

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

X

GLENIS LORMAN, et als.

DECISION/ORDER

Plaintiffs

-against- Index No.: 303074/2012

EMIL MOSBACHER REAL ESTATE LLC., et als.

Defendants.

X

The following papers numbered 1 to 11 read on the below motions noticed on July 23, 2015 and duly submitted on the Part IA15 Motion calendar of **August 17, 2015**:

Papers Submitted	Numbered
Emil's SJ Motion, Affirmation in Support of Motion, with Exhibits	1,2,3
Pls' Affirmation in Opposition, with Exhibits	4,5
Emil's Affirmation in Reply	6
City's SJ Motion, Affirmation in Support, Exhibits	7,8,9
Pls' Affirmation in Opposition	10
City's Affirmation in Reply, exhibits	11

Upon the foregoing papers, the defendant Emil Mosbacher Real Estate, LLC ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiffs Glenis Lorman (individually, "Plaintiff") and Franciska James-Lorman (collectively, "Plaintiffs"), and all cross-claims, pursuant to CPLR 3212. Separately, defendant the City of New York (the "City") moves for summary judgment, dismissing the complaint and all cross-claims, pursuant to CPLR 3212. Plaintiffs oppose both motions. In the interest of judicial economy, the motions are consolidated and disposed of in the following Decision and Order.

I. Background

This matter arises out of an alleged slip and fall incident that occurred on January 26, 2011, at approximately 8:00AM, on the public sidewalk in front of the real property located at 3926 White Plains Road in the Bronx, New York. At relevant times, the real property was a

commercial premises owned by Defendant and leased to the third-party defendant Winston Williams, d/b/a Country Kitchen. Plaintiff testified that on the date of the accident, he left his home located on the south side of East 223rd Street, intending to walk to the 225th Street subway station. Plaintiff walked about fifty (50) feet from his house when he allegedly slipped and fell on ice located near the corner of White Plains Road and East 223rd Street. The incident occurred in front of a business that had a "Country Kitchen" sign up, but was not in operation. Plaintiff testified that he never saw anyone engage in any snow removal efforts at this location before this incident. Plaintiff described the ice condition that he encountered as "whitish" or "grey" that was approximately ½ to 3/4 of an inch thick. He testified that at the time of the accident, it was not snowing.

Co-plaintiff James-Lorman, Plaintiff's wife, testified that the accident location was usually not cleared of snow. She had traversed through the area earlier that day, but could not verify if there was an ice condition on the sidewalk. She did notice, however, that there was untouched snowfall on the sidewalk both before and after her husband's accident. She was not aware of any complaints made to the building about snow and ice prior to this accident.

Wayne Cedena, Defendant's property manager, testified that at the time of this accident, Defendant had leased the premises to a tenant, Winston Williams, d/b/a Country Kitchen. According to the lease, the tenant - a restaurant - was to assume responsibility for maintenance of the abutting sidewalk. Mr. Cedena confirmed that as of January 26, 2011, the property was under renovations and therefore the restaurant was not open for business. Mr. Cedena was present at the site on two occasions between August 2010 and January 26, 2011, and no other representatives from Defendant visited the location. Further, Defendant had never received any prior complaints about snow or ice removal at the premises.

Gerald Miriscal testified on behalf of the City. Mr. Miriscal was employed by the New York City Department of Sanitation. He testified that the Department of Sanitation does not clear snow and ice from the sidewalks near this accident location. The Department did, however, clear the crosswalks in the area.

Defendant contends that it is entitled to dismissal of this action because this incident occurred during an ongoing winter storm, and therefore Defendant was statutorily absolved from

any responsibility to clear snow and ice from the sidewalk during this time period, pursuant to New York City Administrative Code §16-123. Defendant submits a sworn report from a weather expert meteorologist Howard A. Altschule, who confirms that on January 26, 2011, a winter storm snowfall commenced at 7:40 AM and continued until 9:00 PM, when it changed into freezing rain. Mr. Altschule further notes that the air temperature was above freezing the prior day, and dipped below freezing the night before the accident. Thus, the alleged ice condition could have only formed hours before the accident. Because there was an ongoing storm, however, the property owner had until 11:00 AM on January 27, 2011, to clear any snow or ice. Defendant also argues that both Plaintiffs testified that there was no ice present the day before this accident, thus there is no evidence that the condition was in existence for a sufficient length of time. Defendant further asserts that it did nothing to create this allegedly hazardous condition, as all snow removal responsibilities were delegated to the tenant.

The City contends that it had no responsibility to engage in any snow removal efforts at this accident location under New York City Administrative Code §7-210, which obligates abutting property owners, not the City, to maintain sidewalks. Further, there is no evidence that the City caused or created the allegedly hazardous condition.

In opposition to Defendant's motion, Plaintiffs' argues that contrary to the Defendant's contention, neither plaintiff conclusively testified that they did not see the ice patch in the area prior to the accident. Plaintiff only testified that it was "likely" he walked in the area the day before, but could not remember for sure, or remember definitively whether there was ice. While the co-plaintiff's testimony was inconsistent concerning the ice condition, any inconsistencies must be resolved in favor of the opponents to summary judgment. Further, Plaintiff submits an expert report from meteorologist Alicia C. Wasula, Ph.D. Dr. Wasula states, among other things, that Defendant's expert relied on weather data from a weather station that was several miles away from this accident location. After reviewing Doppler photographs and other weather station data, Dr. Wasula opined that although there may have been precipitation in the area, it would likely have melted and dried up before it reached the ground until a point after the accident, when such precipitation began to accumulate. This is consistent with the testimony of both plaintiffs, to the effect that no precipitation was falling as of the time of the accident.

Further, Dr. Wasula opines that the ice that allegedly caused this fall had formed several days prior to the accident. There were significant snowfalls several days before the accident, along with sub-freezing temperatures. While there was a period of melting between around 12:00 PM on January 25 until 1:30 AM January 26, during this time, the melt-refreeze period was not sufficient to create an ice patch of the kind described by Plaintiff - some ½ to 3/4 of an inch thick. Plaintiffs thus contend that the "storm in progress" doctrine did not apply to this matter, and would not be applicable to the ice condition that allegedly caused this accident. The "storm in progress" defense only applies to conditions that materialize as a result of an ongoing storm.

Plaintiffs further argue that Defendant was responsible for maintenance of the subject sidewalk pursuant to New York City Administrative Code §7-210. Defendant could not delegate this responsibility to its tenant or anyone else. Further, if the sidewalk was shoveled, it would be "reasonable to assume" that it was undertaken by representatives of the Defendant. If the tenant indeed performed any snow removal, the Defendant would be vicariously liable.

With respect to the City, Plaintiff makes an argument that the City cannot rely on Administrative Code §7-210 to absolve itself from liability because that provision "is *ultra vires*, and in violation of the New York State Constitution."

Defendant argues in reply, *inter alia*, that Plaintiffs' expert report lacks credibility and merit as it relies on the testimony of the Plaintiffs as opposed to weather data. Moreover, Defendant argues that Plaintiff has submitted no evidence that it created or exacerbated the allegedly hazardous condition. Absent such evidence, Defendant argues that it owed no duty to Plaintiffs and therefore is entitled to dismissal of this action.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v.*

Prospect Hosp., 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Defendant Emil Mosbacher Real Estate, LLC.

It is well established that landowners are under a duty to exercise reasonable care under the circumstances in the maintenance of their property (*See Peralta v. Henriquez*, 100 N.Y.2d 139, 144 [2003]), but may be excused from liability for hazardous conditions caused by an ongoing storm (*Gleeson v. NYCTA*, 74 A.D.3d 161 [1st Dept. 2010]). A landowner's duty to take reasonable measures to remedy a storm-created snow or ice condition does not commence until a reasonable time after the storm has ceased (*Id.*) While a defendant has no obligation to remove any snow or ice during the storm, liability may result if the efforts it did take created a hazardous condition or exacerbated the natural hazards created by the storm (*see Morrone v Verona*, 237 AD2d 805 [3rd Dept. 1997]). As an example of "reasonable time" contemplated by this doctrine, landowners have four (4) hours after snowfall stops to remove show and ice conditions from abutting sidewalks, pursuant to the City of New York Administrative Code § 16-123 (a). In addition, numerous courts have held that 1 ½ hours following cessation of a storm does not constitute "reasonable time" for which snow removal should have occurred (*see Espinell v. Dickenson*, 57 A.D.3d 252 [1st Dept. 2008]). In order to establish a prima facie entitlement to judgment on the "storm in progress" doctrine, a defendant must establish that the plaintiff's fall

was precipitated by a hazardous snow or ice-related condition caused by an ongoing storm (*see Howard v. J.A.J. Realty Enterprises, Ltd.*, 283 A.D.2d 854, 855 [1st Dept. 2001]).

