Entrada v City of New York
2017 NY Slip Op 30930(U)
April 4, 2017
Supreme Court, Bronx County
Docket Number: 306052/12
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ILLUMINADA ENTRADA,

Plaintiff(s),

DECISION AND ORDER

Index No: 306052/12

- against -

CITY OF NEW YORK,

Defendant(s).

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In this action for alleged negligence with respect to the maintenance of the public sidewalk, defendant THE CITY OF NEW YORK (the City) moves seeking an order granting it summary judgment and dismissal of the complaint. The City argues, *inter alia*, that because plaintiff's alleged accident was preceded by significant precipitation - the last of which fell only hours before plaintiff's accident - the City was not required to ameliorate the icy condition alleged. Plaintiff opposes the City's motion asserting, *inter alia*, that the City fails to establish that the period of time between the cessation of the last storm and plaintiff's accident was insufficient to trigger the City's obligation to undertake snow removal efforts as a matter of law.

For the reasons that follow hereinafter, the City's motion is granted.

The instant action is for alleged personal injuries sustained as a result of the alleged failure to maintain the public sidewalk.

The complaint alleges the following: On October 30, 2011, plaintiff, while traversing the sidewalk located on the overpass of the Cross Bronx Expressway, near Dewey Avenue, Bronx, NY, slipped and fell on snow and ice located thereat. Plaintiff alleges that the City owned and maintained the aforementioned sidewalk and was negligent in failing to remove the snow and ice located thereat. Plaintiff alleges that the foregoing negligence caused her accident and the injuries resulting therefrom.

The City's motion for summary judgment is granted inasmuch as on this record, it is clear that the City did not undertake any snow removal efforts at the location of plaintiff's accident prior to her fall such that it did not create the condition alleged. Moreover, on this record, it is also clear that the City had no notice of the condition alleged. Lastly, insofar as the patch of ice alleged to have caused plaintiff's fall, albeit large, was neither unusual, exceptional, or different in character from those conditions that exist during the winter, the City cannot be liable as a matter of law.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a

defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

On September 14, 2003, with the passage of § 7-210 of the New York City Administrative Code, maintenance and repair of public sidewalks and any liability for a failure to perform the same, was shifted, with certain exceptions, to owners whose property abutted the sidewalk (*Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009], *revd on other grounds* 14 NY3d 779 [2009]; *Klotz v City of New York*, 884 AD3d 392, 393 [1st Dept 2004]); *Wu v Korea Shuttle Express Corporation*, 23 AD3d 376, 377 [2d Dept 2005]).

Specifically, §7-210 states, in pertinent part, that

> [i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition. . . [, that] the owner of real property abutting any

> sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. . . [, that][f]ailure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. . . [,and that] [t]his subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

As noted above, prior to that the passage of § 7-210, the duty to repair and maintain the public sidewalks in a reasonably safe condition rested with the municipality within which the sidewalks were located (*Ortiz* at 24; *Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept 2004]; *Belmonte v Metropolitan Life Insurance Company*, 304 AD2d 471, 474 [1st Dept 2003]). Prior to § 7-210, an abutting landowner had no duty to maintain the public sidewalk and was not civilly liable for an accident occurring thereon unless he/she created the dangerous condition alleged or derived a special use from the sidewalk (*Weiskopf* at 203; *Belmonte* at 474). Accordingly, whereas tort liability for an accident involving a defective condition on a public sidewalk was once premised only upon the abutting owner's affirmative acts in making the sidewalk

more hazardous, i.e., causing or creating a dangerous condition (*Ortiz* at 24), with the enactment of § 7-210, it is now well settled that an owner of property abutting a public sidewalk is liable for a dangerous condition upon said sidewalk even in the absence of affirmative acts (*id.* at 25; *Martinez v. City of New York*, 20 A.D.3d 513, 515 [2d Dept 2005]).

Despite the enactment of § 7-210, the City nevertheless remains responsible for the maintenance of certain sidewalks such as those abutting "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (New York City Administrative Code § 7-210[c]), and is, therefore, liable for defects existing on the sidewalks abutting exempt properties that it fails to remediate. Despite § 7-210, the City also remains liable for any defective condition upon a public sidewalk if it created the dangerous condition alleged, or enjoyed a special use of the area upon where the defect existed (*Yarborough* at 726). Additionally, notwithstanding § 7-210, the City remains liable to maintain the curbs abutting public sidewalks because § 7-210 only shifted the responsibility of sidewalk maintenance to an abutting landowner, which is defined as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians" (New York City Administrative Code § 19-101(d); *see*

also Ascencio v New York City Hous. Auth., 77 AD3d 592, 593 [1st Dept 2010] [Defendant, abutting property owner granted summary judgment in an action arising from an accident on a defective portion of the sidewalk when the evidence established that the accident occurred on the curb.]; *Garris v City of New York*, 65 AD3d 953, 953 [1st Dept 2009]).

The foregoing is also true with respect to the removal of snow from public sidewalks (*Klotz* at 357-358). Stated differently, prior to the enactment of § 7-210, as with the duty to maintain public sidewalks in a reasonably safe condition, *i.e.*, free from defects, the duty to remove snow and ice from public sidewalks rested with the municipality and not the owner of the property abutting the public sidewalk (*id.* ["In New York City, prior to September 14, 2003, there were no such statutes (*see* Administrative Code of City of New York § 7-210, as added by Local Laws 2003, ch. 49, § 1 [imposing tort liability for accidents occurring on or after September 14, 2003, on certain abutting landowners, for failure to maintain a sidewalk in a reasonably safe condition, including negligent failure to remove snow and ice.])]; *Harris v City of New York*, 122 AD3d 906, 907 [2d Dept 2014] ["A property owner is under no duty to pedestrians to remove ice and snow that naturally accumulates upon the sidewalk in front of the premises unless a statute or ordinance specifically imposes tort liability for failing to do so. No such provision was in place in New York

City prior to September 14, 2003, the effective date of a revision to the Administrative Code of the City of New York imposing liability on certain abutting landowners" (internal citations and quotation marks omitted).]; *Sanders v City of New York*, 17 AD3d 169, 169 [1st Dept 2005]; [Noting that in 2000, an abutting property owner had no duty to remove snow from the public sidewalk abutting his/her property.]; *Rios v Acosta*, 8 AD3d 183, 184 [1st Dept 2004] ["For well over a century, it has been the common law of this State that an owner of real property, even if required by municipal ordinance to remove snow or ice from a public sidewalk in front of his premises, is not liable in tort for injuries sustained by a pedestrian who slips and falls on a natural accumulation of snow or ice on that sidewalk."]).

Thus, prior to 2003, an abutting property owner was liable for an accident on snow or ice on the sidewalk abutting his/her property only if "the owner's attempts at snow removal made the sidewalk more hazardous" (*Rios* at 184; *Sanders* at 169; *Klotz* at 358). Presently, however, in New York City, with the enactment of § 7-210, it is now well settled that an abutting property owner, "has a duty to keep a sidewalk abutting its property sufficiently clear of snow and ice so that the sidewalk is maintained in a reasonably safe condition (*McKenzie v City of New York*, 116 AD3d 526, 527 [1st Dept 2014] [internal quotation marks omitted]; *Schron v Jean's Fine Wine & Spirits, Inc.*, 114 AD3d 659, 660 [2d Dept 2014

["The owner or lessee of property abutting a public sidewalk is under no duty to remove ice and snow that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so. Section 7-210 of the Administrative Code of the City of New York (hereinafter section 7-210) places such a duty on commercial property owners, and imposes tort liability for injuries arising from noncompliance)" (internal citations and quotation marks omitted).]).

Despite the advent of § 7-210, which exempts certain property owners from the duty to maintain their sidewalks in a reasonably safe condition, owners of exempt property nevertheless remain liable for injuries caused by defects on the sidewalks which abut their property if they caused or created a dangerous condition thereon or derived a special use[1] from the public sidewalk (*Meyer*

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[1] With respect to special use, the doctrine,

> authorizes the imposition of liability against any entity that installs an object onto the sidewalk or roadway, for injuries arising out of circumstances where the entity has been permitted to interfere with a street solely for private use and convenience which is in no way connected with the public use. Liability may [thus] be imposed since the special user has exclusive access to and control of the special use structure or appurtenance. This creates a duty to properly maintain the structure or appurtenance in a reasonably safe condition

v City of New York, 114 AD3d 734, 734-735 [2d Dept 2014] [Court granted motion by defendants for summary judgment on grounds that the property was exempt under § 7-210 and because they established that they neither created the condition alleged to have caused plaintiff's accident nor did they derive a special use from the public sidewalk.])

When there exists an obligation to maintain the public sidewalk, liability for the failure to do so is governed by the law of premises liability. Thus, as is the case with any action sounding in the negligent maintenance of a premises, liability lies if it is proven that a defendant created the dangerous condition, had prior actual or constructive notice of its existence (*Weinberg v 2345 Ocean Associates, LLC*, 108 AD3d 524, 525 [2d Dept 2013]; *Anastasio v Berry Complex, LLC*, 82 AD3d 808, 809 [2d Dept 2011]),

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(*Posner v New York City Transit Authority* (27 AD3d 542, 544 [2d Dept 2006]; *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 298 [1st Dept 1998]). Thus, "[t]hough not ordinarily liable for the repair and maintenance of the sidewalk abutting his premises, an owner is liable if he creates the condition which causes the injury or if the injury is caused by a defect in that portion of the sidewalk which confers a benefit to him as a special use" (*Santorelli v City of New York*, 77 AD2d 825, 826 [1st Dept 1980]; *Nickelsburg v City of New York*, 263 AD 625, 626 [1st Dept 1942]). Moreover, the proponent of liability premised on special use must establish that "the special use or benefit of the abutting owner is itself defective or in disrepair, or where the defect in the adjoining sidewalk is directly caused by the special use or benefit" (*Santorelli* at 826; (*McCutcheon v National City Bank of N. Y.*, 265 AD 878, 878 [2d Dept 1942] ["There was no defect in the vault cover or the metal strip which caused the accident.], *affd* 291 NY 509 [1943]).

or enjoyed a special use of the public sidewalk (*Terilli v Peluso*, 114 AD3d 523, 523 [1st Dept 2014]; *Rodriguez v City of Yonkers*, 106 AD3d 802, 803 [2d Dept 2013]). As in any case premised on the negligent maintenance of real property, it is well settled that a prerequisite for the imposition of liability for a dangerous condition within, or, on real property, is a defendant's occupancy, ownership, control or special use of the premises (*Balsam v Delma Engineering Corporation*, 139 AD2d 292, 296-297 [1st Dept. 1998]; *Hilliard v Roc-Newark Assoc.*, 287 AD2d 691, 693 [2d Dept 2001]). Absent evidence of ownership, occupancy, control, or special use, liability cannot be imposed (*Balsam* at 297). This is particularly important in an action against a defendant, whose property does not abut the sidewalk upon which a plaintiff claims to have fallen, and who unlike a municipal defendant, does not otherwise have a duty to maintain the public sidewalk.

More specifically, with regard to liability for a dangerous snow and/or ice condition in and around a premises, it is well settled that generally there can be no liability for dangerous conditions resulting from the accumulation of snow and ice absent evidence that a defendant, in electing to remove snow, created a hazardous condition or exacerbated a natural one (*Gwinn v Christina's Polish Restaurant, Inc.*, 117 AD3d 789, 789 [2d Dept 2014]; *Wei Wen Xie v Ye Jiang Yong*, 111 AD3d 617, 618 [2d Dept 2013]; *Cotter v Brookhaven Memorial Hosp. Medical Center, Inc.*, 97

AD3d 524, 524 [2d Dept 2014]), had notice - actual or constructive - of the dangerous condition alleged, and evidence that a reasonable period of time elapsed between the accident and last episode of precipitation (*Laster v Port Authority of New York and New Jersey*, 251 AD2d 204, 205 [1st Dept 1998]; *Soboleva v Gojcaj*, 238 AD2d 170 [1st Dept 1997]; *Urena v New York City Transit Authority*, 248 AD2d 377, 378 [2d Dept 1998]; *Robles v City of New York*, 255 AD2d 305, 306 [2d Dept 1998]; *Bertman v Board of Managers of Omni Court Condominium I*, 233 AD2d 283, 283-284 [2d Dept 1996]).

In cases where a municipality is required to address snow and ice conditions upon public sidewalks, the foregoing is no less true. Thus, the *sine qua non* to municipality liability for a dangerous snow/ice condition upon property it is required to maintain is prior notice (*Otero v City of New York*, 248 AD2d 689, 690 [2d Dept 1998]), creation or exacerbation of a dangerous condition (*Robles* at 306), and a reasonable period of time between the last storm and the accident alleged (*Gonzalez v City of New York,* 168 AD2d 541, 541 [2d Dept 1990]; *Valentine v City of New York*, 86 AD2d 381, 383 [1st Dept 1982], *affd* 57 NY2d 932 [1982]).

For purposes of constructive notice, evidence that it had snowed prior to plaintiff's accident is, by itself, insufficient to establish constructive notice of a dangerous ice condition's existence (*Simmons v Metropolitan Life Insurance Company*, 84 NY2d

972, 973-974 [1994] ["The testimony that it had snowed a week prior to the accident was insufficient to establish notice because no evidence was introduced that the ice upon which plaintiff allegedly fell was a result of that particular snow accumulation."]; *Grillo v New York City Transit Authority*, 214 AD2d 648, 649 [2d Dept 1995 [same]). Instead, a plaintiff seeking to establish constructive notice of an ice condition with proof that it had snowed prior to the accident must establish that the condition alleged was actually caused by the prior storm (*Simmons* at 973-974; *Grillo* at 649; *Lenti v Initial Cleaning Services, Inc.*, 52 AD3d 288, 289 [1st Dept 2008]; *Steo v New York University*, 285 AD2d 420, 421 [1st Dept 2001]). Stated differently, a plaintiff seeking to establish constructive notice of an icy condition by asserting that its origins were the result of weather conditions preceding the accident, must establish the origins of such condition (*Baum v Knoll Farm*, 259 AD2d 456, 456 [2d Dept 1999]; *Fuks v New York City Transit Authority*, 243 AD2d 678, 678-679 [2d Dept 1997]; *DeCurtis v T.H. Associates*, 241 AD2d 536, 537 [2d Dept 1997]; *Denton v L.M. Klein Middle School*, 234 AD2d 257, 258 [2d Dept 1996]). This is because, by definition, constructive notice requires a finding that the condition alleged existed for a sufficient period of time to enable a defendant to discover and remedy the same (*Baum* at 456). Thus, generally to prove constructive notice of an icy condition based on a prior storm, a plaintiff must establish that the icy

condition could have formed as a result of the precipitation and the weather that followed thereafter (*Bernstein* at 1022 ["The evidence indicated nothing more than the possible existence of an unmeasurable trace of snow or ice prior to the January 13 snowstorm. Plaintiff produced no evidence that an ice patch of such dimension could have been formed from such precipitation and could have lasted until January 15. Quite simply, plaintiff has failed to show facts and conditions from which the negligence of defendant could have been reasonably inferred."]).

Notwithstanding the foregoing, constructive notice can, of course, be established by evidence that the condition existed for a prolonged period of time such as eyewitness accounts (*Ralat v New York City Housing Authority*, 265 AD2d 185 [1st Dept 1999] ["Furthermore, in their sworn affidavits submitted on renewal, plaintiff's witnesses both describe having observed plaintiff slip and fall on a large patch of ice. Significantly, they also stated that the icy problem on the sidewalk existed for at least a week prior to plaintiff's accident, and that they had observed other tenants from the Edenwald Housing Project slipping and falling on ice in the same area" (internal quotation marks omitted)]), or by the condition of the ice itself, evincing that it is longstanding and its proximity to defendant's property (*Gonzalez v American Oil Co.*, 42 AD3d 253, 256 [1st Dept 2007] ["From these facts—the large size of the ice patch, its consistency as well as its close

proximity to the store's front door, and defendants' failure to perform any meaningful maintenance—one could reasonably conclude that defendants should have discovered this condition well before plaintiff's fall and remedied it."]).

Climatological reports can be used to establish the weather conditions at the time of the accident alleged, including the existence of snow (*see e.g. Bernstein v City of New York*, 69 NY2d 1020, 1021 [1987] [defendant's evidence as to weather conditions, consisted, in part of meteorological data]; *Clarke v Pacie*, 50 AD3d 841, 842 [2d Dept 2008] [same]; *Ralat* at 187 [same]). However, whether such reports establish the origin, formation, and duration of a particular condition is a factual analysis and is wholly dependent on the facts of each case. For example, in *Rivas v New York City Housing Authority* (261 AD2d 148 [1st Dept 1999]), the court held that using climatological data, plaintiff established that defendant had constructive notice of the defect alleged, namely, a patch of ice (*id.* at 148). The court noted that the climatological reports established that it had snowed several days prior to plaintiff's accident, that some snow remained on the ground thereafter, and that the temperatures remained below freezing, which evidence was sufficient to establish that a defendant had constructive notice of the ice patch alleged and had sufficient to time to discover and remedy the same (*id.*). Conversely, the court in *Womble v NYU Hospitals Center* (123 AD3d

469, 469 [1st Dept 2014), held that climatological data submitted failed that a storm was in progress when it lacked a key explaining the data codes used therein.

Generally, there is no duty to abate a snow or ice condition while a storm is in progress and, generally, no liability will be imposed for an accident occurring during a storm (*Fernandez v City of New York*, 125 AD3d 800, 801 [2d Dept 2015]; *Harmitt v Riverstone Associates*, 123 AD3d 1089, 1089 [2d Dept 2014]; *Pacheco v Fifteen Twenty Seven Associates, L.P.*, 275 AD2d 282, 284 [1st Dept 2000]; *Thomas v First Baptist Church of Westbury, N.Y., Inc.*, 245 AD2d 501, 501 [2d Dept 1997]). The rationale being, of course, that snow removal efforts in the midst of falling snow and high winds is rather fruitless (*Powell v MLG Hillside Associates*,, 290 AD2d 345, 345 [1st Dept 2002]). In addition, what constitutes a reasonable time after the cessation of a storm sufficient to impose snow removal efforts is often a question of fact (Rodriguez v Woods, 121 AD3d 474, 476 [1st Dept 2014] ["Once there is a period of inactivity after cessation of a storm, it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable."]; *Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 163 [1st Dept 2003] ["The snowfall having ceased for several hours by the time of plaintiff's alleged accident on the morning of March 7, 1999, there is at least an issue of fact as to whether any delay by appellants in commencing their cleanup was reasonable."]; *Powell* at

346 ["Once there is a period of inactivity after cessation of the storm, it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable."]).

Nonetheless, this issue can be, and has been decided as a matter of law, when the evidence so warrants. With respect to municipal liability, summary judgment has generally been granted, and the issue of reasonableness has been resolved as a matter of law when the storm preceding an accident is severe (*Rodriguez* at 476). In *Valentine*, for example, the court vacated a jury verdict in favor of plaintiff which he obtained at trial upon proof that the time between plaintiff's fall and the cessation of the storm which created the condition alleged was insufficient as a matter of law (*id.* at 388). Specifically, the court noted that because of "the severity [of] the ice storm, the second worst to strike this area in 50 years, [which] was followed by temperatures which never rose above 32 degrees Fahrenheit and reached a low of 17 degrees Fahrenheit on the morning of the accident," the 30 hours between the storm's cessation and plaintiff's accident was insufficient as a matter of law to impose an obligation upon the City of New York to clear the snow at the location of plaintiff's accident (*id.* at 384). Significantly, on the issue of the reasonableness between the cessation of the storm and how long thereafter snow removal efforts were undertaken the court in *Valentine* found it dispositve that the City of New York had not cleaned the area of plaintiff's

alleged fall because it had so much snow to clear and over a wide area such that its resources were limited (*id.* at 382). Specifically, the court noted that

> [t]The city's snow removal operations, which extend over 6,401 miles of streets and 11,420 miles of sidewalk, broken down into 58 snow removal districts, began on December 16 and continued at least until December 21. The snow removal district in which Murdock Avenue is situated consists of 120 miles of streets and 240 miles of sidewalks, abutted by as many as 19,483 dwelling units. In the three days from December 17 to December 19, the city assigned 35, 25 and 33 men, respectively, to snow removal duty in this district alone. Working overtime they used as many as 32 pieces of snow removal equipment in one day, including plows and front-end loaders, and spread, in the three-day period, 1,421 tons of salt

(*id.*). Similarly, in *Weisfeld v City of New York* (282 AD 739, 739 [2d Dept 1953]), the municipal defendant was granted summary judgment when the court concluded that an accident occurring five days after the cessation of a snow storm, during which 16.7 inches of snow fell, could not cast defendant in liability because delay in clearing the snow was not unreasonable. In *Rapoport v City of New York* (281 AD 33, 34 [1st Dept 1952]), the court vacated the jury's verdict upon evidence that plaintiff's accident occurred

> less than ninety hours after the termination of the record-breaking blizzard of December 26, 1947, during which there fell 25.8 inches of snow and 2.67 inches of other precipitation. It

> was the greatest snowfall ever recorded in the history of the city's weather bureau, which began to function in the year 1870. During the ninety hours between the end of the snowfall and the time of plaintiff's accident, the temperature was above the freezing level for a total of only six hours. The testimony showed that during this period the sanitation department and the police department of the city had been used not only to cope with the problem of snow removal, but to aid with the resultant health and manifold safety problems.

Based on the foregoing, the court held that the ninety-hour delay in clearing the snow from the location of plaintiff's accident was not unreasonable as a matter of law (*id.*; *see also Thompson v* Rose, 283 AD 735 [2d Dept 735, 735 [2d Dept 1954 ["The accident occurred on December 23, 1948, about 1:30 P.M., approximately three and a half days after the termination of a snowstorm during which 16.7 inches of snow fell. In our opinion, plaintiff failed to establish any actionable negligence on the part of the City of New York."]; *Ganek v City of New York*, 286 AD 1036, 1036 [2d Dept 1955] [Summary judgment in favor of defendant granted when "[t]he accident occurred on December 23, 1948, shortly after 9:00 A.M., about eighty hours after the termination of a snowstorm during which sixteen and seven-tenths inches of snow fell."]).

While there is no obligation to abate a snow/ice condition until a storm ceases, "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* at 524; *Harmitt* at 1091; *Arashkovitch v City of New York*, 123 AD3d 853, 854 [2d Dept 2014]).

A municipality cannot be held liable for a defective snow/ice condition unless it is established that it is unusual, exceptional, or different in character from those conditions that exist during the winter (*Gaffney v City*, 218 NY 225, 227 [1916] [Plaintiff's action for a fall on the sidewalk due to slush dismissed insofar as the slush was neither unusual or exceptional and was instead a condition naturally to be expected during the winter.]; *Williams v City of New* York, 214 NY 259, 264 [1915]; *Saez v City of New York*, 82 AD2d 782, 783 [1st Dept 1981] ["On the facts before this Court the plaintiff failed to show that the defendants permitted an unusual and dangerous accumulation of ice and snow (- ice patches - -) to remain on the sidewalk for an unreasonable period of time."]; McGuire *v City of New York*, 24 AD2d 496, 497 [2d Dept 1965] ["In our opinion, plaintiff failed to establish that the patch of ice upon which he slipped was dangerous or unusual or exceptional."]; *Mazanti v Wright's Underwear Co.*, 266 AD 18, 21 [3d Dept 1943]). The foregoing rule, was aptly articulated in *Harrington v City of* Buffalo (121 NY 147 [1890]), where the Court of Appeals, affirmed summary judgment in favor of the municipal defendant upon plaintiff's fall on a slippery and icy sidewalk (*id.* at 151). Significantly, the Court noted

> [t]he walk [upon which plaintiff fell], as thus shown, presented no unusual appearance for cities in our uncertain and inclement climate, and caused no more objectionable obstacle to safe passage than frequently exists in cites and villages during the cold season. Whatever might have been its condition, so far as danger was to be apprehended, it arose solely from its frozen and slippery condition, and that, as we have seen, was caused by the freezing of the night before the accident. The danger arising from the slipperiness of ice or snow lying in the streets is one which is familiar to everybody residing in our climate, and which every one is exposed to who has occasion to traverse the streets of cities and villages in the winter season. Accidents occurring from such causes are chargeable solely to the persons injured, unless it can be shown that the cause thereof has been occasioned, aggravated, or negligently permitted by the act of some third party charged with the duty of obviating or removing it . . . The proof fails to show that there was any unusual or dangerous obstruction to travel arising from snow or ice in the street, or, even if there was, that any such lapse of time had intervened between the period of its creation and the occurrence of the accident as afforded a presumption of knowledge in the municipality of its condition; or opportunity to remove the obstacle after notice was received

(*id.* at 150 [emphasis added]).

In support its motion, the City submits plaintiff's 50-h hearing transcript wherein she testified, in pertinent part, as follows: On October 30, 2011, at approximately 6:50AM, plaintiff slipped and fell as she traversed the sidewalk located on the

overpass of the Cross Bronx Expressway near Dewey Avenue. Plaintiff had just left her home on Rever Avenue and intended to walk to work. At some point, after she had traversed 20 feet on the sidewalk on the overpass - which she testified was covered in two inches of uncleared snow - plaintiff slipped and fell on ice. Plaintiff testified that she saw the ice immediately prior to falling. She described the ice as covering the sidewalk and also testified that it had snowed during night preceding the morning of her fall.

The City submits Anthony Amore III's (Amore) deposition transcript wherein he testified, in pertinent part, as follows: on April 26, 2016, the date of his deposition, Amore was a supervisor with DOS within District 10. The sidewalk on the overpass at or near Dewey Avenue and East 177th Street, Bronx, NY falls within the jurisdiction of District 10. Amore testified that DOS maintained a snow folder for each snow storm, which folder contained all snow removal related documents. Specifically, the folder contained documents indicating the routes cleaned and equipment used by DOS to remove snow after a storm. While DOS was responsible to clear snow from the forgoing sidewalk, none of the records in the snow folder indicated whether DOS undertook such efforts. The records do indicate that on October 29, 2011, DOS did not engage in any snow removal efforts on the roadway abutting the overpass at or near Dewey Avenue and East 177th Street, Bronx, NY.

The City submits David Lowe's (Lowe) deposition transcript wherein he testified, in pertinent part, as follows: on October 30, 2011 at 6:45, Lowe was walking and headed to work when he heard screaming. He then noticed that plaintiff was laying on the ground on the sidewalk on the overpass at or near Dewey Avenue and East 177th Street, Bronx, NY. Lowe testified that the sidewalk was covered with ice, that it had snowed the night before, and that neither the sidewalk at this location nor the roadways appeared to have been cleaned.

Lastly, the City submits a certified Local Climatological Data Report, which indicates that on October 29, 2011, at Central Park, there were 2.9 inches of snow on the ground. The report further indicates that two of the foregoing inches fell on October 29, 2011, where it snowed consistently from 4AM on the 29th through 1AM on the 30th.

Based on the foregoing, the City establishes prima facie entitlement to summary judgment.

First, the *sine qua non* to municipality liability for a dangerous snow/ice condition upon property it is required to maintain is prior notice (*Otero* at 690), creation or exacerbation of a dangerous condition (*Robles* at 306), and a reasonable period of time between the last storm and the accident alleged (*Gonzalez* at 541; *Valentine* at 383). Here, while, as will be discussed

below, the City fails to establish that the time between the accident and the last period of precipitation was insufficient to trigger the City's duty to undertake snow removal efforts as a matter of law, the City does establish the absence of notice and that it did not create the condition alleged. While concedely, the testimony provided by City's DOS employees was less than ideal, it nevertheless indicated that DOS had not undertaken any snow removal efforts on the roadways of the overpass. Specifically, Amore testified that the DOS' records indicate that on October 29, 2011, DOS did not engage in any snow removal efforts on the roadway abutting the overpass at or near Dewey Avenue and East 177th Street, Bronx, NY. Additionally, both plaintiff and Lowe testified that based on their observation, there had been no effort to clear snow or ice from the location of the instant accident. Accordingly, the City's evidence establishes the absence of any actual notice of the condition alleged. Based on the forgoing, the City also establishes that, having undertaken no snow removal efforts at the sidewalk at issue, they cannot be charged with creating the condition alleged to have caused plaintiff's fall.

With respect to constructive notice, evidence that it had snowed prior to plaintiff's accident is, by itself, insufficient to establish constructive notice of a dangerous ice condition's existence (*Simmons* at 973-974; *Grillo* at 649). The absence of evidence demonstrating how long a condition existed prior to a

plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group,* 269 AD2d 575, 575 [2000]). "[W]here the hazardous condition is transitory, a defendant may establish its entitlement to summary judgment by demonstrating that the condition could have arisen shortly before the accident" (*Betances v 185-189 Audubon Realty, LLC*, 139 AD3d 404, 405 [1st Dept 2016]; *Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 838 [2005]; *Brooks-Torrence v Twin Parks Southwest*, 133 AD3d 536, 536 [1st Dept 2015]). Here, insofar as plaintiff testified that she did not see any the ice and snow alleged to have caused her fall until immediately prior thereto, defendants establish the absence of constructive notice.

Second, the City also establishes prima facie entitlement to summary judgment insofar as plaintiff's own testimony as well as that of Lowe fails to establish that the condition alleged to have caused this accident was unusual or extraordinary. As noted above, a municipality cannot be held liable for a defective snow/ice condition unless it is established that it is unusual, exceptional, or different in character from those conditions that normally exist during the winter (*Gaffney* at 227; *Williams* at 264; *Saez* at 783; McGuire at 497; *Mazanti* at 21). Here, the condition alleged to have caused plaintiff's accident is ice upon the sidewalk. While

it is alleged that the area of ice was large, this by itself and after the storm which preceded plaintiff's fall is insufficient as a matter of law (*Harrington* at 150).

Contrary to the City's assertion, the evidence submitted fails to establish that the period between the cessation of the prior storm and plaintiff's accident was insufficient so as to obviate the City's duty to abate the condition alleged. Whether the time between a storm's cessation and an accident is sufficient to impose an obligation upon a municipality to clear snow from its sidewalks can and has been decided as a matter of law. The relevant inquiry is whether the storm preceding an accident is severe enough so as to make any delay in clearing snow reasonable as a matter of law (*Rodriguez* at 476). Here, however, the climatological report does not indicate a prolonged multi-day period of heavy precipitation, but merely that it snowed consistently on the 29th and through 1AM on the 30th. While plaintiff testified that she fell at 6:30AM, only six and one half hours after it had stopped snowing, given the nature of the storm, whether the City should have undertaken snow removal efforts cannot be decided as a matter of law and is a question of fact for the jury (Rodriguez at 476; *Tucciarone* at 163; *Powell* at 346; *cf. Rodriguez* at 476).

Nothing submitted by plaintiff raises an issue of fact sufficient to preclude summary judgment. Saliently, plaintiff

contends that issues of fact with respect to notice preclude summary judgment because plaintiff testified that a portion of the sidewalk upon which she fell had been cleared of snow and because the City's own records evince that they salted the roadway on dewey Avenue, which is near the location of the plaintiff's accident. The foregoing, plaintiff urges, indicates that DOS personnel were aware of the icy condition alleged prior to plaintiff's fall, or should have been.

Plaintiff's contentions lack merit. To be sure, here, plaintiff, having seen the ice upon which she slipped only moments before her fall, cannot establish how long the ice was present thereat so as demonstrate that defendants were actually or should have been aware of it. Significantly, actual notice requires proof that defendants were aware of the *specific* condition alleged prior an accident (*Jordan v Irwin*, 284 AD2d 190, 190 [1st Dept 2001]). Here, however, there is simply no evidence that the ice patch upon which plaintiff fell existed when the City undertook snow removal efforts at or near the location of the instant accident. Stated differently, here, if, as per the City's records, DOS was near the situs of the accident on the 29th, there is no proof that any DOS employees saw the icy condition alleged or that it even existed at the time.

With regard to constructive notice, a defendant is charged

with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group,* 269 AD2d 575, 575 [2000]). As noted above, where as here, plaintiff's opposition is bereft of any evidence that the condition alleged existed when the City removed snow near the situs of the accident, plaintiff's opposition fails to establish the condition's existence when DOS was there so as to charge the City with constructive notice.

Plaintiff's expert affidavit, wherein Mark L. Kramer (Kramer) opines that the situs of the accident "was cleaned by defendant through salting or other man-made efforts," is unavailing. It is

well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence *(Cassano v. Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1982]). Moreover, "where the expert states his conclusion unencumbered by any trace of facts or data, his testimony should be given no probative force whatsoever" (*Amatulli by Amatulli v Delhi Const. Corp.*, 77 NY2d 525, 533-534, n 2 [1991] [internal quotation marks omitted]). Here, where the record is devoid of any evidence that the precise location of plaintiff's accident was cleared of snow or ice, Kramer's affidavit is speculative and cannot be accorded any weight. It is hereby

ORDERED that the complaint be dismissed, with prejudice. It is further

ORDERED that the City serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

Dated : April 4, 2017
Bronx, New York

Ben Barbato, ASCJ