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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 101311/2009
VOSPER, NIGEN
vs.
FIVES 160TH, L.L.C.
SEQUENCE NUMBER : 003
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
MAY 21 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/14/12

HON. EILEEN A. RAKOWER J.S.C.

1. CHECK ONE: ..... [X] 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
COUNTY OF NEW YORK: PART 15

----------X

NIGEN VOSPER and YVONNE VOSPER,

Plaintiffs,

Index No.
101311/09

- against -

Decision and
Order

FIVES 160th and BLM INC.,

Mot. Seq. No. 003

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs Nigen Vosper and YvonneVosper bring this action for personal injuries allegedly sustained by plaintiff Nigen Vosper when he slipped and fell on ice as he was exiting his apartment building located at 555 W 160th Street in New York, NY on December 24, 2008 at 7:55 a.m. Plaintiffs filed a Verified Complaint on January 30, 2009, alleging that prior to the date of the accident, "defendants created a dangerous and hazardous condition on said outside landing by removing the step that was there and replacing it with a downward sloping landing, without a handrail." Plaintiffs alleged that "[i]n making said modification, defendants created a dangerous and hazardous condition whenever snow or ice accumulated on said exterior landing by denying the tenants of said building, including the plaintiffs herein, of a safe means of egress." Defendant, Fives 160th, LLC, interposed its Verified Answer. Defendant BLM Inc. has not appeared in this action.

Fives 160th now moves for summary judgment pursuant to CPLR §3212. Plaintiffs oppose. Defendant, in support of its motion, submits: the pleadings, plaintiffs' verified bill of particulars; photographs of the alleged accident location; plaintiffs Nigen Vosper and Yvonne Vosper's deposition transcripts; the deposition transcript of Patricio Valderrabano, the building's superintendent; plaintiffs' weather expert report; plaintiff's liability expert report; defendant's licensed architect expert report; and plaintiff's note of issue.

Plaintiffs, in their opposition, submit portions of Mr. Valderrabano's deposition

transcript; photographs; the report of Alvin Ulbell, a building inspector; and a portion of the deposition transcript of plaintiff Yvonne Vosper.

Relying on plaintiffs' weather expert, defendant states that the causal weather condition started to form from 3:00 a.m. to 6:00 a.m. Plaintiffs' weather expert opined that on the morning of plaintiff's accident, "A mixture of sleet and freezing rain developed between 3:10 a.m. and 3:20 a.m. [on the morning of the accident]. The mixed precipitation changed to all freezing rain by 4:00 a.m. The freezing rain continued to fall before changing to non-freezing rain by 6:00 a.m. as the temperature warmed above freezing (i.e., thirty two degrees) . . . The precipitation that fell prior to 6:00 a.m. produced an icy, thin layer or glaze of ice on the outside landing or slab where plaintiff slipped and fell." Defendant also states that plaintiffs' weather expert's "records also demonstrate that light rain continued to fall into the afternoon." Plaintiffs do not dispute defendant's assertions regarding the causal weather condition. Mr. Valderrabano, the building superintendent, testified that his duties to remove ice from the premises did not begin until 8:00 a.m. He also testified that he arrived on scene and observed the complained of condition at 8:00 a.m.

Defendant relies upon plaintiff Nigen Vosper's testimony, in which he testified that he did not recall seeing any snow or ice or rain on the landing the day before the accident, that he did not complain to the landlord about the subject landing, that no one in plaintiff's household had every complained regarding the landing, and hat he did not know of anyone who had fallen on the landing prior to the accident. Defendant also relies upon plaintiff Yvonne Vosper's testimony, in which she testified that she did not provide defendant with any written complaint regarding the outside areas of the building and that the only complaint made to the building Superintendent was that the landing was "nonsense, and it was not good" and that it was a "monstrosity." While Yvonne testified to having had an accident in the building previously, she failed to report it to the building superintendent.

Plaintiff Nigen Vosper testified as follows regarding his accident:

Q: Now, you claim that your accident was caused by ice on the concrete slab; is that correct?

A: Yes, sir.

Q: Is the cause of your accident solely the ice on the concrete slab; is that correct?

A: Yes, sir.

Q: Is the cause of your accident solely the ice on the concrete slab or did something else attribute to your accident?

A: It's because they normally put salts down when that water freezes. There was no salts down there that day.

Q: But what I'm asking you is, your accident, the fact that you slipped on the concrete slab, is it solely due to ice on the concrete slab?

A: Yes, sir.

Q: Do you know of anything else that attributed to your accident other than the fact that there was ice on the slab?

A: No, nothing else.

Plaintiff Nigen Vosper's deposition transcript, page 44:20-45:14.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-52 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

A defendant who moves for summary judgment in a slip-and fall action has the

initial burden of making a prima facie showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden then shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice. *Rodriguez v. 705-7 East 179th Street Housing Development Fund Corp.*, 79 A.D.3d 518, 520 (1st Dept. 2010).

