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SHORT FORM ORDER

INDEX No. 09-41964
CAL. No. 11-00811OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6-2-11
ADJ. DATE 9-12-11
Mot. Seq. # 002 - MG
CDISP

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ANDREW CUILLO,

Plaintiff,

- against -

FAIRFIELD PROPERTY SERVICES, L.P. and STRATHMORE TERRACE HOMEOWNERS ASSOCIATION, INC.,

Defendants.

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Upon the following papers numbered 1 to 10 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 5 - 7 ; Replying Affidavits and supporting papers 8 - 10 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment in their favor dismissing the complaint and all cross claims asserted against them is granted.

Plaintiff commenced this action to recover damages for personal injuries sustained when he slipped and fell on ice on a sidewalk in the Strathmore Terrace complex where he resides. Strathmore Terrace is a community for residents 55 and over, with a clubhouse and recreation area which includes a pool, tennis court, bocci ball court, miniature golf course and other amenities. The incident occurred on Sunday, January 28, 2007 at approximately 9:00 a.m. while plaintiff was walking his dog on a sidewalk in the recreation area. Plaintiff testified that it was a sunny day, with the temperature between 33 and 34 degrees. He described the conditions as follows: "[t]he streets were wet, but it was a beautiful morning, the sun was shining, that's why it caught me off guard, you know." In response to questioning, he acknowledged that no snow, rain or sleet was falling. He did not see any snow or ice on any pathway on the property as he walked his dog and the walkways were not slippery. He did notice that the roadways were wet, but not

slippery. The grass and driveways were not wet, except his driveway. There was no snow or ice on the parked vehicles. He did not know when precipitation had last fallen. He had never noticed, in the ten years he lived at the complex, "black ice" on the walkway where he fell and had never complained about the conditions of the pathway to anyone prior to his accident. He never slipped at that location or seen that condition before. He only noticed the "black ice" after he fell and did not know the source of the water that formed the "black ice." To him, "it just looked like sidewalk" and he could not see ice on the pathway and it did not look wet.

The property is managed by defendant Fairfield Property Services, LP ("Fairfield") under the direction and control of defendant Strathmore Terrace Homeowners Association, Inc. (the "HOA"). The record reflects that the HOA is the owner of the portion of the premises where the plaintiff's accident occurred. The plaintiff pays a monthly fee to the HOA for maintenance of the grounds, including snow and ice removal. The HOA hired an outside entity to perform snow removal and salt/sand activities. According to the EBT testimony of Vinnie Kilcommons, the maintenance superintendent for Fairfield, the snow removal contract does not cover the sidewalks in the recreation area. He also testified that he knew of no other falls on the pathways in the recreation area due to snow or ice during the two years prior to plaintiff's fall.

Mr. Kilcommons and Joyce Seman, president of the HOA and a long-time resident at the property, each testified that the recreation area is closed in the winter and that the sidewalks therein are not maintained or inspected for snow and ice conditions. Nevertheless, Kilcommons and Seman acknowledge that although the amenities are not in use, there are no barriers erected to cordon off the recreation area to pedestrians, there are no signs posted to indicate the sidewalk is closed, and the residents are not otherwise advised to stay out of the area. Furthermore, Kilcommons and Seman are aware that residents traverse the sidewalks in the recreation area year round to get from one side of Strathmore Terrace to the other. Ms. Seaman also testified that she knew of no other falls on the pathways in the recreation area due to snow or ice during the two years prior to plaintiff's fall. Both have submitted affidavits which attest to the fact that they were not aware of ponding or puddling conditions in the area of the accident and that they never received complaints about ponding or puddling at the site.

Plaintiff testified that the sidewalk in the recreation area sloped down. As he was walking he suddenly slipped, slid down the sidewalk and landed in a puddle of water. He did not notice the ice on the sidewalk before he slipped, but after he fell, he saw "invisible ice, like...glass, on top of the cement." Plaintiff claims that a neighbor witnessed him slip and fall, but neither the witness nor plaintiff reported the accident to Fairfield or the HOA.

