOE  
Attorney for Defendant Mitsui Japanese Restaurant  
P.O. Box 9038  
Melville, New York 11747

JAKUBOWSKI, ROBERTSON, MAFFEI  
GOLDSMITH & TARTAGLIA, LLP  
Attorney for Defendant Town of Islip  
969 Jericho Turnpike  
St. James, New York 11780

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 10-12, 13-14; Replying Affidavits and supporting papers 15-17; Other       ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#003) by the defendant Great South Bay Development Corp. (Great South Bay) for summary judgment dismissing the complaint and all cross claims asserted against it is denied.

This is an action to recover damages from the defendants for injuries allegedly sustained by the plaintiff as a result of a slip and fall accident that occurred on February 4, 2011, on the sidewalk at or

about Fourth Avenue and Main Street, Bay Shore, in the Town of Islip, due to ice and snow. It is alleged that the plaintiff's injuries were suffered as a result of the negligence of the named defendants in creating and/or failing to ameliorate a dangerous condition. By order of the undersigned, dated April 23, 2013, the motion for summary judgment of the defendant Mitsui Japanese Restaurant (Mitsui) was denied and the motion for summary judgment of the Town of Islip dismissing the complaint and all cross claims as against it was granted.

Defendant Great South Bay now moves for summary judgment dismissing the complaint and all cross-claims against it. In support of the motion Great South Bay submits, *inter alia*, its attorney's affirmation, the transcripts of the depositions of the plaintiff, Peter Kletchka, an employee of former defendant Town of Islip, Steven Benkin on behalf of defendant Great South Bay, John Sullivan, on behalf of defendant Great South Bay, Eric Yeh, as a witness for defendant Mitsui, and a copy of the lease between defendant Mitsui and defendant Great South Bay, and the transcript of the deposition of Juan E. Lagara, a nonparty witness. It also incorporated by reference the pleadings submitted in a prior motion herein.

In opposition, the plaintiff submits her attorney's affirmation. Defendant Mitsui, opposes the motion to the extent it seeks indemnification against it, and submits its attorney's affirmation, and the deposition of Juan E. Lagara, a nonparty witness.

Plaintiff testified that the accident occurred on February 4, 2011, in Bay Shore. She went out to dinner with her friend Steve Clarke. They drove in Steve's car and parked on Fourth Avenue north of Main Street at about 8:30 p.m. When they left the car, it was a little bit slippery. They walked to a restaurant called the Nutty Irishman and had dinner. They left at about 9:30 p.m. and walked back toward the car. They crossed over the street at Fourth Avenue. When she walked, she had to climb over a mound of snow to get to the sidewalk. She could not get to the sidewalk without going over the snow. The snow was right along the sidewalk, a few feet high. Steve did not climb over, he was going to the driver's side. He was not with her. There were ice and patches of snow. She lifted her leg and tried to climb over the snow pile. She slipped on ice, fell forward on the sidewalk and hit the ground with her jaw. The ice covered the entire sidewalk. When she fell forward, her hands were in her pockets. She did not remember if it appeared to have been plowed up onto the curb by a snow plow. She just remembers it was icy and patchy. She did not complain to anyone about the condition of the sidewalk prior to the accident. After she fell, Steve drove her to Good Samaritan Hospital.

Peter Kletchka on behalf of former defendant Town of Islip testified that he is the public works project supervisor. The department of Public Works is responsible for snow removal on roadways that are dedicated to and owned by the defendant Town. Main Street in Bay Shore is owned by the State of New York and the State is responsible for removing ice and snow from that roadway. Fourth Avenue in Bay Shore is a Town road and the Town is responsible for the removal of ice and snow. The Town is not responsible for the removal of snow and ice from the sidewalk which fronts Mitsui Restaurant on Fourth Avenue. The Town Code requires adjacent property owners to maintain sidewalks adjacent to their property. When snow is plowed, it is generally pushed to the right in the direction of travel. Any snow piled up in order to clear the travel lane is the responsibility of the adjacent property owner, the Town does not clean it up.

Eric Yeh testified as a witness for defendant Mitsui Restaurant. He is employed as the manager of the restaurant and held that position in February of 2011. He was "somewhat" familiar with the lease agreement between Mitsui and Great South Bay, a copy of which he identified. He testified that under the lease Mitsui was responsible for maintaining the sidewalk outside of the restaurant, including snow and ice. It was his responsibility to make sure that snow and ice were removed from the sidewalk after a snowfall. He did not hire anyone to remove the snow and pile it onto the curb. Usually, by the time he got to the restaurant, the whole block was already done. He did not know who did the clearing. He saw people shoveling and assumed but did not know that they were from the Town. They put the snow on the curb, close to the street. He did, at times, clear a path on Main Street from the street to the front door of the restaurant. If snow continued during the day, he would have the snow removed and spread salt throughout the day. He inspected the sidewalk upon arrival at work, at 11:00 a.m., and would monitor the snow throughout the day by looking out the windows. He did not know who cleared the snow and ice after it fell, only that it was done. He had only seen people clearing the parking lot in back of the building. Whoever removed the snow also put down salt.

