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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS Justice

PART 6

Index Number : 107190/2006
WASHINGTON, RICHARD
vs.
MILFORD MANAGEMENT
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 11/28/11

MOTION SEQ. NO. 006

The following papers, numbered 1 to 19, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1→14

Answering Affidavits — Exhibits _____ | No(s). 15→18

Replying Affidavits _____ | No(s). 19

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
and Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/24/12

_____, J.S.C.
JOAN B. LOBIS

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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RICHARD WASHINGTON and ELIZABETH WASHINGTON,

Plaintiffs,

Index No. 107190/06

Decision and Order

-against-

MILFORD MANAGEMENT CORP., MF ASSOCIATES, HEALTH INSURANCE PLAN OF GREATER NEW YORK, YORKVILLE LAND ASSOCIATES, LHHN MEDICAL, P.C., and LENOX HILL HOSPITAL,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Defendants Milford Management Corp., MF Associates, Yorkville Land Associates (collectively "Milford Management"),[1] and Health Insurance Plan of Greater New York ("HIP") move for an order granting them summary judgment, pursuant to C.P.L.R. Rule 3212, dismissing plaintiffs' complaints against them on the grounds that there are no triable issues of fact. Plaintiffs Richard Washington and Elizabeth Washington oppose the motion.

Plaintiffs bring this lawsuit against Milford Management and HIP for injuries that Mr.

[1] The relationship between Milford Management Corp., MF Associates, and Yorkville Land Associates is unclear, but the moving papers refer to all three entities as "Milford Management." Accordingly, the court will consider the arguments on behalf of "Milford Management" as being made on behalf of Milford Management Corp., MF Associates, and Yorkville Land Associates.

Washington sustained as the result of an alleged slip and fall.[2] On January 31, 2005, at approximately 1:00 p.m., Mr. Washington fell on the 96th Street side of premises located at 215 East 95th Street, New York, New York (the "Premises").[3] He sustained a fractured shoulder as a result of the fall. He alleges that icy conditions on the public sidewalk caused him to slip and fall. The Premises are owned by Milford Management and leased to HIP. On or about May 24, 2006, plaintiffs commenced this action against, inter alia, Milford Management and HIP, alleging that they were negligent in their ownership, operation, maintenance, and control of the Premises by allowing the Premises to become and remain snow- and ice-laden; by failing to shovel or otherwise remove snow and ice; by improperly removing snow and ice; by creating a dangerous and hazardous condition; by failing to salt; and by improperly salting the ground. Additionally, plaintiffs allege that Milford Management and HIP were on notice of the condition because their agents, servants, and employees were present to observe and correct the condition and failed to do so, and because the condition existed for a long period of time prior to the accident.

The movants seek to dismiss plaintiffs' complaint against them, arguing that they did not create the dangerous condition or have actual or constructive notice of the condition that caused Mr. Washington's injuries. In support of their motion, the movants attach the transcripts of the examinations before trial ("EBT") of Mr. Washington; Mrs. Washington; Ernest Sanchez, the

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[2] Plaintiffs also raised claims against Lenox Hill Hospital ("LHH") and LHHN Medical, P.C., for premises liability and medical malpractice. In a decision dated July 21, 2010, this court granted LHH summary judgment on the premises liability claims and granted LHHN Medical, P.C., summary judgment as to all claims against it. Plaintiffs' claims against LHH sounding in medical malpractice survived LHH's motion for summary judgment.

[3] The Premises cover the block between East 95th Street and East 96th Street, between 2nd and 3rd Avenues.

superintendent of the Premises in 2005; and Richard P. Mayer, the Executive Director of Lenox Hill Community Medical Group. They also offer an affidavit from Michael Gooley, the Assistant Director of Real Estate Services for HIP.

Mr. Washington testified that on January 31, 2005, he accompanied his wife to her doctor's appointment at the 96th Street entrance of what Mr. Washington referred to as the HIP Center. Upon arriving at the Premises, Mr. Washington testified that he observed no snow, salt, or sand on the sidewalk, but that there were a few patches of ice approximately one (1) foot in size and one (1) inch in thickness. He stated that the ice looked as if someone had been chipping at it, that he believed that someone did a poor job clearing the ice from the sidewalk, and that the ice must have dropped on the ground. He further testified that he had no difficulty walking from his car to the HIP Center, however, he fell on his way back to the car, approximately three (3) feet from the exterior fence of the HIP Center.

Mrs. Washington testified that on January 31, 2005, she was walking beside her husband when he fell on the sidewalk outside the HIP Center. She stated that she did not fall, and that she did not observe any ice when she entered the HIP Center for her appointment. She testified that she did not see the ice that caused her husband's fall until after he had fallen, and described the piece of ice to be dark, old, and hard, with approximately ten (10) grooves in it. She also stated that there were other patches of ice scattered on the ground, as a result of a poor shoveling job. She stated that the ice was present from the last snowfall that occurred a couple weeks prior to the accident.

Ernest Sanchez testified on behalf of Milford Management. He testified that he is employed by Ogden Cap Properties ("Ogden Cap") at 225 East 95th Street.[4] Mr. Sanchez stated that on January 31, 2005 he was the superintendent and a resident of 215 East 95th Street. He testified that the property he managed consisted of four (4) buildings: 205, 215, 225 and 235 East 95th Street, collectively known as Normandie Court, and that the HIP Center is located below the lobbies of all four buildings. In 2005, as superintendent, Mr. Sanchez was responsible for the operation of the Premises and supervised approximately one hundred (100) people, including doormen, porters, and handy-persons. The Premises staffed approximately forty (40) porters, whose duties included snow removal. Mr. Sanchez testified that only Ogden Cap employees performed snow removal at the Premises. During the time in question, Mr. Sanchez stated that the Premises had snow shovels, snow blowers, and sanding/salting equipment. Mr. Sanchez explained that the snow removal procedure was to divide the Premises into zones, and assign a few men to each zone. Porters were also assigned to sidewalks and street corners, and each assigned porter was to clear the entrance ways and apply calcium chloride. In addition, a porter traveled around the Premises with an ice chipper, calcium chloride, a broom, and a dustpan to spot clean trouble areas. A snow and ice removal record is completed every time snow and ice removal efforts are undertaken, and the record is maintained in the building for up to seven (7) years. The snow and ice removal record annexed to the moving defendants' papers indicates that ice was chiseled on the 96th Street entrance of the Premises on

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[4] Mr. Sanchez testified that he was previously employed by Milford Management until about July 2003, when Milford Management separated from Ogden Cap. For the purposes of this motion, Milford Management does not dispute that Ogden Cap and Milford Management are part of the same entity.

January 28, 2005, and that the area was also salted.

Richard P. Mayer testified that he is employed by Lenox Hill Hospital ("LHH") as the Executive Director of the Lenox Hill Community Medical Group, located at 215 East 95th Street, and worked Monday through Friday in 2005. Mr. Mayer states that Milford Management was responsible for the care and maintenance of the sidewalks in front of the Premises, that he observed uniformed employees of the building removing snow from the sidewalks in the month of January 2005, and that they would appear at the first sign of a snowfall. He testified that Lenox Hill Community Medical Group was a subtenant of HIP, and that HIP leased space from Milford Management. He stated that Lenox Hill Community Medical Group was the only commercial tenant on the Premises. Mr. Mayer further testified that he used the 96th Street entrance daily, that he neither made nor received any complaints in January 2005 about the condition of the sidewalk, and that he did not observe any snow or ice on the sidewalk on January 31, 2005.

Michael Gooley submits a sworn affidavit stating that he is the Assistant Director of Real Estate Services for HIP and has been employed in this capacity since 1981. Mr. Gooley states that his duties include administration of HIP's leased properties, and that he has personal knowledge of the lease and sublease in effect for January 31, 2005 for 215 East 95th Street. He sets forth that on or about June 12, 1991, HIP leased the Premises from Milford Management, and that on or about June 30, 2000, HIP sub-leased the Premises to LHH. Mr. Gooley maintains that since June 2000, HIP has not occupied any portion of the Premises. Regardless, Mr. Gooley sets forth that snow removal was Milford Management's responsibility. As such, Mr. Gooley states that HIP was not

responsible for the removal of snow or ice from the sidewalk; that HIP did not clear any snow in January 2005; and that HIP did not subcontract with a snow removal company to remove snow from the sidewalks, as it was Milford Management's responsibility pursuant to the lease.

Based on the testimony, Milford Management and HIP collectively argue that they are entitled to summary judgment because there is no proof that they created the alleged dangerous condition, had actual knowledge of the condition, or had constructive knowledge of the condition. They maintain that there is no evidence that their prior removal acts caused or exacerbated the condition. Further, the moving defendants argue that plaintiffs' allegations are conclusory, speculative, and insufficient to establish liability, as there is no evidence in the record indicating where the ice came from. More specifically, Milford Management and HIP argue that Mr. Washington's statements that ice must have "dropped on the ground" and that someone did a poor job shoveling and chipping the ice, and Mrs. Washington's recollection that a snow storm had occurred a couple of weeks prior to the accident, are all without basis and are insufficient to establish (1) that the condition existed for a sufficient period of time for them to discover and remedy the condition, or (2) that their snow removal efforts created the condition. Milford Management and HIP argue that plaintiffs' mere allegation that some patches of ice were present on the sidewalk in front of the Premises provides no basis for imposing liability.

Defendant HIP further argues that it is entitled to summary judgment on the grounds that it owed no duty of care to plaintiffs, as snow removal was Milford Management's exclusive responsibility under the lease, which Mr. Gooley's affidavit supports. HIP argues that it did not

occupy the leased space at the time of Mr. Washington's fall. It points out that, as an out-of-possession tenant, HIP could not have had actual or constructive notice of the dangerous condition. In addition, HIP points out that Mr. Sanchez testified on behalf of Milford Management that no one besides Ogden Cap employees performed snow and ice removal at the Premises.

In opposition, plaintiffs argue that summary judgment should be denied because Milford Management did cause and create the condition responsible for Mr. Washington's fall; that issues of fact exist as to whether Milford Management had constructive notice of the condition; and that Milford Management failed to establish that it lacked actual notice.[5] In support of their opposition, plaintiffs offer affidavits from Mr. and Mrs. Washington, and an expert affidavit from meteorologist George Wright. The substance of Mr. and Mrs. Washington's affidavits echo their earlier EBT testimony. Plaintiffs' expert, Mr. Wright, sets forth that he is a professional meteorologist with degrees in meteorology and the owner of Wright Weather Consulting, LLC. He states that he reached his expert opinion after having reviewed plaintiffs' bill of particulars, their affidavits, and official copies of weather and climatological data for January 2005 from sources such as the National Climatic Data Center. To a reasonable degree of meteorological certainty, Mr. Wright states that at the Premises, between thirteen and one-half (13.5) and fourteen and one-half (14.5) inches of snow fell from January 22 to January 23, 2005; the weather was dry and cold with

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[5] Plaintiffs additionally argue that MF Management and Yorkville Land Associates failed to establish, separately from Milford Management Corp., that they lacked actual and constructive notice of the condition responsible for Mr. Washington's fall. However, as was set forth supra at page 1, fn. 1, the movants refer to all three entities as Milford Management and the court is considering the arguments on behalf of "Milford Management" as made on behalf Milford Management Corp., MF Management, and Yorkville Land Associates.

no measurable snowfall between January 23 and January 29; and that there was light snowfall which evaporated by late morning on January 30. Mr. Wright states that on January 31, 2005, there was no precipitation. He opines that the ice described by plaintiffs was "entirely consistent with the prevailing meteorological conditions prior to and at the time of" Mr. Washington's fall. He states that, at 1:00 p.m. on January 31, 2005, there were between eight (8) to nine (9) inches of snow present on exposed, undisturbed (not walked upon or shoveled), and untreated (not salted) ground. Mr. Wright opines that the ice that caused Mr. Washington to fall could only have been produced by the major winter storm that occurred between January 22 and January 23, because the temperatures after this storm were cold enough to allow for the ice to remain frozen on the sidewalk and the ice would have been present for at least eight (8) days prior to Mr. Washington's fall.

Plaintiffs argue that Milford Management had actual notice of the condition, in light of plaintiffs' testimony that the ice had indented grooves in it as if someone had previously used an ice chipper on it; Milford Management's admission that it, alone, is responsible for snow removal at the Premises; and Milford Management's actual performance of snow and ice removal in the days prior to Mr. Washington's fall. Plaintiffs further argue that Milford Management had constructive notice of the condition, based on plaintiffs' testimony that the ice appeared to be dark and old and Mr. Wright's opinion that the ice that caused Richard Washington to fall must have remained on the sidewalk for at least eight (8) days prior to the accident, which would have given Milford Management ample time to observe and correct the condition. In addition, plaintiffs argue that Milford Management has failed to submit an affidavit from someone with knowledge that 96th Street sidewalk was inspected and was found to be free of snow and ice.

In reply, Milford Management and HIP argue that they are entitled to summary judgment on the grounds that plaintiffs failed to raise a triable issue of fact. They argue that Mr. and Mrs. Washington's affidavits should not be considered because they contain statements that are inconsistent with their respective EBT testimony. They further point out that plaintiffs failed to oppose summary judgment as to HIP. They state that Mr. Wright never concludes that there was ice on the ground. Further, they argue that Mr. Wright's statement that the conditions on January 31, 2005 were conducive to the development of ice on "unexposed, undisturbed, and untreated" ground is irrelevant to the actual conditions on the sidewalk and is contradictory to plaintiffs' statement that the sidewalk was "walked on by many people." Milford Management and HIP argue that Mr. Wright's testimony is speculative because it fails to rule out other causes of the ice patch and is unsupported by proof in the admissible form. They maintain that the court should disregard plaintiffs' expert's affidavit because the expert was not identified until about five (5) months after the filing of the note of issue and certificate of readiness.

A movant for summary judgment must make a prima facie showing of entitlement by demonstrating that there are no material issues of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Once the movant satisfies this burden, then the burden shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. Zuckerman v. City of N.Y., 49 N.Y.2d 557, 560 (1980). All reasonable inferences will be drawn in favor of the non-moving party. Dauman Displays v. Masturzo, 168 A.D.2d 204, 205 (1st Dep't 1990). "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." Daliendo v. Johnson, 147 A.D.2d 312, 317 (2d Dep't 1989) (citations omitted).

To establish a prima facie case of negligence, a plaintiff must demonstrate that a defendant breached a duty of reasonable care that he or she owed to the plaintiff, and that such breach proximately caused the plaintiff's injury. Solomon v. City of N.Y., 66 N.Y.2d 1026, 1027 (1985). Generally, a property owner is under no duty to remove ice and snow that naturally accumulates upon the sidewalk in front of its premises, unless the condition was made more dangerous as a result of the owner's snow removal efforts. Gerber v. City of N.Y., 280 A.D.2d 289–90 (1st Dep't 2001). However, the Administrative Code of the City of New York § 7-210 "imposes tort liability upon certain property owners, including the defendants herein, for the negligent failure to remove snow and ice from the sidewalk abutting their property." Martinez v. Khaimov, 74 A.D.3d 1031, 1032– 33 (2d Dep't 2010). In a slip and fall incident involving snow and ice, a property owner may be held liable only upon a showing that it created the dangerous condition or had actual or constructive notice of the condition. Id. at 1033; Salvanti v. Sunset Indus. Park Assocs., 27 A.D.3d 546 (2d Dep't 2006). To place defendants on constructive notice, the dangerous condition must have existed for a sufficient length of time before the accident as to allow defendants to discover and remedy it. Gordon v. Am. Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

The movants have established that Milford Management was responsible for snow removal at the Premises. They further established that HIP was an out-of-possession sub-lessor who exercised no control over the Premises and who did not undertake snow-removal at the Premises. As such, defendant HIP has prima facie established that it owed no duty to plaintiffs. Furthermore, as HIP lacked actual and constructive notice of the condition, it cannot be held liable for plaintiffs' injuries. Suntken v. 226 W. 75th St., 258 A.D.2d 314 (1st Dep't 1999). Plaintiffs failed to oppose

HIP's arguments. Accordingly, that branch of the motion seeking to dismiss the complaint as against HIP is granted.

As to Milford Management, it has prima facie established that it did not have actual or constructive notice of the icy condition through the EBT testimony of Mr. Sanchez, who stated that Milford Management routinely undertook to remove snow and ice at the Premises and described the ice removal procedure in place at the Premises; the ice removal records, which showed that ice removal was performed on January 28, 2005; the EBT testimony of Mr. Mayer, who stated that he neither observed any snow or ice as he entered the building on January 31, 2005 at the 96th Street entrance, nor received any complaints about ice on that day; and the EBT testimony of plaintiffs, who stated that they made no complaints to anyone at the Premises about the icy conditions, which would have put Milford Management on actual notice of any icy conditions. Moreover, Mrs. Washington acknowledged that she did not recall observing any ice or snow as she walked into the building for her appointment.

However, the court finds meritless defendants' argument that plaintiffs' affidavits annexed to their opposition papers are rife with inconsistencies and were fabricated by their attorney. Unlike the cases to which defendants cite, plaintiffs' affidavits do not allege new facts that were not already contained in their EBT testimony. Their descriptions of the ice in their affidavits are not materially different from their prior accounts during their EBTs.