In the complaint, as amplified by the bill of particulars, plaintiff alleges that defendants created the dangerous condition by negligently designing and grading the area surrounding the sidewalk which allowed water to drain across it thereby causing a recurring dangerous condition. Plaintiff also alleges that defendants' employees or agents were at the property on a daily basis and observed, or should have observed, the icy sidewalks and thus had actual notice of the dangerous condition which caused his accident. Moreover, plaintiff alleges that the dangerous icy and slippery condition existed for a sufficient amount of time to charge defendants with constructive notice.

Issue has been joined, discovery completed, and the note of issue filed. Defendants now move for summary judgment dismissing the complaint on the grounds that they neither created nor had actual or constructive notice of the icy condition which caused plaintiff's accident.

Defendants seeking summary judgment in a slip and fall case have the initial burden of making a prima facie showing that they did not create or have either actual or constructive notice of the dangerous condition for a sufficient length of time to remedy it (*see* ***Villano v Strathmore Terrace Homeowners Assn., Inc.***, 76 AD3d 1061, 908 NYS2d 124 [2d Dept 2010]; ***Valdez v Aramark Serv.***, 23 AD3d 639, 804 NYS2d 811 [2d Dept 2005]). This burden cannot be satisfied by merely pointing out gaps in the plaintiff's case (*see* ***Valdez v Aramark Serv.***, 23 AD3d 639, *supra*). A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the defendant a reasonable opportunity to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; ***Perez v New York City Hous. Auth.***, 75 AD3d 629, 906 NYS2d 299 [2d Dept 2010]; ***Robinson v Lupo***, 261 AD2d 525, 690 NYS2d 640 [2d Dept 1999]).

The defendants established their entitlement to judgment as a matter of law by submitting evidence sufficient to demonstrate that they did not create or have actual or constructive notice of the "black ice" that allegedly caused the plaintiff to fall (*see* ***Cantwell v Fox Hill Community Assn., Inc.***, 87 AD3d 1106, 930 NYS2d 459 [2d Dept 2011]; ***Crosthwaite v Acadia Realty Trust***, 62 AD3d 823, 879 NYS2d 554 [2d Dept 2009]; ***Abbattista v King's Grant Master Assn., Inc.***, 39 AD3d 439, 833 NYS2d 592 [2d Dept 2007]; ***Robinson v Trade Link Am.***, 39 AD3d 616, 833 NYS2d 243 [2d Dept 2007]; ***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]) and that they did not have actual notice of a recurring dangerous "back ice" condition in the area where the plaintiff fell (*see* ***Anderson v Central Val. Realty Co.***, 300 AD2d 422, 751 NYS2d 586 [2d Dept 2002]).

The Court is cognizant of the caselaw that holds that "[o]n a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law" (***Goldman v Waldbaum, Inc.***, 248 AD2d 436, 437, 669 NYS2d 669 [2d Dept 1998]). In cases involving hazardous conditions which are visible, in order "[t]o meet its burden on the issue of ... constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 598-599, 869 NYS2d 222 [2d Dept 2008]; *see also* ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011] [grease on steps]; ***Farrell v Waldbaum's, Inc.***, 73 AD3d 846, 900 NYS2d 453 [2d Dept 2010] [grapes]; ***McPaul v Mutual of Am. Life Ins. Co.***, 81 AD3d 609, 915 NYS2d 870 [2d Dept 2011] [water condition]; ***Goodyear v Putnam/Northern Westchester Bd. of Coop. Educ. Servs.***, 86 AD3d 551, 927 NYS2d 373 [2dDept 2011] [urine on the floor]). Under certain circumstances, where ice or snow is visible and apparent, the time when a defendant last inspected for a dangerous condition is relevant (*see* ***Joe v Upper Room Ministries, Inc.***, 88 AD3d 936, 931 NYS2d 658 [2d Dept 2011] [ice]; ***Baines v G&D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009] [ice]; ***Martinez v Khaimov***, 74 AD3d 1031, 906 NYS2d 274 [2d Dept 2010] [snow mound]; ***Totten v Cumberland Farms, Inc.***, 57 AD3d 653, 871 NYS2d 179 [2d Dept 2008] [ice]; ***Mazzio v Highland Homeowners Assn. and Condos***, 63 AD3d 1015, 883 NYS2d 59 [2d Dept 2009] [patches of ice]).

In the instant case, as to the issue of constructive notice, there were no weather conditions existing on the morning plaintiff fell to give rise to any concern to the defendants with regard to naturally forming ice conditions. Neither defendant was aware of the "black ice" alleged by plaintiff. In fact, plaintiff's own testimony indicates that prior to his fall he did not see the ice, that is, it was not visible and apparent. Where an injured plaintiff states that the ice was clear and not visible, courts have found that the defendant has satisfied the prima facie burden on the issue of constructive notice (*see e.g.* ***Gershfeld v Marine Park Funeral Home, Inc.***, 62 AD3d 833, 879 NYS2d 549 [2d Dept 2009]; ***Aurilia v Empire Realty Assocs.***, 58 AD3d 773, 873 NYS2d 103 [2d Dept 2009]; ***Christal v Ramapo Cirque Homeowners Assn.***, 51 AD3d 846, 857 NYS2d 729 [2d Dept 2008]; ***Kaplan v DePetro***, 51 AD3d 730, 858 NYS2d 304 [2d Dept 2008]; ***Simon v Maimonides Med. Ctr.***, 52 AD3d 683, 859 NYS2d 373 [2d Dept 2008]; ***Goodwin v Knolls at Stony Brook Homeowners Assn.***, 251 AD2d 451, 674 NYS2d 411 [2d Dept 1998]).

This Court disagrees with the conclusion of the First Department, as set forth in ***Spector v Cushman & Wakefield, Inc.***, 87 AD3d 422, 928 NYS2d 9 (1st Dept 2011), that in a "black ice" case, the Second Department similarly requires a defendant to submit testimony as to when the premises was last inspected. In the case relied upon to support that position, ***Mignogna v 7-Eleven, Inc.***, 76 AD3d 1054, 908 NYS2d 258 (2d Dept 2010), the facts reveal that employees of the defendant were present in the parking lot shoveling and salting the area where the plaintiff allegedly fell. Such facts support a claim of actual or constructive notice. Based on the particular facts set forth herein, defendants need not establish that the specific location had been inspected at any time prior to the plaintiff's accident so as to demonstrate the absence of constructive notice. Thus, defendants have satisfied their prima facie burden by showing that they neither created nor had actual or constructive notice of the "black ice" condition which caused plaintiff's accident. "On the evidence presented, the [black ice] that [allegedly] caused plaintiff's fall could have been deposited there only minutes ... before the accident and any other conclusion would be pure speculation" (***Gordon v American Museum of Natural History***, 67 NY2d at 838, *supra*).

Moreover, plaintiff's counsel has conceded the issue as to notice of this particular "black ice" condition by advancing a claim of a recurring dangerous condition (*see* aff. of Ellen Buchholz, Esq., ¶ 3, August 22, 2011). In order to do so, plaintiff relies upon the expert affidavits of an undisclosed engineer and a meteorologist. It is their belief that it was the manner in which the sidewalk was constructed that caused the recurring condition of pooling of water at the particular location. However, defendants oppose the submission of the previously undisclosed experts in opposition to the summary judgment motion, in light of plaintiff's failure to respond to the CPLR 3101-d expert witness demand and the disclosure after the filing of the note of issue. Defendants' find particularly egregious the fact that the engineer visited the site and was apparently retained by plaintiff months before the service of the summons and complaint.

The Court will not consider the affidavits of the purported experts since plaintiff failed to identify the experts in pretrial disclosure and served the affidavits after the note of issue and the certificate of readiness attesting to the completion of discovery were filed. Additionally, plaintiff did not provide any excuse for failing to identify the experts in response to the discovery demands even though the record discloses that one of the experts was retained prior to commencement of the action (*see* ***Kopeloff v Arctic Cat, Inc.***, 84 AD3d 890, 923 NYS2d 168 [2d Dept 2011]; ***Stolarski v DeSimone***, 83 AD3d 1042, 922 NYS2d 151 [2d Dept 2011]; ***Santiago v C&S Wholesale Grocers, Inc.***, 83 AD3d 814, 920 NYS2d 695 [2d Dept 2011]; ***Pellechia v Partner Aviation Enters., Inc.***, 80 AD3d 740, 916 NYS2d 130 [2d Dept 2011]; ***Gerardi v Verizon New York, Inc.***, 66 AD3d 960, 888 NYS2d 136 [2d Dept 2009]; ***Wartski v C.W. Post***

Campus of Long Is. Univ., 63 AD3d 916, 882 NYS2d 192 [2d Dept 2009]; ***Yax v Development Team, Inc.***, 67 AD3d 1003, 893 NYS2d 554 [2d Dept 2009]; ***King v Gregruss Mgt. Corp.***, 57 AD3d 851, 870 NYS2d 103 [2d Dept 2008] [inspection prior to commencement of action]; ***Construction by Singletree, Inc. v Lowe***, 55 AD3d 861, 866 NYS2d 702 [2d Dept 2008]; ***Gerry v Commack Union Free School Dist.***, 52 AD3d 467, 860 NYS2d 133 [2d Dept 2008]; ***Soldano v Bayport-Blue Point Union Free School Dist.***, 29 AD3d 891, 815 NYS2d 712 [2d Dept 2006]; ***DeLeon v State of New York***, 22 AD3d 786, 803 NYS2d 692 [2d Dept 2005]; ***Safin v DST Russian & Turkish Bath, Inc.***, 16 AD3d 656, 791 NYS2d 443[2d Dept 2005]).

In any event, even if the affidavits were considered, they offer conclusory and speculative opinions and do not raise an issue of fact. The engineer did not base his conclusions on accepted industry standards and failed to offer his measurements from his site visits. The meteorologist speculates upon either a rainfall three weeks before the accident as a possible source of the dangerous condition or trace precipitation in the early morning hours, when the temperature was at 36°F or 37°F. The speculation by both experts as to a recurring condition runs counter to plaintiff's testimony of not noticing such a condition in the ten years he resided at the complex. Absent consideration of these affidavits, the plaintiff failed to raise a triable issue of fact as to notice of a recurrent condition (*see* ***Perez v New York City Hous. Auth.***, 75 AD3d 629, *supra*).

A defendant who has actual knowledge of a recurring, dangerous condition may be charged with constructive notice of each specific re-occurrence of such condition (*see* ***Sewitch v LaFrese***, 41 AD3d 695, 839 NYS2d 114 [2d Dept. 2007]; ***Brown v Linden Plaza Hous. Co. Inc.***, 36 AD3d 742, 829 NYS2d 571 [2d Dept. 2007]; ***Fielding v Rachlin Mgt. Corp.***, 309 AD2d 894, 766 NYS2d 381 [2d Dept. 2003]; ***Fruend v Ross-Rodney Hous. Corp.***, 292 AD2d 341, 738 NYS2d 612 [2d Dept. 2002]; ***Osorio v Wendell Terrace Owners Corp.***, 276 AD2d 540, 714 NYS2d 116 [2d Dept. 2000]). Liability in such cases will, however, attach only where the plaintiff demonstrates by specific factual references that the defendant had actual knowledge of the allegedly recurring condition (*see* ***Perlongo v Park City 3 & 4 Apts., Inc.***, 31 AD3d 409, 818 NYS2d 158 [2d Dept. 2006]; ***Green v City of New York***, 34 AD3d 528, 825 NYS2d 227 [2d Dept. 2006]).

Here, in light of defendants' submissions, it was incumbent upon plaintiff to establish, by proof in admissible form, that genuine questions of fact exist. Review of plaintiff's submissions reveal that no such questions of fact were raised. The opposing papers failed to include due proof tending to establish that the icing condition was caused or exacerbated by the moving defendants' negligent design or construction of the walkway (*see* ***Regan v Hartsdale Tenants Corp.***, 27 AD3d 716, 813 NYS2d 153 [2d Dept. 2006]; ***Richardson v Campenelli***, 297 AD2d 794, 748 NYS2d 31 [2d Dept. 2002]). Nor did the submissions include proof that the defendants had actual or constructive notice of the icing condition which allegedly caused the plaintiff's fall (*see* ***Christal v Ramapo Cirque Homeowners Assoc.***, 51 AD3d 846, *supra*; ***Murphy v 136 Northern Blvd., Assoc.***, 304 AD2d 540, 757 NYS2d 582 [2d Dept. 2003]).

