SHORT FORM ORDER

INDEX No. 15-609398
CAL. No. 17-01701OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 3-1-18
ADJ. DATE 5-16-18
Mot. Seq. # 001 - MD

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DENISE GEBHART,

Plaintiff,

- against -

THE ROMAN CATHOLIC CHURCH OF SAINT JUDE and ST. JUDE'S NURSERY SCHOOL,

Defendants.

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Upon the following papers e-filed and read on this motion for summary judgment : Notice of Motion and supporting papers by defendants dated January 10, 2018 ; Answering Affidavits and supporting papers by plaintiff dated May 9, 2018 ; Replying Affidavits and supporting papers by defendants dated June 12, 2018 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant The Roman Catholic Church of Saint Jude, sued herein as The Roman Catholic Church of Saint Jude and St. Jude's Nursery School, for summary judgment dismissing the complaint, pursuant to CPLR 3212, is denied.

Plaintiff commenced this action against defendant to recover damages for injuries she allegedly sustained from a slip and fall accident that occurred on January 26, 2015 on a walkway in front of the parish center of defendant The Roman Catholic Church of Saint Jude, which is located in Mastic Beach, New York. By her bill of particulars, plaintiff alleges that defendant created a dangerous condition by failing to properly remove snow and ice from the walkways, and that it was negligent in failing to apply a melting agent on the walkways, in failing to inspect the walkways, and in failing to warn of the alleged dangerous condition.

Defendant now move for summary judgment dismissing the plaintiff's complaint on the grounds that the "storm in progress" rule precludes liability for the icy condition on the surface of the walkways that allegedly caused plaintiff to slip and fall. In support of the motion, defendant submits copies of the

pleadings and the bill of particulars, the transcripts of the parties' deposition testimony, pictures of the subject premises, an incident report, the affidavit of Paul Eisen, and certified meteorological records from the National Climatic Data Center.

Plaintiff testified that on the date of the incident, she arrived at the parish center between 8:50 a.m. and 9:00 a.m., and that she intended to walk her son inside to attend the nursery school. She testified that she exited her vehicle, assisted her son out of the vehicle and held his hand. She testified that the weather was overcast, and that she does not recall any precipitation on the morning of the incident, but she observed a light dusting of snow on the handicap ramp. Plaintiff testified that she intended to enter the building by traversing the handicap ramp which is located to the left of the front entrance and main walkway, as it was closer. She testified that she stepped onto the curb, traversed the sidewalk and was about to walk up the handicap ramp when she slipped and fell. Plaintiff testified that she did not observe any ice on the walkway before she slipped, but that she observed ice on the entire walkway when she was on the ground.

Cynthia Lacey testified that she is the business manager for defendant, and that she has worked at the subject premises for eleven years. She testified that her responsibilities include financial, operations and general maintenance of the building, and that she works Monday through Thursday from 8:00 a.m. until 6:00 p.m. She testified that her son, Cameron Lacey, also works for the parish, and that he is a custodian. She testified that he works on Monday, Tuesday, Wednesday and Friday from 8:30 a.m. until 4:30 p.m.

Lacey testified that there are five buildings on the premises, and that her office is located in the rectory. She testified that the nursery school is contained in a building that has three entrances, that the nursery school begins each weekday morning at 9:00 a.m., and that the school doors are unlocked at 8:55 a.m. She testified that Cameron reports to her office upon arrival, signs the time sheet, and that she gives him the keys to the buildings and provides him with any special instructions for the work day. She testified that Cameron inspects the bathrooms before the children arrive, that he checks in with the teacher in the upstairs classroom to obtain any special instructions, and then he unlocks the front door of the building and opens it and closes it as each parent and child arrive.

Lacey testified that defendant has a contract with Gregg's Landscaping for snow removal services during winter months and that the company plows the parking lot and applies salt and sand in the parking lot. She testified that Cameron is responsible for maintaining the sidewalks, walkways and entrances, and that he uses shovels, snowblowers, ice picks and rock salt, which are owned by defendant and stored on the premises.

