IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DEBRA RESTIFO,	)	CASE NO. 12-CV-777214
	)	
Plaintiff	)	JUDGE PAMELA A. BARKER
	)	
v.	)	
	)	**OPINION AND JOURNAL ENTRY ON**
SNIDER COMPANY,	)	**DEFENDANT'S MOTION FOR**
	)	**SUMMARY JUDGMENT**
	)	
Defendant	)	
	)	
	)	

This matter is before the Court on the Motion For Summary Judgment Of Defendant The Snider Company ("Defendant's Motion") filed on November 21, 2012, and Plaintiff Debra Restifo's Brief In Opposition To Defendant's Motion For Summary Judgment ("Plaintiff's Brief") filed on December 24, 2012.

Civ. R. 56(C) provides in relevant part as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: '*** (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence

that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.'" *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

"Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials which directly negate its opponent's claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge 'that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

In order to defeat a motion for summary judgment on a negligence claim, a plaintiff must establish that a genuine issue of material fact remains as to whether: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; and (3) the breach of duty proximately caused the plaintiff's injury. *Texler v. D.O. Summers Cleaners & Shirt Laundry*

Co. (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 271. Whether a duty exists is a question of law for the court to determine. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265. The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. If no duty exists, the legal analysis ends and no further inquiry is necessary. *Gedeon v. East Ohio Gas. Co.* (1934), 128 Ohio St. 335, 338, 190 N.E. 924.

The deposition testimony of Plaintiff, offered by Defendant in support of its Motion and by Plaintiff in opposition to Defendant's Motion, establishes the following facts. On March 4, 2010, at approximately 3:30 p.m., Plaintiff was walking on the sidewalk on Defendant's property attempting to enter a restaurant called The Courtyard Café. (Deposition of Plaintiff, p. 35, lines 23-25; p. 36, lines 1-19; p. 37, lines 20-25; p. 38, line 1.) The complex where The Courtyard Café is located is shaped like an "L" with The Courtyard Café located in the corner of the "L". (Plaintiff's Deposition, p. 36, lines 7-22.) Plaintiff and her sister walked down the sidewalk, her sister walked on in to the door, but Plaintiff decided to jog over to the right of the entrance to where there was a garbage can to throw away her empty water bottle. (Plaintiff's Deposition, p. 38, lines 14-21; p. 39, lines 4-25; p. 40, lines 1-2.) The garbage can was in the corner of the L-shaped structure next to a large pole. (Plaintiff's Deposition, p. 39, lines 4-9.) When Plaintiff walked that way towards the garbage can, she just completely fell down or her feet came right out from underneath her, and she hit her head and back. (Plaintiff's Deposition, p. 38, lines 21-25; p. 39, line 1.)

According to Plaintiff, ice on the sidewalk caused her to fall and the ice on the sidewalk was caused by water leaking from the roof onto the sidewalk. (Plaintiff's Deposition, p. 43,

lines 15-21.) Plaintiff knew that the ice came from water dripping from the roof, because as she was on the ground after her fall, water dripped down onto her face and hair. (Plaintiff's Deposition, p. 43, lines 22-24.) To Plaintiff's knowledge, there was no ice anywhere else on the sidewalk as she was walking into the restaurant and she did not encounter any ice in the parking lot. (Plaintiff's Deposition, p. 43, line 25; p. 44, lines 1-3 and 17-18.) According to Plaintiff, it was very cold or cold, but it was a sunny day so the snow had melted on the sidewalks and the street. (Plaintiff's Deposition, p. 38, lines 2-11; p. 44, lines 19-22.)

Plaintiff attached to her Brief color copies of three photographs, marked as Plaintiff's Exhibits A, B, and C and asserted in her Brief that these are pictures taken of the building where the incident took place depicting a roof with no gutters installed along with a small patch of ice on the ground immediately beneath that area. (Plaintiff's Brief, at page 2.) However, these photographs have not been identified or authenticated as required by Evid. R. 901(A) and therefore, are not admissible evidence. *Buchanan v. Spitzer Motor City Inc.* (Feb. 7, 1991), 8th Dist. Nos. 57893 and 58058, 1991 Ohio App. LEXIS 528, citing *Heldman v. Uniroyal, Inc.* (1977), 53 Ohio App.2d 21, 31, 371 N.E.2d 557. As explained by the Court in *Heldman*:

> "The rule is well settled that photographs are not objectionable as long as they are properly identified, are relevant and competent and are accurate representations of the scene which they purport to portray. A picture cannot be admitted without a proper foundation. There must be testimony that the photograph is a fair and accurate representation of that which it represents. *See State* v. *Hill* (1967), 12 Ohio St. 2d 88, 90; *Cincinnati, Hamilton & Dayton Ry. Co.* v. *De Onzo* (1912), 87 Ohio St. 109; *Ohio Power Co.* v. *Diller* (1969), 18 Ohio App. 2d 167; *DeTunno* v.. *Shull* (1956), 75 Ohio Law Abs. 602.

Plaintiff did not submit sworn testimony by any witness with knowledge, whether by deposition or affidavit, to establish that these photographs truly and accurately depict or represent the roof of the building or the small patch of ice or what Plaintiff asserts is what they

purport to depict. *Id. See* Evid. R. 901(B)(1) Indeed, there is no evidence offered to establish when these photographs were taken and by whom. Accordingly, these photographs cannot be considered as evidence in ruling upon Defendant's Motion.

There is no dispute between the parties that Plaintiff was a business invitee of Defendant. Therefore, Defendant owed Plaintiff a duty to exercise reasonable care in making the premises safe for her use. *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51, 52-53, 372 N.E.2d 335; *Busse v. Grand Finale, Inc.* (1981), 3 Ohio App.3d 65, 443 N.E.2d 1011; *Hoenigman, et al. v. McDonald's Corporation, et al.* (January 11, 1990), Cuyahoga App. No. 56010, at *1.

However, Defendant's duty does not extend to protection against hazards from natural accumulations of ice and snow which are similar to surrounding conditions. *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, 227 N.E.2d 603; *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraphs two and three of the syllabus, 233 N.E.2d 589; *Hoenigman v. McDonald's*, *supra* at *2.

In Ohio, as a general rule, no duty is owed, even to an invitee, to remove natural accumulations of ice and snow. *Porter v. Miller* (1983), 13 Ohio App.3d 93, 468 N.E.2d 134; *Kingkey v. Jewish Hospital Association* (1968), 16 Ohio App.2d 93, 242 N.E.2d 352; *Hoenigman v. McDonald's* , *supra* at *2; *Bailey v. St. Vincent DePaul Church* (May 8, 1997), Cuyahoga App. No. 71629, 1997 WL 232685 at *2, citing *Simmers v. Bentley Constr. Co.* (1991), 64 Ohio St.3d 642, syllabus at three.

Exceptions to the general rule stated above do exist. As explained by the Eighth District Court of Appeals in *Bailey v. St. Vincent DePaul Church*, *supra* at *2:

> If an occupier is shown to have had notice, actual or implied, that a natural accumulation of snow and ice on his or her premises has created a condition

> substantially more dangerous than a business invitee should have anticipated by reason of the knowledge of the conditions prevailing generally in the area, negligence may be proved. *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38. A second exception to the no-duty rule exists where the owner is actively negligent in permitting or creating an unnatural accumulation of ice and snow. *Lopatkovich v. City of Tiffin* (1986), 28 Ohio St.3d 204.

In order to prevail on her claim, Plaintiff must produce evidence that either the natural accumulation of snow and ice was substantially more dangerous than she could have appreciated and that Defendant knew of this or should have known this (the owner had superior knowledge of the existing danger or peril), or that defendant was actively negligent in permitting or creating an unnatural accumulation of ice and snow. *Bailey v. St. Vincent DePaul Church*, *supra* at *2; *Mubarak v. Giant Eagle, Inc.* (Nov. 10, 2004), Cuyahoga App. No. 84179, 2004 WL 2578894, at *3-4, citing *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209, 210, 503 N.E. 2d 159, and *Lopatkovich v. City of Tiffin* (1986), 28 Ohio St.3d 204, 503 N.E.2d 154.