Defendants further contend that Mr. Wright's statement that between eight and nine

inches of snow and ice would have been present on "exposed, undisturbed and untreated" ice is irrelevant to the actual condition and contradicts plaintiffs' statement that the sidewalk was "walked on by many people." The courts finds this argument unavailing. Mr. Wright testified as an expert as to the weather conditions that persisted in the area, not as a witness who observed any ice at the Premises. His affidavit states that the weather was cold enough to allow ice to have formed and remained on the sidewalk, which is sufficient to raise a triable issue of fact in opposition to a motion for summary judgment.

Furthermore, Milford Management's argument that Mr. Wright's affidavit is speculative because it fails to rule out other causes of the ice patch is misplaced. The cases to which the movants cite are distinguishable from the case at bar because, here, plaintiffs' expert sufficiently relied on relevant evidence and meteorological data. Ortner v. City of N.Y., 50 A.D.3d 475 (1st Dep't 2004); Moss v. City of N.Y., 5 A.D.3d 312 (1st Dep't 2004); McCord v. Olympia & York Maiden Lane Co., 8 A.D.3d 634 (2d Dep't 2004). In addition, Mr. Wright's affidavit is not speculative, as it is supported by data from the National Climatic Data Center, which plaintiffs include in their opposition papers. Zemotel v. Jeld-Wen, Inc., 50 A.D.3d 1586, 1587 (4th Dep't 2008); C.P.L.R. Rule 4528. Moreover, defendants have failed to show how Mr. Wright's affidavit fails to conform to C.P.L.R. Rule 4528.

Additionally, as to the moving defendants' argument that plaintiffs' expert affidavit should not be considered because they identified their expert after the filing of the note of issue and certificate of readiness, the court find this argument unpersuasive. The movants fail to articulate

which rules, laws, or orders plaintiffs violated. C.P.L.R. § 3101(d) states, in relevant part, that "[u]pon request, each party shall identify whom the party expects to call as an expert witness[.]" C.P.L.R. § 3101(d)(1)(i). The moving defendants have failed to show that they have made any such request, with which plaintiffs have not complied. In addition, as no trial date has been scheduled for this case, it is permissible for plaintiffs to disclose their expert at this time.

Finally, the court finds that plaintiffs have raised triable issues of fact as to whether Milford Management had constructive notice of the condition and as to whether Milford Management created the dangerous condition. Plaintiffs' testimony that the snow looked old, as if it had been walked upon by many people, along with the affidavit of plaintiffs' expert, who states that if there were ice, it only could have been from the snow storm that occurred between January 22 and January 23, 2005, and that the weather after the storm was cold enough to allow ice to have formed and remained on the Premises, raise issues of fact as to whether the condition may have been present for a period of time, thereby providing Milford Management with constructive notice and sufficient time to remedy the condition. C.f. Gordon v. Am. Museum of Natural History, 67 N.Y.2d 836, 838 (1986). "It is well settled that where a condition continues for some period of time, there is a jury question" as to whether the defendant knew or should have known of the existence of the condition. Taylor v. Bankers Trust Co., 80 A.D.2d 483, 487 (1st Dep't 1981). Additionally, plaintiffs testified that there appeared to have been grooves in the ice, as if someone had been "chipping at it." Mr. Sanchez also testified that porters would travel around the Premises with an ice chipper, among other things, to spot clean trouble areas, and the snow and ice removal log indicates that on January 28, 2005, an ice chipper was used at the 96th Street entrance. Whether the

shoveling of the sidewalks and ice removal efforts of Milford Management created the hazardous condition is a question for the trier of fact. Glick v. City of N.Y., 139 A.D.2d 402, 403 (1st Dep't 1988). Accordingly, that branch of the motion seeking to dismiss all claims against Milford Management is denied.

Accordingly, it is hereby

ORDERED that the branch of the motion seeking summary judgment dismissing all claims against Health Insurance Plan of Greater New York is granted; and it is further

ORDERED that the branch of the motion seeking summary judgment dismissing all claims against Milford Management Corp., MF Associates, and Yorkville Land Associates is denied; and it is further

ORDERED that the remaining parties shall appear for a pre-trial conference on April 10, 2012, at 9:30 a.m.

Dated: February 24, 2012

ENTER:

JOAN B. LOBIS, J.S.C.