SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 108434/2009
HABIB, MYRON
vs.
116 CENTRAL PARK SOUTH
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

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).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

is decided in accordance with the annexed decision.

FILED
OCT 09 2012
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
OCT - 5 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 10/4/12

EK , **J.S.C.**

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**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

MYRON HABIB,

Plaintiff,

Index No.108434/09

-against-

DECISION/ORDER

116 CENTRAL PARK SOUTH CONDOMINIUM, GUMLEY HAFT, PARK HOUSE ASSOCIATES, LTD., 120 OWNERS CORP AND COOPER SQUARE REALTY, INC.,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	3
Answering Affidavits to Cross-Motion.....	4
Replying Affidavits.....	5
Exhibits.....	

Plaintiff Myron Habib commenced the instant action to recover damages for personal injuries he allegedly sustained when he slipped and fell on ice on January 11, 2009. Defendants 116 Central Park South Condominium ("116 Central") and Gumley-Haft, LLC. ("Gumley") now move for summary judgment dismissing the complaint and defendants 120 Owners Corp. ("120 Owners") and Cooper Square Realty, Inc. ("Cooper") cross move for summary judgment dismissing the complaint on the grounds that the accident did not happen on each of their respective properties and that they did not cause the condition or have actual or constructive

notice of the condition. For the reasons set forth below, both the motion and cross motion for summary judgment are granted and the complaint and cross claims are dismissed as to these defendants.

The relevant facts are as follows. Plaintiff allegedly fell on ice and/or snow on January 11, 2009. Throughout the lawsuit, he has given contradictory information about whether he fell in front of 116 Central Park or 120 Central Park. In response to the present motions, he has taken the position that he has fallen in front of 116 Central Park but is bringing a direct claim against 120 Central because an employee of 116 Central states that he fell in front of 120 Central Park and 116 Central asserts that the accident occurred in front of 120 Central Park. Plaintiff's testimony in his deposition about how the accident occurred and what he fell on is also inconsistent. He initially states in his deposition that he does not know whether he fell on snow or ice or a combination thereof and that he did not recall seeing any ice that morning. He then states in the same deposition that he saw what seemed like very thin ice and moisture.

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it did not cause the condition and that it did not have actual or constructive notice of the condition. *See Branham v. Loews Orpheum Cinemas,* 31 A.D.3d 319 (1st Dept 2006). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837-838 (1986). Moreover, "a prima facie case of negligence must be based on something more than conjecture; mere speculation regarding causation is inadequate to sustain the cause of action. Conclusory allegations unsupported by evidence are insufficient to establish the requisite notice for imposition of liability." *See Mandel v 370 Lexington Ave., LLC,*

32 A.D.3d 302, 303 (1st Dept 2006). Finally, "the mere presence of ice does not establish negligence on the part of the entity responsible for maintaining the property." *Lenti v Initial Cleaning Services, Inc.*, 52 A.D.3d 288, 289 (1st Dept 2008). Rather, "plaintiff must present evidence from which it may be inferred that the ice on which he slipped was present on the sidewalk for a long enough period of time before the accident that the party responsible for the sidewalk would have had time to discover and remedy the dangerous condition." *Id.* at 289.

In the instant action, 116 Central and Gumley have established their prima facie right to summary judgment on the ground that they did not cause the condition on which plaintiff slipped and fell and did not have actual or constructive notice of the condition. Mario Williams, who is a doorman at 116 Central, testified at a deposition that he was working the morning shift on the accident from 5:00 a.m. until 1:00 p.m.; that when he arrived at the premises at 5:00 a.m., there was an accumulation of snow on the sidewalk in front of the building and he cleared the entire sidewalk in front of 116 Central at 5:00 a.m.; that he went out again at 7:30 and cleared the sidewalk again; and that he did not observe any accumulation on the sidewalk from the time that he cleared the sidewalk at 7:30 and the time of plaintiff's accident at 9:00 a.m. Moreover, the certified weather records from the time in question, which were submitted as part of defendants' moving papers, establish that on the day before the accident, there was precipitation in the form of snow and freezing rain and that on the day of the accident, the last measurable precipitation was around 5:00 a.m. and there was a trace of precipitation around 6:00 a.m.

In response, plaintiff has failed to raise an issue of fact as to whether 116 Central or Gumley caused the slippery conditions or had actual or constructive notice of the condition which caused his accident. Plaintiff has offered no evidence to support his speculative claim that defendants created the icy condition by the manner in which they shoveled the sidewalk. He has

also failed to present evidence from which it may be inferred that the ice on which he slipped was allegedly present on the sidewalk for a long enough time before the accident that 116 Central would have had enough time to discover and remedy the condition. To the contrary, plaintiff could not even provide any clear testimony as to what caused him to fall or what the condition on the sidewalk was right before he fell. When he was initially asked what caused him to fall, he testified that he fell because he slipped on some ice or snow. He could not answer the question of whether he fell on ice or snow or a combination. He then testified that he did not observe the condition which caused him to fall after he fell. He then stated that he does not recall seeing any ice on the sidewalk that morning. He then stated that he stepped on either ice or snow and that he determined that he stepped on ice or snow by falling. After continued questioning, he stated that he saw moisture and he saw something there. He said what he saw was "more like an ice. Very thin." The foregoing testimony is insufficient to create a factual issue as to whether 116 Central or Gumley caused the condition or had actual or constructive notice of the condition which caused plaintiff to fall. Any finding as to when and if an ice patch developed and what caused it would be based solely on speculation.

The court now turns to the cross-motion of defendants 120 Central and Cooper for summary judgment. This cross-motion is untimely as it was filed more than sixty days after the filing of the Note of Issue. However, as the cross-motion was filed while the underlying motion for summary judgment was still pending, and the issues involving potential liability of the parties are already properly before the court, the court will consider the cross-motion. *See Grande v. Peteroy*, 39 A.D.3d 590, 591-92 (2d Dept 2007)("an untimely motion or cross motion for summary judgment may be considered by the court where...a timely motion for summary judgment was made on nearly identical grounds"); *see also Bressingham v. Jamaica Hospital*

Medical Center, 17 A.D.3d 496 (2d Dept 2005).

The defendants 120 Central and Cooper have also established their prima facie right to summary judgment on the ground that they did not cause the condition on which plaintiff slipped and fell and did not have actual or constructive notice of the condition. As part of their moving papers on their cross motion, these defendants have submitted the deposition transcripts of three employees of Cooper, who all testified that the sidewalk in front of 120 Central was clear and dry at the time of the accident and there was no snow and ice at the time of the accident. In response, plaintiff has failed to raise an issue of fact about whether 120 Central or Cooper caused or had notice of the condition which caused his accident. To the contrary, plaintiff has alleged that the sidewalk in front of 116 Central was dry at the time of the accident and that he did not fall in front of 116 Central. Based on these statements, he has failed to raise any issue of fact sufficient to impose liability on 116 Central or Cooper.

Based on the foregoing, this action is dismissed as against 116 Central, 120 Central, Gumley and Cooper. The only remaining defendant in this action is Park House Associates, Ltd. ("Park House"). If plaintiff plans to discontinue the action against Park House, plaintiff must notify the court. However, if plaintiff plans to continue the action against Park House, plaintiff and Park House must appear for a compliance conference on December 4, 2012 at 11:00 a.m. at 60 Centre Street, Room 43[illegible]. This constitutes the decision, order and judgment of the court.

Dated: 10/4/12

Enter:

J.S.C.