In this matter, Defendant initially contends that because neither plaintiff saw the alleged icy condition at the accident location the day before the accident, the condition must have either formed overnight or was related to the snow storm that had commenced roughly 15-30 minutes before this incident. First, contrary to the Defendant's characterization of the testimony, the plaintiffs did not conclusively testify that there was no ice patch at the accident location the day before the accident. Plaintiff Glenis Lorman testified as follows:

Q: Before you had your fall, do you remember seeing any snow or ice in the area where you slipped?

A: I didn't see ice, but there was snow along the edges somewhere. I don't know exactly, but there was snow to the side.

Q: Did you walk in that same area the day before?

A: I did, yeah.

Q; Did you see a patch of ice the day before?

A: I didn't see a patch of ice the day before. (Lorman EBT at 60:21-25; 61:1-5).

The testimony, however, continued:

Q: Had you crossed 223rd in the approximate same area going –

A: Approximately, approximate, I don't remember if there was a patch of ice there.

Q: Do you know if you definitely walked along 223rd and made that turn on White Plains Road at County Kitchen the day before?

A: I don't remember it. I wouldn't say definitely, but its likely the road I would have taken.

Q: If you didn't do it the day before –

A: Right.

Q: – is the only other option is that you would have crossed at the crosswalk from 223rd over to south to north?

A: That's a likely scenario.

...

Q: Before your accident, did you see any snow or ice in that area where you fell?

A: The same day or the day before?

Q: At any time before you fell that day, the day before, two days before?

A: I'd seen snow on the other side, but I don't remember if I see ice before, but there was snow.

Q: When you saw snow on the other side, on the side piled up?

A: On the side piled up.

Q: Did you see snow in the exact area where you slipped and fell?

A: I don't remember seeing snow there.

(*Id.* at 61:6-20; 62:1-14).

Plaintif Franciska James Lorman testified:

Q: Did you pass there [the accident location] that morning on your way to work?

A: I did.

Q: Did you notice any snow, ice, or other substances in front of the Country Kitchen on the 223rd side of the restaurant?

A: Yes, I noticed that it was not clean, so I didn't walk on the sidewalk. I actually walked out on the road to be honest. (James-Lorman EBT at 8:24-25; 9:1-8).

Plaintiff James-Lorman later testified that she had no memory of the sidewalk condition the morning of the accident, other than noting that the area was "not cleaned" and contained "untouched" snow. She did not recall if ice was present at the location.

The above testimony demonstrates that, in fact, the condition of the sidewalk on the day before this accident is unsettled. Plaintiff Lorman did not precisely remember whether (1) he traversed through the precise accident location the day before his accident, or (2) there was an icy condition in the area the day before his accident. Plaintiff James-Lorman testified that she did not recall if the icy condition was present the day after her accident, when the area was covered by fallen snow. Therefore, resolving all reasonable inferences in the manner most favorable to the opponent of a summary judgment motion, this testimony fails to conclusively establish the length of time this particular ice condition was in existence (*see, e.g., Martinez v. Khaimov*, 74 A.D.3d 1031 [2nd Dept. 2010]).

Next, the deposition testimony and conflicting expert metrologist reports further raise an issue of fact as to whether the ice that caused plaintiff's fall formed overnight, or had been in existence for several days before the accident. Contrary to Defendant's contentions, Plaintiff's expert report is in admissible form, and the expert affirms that the contents of her report are true and accurate. Further, a court is not precluded from considering an expert affidavit even where the expert was not disclosed during discovery pursuant to CPLR 3101(d)(1)(i) (*see Rivers v. Birnbaum*, 102 A.D.3d 26 [2nd Dept. 2012]). Both experts agree that approximately four inches of snow fell in the area on January 21. Defendant's expert states that, as of that date, some 6.5 inches of snow and ice were "on the ground" in "exposed, untreated, and undisturbed areas." Air temperatures remained well below freezing from January 22 through January 24, with high daily temperatures only reaching the mid-twenties. On January 25, the day before the accident, there was a light snowfall in the area between 6:00 AM until approximately 12:00 PM. Both experts state that temperatures remained above freezing from 12:00 PM on the 25th through approximately 1:00 AM on January 26, when temperatures dropped below freezing up until the time of the accident.

