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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

HERBERT G. DRAESEL,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

INDEX NO. 400249/09
MOTION DATE 5/22/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-H | No(s). 1; 2

Affirmation In Opposition — Exhibits A-C | No(s). 3

Replying Affirmation — Exhibits | No(s).

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

Upon the foregoing papers, it is ordered that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

In this action, plaintiff alleges that, on February 12, 2008, at approximately 9:30 p.m., he slipped and fell "due to the improper, negligent and unlawful accumulation of ice" on stairway S4 of the entrance to the subway station at 50th Street and Broadway in Manhattan, for the uptown No. 1 line. (McCrink Affirm., Ex A [Notice of Claim].) At his deposition, plaintiff testified as follows:

"A. There was snow on the steps and that's when I decided to go first.
Q. But when you say there was snow on the steps, was that pristine snow, snow that had just fallen, were there footprints on the snow; what did you see?
A. There was ice under the snow.
Q. How do you know there was ice under the snow?

(Continued . . .)

A. Because that's what I slipped on.
Q. But before you stepped on that particular step, did you know that there was ice underneath?
A. Yes.
Q. How did you know there was ice underneath before you stepped on the step?
A. Then, no, I didn't know that until I stepped on the step."

(McCrink Affirm., Ex F [Plaintiff's EBT], at 71.)

Defendant moves for summary judgment dismissing the action, arguing that plaintiff's accident allegedly occurred during a storm in progress, and that plaintiff has not demonstrated that defendant had actual or constructive notice. Defendant submits a weather report produced by the National Climatic Data Center, which shows that, on February 12, 2008, temperatures ranged from 17 to 31 degrees Farenheit, and there was precipitation in the afternoon and evening, with .07 inches of precipitation for the hour ending at 9 p.m., and .08 inches of precipitation for the hour ending at 10 p.m. (McCrink Affirm., Ex H.) The weather notations for February 12, 2008 are "RA [rain] FZRA [freezing rain] SN [snow] FG+ [fog, heavy] FZFG [freezing fog] BR [mist] UP [unknown precipitation]." (*Id.*)

Plaintiff opposes the motion, arguing that the weather report is not in admissible form because it is not in the form of an affidavit. In any event, plaintiff contends there is an issue of fact whether there was a storm in progress, because the weather report indicates that the weather notations for the precipitation for the hour ending at 10 p.m. were "UP [unknown precipitation] BR [mist]", not snow. (McCrink Affirm., Ex H.)

Plaintiff also asserts that defendant engaged in snow removal efforts based on the testimony of Christopher Meninger, a cleaner assigned to the station on February 12, 2008 from 3:00 p.m. to 11:00 p.m. (Aiello Opp. Affirm., Ex B [Meninger EBT], at 11, 25.) Meninger testified, in pertinent part:

"Q. Can you tell me the general procedure that you would take if you would arrive at your job and it had been snowing?
A. The priority is to get rid of the snow for safety reasons. We are supposed to take care of that for customer [*sic*].

(Continued . . .)

Q. How would you do that?
A. I would go on to the station, look and see if there is snow, go through eight turnstiles or eight stairs ways [*sic*] and make sure to shovel the snow, put salt and sand down, whatever need be.
Q. And you would do that upon arriving and beginning your shift?
A. That's my priority, look to make sure. Safety is first for Transit Authority to do that, yes.
Q. Would you go and shovel the snow yourself if need be?
A. Yes.

* * *

Q. And after shoveling the snow, would you then apply salt or sand; what would you do?
A. Yes, after shoveling, I apply salt and sand and shovel again to double check."

(Meninger EBT, at 17-19.) Plaintiff argues that summary judgment should be denied because defendant's snow removal efforts might have created or exacerbated a dangerous condition.

Plaintiff also claims that defendant had actual notice of the dangerous condition on the stairway. At the statutory hearing, plaintiff was asked, "Did she [plaintiff's wife'] go for medical assistance? Did she look for anybody to assist you or any assistance from people working at the train station?" Plaintiff answered,

> "Oh, yes, they came immediately. The man, whoever it was, that was at the booth came out immediately. He was wonderful. He immediately wanted to put me in an ambulance.
>
> *He had told me that six other people that same night had fallen.* So, he was really being very helpful."

(McCrink Affirm., Ex E, at 14. [plaintiff's emphasis])

Defendant has demonstrated prima facie entitlement to summary judgment as a matter of law on the ground that a storm was in progress on February 12, 2008 at the time of plaintiff's alleged accident.

