SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JOYCE FLEMING,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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PART C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 101112/10
Motion No. 2340-002

The following papers number 1 to 3 were fully submitted on the 5th day of December, 2012:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant, with Supporting Papers, Exhibits and Memorandum of Law (dated July 30, 2012)	1
Affirmation in Opposition by Plaintiff, with Supporting Papers, Exhibits and Memorandum of Law (dated September 19, 2012)	2
Memorandum of Law in Reply (dated December 4, 2012)	3

Upon the foregoing papers, the motion for summary judgment by defendant the New York City Housing Authority (hereinafter the "NYCHA") is granted, and the complaint is dismissed.

In this personal injury action, plaintiff claims that she was negligently caused to trip-and-fall over a snow-covered section of "white metal wire fence" lying on the walkway in front of the premises known as 70 New Lane, Staten Island, New York at approximately 4:00 p.m. on December 20, 2009. According to plaintiff, the foregoing operated to "render [the] premises dangerous and defective" notwithstanding defendant's earlier snow removal efforts (*see* Plaintiff's Verified Bill of

Particulars, para 3). It is undisputed that the subject premises, an apartment building, is owned and maintained by defendant NYCHA, which has been plaintiff's landlord for more than five years (*see* Plaintiff's General Municipal Law Hearing, p 27).

To the extent relevant, plaintiff testified at her 50-h hearing that on the date of the accident, she had exited the front entrance of the building in order to walk her dog (id. at 30). She described the weather as "cold" and although "it wasn't snowing" that day, she alleged that it had snowed "the whole week before", leaving the walkway "spotted [with] snow" (id. at 16-18, 21). According to plaintiff, when she turned around to walk back toward the building, she "felt like someone [had] grabbed [her right] foot" (id. at 33); she experienced "a tug"; and "went flying" (id.). It was then that she noticed the section of white wire fence which had apparently become "flattened to the ground under the snow" (id. at 33-34), and caught "her toe" (*see* EBT of Joyce Fleming, p 80). Plaintiff described this section of fence as approximately "two feet long" and "a foot [wide]" (*see* Plaintiff's General Municipal Law Hearing at 34). Plaintiff claimed that she did not see the fence prior to her fall (id. at 36). Afterwards, plaintiff noticed that the fence was covered by about an inch of snow (id. at 38).

Plaintiff further testified that she recalled seeing workers shoveling and using snowblowers to clear the sidewalk on the day before her accident (*see* EBT of Joyce Fleming, p 49). She also testified that she was aware that such fencing had been put up by one of the tenants alongside the walkway during the summer (id. at 82-83), and that it extended "from the front of the building until almost the end of the pavement" (id.).[1] Prior to her accident, plaintiff had never complained about the fence, nor had she noticed that any part thereof had fallen or been knocked to the ground (id. at 82-85, 112-113).

[1]The terms "walkway", "sidewalk" and "pavement" have been used interchangeably by both parties to describe the accident location.

Mr. Julius Tiven, defendant's resident building superintendent, testified on its behalf that there are standard written procedures for snow removal throughout the NYCHA (*see* EBT of Julius Tiven, p 16) pursuant to which the snow generally "is not [to be] piled on the sidewalk", but to be "directed up onto the lawn areas" (id. at 20). Compliance would be assured through inspections he performed at least once daily (id.). According to the witness, snow removal operations had begun at about 7:00 a.m. on the date of plaintiff's accident[2] by a staff of caretakers and the groundskeeper, who employed a combination of snow shovels, a manual plow and a snow blower (id. at 22-24, 34). These efforts, plus sanding and salting, purportedly "took the majority of the day" (id. at 34). When asked about the subject "small wire fence", the witness recalled that it had been "installed by... residents who maintain [a] garden" in the area prior to the summer planting season (id. at 37), and that he had never been instructed to take it down (id.). Neither did he profess knowledge of any complaints about the fence (id. at 44). When asked if the fence had been affected by the snow removal effort, the witness stated that the "fence was covered by snow... [and] not visible [after] the sidewalk [had been] cleared" (id.). In his supporting affidavit, Mr. Tiven further stated that by 1:00 p.m. when he inspected the premises, the walkways "were all clear", and that he "saw no snow, ice, fencing or other obstructions on the walkways" (*see* Affidavit of Julius Tiven).

At his EBT, Mr. Ronald Gerhard, defendant's supervising groundskeeper, testified that he was operating a snow blower on the date in question, and that he personally inspected the area after the snow removal operations were complete (*see* EBT of Ronald Gerhard, p 22). According to the witness, the snow which had been removed from the sidewalk was piled "in[to] the parking lot" (id. at 27-28). Mr. Gerhard denied that any portion of the wire fence had been moved during the snow removal operations (id. at 38-40), and specifically denied ever seeing "any portion of the white metal fence laying down" on the walkway (id. at 40). In an affidavit, Mr. Gerhard noted that on the date

[2] Plaintiff testified that defendant's snow removal efforts had been performed on the previous day.

of the accident, he had re-inspected the walkways at approximately 1:00 p.m. and, like Mr. Tiven, "saw no snow, ice, fencing or other obstructions [there]on" (*see* Affidavit of Ronald Gerhard).

It is well settled that a property owner who moves for summary judgment in a slip and fall case involving snow and ice on its property has the burden of demonstrating prima facie that it did not create the dangerous condition that caused the accident, or have actual or constructive notice thereof (*see Totten v Cumberland Farms, Inc.,* 57 AD3d 653 [2nd Dept 2008]). In order to provide constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit defendant or its employees to discover and remedy it (*see Stewart v Sherwil Holding Corp*, 94 AD3d 977 [2nd Dept 2012]).

In support of its motion, defendant has submitted a copy of a local climatological report for the month of December in 2009 issued by the National Climatic Data Center (*see* Defendant's Exhibit "L"). The monthly summary reveals that the snow began falling at approximately 3:00 p.m. on Saturday, December 19, 2009 and had stopped by 7:00 a.m. on the morning of Sunday, December 20, 2009 (the day of the accident), leaving between 8 and 9 inches of snow on the ground (id.). in addition, defendant submitted evidence in the form of testimony and affidavits from the employees who were responsible for clearing the snow from the sidewalk that they began to remove the snow at or about 7:00 a.m. on the day in question, and that the walkways had been cleared by 1:00 p.m. Defendant also submitted an excerpt of the groundskeeper log sheet for the date of the accident, which reflects the same start time of the snow removal process and the same inspection time (*see* Defendant's Exhibit "J"). Plaintiff, of course, placed the time of her fall at or about 4:00 p.m.

Based on the foregoing, defendant has demonstrated prima facie that it lacked prior notice of the alleged snow-covered section of wire fence which plaintiff alleges had been "flattened" onto the walkway and purportedly was the cause of her injury. Defendant has also demonstrated prima facie that it neither caused or created the claimed dangerous condition (*cf. Stewart v Sherwil Holding Corp*, 94 AD3d at 978) by the submission of evidence from its employees who were at the premises on the day of the accident to remove the snow, as well as evidence as to when the premises was last inspected and found passable (*cf. Totten v Cumberland Farms, Inc.,* 57 AD3d at 654; *Carthans v. Grenadier Realty Corp*, 38 AD3d 489 [2nd Dept 2007]). Moreover, defendant has established that it had no duty to clear snow and ice from the garden area bordered by the fence which had been installed by the building's residents (*see Maldonado v. Novartis Pharms Corp*, 58 AD3d 813 [2nd Dept 2009]; *Garcia v. New York City Hous Auth*, 234 AD2d 102, 103 [1st Dept 1996]). In opposition, plaintiff has failed to raise a triable issue of fact. In this regard, plaintiff's contention that a section of the above fence had been "flattened" during defendant's snow removal efforts is unsupported by any evidence before the Court, and is therefore wholly speculative in nature.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk enter judgment in accordance herewith.

ENTER,

/S/
J.S.C.

DATED: MARCH 15, 2013