Steven Benkin on behalf of defendant Great South Bay, that he is the president and sole shareholder of Great South Bay. Great South Bay owned the property on Fourth Avenue in Bay Shore, including the portion leased to the defendant Mitsui. There are apartments on the second floor of the property. There is a lobby entrance to the apartments separated by about twenty or thirty feet from Mitsui. In February of 2011, there was no super hired to take care of the apartments, rather a cleaning service was contracted to clean the building, maintain the hallways and sweep around the front and common areas. He had a man named John Sullivan working at the property in February, 2007, collecting rent and making bank deposits. Under the lease agreement, it was the responsibility of Mitsui to remove snow and ice from the sidewalk surrounding the restaurant. A gentleman by the name of Juan removed snow from the building's parking lot in February of 2011. He could not remember Juan's last name. Juan also removed snow and ice from the sidewalk in front of the lobby entrance. He would call Juan as he needed him. He removed the snow from the sidewalk with a shovel. He was not sure if Juan put down ice melt or sand every time, but he assumed so. He did not recall seeing Juan removing snow and ice from the sidewalk surrounding the Mitsui restaurant. He did not see anyone from Mitsui removing snow and ice from the sidewalk around the restaurant. He could not remember if Juan would give him a bill or invoice. He thought that at the end of the season Juan would tell him how much it was. Sometimes Juan would have someone help him with the snow removal. He believed Juan did snow removal as a "side" business. When asked if Juan might have cleared the whole sidewalk he replied that Juan may have gone "a little further in one direction or another." He could not recall if he ever talked to Juan about how far he would go removing snow on Fourth Avenue.

John Sullivan testified as a witness on behalf of defendant Great South Bay. He is an employee of W. I. Equipment Corp., with offices at 2 Fourth Avenue, Bay Shore. Steve Benkin is the president of the corporation and the owner of the property. He does other work for Mr. Benkin, such as collecting rent checks from tenants on the property. He very rarely did any snow shoveling, salting and sanding. He might put rock sand outside the door, but that was it. When it snowed, Juan shoveled the area in front of the apartments. He never saw Juan shovel, because Juan comes at night after he leaves work.

Juan Lagara, testified as a nonparty witness. He is employed by Captain Bill's Marina. He also did work in February of 2011, for Steve Benkin to help him out by cleaning up snow when it snowed. He helped with his building on Main Street and Fourth Avenue. Mr. Benkin doesn't "hire" him, he helps out because Steve Benkin is a friend of his boss. He pays him with a check. He did not recall what name was on the check. He did not need to be called, he just came when it snowed. He brought his own shovel. Sometimes someone else from the Great South Bay building would do the shoveling. Mitsui was supposed to shovel the sidewalk in front of the restaurant, but sometimes the other person or he would shovel the entire sidewalk, including the portions in front of Mitsui. He never told Steve Benkin that he did this.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Fundamental to recovery in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49 [1986]). To establish a prima facie case of liability in a slip and fall accident involving snow and ice, a plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*Edwards v Mantis, LLC*, 106 AD3d 689, 964 NYS2d 235 [2d Dept 2013]; *Zabbia v Westwood, LLC*, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]; *Tsivitis v Sivan Associates, LLC*, 292 AD2d 594, 741 NYS2d 545 [2d Dept 2002]).

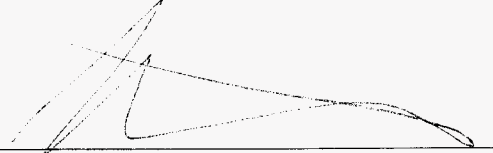
The defendant Great South Bay has not established its entitlement to summary judgment. Juan Legara testified that he sometimes, as a favor to Mr. Benkin, shoveled the sidewalks in front of the subject building for which work he was paid by Mr. Benkin. There was also an employee of the building who also did snow shoveling. He testified that Mitsui was supposed to shovel the sidewalk in front of the restaurant, but sometimes the employee or he would shovel the entire sidewalk, including the portions in front of Mitsui. The testimony of Eric Yeh, as a witness for defendant Mitsui, establishes that even though it was Mitsui's obligation under their lease to do so, someone other than Mitsui shoveled the sidewalk prior to plaintiff's accident. In particular, there is evidence that this other individual was actually paid by the movant for his snow removal efforts. Thus, there is a question of fact as to whether

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the defendant Great South was responsible for the snow removal which took place prior to plaintiff's accident and whether such snow removal created the snow and ice condition which caused the plaintiff's accident. This issue of fact precludes the granting of summary judgment with regard to the defendant Great South Bay.

Accordingly, the motion by the defendant Great South Bay for summary judgment dismissing the complaint and all cross claims asserted against it is denied.

Dated: July 3, 2013



**HON. JOSEPH C. PASTORESSA, J.S.C.**

FINAL DISPOSITION     NON-FINAL DISPOSITION