"A landlord has a duty to maintain its property in a reasonably safe condition under the extant circumstances. For a plaintiff to show a breach of that duty she is required to first establish that the landlord either created or had actual or constructive notice of the hazardous condition which precipitated an injury." (see *Beck v. J.J.A. Holding Corp.*, 12 A.D.3d 238 [1st Dept. 2004]. The burden is upon plaintiff to make such a showing. (*Strowman v. Great Atlantic and Pacific Tea, Co., Inc.*, 252 AD2d 384 [1st Dept. 1998]). In order to prove that defendant had constructive notice of a defect, plaintiff must show that the defect existed for a sufficient length of time before plaintiff's accident. (*Id.* at 240).

"[I]t is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended." *Espinell v. Dickson*, 2008 NY Slip Op. 9638, *1 (1st Dept. 2008) (citing *Pippo v City of New York*, 43 AD3d 303, 304 [2007]). "The Court has further held that '[a] reasonable time is that period within which the [landowner] should have taken notice of the icy condition and, in the exercise of reasonable care, remedied it by clearing the sidewalk or otherwise eliminating the danger'" *Id.* (citing *Valentine v City of New York*, 86 AD2d 381, 383 [1982], *affd*, 57 NY2d 932 [1982]). "It is not until 'the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation," that an owner or occupant may be held liable for injuries caused by accumulated ice or snow'" (*Powell v. MLG Hillside Assocs., L.P.*, 290 A.D.2d 345, 345-46[1st Dept 2002]).

On the record before the Court, Fives 160th has sustained its prima facie burden of proof based on plaintiffs' weather expert's findings that the subject ice condition was created at 6:00 a.m., the morning of plaintiff's 7:55 a.m. accident, and the lack of evidence that defendant caused or created the hazardous condition or had notice of the complained of condition until after the accident. As the record demonstrates, the building superintendent's snow removal responsibilities did not commence until 8:00 a.m. In opposition to this showing, plaintiffs have failed to raise a triable issue of fact. Plaintiffs' claim that "two hours" notice is sufficient.

However, New York Administrative Code grants landowners four hours to remedy snow or ice conditions (New York City Administrative Code Section 16-123) and furthermore the building superintendent's snow removal responsibilities did not commence until 8:00 a.m. Plaintiffs' alternative claim that actual notice was provided to defendants from the weather forecast is speculation. *Rodriguez*, 79 A.D.3d at 520-21.

Plaintiffs have also failed to raise a triable issue of fact with respect to the alleged defective nature of the subject landing. Plaintiffs claim that it "is undisputed that two years before this occurrence, defendant changed the front entrance and created a downward (towards the public sidewalk) sloping ramped platform." Plaintiffs have submitted an affidavit of Alvin Ubell, plaintiffs' building inspector.[1] Ubell opines that the landing had three "major faulty conditions." Ubell states that the subject landing/ramp should have had a level platform, has a step at its foot that should have had a smooth interface with the sidewalk flag, and is non-compliant because it has a slope greater than 1 to 12 and did not have a safety handrail. Ubell concludes that if there had been handrails, "then the accident experienced by Mr. Nigen Vosper should not have occurred." Plaintiffs' reliance on Udell's report is misplaced. The condition of the ramp and the lack of handrails did not cause the fall. Plaintiff Nigen Vosper testified that he fell solely as a result of the ice. He did not testify that the downward slope of the ramp or lack of handrails contributed to his fall. *See Scheer v. City of New York*, 211 A.D. 2d 778, 778 (1995) ("Speculation, guess and surmise, however, may not be substituted for competent evidence."); *Grob v. Kings Realty Associates, LLC*, 4 A.D.3d 394 (2d Dept 2004). Accordingly, plaintiffs have not met their burden and defendant's motion for summary judgment is granted.

Furthermore, plaintiffs' action against defendant BLM Inc. shall also be dismissed. Plaintiffs commenced this action against defendants on January 30, 2009. As defendant BLM did not answer and has not appeared in this matter, and plaintiffs have not moved for default judgment within one year of the default and no cause is shown why the action should not be dismissed, the Court dismisses plaintiffs' action against BLM sua sponte. CPLR 3215(c).

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[1] The Court also notes that defendant's expert Denise Beckart, an architect, has submitted an affidavit and report that concluded that any slope of the subject landing is "not hazardous to pedestrians and is within accepted industry standards."

For the foregoing reasons, it is hereby:

ORDERED that defendant Fives 160th, LLC's motion for summary judgment is granted; and its further

ORDERED that plaintiffs' action against defendant BLM Inc. is dismissed; and it is further

ORDERED that Clerk is directed to enter judgment dismissing plaintiffs' action in its entirety.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: May 14, 2012

EILEEN A. RAKOWER, J.S.C.