Lacey testified that when she left her house at 7:30 a.m. on the morning of the incident, it was snowing and sleeting, and that the precipitation continued when she arrived for work at the subject premises. She testified that ice was forming as the precipitation was falling, and that it was very cold outside. She testified that the ground was very slippery so she went to the nursery school to meet with Cameron to give him instructions. Lacey testified that Cameron was shoveling the front walkway underneath the awning, and that the handicap ramp had been shoveled. According to her testimony, Lacey instructed Cameron to concentrate on the main entrance way and stairway and to apply a lot of rock salt, as the precipitation, which she described as "ice pellets," was continuously falling. She explained that as the ice from the storm was falling quickly, Cameron would not be able to keep up with shoveling both the ramp and the main walkway.

Lacey testified further that the handicap ramp is sloped, that it should not be used during inclement weather, and that cones are placed at the ramp to prevent patrons from using it in dangerous conditions. She testified that she did not instruct Cameron to place the cones at the ramp on the morning of the incident, as she wanted him to concentrate on the front entrance and main walkway.

Lacey also testified that Gregg's Landscaping had applied sand and salt to the parking lot before she arrived to the subject premises, and that there were mounds of snow on the sidewalk from prior snow storms. She testified that the William Floyd School District called for early dismissal because of the weather conditions, and that schools were to be closed at 11:00 a.m.. She testified that the parish follows the district's policy, and that all classes and programs after 11:30 a.m. were cancelled at the parish center.

Lacey testified that Cameron called her at 9:10 a.m. to inform her of the incident, and that she proceeded to the scene where she observed plaintiff sitting on the sidewalk at the edge of the handicap ramp. She testified that after plaintiff was taken by ambulance, she observed "frozen ice" on the ground where plaintiff was sitting after she fell, and that she observed snow on the ground next to it. She testified that she created an incident report as required by defendant, and that cones were placed by the ramp.

Cameron Lacey testified that light snow was falling when he left his house at 8:00 a.m. on the date of the incident. He testified that he arrived at the parish center at 8:30 a.m., and that he did not observe any ice on the handicap ramp, but that the two steps leading to the main entrance were slushy, and that he shoveled continuously, as snow kept falling. He testified that the school requires that its doors be locked, and that one of his duties is to open the entrance door each time someone arrives and lock it until the next person arrives. He testified that at the time of the incident, he was shoveling the main entrance walkway and pausing when parents and children arrived so he could unlock and open the front entrance doors.

Cameron testified that patrons generally use the main walkway to enter the school, and that he did not observe anyone using the handicap ramp on the date of the incident. He testified that while he was opening the doors for a parent and child, he heard a scream, and he observed plaintiff sitting on the ground. He testified that he walked down the ramp which was covered with snow, that he had no issue traversing it, and that he observed ice where the ramp meets the sidewalk, which is where plaintiff was sitting. He testified that plaintiff told him that she was rushing and had slipped, and he called an ambulance. Cameron testified he did not shovel the area where plaintiff slipped, nor did he apply salt or sand to the area, as he was primarily concerned with the main entrance walkway.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (***Blatt v L'Pogee, Inc.***, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]), and have a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). This nondelegable duty includes the duty to provide the public with a safe means of ingress and egress (*see* ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]).

"In slip-and-fall cases involving snow and ice, a property owner is not liable unless he or she created the defect, or had actual or constructive notice of its existence" (***Gil v Manufacturers Hanover Trust Co.***, 39 AD3d 703, 704, 833 NYS2d 634 [2d Dept 2007]; *see* ***Powell v Cedar Manor Mut. Hous. Corp.***, 45 AD3d 749, 844 NYS2d 890 [2d Dept 2007]). Notwithstanding, a defendant may be exonerated from liability even if he or she has notice of the dangerous condition under the "storm in progress" rule. Under the storm in progress rule, a property owner will not be held responsible for accidents caused by snow or ice that accumulates on its premises during a storm or for a reasonable period of time thereafter (***Sherman v New York State Thruway Auth.***, 27 NY3d 1019, 32 NYS3d 568 [2016]; ***Talamas v Metropolitan Transp. Auth.***, 120 AD3d 1333, 993 NYS2d 102 [2d Dept 2014]; ***Popovits v New York City Hous. Auth.***, 115 AD3d 657, 658, 981 NYS2d 562 [2d Dept 2014]). The determination of what constitutes a reasonable time may be decided on a motion for summary judgment, based upon the circumstances of the case (*see* ***Valentine v City of New York***, 57 NY2d 932, 457 NYS2d 24 [1982]; ***Dumela-Felix v FGP W. St., LLC***, 135 AD3d 809, 22 NYS3d 896 [2d Dept 2016]).

Here, defendant submits an affidavit by Paul Eisen, who states that he is a certified consulting meteorologist with 35 years of experience as an environmental scientist and meteorologist. Defendant also submits certified copies of meteorological records from the National Climatic Data Center setting forth local climatological data for Brookhaven and Islip, New York in January of 2015. Eisen opines, with a reasonable degree of scientific certainty, that a storm was in progress at the time of plaintiff's incident, and that it began at 7:00 a.m. and continued throughout the day. He states that the precipitation that was falling was frozen or froze upon contact with exposed surfaces. Although the precipitation was light, outside temperatures were in the mid-twenties, making surface conditions very slippery. Additionally, he states that radar images timed at 8:46 a.m., 8:56 a.m., and 9:06 a.m. indicate that snow was falling and that a major storm was developing on January 26, 2015.

Defendant's submissions, which demonstrate that freezing rain was falling and temperatures were at or below freezing, establish prima facie that a storm was in progress at the time plaintiff slipped and fell (*see* ***Sherman v New York State Thruway Authority***, 27 NY3d 1019, 132 NYS3d 568 [2016]; ***Gervasi v***

Blagojevic, 158 AD3d 613, 70 NYS3d 585 [2d Dept 2018]). Therefore, the burden shifts to plaintiff to raise a triable issue of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). Plaintiff must "show that something other than the precipitation from the storm in progress caused the accident" (***Blair v Loduca***, 164 AD3d 637, 640, 83 NYS3d 132 [2d Dept 2018]).

In opposition, plaintiff submits an affidavit by her own expert, Howard Altschule, who states that he is a certified consulting meteorologist with over 22 years of experience. Altschule enumerates the weather data that he relied upon in support of his opinions and submits a DVD disc with radar images. He states that he also reviewed the affidavit and data of Paul Eisen. Altschule opines, with a reasonable degree of scientific certainty, that the icy condition that caused plaintiff to slip and fall was created by a storm that occurred on January 24, 2018 and caused 2.2 inches of snow and .88 inches of precipitation to accumulate. He states that on January 25, 2015, no precipitation occurred, and that temperatures rose to 42 degrees and remained above freezing from midnight until 6:55 p.m. on January 25, 2018, when temperatures dropped below freezing. He states that the temperature changes caused the snow and precipitation to melt and refreeze, and that the light snow dusting that occurred on the morning of the incident covered the old ice.

The conflicting opinions of the expert meteorologists raise triable issues of fact as to whether the snow or ice that plaintiff slipped on resulted from the trace amounts that had fallen on the morning of the incident or was old ice caused by the precipitation and weather conditions occurring on the two days prior to the incident (*see* ***Arroyo v Clarke***, 148 AD3d 479, 479, 49 NYS3d 660 [1st dept 2017]). Where as here, the parties adduce conflicting expert opinions, summary judgment must be denied, as such issues of credibility are properly determined by the trier of fact (***Willoughby Rehabilitation & Health Care Ctr., LLC v Webster***, 134 AD3d 811, 22 NYS3d 814 [2d Dept 2015]; ***Leto v Feld***, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; *see also* ***Calpo–Rivera v Brady***, 163 AD3d 910 82 NYS3d 72 [2d Dept 2018]). Furthermore, the descriptions of the weather conditions at the time of the incident vary amongst plaintiff, Cynthia Lacey, and Cameron Lacey. Such variances raise issues of credibility that further preclude summary judgment (*see* ***Cohen v Lebgutt Realty, LLC***, 158 AD3d 740, 71 NYS3d 639 [2d Dept 2018]; ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and Order of the Court.

Dated: December 28, 2018

J.S.C.

HON. DAVID T. REILLY

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**