Plaintiff only raised the first "exception" to the no-duty rule, arguing at page 6 of her Brief that "Defendant should have known that by not having gutters installed on its roof where the "L" meets, it was creating a condition substantially more dangerous than the Plaintiff should have anticipated." However, this Court's review of the Plaintiff's deposition testimony belies the assertion at page 5-6 of Plaintiff's Brief that Plaintiff testified that "she felt and observed water to be dripping from the corner of the **gutterless** roof." (Emphasis added.) Plaintiff's deposition, which is the only admissible evidence before the Court, does not include any testimony from Plaintiff that the roof where the "L" meets did not have gutters installed. Indeed, in her deposition, Plaintiff's only use of the word "roof" was on page 43, line 20, where she stated the roof was leaking water on the sidewalk; and her only use of the word "roofline" was on page 41, line 20, where she used that term to describe the area of her fall. During her

deposition, Plaintiff never used the word gutter or the term "gutterless roof". Thus, there is no evidence before the Court that there were no gutters installed on the roof above the area where the Plaintiff fell on an icy patch.

Thus, contrary to Plaintiff's argument at page 5 of her Brief, the facts do not fall squarely in line with those of *Tyrell v. Invest. Assoc., Inc.*, 16 Ohio App.3d 47, 474 N.E.2d 621 (8th Dist. 1984). In *Tyrell*, immediately after the plaintiff's fall, an individual employed as a pharmacist by the drug-store tenant of the building owner advised the plaintiff that the store occasionally had problems with melting snow and rain dripping from the building's canopy onto the area of the plaintiff's fall. The plaintiff returned to the drug store nine days later, noticed that the canopy's underside was damaged and discolored directly above the sidewalk area where he had seen the icy patch after he had fallen and took photographs of the canopy's condition that were later admitted into evidence at trial.

At trial, the pharmacist testified that the evening of the plaintiff's fall he saw the icy patch under the canopy edge and put rock salt on it and that he had been aware for several years that water occasionally dripped from the edge of the canopy and formed ice in front of his store. Also at trial, the plaintiff called a roofer as an expert witness about defects in the building's canopy, who testified that the canopy's design and construction accumulated moisture and failed to divert it properly, so it dripped on the sidewalk and that the canopy condition observed nine days after the plaintiff's fall had existed before the fall and demonstrated the described defect.

In reversing the trial court's decision directing a verdict in favor of the defendant drug store tenant and affirming the jury's verdict against the building owner, the Eighth District

Court of Appeals noted that the plaintiff's evidence described ice formed by non-natural accumulations in an area which differed markedly from surrounding conditions and because the drug store's employees did not create the hazard, it had no duty to plaintiff unless its employees knew or should have known about its existence. The Court found that since the evidence demonstrated that the employees knew about the hazard from the dripping canopy which periodically created the icy patch or hazardous condition, the drug store was in a better position to foresee and prevent the resulting hazard than its business invitees and therefore, the jury could reasonably find that the drug store had failed to exercise reasonable care for its customers' safety. The Court also noted that the building owner was generally responsible for the condition of the building canopy which extended over the sidewalk.

In the instant matter, Plaintiff has not presented any evidence to demonstrate that there was a gutterless roof above the area where the Plaintiff fell, much less that it was defective and created a hazardous condition, i.e., the icy patch upon which Plaintiff testified she fell, and/or that Defendant knew about it or should have known about. Thus, this case is clearly distinguishable from *Tyrell*.

Plaintiff also argues at page 6 of her Brief that the facts in *Hoenigman v. McDonald's Corp.*, *supra*, relied upon by Defendant in support of its Motion for Summary Judgment, differ greatly because Plaintiff herein has demonstrated that the roof above where she fell on the icy patch did not have gutters and in *Hoenigman*, the municipal inspector testified that the restaurant had gutters and complied with the local building code. However, contrary to Plaintiff's argument, and as was true of the plaintiffs in *Hoenigman*, Plaintiff herein has not produced evidence to demonstrate that the roof over the icy patch where she fell did not have

gutters and/or that the roof was defective and/or that a gutterless or defective roof caused the icy patch or hazard.

Accordingly, the Court finds that there are no genuine issues of material fact and that the material facts presented demonstrate that as a matter of law, Defendant is entitled to judgment in its favor. Therefore, Defendant's Motion is **GRANTED**.

_____

Judge Pamela A. Barker