[* 1]

SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9
Justice

EDWARD BARNUM,

Plaintiff,

-against-

CITY OF NEW YORK, CREST FOREST REALTY CORP., GLENDALE BUSINESS PARK ASSOC., LLC, NORAYR D. TASCI, MARGRIT TASCI, JOHN WERWAISS AND WERWAISS & CO., INC.,

Defendant.

Index Number..4166/2010

Motion Date...1/11/13

Motion Cal. Number.....10 - 14

Sequence No...3 - 7

GLENDALE BUSINESS PARK ASSOC., LLC, JOHN WERWAISS AND WERWAISS & CO, INC.,

Third-Party Plaintiffs,

-against-

SYLVANIA LIGHTING SERVICES, CORP.,

Third-Party Defendants.

Index No: 350282/11

The following papers numbered 1 to 79 read on this motion

Notices of Motions - Affidavits - Exhibits	1 - 20
Answering Affidavits - Exhibits	21 - 69
Reply Affidavits	70 - 79

All defendants seek summary judgment in their respective favor pursuant to CPLR 3212.

Plaintiff in this negligence action seeks damages for

personal injuries sustained in a slip and fall on snow and/or ice on a public sidewalk in Glendale, Queens, on January 15, 2009.

Timeliness: Motions by the City and Sylvania

At the outset, the court notes that motions by the City and Sylvania are timely. Plaintiff filed the Note of Issue on May 25, 2012. Since 120 days from this date fell on a Saturday, these movants properly filed their motions on Monday, September 24, 2012 (see N.Y. Gen. Const. Law §25-a).

As the proponents of the four separate motions for summary judgment, defendants have to establish, prima facie, that they neither created the snow and ice condition nor had actual or constructive notice of the condition (*see Persaud v S & K Green Groceries, Inc.*, 72 AD3d 778, 779 [2010]; *Vasta v Home Depot*, 25 AD3d 690 [2006]). Defendants here submitted evidence that the storm did not cease until approximately 12:28 p.m., less than one hour before the alleged accident which occurred at approximately 1:15 p.m. Under the "storm in progress" rule, a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or ice on its premises until an adequate period of time has passed following the cessation of the storm, within which time the owner has the opportunity to ameliorate the hazards caused by the storm (*see Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]; *Sfakianos v Big Six Towers, Inc.*, 46 AD3d 665 [2007]; *Smith v Leslie*, 270 AD2d 333 [2000]; *Taylor v New York City Tr. Auth.*, 266 AD2d 384 [1999]; *Mangieri v Prime Hospitality Corp.*, 251 AD2d 632 [1998]).

The burden then shifts to the plaintiff to raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the individual defendants had actual or constructive notice of the preexisting condition (*see generally DeVito v Harrison House Assoc.*, 41 AD3d 420 [2007]; *Alers v La Bonne Vie Org.*, 54 AD3d 698 [2008]). Plaintiff has failed to raise a triable issue of fact in this regard. Plaintiff's allegations that the ice which allegedly caused his accident had been present from the last storm which occurred five days prior, or that it was "from another time," is insufficient to raise a triable issue of fact as to whether he fell on "old" ice (*see Small v Coney Is. Site 4A-1 Houses, Inc.*, 28 AD3d 741, 742 [2006]; *see also Chapman v City of New York*, 268 AD2d 498 [2000]; *Pohl v Sternberg*, 259 AD2d 742 [1999]). Evidence that there was ice in the general vicinity of the accident prior to the storm is insufficient to raise a triable issue of fact as to whether the defendant had actual or constructive notice of the condition of the specific area where the plaintiff fell (*see Alers v La Bonne Vie Org.*, 54 AD3d 698 [2008]; *Powell v Cedar Manor Mut. Hous.*

Corp., 45 AD3d 749 [2007]; *DeVito v Harrison House Assoc.*, 41 AD3d 420 [2007]; *Robinson v Trade Link Am.*, 39 AD3d 616 [2007]; *Small v Coney Is. Site 4A-1 Houses, Inc.*, 28 AD3d 741 [2006]; *Reagan v Hartsdale Tenants Corp.*, 27 AD3d 716 [2006]; *Dowden v Long Is. R.R.*, 305 AD2d 631 [2003]; *Zoutman v Goshen Cent. School Dist.*, 300 AD2d 656 [2002]).

Accordingly, the separate motions by the City, Sylvania, Glendale Park/Werwaiss and Glendale Properties, are granted.

Motion by Glendale Park/Werwaiss

Defendant Glendale Park/Werwaiss further argues that John Werwaiss and Werwaiss & Co., did not own, occupy or control any property involved in the alleged incident; that the alleged incident did not occur on the property of Glendale Business Park Associates, LLC; and that the lease agreement obligates the tenant, Sylvania to remove snow and ice from Glendale Business Park Associates, LLC's premises. Alternatively, defendant Glendale Park moves for conditional summary judgment against Sylvania based upon the lease.

The branch of the motion which seeks to dismiss the complaint insofar as asserted against John Werwaiss and Werwaiss & Company (the "Werwaiss defendants"), is granted. "Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property" (*Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 710 [2012]; *see Bennett v Weber Job Lot Corp.*, 93 AD3d 684 [2012]; *Morrison v Gerlitzky*, 282 AD2d 725, 725 [2001]; *Millman v Citibank*, 216 AD2d 278, 278 [1995]). The Werwaiss defendants demonstrated that they do not (and did not) own the property where plaintiff fell, nor is there evidence in the record that these defendants own(ed) the easement to the property where plaintiff fell.

