At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 25th day of SEPTEMBER 2013

PRESENT:

HON. LARRY D. MARTIN, J.S.C.

MARGARET HARMITT,

Plaintiff,

-against-

RIVERSTONE ASSOCIATES a/k/a RIVERSTONE ASSOCIATES, LLC,

Defendant.

MOTION SEQ. # 2

INDEX. NO.

21464/2010

The following papers numbered 1 to 5 read on this motion	Papers Numbered
Notice of Motion — Order to Show Cause and Affidavits (Affirmations) Annexed	1–2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	4
Memorandum of Law	5

Hon. Larry D. Martin, J.S.C.:

Upon the foregoing papers, Defendant Riverstone Associates a/k/a Riverstone Associates LLC ("Defendant") moves for an order pursuant to CPLR Rule 3212 granting it summary judgment and dismissing the complaint. Plaintiff Margaret Harmitt commenced this action seeking damages for personal injuries sustained from a slip-and-fall accident on February 27, 2010 at 300 Riverdale Avenue in Brooklyn, New York (the "premises"). Plaintiff is a home health aide and was assigned to cover a non-regular patient for another aide at the premises, which she has never visited prior to her accident. At her deposition, Plaintiff testified that she had to cross Riverdale Avenue to get to the premises and there was a snow embankment about three (3) feet high on the sidewalk that she had to get over in order to get to the front

door of the building. No area of the sidewalk was cleared between the embankment and the building entrance, which was about seven to eight (7–8) feet away from the embankment. However, Plaintiff also testified that she believed part of the sidewalk near the building door had been shoveled or cleared "because it was piled up"; explaining further, "I believe they shovel some [snow] and pile it up because it was in a heap like this". Plaintiff alleges she stepped up onto the embankment with her right foot from the street and slipped as she tried to step with her left foot. A passerby helped her get up and escorted her into the building. When she got to the client's apartment, she called her agency at 7:30 a.m. to notify them about her accident. Plaintiff alleges that Defendant failed to maintain the front of the building/sidewalk which was icy, slippery, unsafe and a dangerous, defective, or hazardous condition after having actual or constructive notice of said condition.

Defendant moves for summary judgment arguing that it is not liable for Plaintiff's fall under the "storm in progress" doctrine. According to a certified climatology report submitted by Defendant, snow began to fall on February 25, 2010 and did not stop until around 3:00 a.m. on February 27, 2010, the morning of the accident. Because Plaintiff's accident occurred sometime before 7:30 a.m., Defendant argues that under the doctrine it did not have a reasonable amount of time or sufficient opportunity to ameliorate the condition.[1] Defendant also argues that no notice was given about the alleged dangerous condition, and the building superintendent, Felipe Suarez, testified that he was not aware of Plaintiff's accident until this lawsuit.

In opposition, Plaintiff argues that based on the climatology report submitted by Defendant, snow did not accumulate to more than twenty (20) inches in total by the end of the snow storm. Thus Plaintiff

[1] *The superintendent for the premises, Felipe Suarez, testified that as a general matter of practice,* he directs the building's porters to begin snow removal at 7:30 a.m. using a snow-removal machine, salt, and sometimes a shovel, although he does not recall exactly what occurred on the date of the accident regarding snow removal (*see* Aronoff aff, exhibit H).

contends that this allegation, coupled with Plaintiff's testimony that she "believe[d] they shovel some [snow] and pile it up because it was in a heap like this", supports the idea that Defendant created the condition.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In order to succeed on this motion, a defendant must prove that "it neither created the snow and ice condition nor had actual or constructive notice of the condition" (*Smith v Christ's First Presbyterian Church of Hempstead*, 93 AD3d 839 [2d Dept 2012]). To constitute constructive notice, a defect must be visible and apparent, and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (*Gordon v Am. Museum of Natural History*, 67 NY2d 36 [1986]). Additionally, under the "storm in progress" rule, a property owner will not be held liable for accidents occurring as a result of accumulation of snow or ice on its premises until an adequate period of time has passed following cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm (*Smith*, 93 AD3d at 840; *Sfakianos v Big Six Towers, Inc.*, 46 AD3d 665 [2d Dept 2007]). Once the proponent has met its burden, the opponent must produce competent evidence in admissible form to establish the existence of material and triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Here, the parties appear to disagree as to when the snow fall stopped. In the attorney affirmation, counsel for Plaintiff alleges that the snow stopped the night before the accident (Riso aff, ¶ 9);[2] though

[2] This assertion is inconclusive at best. In support, it cites to Plaintiff's deposition transcript where she testified that she thought it snowed the night before, but cannot recall whether it was still snowing when she went to bed at 10 p.m. (Riso aff, exhibit B [page 19 of Plaintiff's deposition transcript]). Though not decisive (as discussed *infra*), the Court notes that by alleging that snowfall ceased the night before the accident, Plaintiff is essentially rejecting the Defendant's climatological report — but it cannot do so when she is also using the same report to support her theory of the case that

