C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

WANDA GOMEZ,

Plaintiff,

-against-

WEBSTER LLC,

Defendant.
X

Index No: **301639/2014**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

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

No On Calendar of **October 13, 2016**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1
Answering Affidavit and Exhibits	2
Replying Affidavit and Exhibits	3
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. This action arose as a result of personal injuries sustained by plaintiff when she fell on snow and ice while traversing a sidewalk adjacent to property owned by defendant. Defendant seeks dismissal of the action on six grounds.

OPEN AND OBVIOUS CONDITION

Defendant argues that since the icy condition was an open and obvious condition, plaintiff could easily perceive how dangerous the snow and ice condition was, and therefore, defendant is not negligent for the icy condition of the sidewalk. Defendant cites to *Melendez v. City of N.Y.*, 76 A.D.3d 442 [1st Dept 2010]), for the proposition that the "open and obvious doctrine [applies] to natural geographic phenomena." *Id.* at 443. However, the First Department gave three

examples of what it means by natural geographic phenomena, such as "a whirlpool area in a state park where four camp counselors drowned (*Cohen v State of New York*, 50 AD3d 1234 [2008], *lv denied* 10 NY3d 713 [2008]); a ten-foot cliff over which an infant plaintiff rode his bike (*Comack v VBK Realty Assoc., Ltd.*, 48 AD3d 611 [2008]); and a ravine in a county park into which plaintiff fell (*Cramer v County of Erie*, 23 AD3d 1145 [2005])." *Id.* It is clear that a paved sidewalk is not a natural geographic phenomenon.

The following hoary case from the Court of Appeals is instructive:

> But one who passes along a sidewalk has a right to presume it to be safe. He is not called upon to anticipate danger, and is not negligent for not being on his guard. Whoever left this area in the sidewalk open and uncovered was guilty of a positive wrong. It amounted to an obstruction of the street. It was a trap set for the unwary, or for those hurried or inattentive. Nobody was bound to anticipate its existence, or to look for it, although it was visible. The plaintiff, therefore, was bound to no special care to avoid such an accident as happened,

McGuire v. Spence, 91 N.Y. 303, 305–06 [1883]).

ADMINISTRATIVE CODE 27-127 and 27-128

Plaintiff plead in her Bill of Particulars that Administrative Code 27-127 and 27-128 were violated by defendant. However, "[a]dministrative Code § 28-301.1, which repeals and re-codifies former sections 27-127 and 27-128 (*see McLaughlin v Ann-Gur Realty Corp.*, 107 AD3d 469, 469 [1st Dept 2013]), is also unavailing. Sections 27-127 and 27-128 were merely nonspecific safety provisions (*Ram v*

64th St.-Third Ave. Assoc., LLC, 61 AD3d 596, 597 [1st Dept 2009]; *see Kittay*, 95 AD3d at 452)." *Centeno v. 575 E. 137th St. Real Estate, Inc.*, 111 A.D.3d 531 [1st Dept 2013]).

Therefore, plaintiff's claim of violation of Administrative Code 27-127 and 27-128 is dismissed.

DUTY TO REMOVE SNOW

Defendant argues that it is an out-of-possession landlord with no duty to clear a path on the sidewalk adjacent to its property. The Building Manager, Randolph Evans, (Evans), an employee of Vandolph Management, avers in an affidavit that the tenants in the building were responsible for snow removal. Evans further avers that "In no event was Webster LLC responsible for snow removal activities outside the premises. Webster LLC did not maintain any presence at the premises." However, at his deposition Evans testified that it was the duty of the superintendent, Carlos Pino, (Pino), to remove the snow if none of the four tenants were in the building. Evans further testified that Pino worked for defendant and was on defendant's payroll. (transcript, p. 39). Clearly, there is an issue of fact regarding defendant's duty to remove snow and ice on the subject sidewalk.

NOTICE

Defendant argues that it had no notice of any hazardous condition on the sidewalk. However, "plaintiff's description of the ice as "dark" and "dirty," standing alone, is sufficient to raise an issue of fact whether the ice had been there long enough to be discovered and remedied by defendant (*see Tubens v New York*

City Hous. Auth., 248 AD2d 291 [1st Dept 1998]; *see also Wright v Emigrant Sav. Bank*, 112 AD3d 401, 401-402 [1st Dept 2013])." *Guzman v. Broadway 922 Enterprises, LLC*, 130 A.D.3d 431 [1st Dept 2015]).

STORM IN PROGRESS

Defendant argues that the storm in progress doctrine relieved defendant of any duty to clear the snow and ice. The facts of the above cited case, are very similar to the facts herein. "Defendant argues that it had no duty to remedy the alleged icy condition that caused plaintiff to slip and fall in front of its deli because there was a storm in progress at the time of the accident (*see* Administrative Code of City of NY § 16-123). However, the record demonstrates that the storm-in-progress doctrine has no application here. Plaintiff testified that the ice on which she slipped was covered by a thin layer of recently fallen, clean snow, that the ice, which she felt with her hand after she fell, was dark, dirty, and very thick, and that there was built-up dirty snow in the area..." *Guzman v. Broadway 922 Enterprises, LLC*, 130 A.D.3d 431 [1st Dept 2015]).

ADMINISTRATIVE CODE 16-123(b)

Defendant argues that the subject ice was so frozen that it could not be removed without injury to the underlying pavement. Defendant further argues, as permitted by Administrative Code 16-123(b), it spread sand on the ice as a measure to prevent falls. Defendant submits a photograph to illustrate that sand was spread on the ice. However, it cannot be held as a matter of law that 1) the ice

could not be removed without harm to the underlying sidewalk, 2) that the photograph indeed depicts sand on the ice, or 3) that the amount of sand distributed on the ice was sufficient to achieve its purpose.

CONCLUSION

"To obtain summary judgment it is necessary that the movant establish [a] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in [movant's] favor [CPLR 3212, subd. (B)], and [movant] must do so by tender of proof in admissible form" *(Friends of Animals v. Asso. Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]).

Defendant's motion for summary judgment is granted to the limited extent that the Administrative Code 27-127 and 27-128 are hereby dismissed. The motion is otherwise denied.

The foregoing constitutes the decision, order and of the Court.

Dated: 12/2/2016

KENNETH L. THOMPSON JR. J.S.C.