Glendale Park argues, inter alia, that they are not responsible for plaintiff's accident because they were out-of-possession landlords and that, under the lease, Sylvania was obligated to remove snow and ice from the premises. However, as owners of the premises, Glendale Park had a *non-delegable* duty, pursuant to a municipal ordinance which expressly imposes liability on abutting landowners, to maintain the Premises in a reasonably safe condition and to remove snow and ice from the sidewalk abutting the Premises, regardless of the fact that they were out-of-possession landlords (Administrative Code of City of NY § 7-210; *see James v Blackmon*, 58 AD3d 808, 809 [2009]; *Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [2008]). Section 7-210 of the Administrative Code of the City of New York requires a commercial landowner to maintain the sidewalk abutting the land in a reasonably safe condition and expressly imposes

liability on the landowner for injuries caused as a result of a failure to do so (*id*). A lease provision placing a duty on the tenant to maintain the premises does not affect the landowner's statutory nondelegable duty and does not provide a defense to a claim based upon section 7-210 (see *James, James v Blackmon,* 58 AD3d 808 [2d Dept.2009]; *Reyderman v Meyer Berfond Trust No.1,* 90 AD3d 633 [2d Dept.2011]). Thus, the fact that there is a lease in existence between the owner and tenant requiring the tenant to maintain the sidewalk abutting the premises is not per se a defense to the plaintiff's action (see *Buroker v Country View Estate Condominium Ass'n,* 54 AD3d 795 [2d Dept.2008]).

In any event, the branch of the motion to dismiss the claims against Glendale Park, is granted based upon the "storm in progress" rule (*see Solazzo v New York City Tr. Auth.*, supra; *Sfakianos v Big Six Towers, Inc.*, supra; *Smith v Leslie*, supra).

In light of the court's dismissal of the complaint as against Glendale Park, the question of indemnification from Sylvania is academic (*Reyes v. Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 498 [1st Dept.2008]; *Cardozo v. Mayflower Center, Inc.*
16 A.D.3d 536 [2d Dept. 2005]).

Motion by the Tasci defendants

Plaintiff allegedly slipped and fell on ice on a public sidewalk abutting the Tasci's one-family house. The defendant Norayr Tasci testified at his deposition that he performed snow removal work on three sides of the house but not on the northwest corner of 72nd Drive (also known as 73rd Avenue and 88th Street), where plaintiff testified that he fell, as that area was not on their property. Since the Tascis' property constituted a one-family house, was owner-occupied, and was used exclusively for residential purposes, the Tasci's are exempt from liability imposed pursuant to section 7-210 (b) of the Administrative Code of the City of New York for negligent failure to remove snow and ice from the sidewalk (*see Braun v Weissman*, 68 AD3d 797, 798 [2009]; *Bi Chan Lin v Po Ying Yam*, 62 AD3d 740, 741 [2009]). Thus, the Tasci defendants may be held liable for the hazardous condition on the sidewalk only if they either undertook snow and ice removal efforts that made the naturally-occurring condition more hazardous (*see Braun v Weissman*, 68 AD3d at 797-798; *Bi Chan Lin v Po Ying Yam*, 62 AD3d 740 [2009]; *Robles v City of New York*, 56 AD3d 647 [2008]; *Bruzzo v County of Nassau*, 50 AD3d 720, 721 [2008]), or caused the defect to occur because of a special use (*see Campos v Midway Cabinets, Inc.*, 51 AD3d 843 [2008]; *Nunez v City of New York*, 41 AD3d 677 [2007]; *Breger v City of New York*, 297 AD2d 770, 771 [2002]; *Dos Santos v Peixoto*, 293 AD2d 566

[2002]).

In support of their motion for summary judgment, the Tasci defendants demonstrated, as a matter of law, that they did not create or increase an existing hazard by removing the snow and ice that had accumulated on the sidewalk, or cause such condition through a special use of the sidewalk (*see Katz v City of New York*, 18 AD3d 818, 819 [2005]; *Breger v City of New York*, 297 AD2d at 771). In opposition, the plaintiff failed to proffer any evidence sufficient to raise a triable issue of fact as to whether the Tasci defendants created or exacerbated the alleged icy condition on the sidewalk through their snow removal efforts (*see Cruz v County of Nassau*, 56 AD3d 513 [2008]; *Klotz v City of New York*, 9 AD3d 392 [2004]; *Wilson v Prazza*, 306 AD2d 466 [2003]; *Archer v City of New York*, 300 AD2d 518 [2002]; *Yen Hsia v City of New York*, 295 AD2d 565 [2002]; *Penny v Pembrook Mgt.*, 280 AD2d 590 [2001]), or caused such condition by their special use of the sidewalk (*see Savage v Shah*, 297 AD2d 795, 796 [2002]; *Blum v City of New York*, 267 AD2d 341, 342 [1999]; *Oathout v Soiefer Bros. Realty Corp.*, 253 AD2d 863 [1998]).

Therefore, the motion for summary judgment by the Tasci defendants dismissing the complaint insofar as asserted against them is granted.

Accordingly, the motions for summary judgment by the five defendants dismissing the complaint insofar as asserted against them are granted.

April 3, 2013

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J.S.C.