(Continued . . .)

> "Under the so-called 'storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm. However, even if a storm is ongoing, once a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm."

(*Cotter v Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 97 AD3d 524 [2d Dept 2012] [internal citations and quotation marks omitted]; *see also Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735-736 [1st Dept 2005].)

Plaintiff's objection to the weather report is without merit. CPLR 4528 provides, "Any record of the observations of the weather, taken under the direction of the United States weather bureau, is prima facie evidence of the facts stated." Here, the weather report bears the certification that it is an official publication of the National Oceanic and Atmospheric Administration. (McCrink Affirm., Ex H.) As such, the NOAA weather report is self-authenticating and would have been admissible at trial.

The weather report that defendant submitted establishes that a winter storm was in progress at the time of plaintiff's accident. Contrary to plaintiff's argument, the snow in progress defense "is not limited to snow, but applies as well to conditions caused by sleet and/or freezing rain." (*Hilsman v Sarwil Assoc., L.P.*, 13 AD3d 692, 693-694 [3d Dept 2004].) The weather report indicates that the range of temperatures on February 12, 2008 were below freezing.

Although Meninger testified that his general procedure would be to remove snow at the beginning of his shift if it had been snowing, Meninger did not testify that he actually performed snow removal on February 12, 2008. Meanwhile, plaintiff testified at his deposition that he did not feel any sand on the staircase:

> "A. I would say that if there was sand, I would have felt the sand; so therefore, I would say there was no sand.

(Continued . . .)

Q. Do you know for a fact that there was no sand there?
A. I think I could say that there was no sand there.
Q. On what basis?
A. Well, I don't think I would have slipped if there had been sand.
Q. But do you know for a fact that there was no sand on any of those steps.
A. I would say that there was no sand."

(Plaintiff's EBT, at 86.)

Even if the Court were to assume that Meninger had performed snow and ice removal, "[t]here is simply no evidence that by removing the snow and applying salt, defendant exacerbated the condition." (*Gleeson v New York City Tr. Auth.*, 74 AD3d 616, 617 [1st Dept 2010].)

In *Gleeson*, the Appellate Division, First Department affirmed the lower court's decision (Schachner, J.) to grant the defendant summary judgment dismissing the complaint. The defendant tendered evidence that there was a storm in progress, and "[t]he record shows that defendant's employee was in the process of removing snow and ice and salting the steps when the accident occurred." (*Id.* at at 617.) In affirming the dismissal, the Appellate Division reasoned, "There is simply no evidence that by removing the snow and applying salt, defendant exacerbated the condition. Indeed, plaintiff testified that part of the steps had been shoveled and salted." (*Id.* [internal citation omitted].)

Plaintiff argues that, given the testimony that snow removal might have been performed, summary judgment should be denied, citing *Pipero v New York City Transit Authority.* (69 AD3d 493 [1st Dept 2010].) In *Pipero*, the Appellate Division affirmed the lower court's decision (Schachner, J.) denying the defendant's motion for summary judgment dismissing the complaint. Like *Gleeson*, the defendant in *Pipero* submitted evidence of a storm in progress. However, the Appellate Division affirmed denial of summary judgment, stating, "[P]laintiff's testimony and defendant's own records raise issues of fact as to whether defendant gratuitously and negligently performed snow and ice removal operations and as to whether its failure to place sand or salt on the stairs created or exacerbated a dangerous condition." (*Id.*)

(Continued . . .)

Justice Schachner authored the lower court decisions in both *Gleeson* and *Pipero*, which presented similar facts. Because the only ostensible difference between the two different outcomes mentioned in the appellate decisions was the lack of evidence that defendant created or exacerbated a dangerous condition in *Gleeson*, the decisions must turn on this distinction. On this motion for summary judgment, it is not reasonable to infer solely from the cited EBT testimony respecting general snow removal procedures that snow removal actually had been performed, or that a triable issue of fact is thereby presented as to whether a dangerous condition was created or exacerbated.

Here, as in *Gleeson*, there is no evidence either that defendant performed snow removal, or that such snow removal was negligently performed, or that such snow removal would have created or exacerbated a dangerous condition of the stairway S4. Therefore, defendant's summary judgment motion is granted.

Dated: 6/14/12
New York, New York

HON. MICHAEL D. STALLMAN, J.S.C.

1. Check one: .....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE