SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ELVIRA PALACIO,

Plaintiff,

-against-

SEWARD PARK HOUSING CORPORATION and
CHARLES H. GREENTHAL MANAGEMENT CORP.,

Defendants.

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Index No. 154859/15

Motion seq. nos. 001 and 002

DECISION & ORDER

BARBARA JAFFE, JSC:

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By notice of motion, defendants Seward Park Housing Corporation (Seward) and Charles H. Greenthal Management Corp. (Greenthal) move for an order vacating the note of issue and certificate of readiness, and compelling plaintiff to comply with their discovery demands. (Seq. 001). By a separate notice of motion, defendants move for an order granting them summary dismissal on the ground that a storm in progress at the time of plaintiff's accident precludes liability. (Seq. 002). Plaintiff opposes both motions.

I. PERTINENT FACTS

A. Background

On March 5, 2015 at approximately 9:15 am, plaintiff allegedly slipped and fell on snow and ice on the sidewalk abutting the property at 208-212 East Broadway, New York, New York,

which is owned by Seward and managed by Greenthal. (NYSCEF 19, 20). She was then transported by ambulance to Lower Manhattan Hospital. (NYSCEF 20, 21).

At a deposition held on June 1, 2016, plaintiff testified that the morning of her accident, it was snowing as she was pushing a grocery cart home from the supermarket; the entire sidewalk was covered with ice and she slipped and fell on a patch of dark ice beneath the fresh snow. As a result of the fall, plaintiff alleged, she injured her wrist, and now has pain in her "whole arm" and "whole body," and cannot use her hand as she is unable to tighten her grip. She also testified that she was in a prior car accident which resulted in a back injury and hospitalization, and in relation to which she had brought a lawsuit. (NYSCEF 21, at 23-25).

In an affidavit submitted by defendants in support of their motion, Seward's superintendent states that it is the practice of Seward's porters to remove snow from the sidewalk, and it is his practice to walk around the property "on various occasions" during the day, and at the end of a workday, he drives around to see whether the sidewalk is free from obstructions including snow and ice, which he did on the date of the accident. He recalls that it was snowing on the day of the accident, but has no specific memory of the sidewalk from the prior evening, although he claims that he would have remembered if it had been covered in ice. (NYSCEF 24).

In another affidavit submitted by defendants in support of their motion for summary dismissal, meteorologist George Wright provides his analysis of the weather conditions at the location of the accident based on, *inter alia*, an analysis of plaintiff's verified bill of particulars and deposition, certified climatological records from a weather station located approximately 4.5 miles from the location, and other data including surface weather maps and radar images. He states that there was rainfall from approximately 9 pm on March 4, 2015, that continued through

3:30 the following morning when the rain turned to snow. He also states that the snow continued to fall and, as the temperature fluctuated above and below freezing, the rainwater and slush on the sidewalk began to freeze, which created a layer of ice on top of which snow accumulated. By the time of plaintiff's accident, he states, the snowfall was moderate, and approximately two inches of snow had accumulated on top of a newly formed layer of ice.

B. Procedural background

On or about June 24, 2016, defendants served plaintiff with a notice for discovery and inspection demanding, *inter alia*, "[t]rue, accurate and complete copies of all pleadings, bills of particulars, medical records and reports and deposition transcripts concerning the suit commenced by the plaintiff regarding her previous personal injury." (NYSCEF 13, Exh. E). On or about August 10, 2016, plaintiff served defendants with a response to the notice for discovery and inspection in which she, *inter alia*, objected to their demand for records relating to her previous personal injury, claiming it was irrelevant. (NYSCEF 13, Exh. F).

On or about August 12, 2016, plaintiff filed her note of issue. (NYSCEF 11).

II. MOTION FOR SUMMARY JUDGMENT

Defendants deny liability for plaintiff's injuries as their duty to clear the sidewalk of obstructions was suspended by a storm in progress. They rely on their expert's opinion which they claim establishes that a storm was in progress at the time of plaintiff's accident as he states that (1) a steady rainfall began the evening at approximately 9 pm, before plaintiff's accident, when the temperatures were above freezing, (2) at 3:30 am, rain mixed with snow and created slush, (3) by 4:30 am, temperatures dropped, the slush froze, and snowfall began, and (4) snow fell heavily for the remainder of the morning and thereafter. They observe that plaintiff's testimony is consistent with their expert's opinion inasmuch as plaintiff states that it was

snowing that morning. (NYSCEF 17). They also assert, relying on their expert's opinion, that as a result of the high temperatures and rain that fell on March 4, any ice pre-existing the storm would have melted. Thus, they contend, the ice on which plaintiff fell must have formed during the storm, and that absent evidence that the ice on which she fell preexisted the storm, plaintiff cannot establish that they had notice of the dangerous condition. They observe that plaintiff testified that when she passed that location on March 1, she did not notice any ice on the sidewalk, and that although Seward's porter does not recall inspecting the location the evening before plaintiff's accident, as he testified that it was his practice to inspect the sidewalk daily, he would have noticed any ice and thus, his affidavit does not support plaintiff's assertion that the ice preexisted the storm. (*Id.*).

In opposition, plaintiff argues that the weather records support her contention that the ice preexisted the storm, as there were more than six inches of snowfall in the four days preceding her accident, and as temperatures fluctuated above and below freezing during that period which, she asserts, caused snow to melt and refreeze. Moreover, she observes that, as of the morning of March 5, there were 13 inches of snow on the ground which, she contends, establishes that the ground was not clear of preexisting snow and ice at the time of her accident. Her testimony that the ice was "dark," she argues, considered with this climatological data, creates an issue of fact as to whether the ice on which she fell formed before the storm began, and whether defendants had notice of the icy condition, as they would have had ample opportunity to remove ice that formed as a result of prior snowfalls. She contends that they may even have caused the condition by negligently removing snow from the sidewalk, and allowing runoff from piles of shoveled snow to melt and refreeze. (NYSCEF 43).

Plaintiff denies that defendants' expert affidavit is relevant as it is not site-specific, and concerns regional weather conditions. Nor is the porter's testimony relevant absent a recollection of anything about his inspection the prior evening and that in any event, the condition would not likely have been visible to him as he drove on the street abutting the sidewalk. (*Id.*).

In reply, defendants argue that there is no evidence that the icy condition preexisted the storm, and observe that plaintiff provides no photographic evidence of the condition or affidavit as to the existence or location of ice or snow. They also assert that whether the porter could see the condition from the street is irrelevant, as he stated that it was also his daily practice to inspect the location on foot. (NYSCEF 51).

A party seeking summary judgment must demonstrate *prima facie,* that it is entitled to judgment as a matter of law, by presenting sufficient evidence to negate any material issues of fact. (*Forest v Jewish Guild for the Blind,* 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer admissible evidence to demonstrate the existence of factual issues that require a trial. (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad,* 64 NY2d at 853). A defendant moving for summary judgment must negate, *prima facie,* an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.,* 23 AD3d 365, 366 [2d Dept 2005]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. (*Forest,* 3 NY3d 314). Moreover, "as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively

demonstrate the merit of its claim or defense." (*Mennerich v Esposito,* 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.,* 185 AD2d 614, 615 [4th Dept 1992]).

An owner or occupant of a premises has a duty to remove an accumulation of snow or ice outside the premises which may be dangerous to those entering the premises, or to take other measures to ensure the safety of the premises, when it has actual or constructive notice of the existence of the condition and a reasonable opportunity to act. (86 NY Jur 2d, Premises Liability § 341 [2017]; 15 NY Prac, New York Law of Torts § 12:11 [2016]; *see eg Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541, 542 [1st Dept 2015]; *Solazzo v New York City Transit Auth.,* 21 AD3d 735, 736 [1st Dept 2005], *affd* 6 NY3d 734). An owner or occupant of premises will not, however, be held liable for injuries "sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter." (*Dylan v CEJ Properties, LLC*, 148 AD3d 1115, 1116 [2d Dept 2017]; *Espinell v Dickson*, 57 AD3d 252, 254–55 [1st Dept 2008]). Thus, the duty "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." (*Pippo v City of New York,* 43 AD3d 303 [1st Dept 2007]; *Powell v MLG Hillside Assocs., L.P.,* 290 AD2d 345 [1st Dept 2002]). Evidence of a storm in progress presents *a prima facie* case for dismissal, and is especially persuasive where based on the analysis of a licensed meteorologist. (*Powell,* 290 AD2d at 345-46)

Here, the certified climatological data reflects that precipitation began to fall at approximately 9 pm on March 4 and continued unabated until approximately 7 pm on March 5. Defendants have thus established, *prima facie*, that as there was a storm in progress commencing before and continuing when plaintiff fell, they cannot be held liable for her injury. (*See Dylan*,

148 AD3d at 1117 [meteorologist's affidavit and certified climatological data established storm in progress and *prima facie* case for summary judgment]).

Notwithstanding the defense expert's opinion that the ice formed that morning, plaintiff's testimony that the ice was "dark," in light of the climatological data showing significant snowfall and fluctuating temperatures in the days preceding the accident, raises a factual issue as to whether defendants had constructive notice of the ice, and whether the icy condition preexisted the storm, thus precluding summary dismissal. (*See Genao v M.E.I.T. Assocs., LLC*, 126 AD3d 497, 498 [1st Dept 2015] [evidence that 23 inches of snow fell in previous days raised triable fact as to whether ice preexisted storm in progress]; *Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 567 [1st Dept 2011] [plaintiff's description of the "nature" of the ice, with weather data showing below freezing temperature in days preceding storm, was sufficient at summary judgment stage to raise triable issue as to preexistence, even where defendant's expert opined that preexistence was impossible]; *Tubens v NY City Hous. Auth.*, 248 AD2d 291, 292 [1st Dept 1998] [claim of "old ice" not speculative where some 10 inches of snow, as opposed to trace amounts, fell in two days preceding accident]). In any event, plaintiff's testimony that the ice was "dark" and covered the entire sidewalk is, standing alone, sufficient to raise a triable issue of fact as to whether the ice preexisted the storm in progress and, therefore, whether defendants had constructive notice of the condition. (*See Guzman v Broadway 922 Enterprises, LLC*, 130 AD3d 431 [1st Dept 2015] [plaintiff's description of ice and "dark" and "dirty" sufficient to raise triable issue of fact as to whether ice preexisted storm in progress]; *Genao,* 126 AD3d at 498 [plaintiff and sister testified that ice was "grayish" and about "three fingers" thick, creating issue of fact as to whether ice preexisted storm in progress]; *Wright v Emigrant Sav. Bank*, 112 AD3d 401, 401–02 [1st Dept 2013] [plaintiff's description of ice as "black grayish" and "dirty snow" raised issue

of fact as to notice]; *Meehan v Barksdale Tenants Corp.*, 73 AD3d 514, 514 [1st Dept 2010] [testimony that ice was gray combined with evidence of two days of below freezing temperature sufficient to raise issue of fact as to constructive notice]). *DeJesus v New York City Housing Authority* is distinguishable in that, *inter alia*, neither ice nor snow conditions were addressed. (11 NY3d 889 [2008]).

Given the foregoing, I need not reach the parties' contentions as to whether Lozado could have seen the icy condition, whether the defense expert's analysis of the weather pertains to the site of plaintiff's accident, or whether defendants may have caused the condition to exist by negligently removing snow from the sidewalk.

III. MOTION TO VACATE NOTE OF ISSUE

Although defendants state in their motion papers that plaintiff has failed to appear for a physical examination, plaintiff's physical examination is now complete and the only issue remaining concerns defendants' demand for records exchanged during plaintiff's prior personal injury lawsuit. (NYSCEF 60).

Defendants contend that these records are relevant and discoverable as plaintiff testified that she is experiencing pain in not only her wrist, but her entire arm and body, and as she claims in her verified bill of particulars that she suffered permanent injuries which caused partial disability, and "shock to the body and nervous system, produced functional and organic disturbances, sympathetic and radiating to and about the adjacent and surrounding areas, as well as tissue damages." (NYSCEF 20). She also, they observe, states in her complaint that she "sustained severe injuries to various parts of [her] body." (NYSCEF 1, 13). Thus, they argue that the note of issue and certificate of readiness are inaccurate, as pretrial discovery is not

complete, and that it must be vacated and an order issued compelling plaintiff to produce the records. (NYSCEF 13).

In opposition, plaintiff argues that the records are neither relevant nor discoverable, as her back injuries are unrelated to her wrist injury. She contends that, even if she must produce the records, I should permit the case to remain on the trial calendar while discovery continues. (NYSCEF 14). Moreover, in her oral argument, she asserted that she has no intention of claiming at trial any injuries other than those alleged in her bill of particulars. (NYSCEF 60).

In reply, defendants reassert that they are entitled to determine whether plaintiff's claimed injuries and damages are attributable to other accidents. (NYSCEF 16).

Pursuant to 22 NYCRR 202.21(e), a party may move to vacate a note of issue within 20 days of its service on the ground that the case is not ready for trial and it appears that a material fact in the certificate of readiness is incorrect. Where the certificate of readiness incorrectly states that all discovery is complete, it is within my discretion to vacate the note of issue (*Nielsen v NY State Dormitory Auth.*, 84 AD3d 519, 520 [1st Dept 2011]), or allow the action to remain on the trial calendar while discovery is completed (*Cabrera v Abaev*, 150 AD3d 588 [1st Dept 2017]; *Suarez v Shapiro Family Realty Assocs., LLC*, 149 AD3d 526 [1st Dept 2017]).

It is well settled that CPLR 3101(a) requires full disclosure of all evidence material and necessary to the prosecution or defense of an action. (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000]). What is "material and necessary" generally has been left to the sound discretion of the court and may include "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Id.*). The issue is not whether the material is admissible at trial, as pretrial discovery extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof.

(*Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 612 [2d Dept 2011]). Rather, the test is one of usefulness and reason." (*Andon ex rel. Andon*, 94 NY2d at 746).

As plaintiff claims in her verified bill of particulars that, as a result of this accident, she suffers from permanent injuries, shock to the body and nervous system, and partial disability, and testified that she experiences pain in her entire arm and body, the records exchanged in her prior personal injury lawsuit are relevant and discoverable. (*Dibble v Consol. Rail Corp.*, 181 AD2d 1040, 1040 [4th Dept 1992] [records as to prior back and leg injuries discoverable in action for injury of head, neck, shoulder and arm as plaintiff claimed multiple trauma, contusions and abrasions to his body and limbs]).

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED, that defendants' motion for summary dismissal is denied; and it is further

ORDERED, that defendants' motion to vacate plaintiff's note of issue is granted unless plaintiff provides defendants, within 30 days of service on her of a copy of this order with notice of entry, with a response to their June 2016 discovery demand for copies of all pleadings, bills of particulars, medical records and reports, and deposition transcripts from the lawsuit she commenced in relation to her prior back injury. If plaintiff fails to comply, defendants may submit an affirmation of non-compliance.

ENTER:

Barbara Jaffe, JSC
BARBARA JAFFE

DATED: June 26, 2017
New York, New York