Although plaintiff contends that the moving defendants are chargeable with constructive notice of the "ongoing" and "recurring" icing condition in the area where the plaintiff fell due to the defendants' possession of actual knowledge of said condition, these contentions are not supported by the evidence adduced on the instant motion.

The deposition testimony before the Court fails to establish that the defendants had actual notice of said condition. The plaintiff also testified that he never notified the defendants about the allegedly recurring

condition. Since there was no evidence that the defendants otherwise acquired actual notice of the recurring condition, the plaintiff failed to raise a question of fact regarding whether the moving defendants had actual knowledge of such condition (*see* ***Green v City of New York***, 34 AD3d 528, *supra*; *see also* ***Arrufat v City New York***, 45 AD3d 710, 846 NYS2d 296 [2d Dept. 2007]; *cf.* ***Sewitch v LaFrese***, 41 AD3d 695, *supra*; ***Brown v Linden Plaza Hous. Co. Inc.***, 36 AD3d 742, *supra*; ***Osorio v Wendell Terrace Owners Corp.***, 276 AD2d 540, *supra*).

Under the circumstances, plaintiff could not make a prima facie showing that the defendants either created the alleged defective condition or that they had actual or constructive notice of the condition. Plaintiff presented no evidence concerning the length of time the ice was on the ground before his fall or that it existed for a sufficient length of time for defendants to discover and remedy it (*see* ***Murphy v 136 Northern Blvd. Assocs.***, 304 AD2d 540, *supra*; ***Mankowski v Two Park Co.***, 225 AD2d 673, 639 NYS2d 847 [2d Dept 1996]) or that they had actual notice of a recurring dangerous condition on the premises (*see* ***Connelly v Shop Rite Supermarkets, Inc.***, 38AD3d 588, 830 NYS2d 670 [2d Dept 2007]; ***Anderson v Central Valley Realty Co.***, 300 AD2d 422, *supra*; ***Ortega v New York City Tr. Auth.***, 262 AD2d 470, 692 NYS2d 131 [2d Dept 1999]; ***Roman v Met-Paca II Assocs., LP***, 85 AD3d 509, 925 NYS2d 447 [1st Dept 2011]).

In any event, Fairfield has established that it owed no duty of care to plaintiff, and thus cannot be held liable for his injuries. Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Unless a comprehensive and exclusive management agreement exists between the agent and the owner which displaces the owner's duty to safely maintain the premises, a management company cannot be held liable for injuries sustained in a slip and fall accident (*see* ***Espinal v Melville Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Roveccio v Ry Mgt. Co. Inc.***, 29 AD3d 562, 816 NYS2d 114 [2d Dept 2006]). The relevant management agreement between Fairfield and the HOA has been proffered by defendants. The agreement clearly does not create a comprehensive and exclusive maintenance obligation in Fairfield as the HOA retained substantial control over the management and operation of the property (*see* ***Roveccio v Ry Mgt. Co., Inc.***, 29 AD3d 562, *supra*).

Specifically, the agreement provides that the common elements of the property are to be "maintained in such condition as determined by the Board of Directors, including exterior cleaning..." The agreement also provides that "[o]rdinary repairs shall be made only with the prior approval of the [HOA]...." Therefore, Fairfield has established its prima facie entitlement to summary judgment (*see* ***Lennon v Oakhurst Gardens Corp.***, 229 AD2d 897, 645 NYS2d 652 [3d Dept 1996]; *see also* ***Fung v Japan Airlines Co., Ltd.***, 51 AD3d 861, 858 NYS2d 738 [2d Dept 2008]; ***Hagen v Gilman Mgt. Corp.***, 4 AD3d 330, 770 NYS2d 890 [2d Dept 2004]). In opposition, defendants have failed to raise a triable issue of fact as to Fairfield's liability.

Accordingly, summary judgment is granted and the action is dismissed. This constitutes the decision and order of the Court.

Dated: 12/21/11

THOMAS F. WHELAN, J.S.C.