Plaintiff's own affidavit submitted in her opposition papers states that snow ceased the morning of her accident (Harmitt affidavit, ¶ 12); meanwhile, Defendant's certified climatological report demonstrates that the snow stopped around 3:00 a.m. (Aronoff aff, exhibit F). It is undisputed that Plaintiff fell sometime just before 7:30 a.m. As such, this Court finds that Defendant did not have a sufficient period of time to ameliorate the alleged hazard under the "storm in progress" rule, and cannot be liable for Plaintiff's accident (*see Smith*, 93 AD3d at 840 [defendant did not have a reasonably sufficient amount of time to remedy alleged dangerous condition where snow ceased at 11:30 p.m. the night before plaintiff's accident at 8:00 a.m.]). The result is the same under all accounts of when the snowfall ceased (*see Sfakianos v Big Six Towers, Inc.*, 2006 WL 6103243, No. 7511/05 [Queens County Oct. 62, 2006], *affd* 46 AD3d 665 [2d Dept 2007] [defendant entitled to summary judgment on the law, even accepting plaintiff's assertion as true that snow ceased at 11:00 p.m. the night before plaintiff's accident occurring at 7:50 a.m., though defendant contended the snow ceased at 4:11 a.m. on the morning of the accident]; *Whitt v. St. John's Episcopal Hosp.*, 258 AD2d 648 [2d Dept 1999] [granting defendant summary judgment where it submitted climatological records indicating that precipitation ceased between 10 and 11 p.m. the night before the accident; plaintiff testified that snow stopped only five or six hours before accident; and accident occurred at 7:30 a.m.]).

Plaintiff fails to raise a genuine and material issue of fact in dispute. Plaintiff testified that she believed snow had been shoveled into a "pile" near the building entrance and, as similarly stated in her affidavit, that "the snow was partially cleared in front of Defendant's building" (Harmitt affidavit, ¶ 3). Therefore, Plaintiff argues that Defendant created the dangerous condition by undertaking efforts to remove snow. In support of this theory, Plaintiff points to her deposition testimony that the embankment was around 3 feet high (or twenty-four inches [24"]) but only twenty inches (20") of snow fell according to the

climatology report. This assertion is insufficient to defeat summary judgment because the evidence to rebut defendant's prima facie entitlement to judgment under the "storm in progress" doctrine must be more than speculative in nature (*see Dowden v. Long Island Rail Rd.*, 305 AD2d 631 [2d Dept 2003]).

It is well-settled that "[a] failure to remove all of the snow is not negligence and liability will not result unless it is shown that the defendant made the sidewalk more hazardous" (*Reidy v EZE Equip Co.*, 234 AD2d 593 [2d Dept 1996] [internal citations omitted]; *see also Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2d Dept 2003]; *Kennedy v C & C New Main St. Corp.*, 269 AD2d 499 [2d Dept 2000]; *Verdino v Alexandrou*, 253 AD2d 553 [2d Dept 1998]).

Here, as in *Whitt*, the "plaintiffs, in opposing [the] motion, relied primarily on the speculation that the icy condition might have been exacerbated in some way by the maintenance work done by agents of the defendant during the progress of the storm". However, the Second Department held that there is "no evidence that the defendant's cleaning operation either caused or created the condition upon which plaintiff slipped" (*Whitt*, 258 AD2d at 649; *see also Kay v Flying Goose, Inc.*, 203 AD2d 332 [2d Dept 1994]).

The Court must view the evidence in a light most favorable to the plaintiff as the non-movant in a motion for summary judgment (*see Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]). Even if Plaintiff had a witness or some other evidence showing that one of Defendant's agents or employees actually did undertake removal efforts, the result would be the same. In *Washington*, the Second Department reversed the trial court's decision in order to grant summary judgment to the defendant even where defendant's employee testified that he shoveled snow into a mound on the sidewalk earlier in the day of plaintiff's accident (308 AD2d at 444–45). Thus, as a matter of law, Plaintiff's theory that Defendant created the dangerous condition cannot stand to bar Defendant from its entitlement to judgment.

In conclusion, the Court finds that Defendant is not liable for Plaintiff's fall that occurred sometime

before a reasonable time lapsed for Defendant to ameliorate the natural, hazardous condition. Plaintiff's speculation is insufficient to raise a material issue of fact. Accordingly, Defendant's motion for summary judgment is granted and the complaint shall be dismissed.

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

ENTER,

For Clerks use only
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MD ___
Motion Seq. # 2

SEP 25 2013

HON. LARRY D. MARTIN

J.S.C.

Nancy T. Sunshine
clerk

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