Defendant's expert opined that "melting and refreezing process" occurred between January 20 and January 26, and these processes caused "new ice to form." He alleged that new ice formed between midnight and 1AM the day of the accident. He further alleged that a moderate snowfall commenced at around 7:46 AM on the date of the accident, and this snowfall accumulated a coating of 1/4 of an inch by the time of the alleged fall, enough to cause slippery

surfaces. Plaintiff's expert, on the other hand, opined that the ice that caused this accident originated over four days beforehand, as foot-traffic compacted the snow that had fallen on January 21. This ice condition, along with observed snow piles on either side of the sidewalk, would have begun to partially, but not completely, melt on January 25, only to refreeze during the overnight hours of January 26. Plaintiff's expert notes that ice of the condition observed by plaintiff – some 1/2 to 3/4 of an inch thick, and gray in color with debris inside, could not have formed in the hours before the accident, because ice of this depth would not have had time to completely melt during the brief period of above-freezing temperatures on January 25. Rather, ice of this nature is more likely to have formed due to the compaction of old snow. Moreover, While Defendant's expert alleged that snowfall commenced on January 26 at around 7:45 AM, the Plaintiff's expert opines that, upon review of radar animations in the area, it is likely that precipitation may have been falling at the time, but had been evaporating before it reached the ground. This comports with Plaintiffs' testimony, where both alleged that it was not snowing at the time of the accident. Defendant urges that the Plaintiff's expert testimony is not credible or reliable because it "rejects" the "official weather data in favor of" the plaintiff's testimony. Defendant, however, offers no expert opinion rejecting the plaintiff's expert's methodology or conclusions.

At bottom, Plaintiff's expert's non-speculative and non-conclusory opinion is sufficient to raise an issue of fact as to whether the ice condition that allegedly caused plaintiff's accident had existed for several days prior to this accident, and was not formed overnight or caused by an ongoing storm (*see, e.g. Rodriguez v. Woods*, 121 A.D.3d 474 [1st Dept. 2008]).

Point "B" of the Defendant's motion asserts that, since defendant owed no duty of care due to an ongoing storm, they could only be held liable if they created the hazard by negligent snow removal efforts. As noted, *supra*, however, there are triable issues of fact as to whether the allegedly hazardous condition was produced as a result of an ongoing storm. The cases relied on by the Defendant are inapposite, as they concern either an accident that occurred during an ongoing storm, (*Adley v. Kansas Fried Chicken*, 106 A.D.3d 565 [1st Dept. 2013]), or a matter that did not involve the application of Administrative Code §7-210 (*Joseph v. Pitkin Carpet, Inc.*, 44 A.D.3d 462 [1st Dept. 2007]).

Defendant argues that it performed no snow or ice removal at the premises at any time, as that duty was delegated to its commercial tenant, Winston Williams d/b/a Country Kitchen, pursuant to the lease. Defendant also argues that there was no evidence that it had any notice of the icy condition because it had not been present the prior day, and if it was there, it was created in the overnight freeze.

New York City Administrative Code §7-210 imposes upon owners of real property the affirmative duty to maintain abutting public sidewalks in a reasonably safe condition. This includes the duty to keep an abutting sidewalk sufficiently clear of snow and ice (*see McKenzie v. City of New York*, 116 A.D.3d 526 [1st Dept. 2014]; *Alexis v. City of New York*, 111 A.D.3d 527 [1st Dept. 2013]). The duty imposed on property owners by §7-210 is non-delegable (*Cook v. Consolidated Edison Co. of N.Y.*, 51 A.D.3d 447, 448 [1st Dept. 2008]). Therefore, the mere existence of a lease provision placing a duty on a commercial tenant to maintain the premises does not affect a landowner's statutory duty, and does not provide a defense to a claim based upon §7-210 (*see James v. Blackmon*, 58 A.D.3d 808 [2nd Dept. 2011]; *Reyderman v. Meyer Berfond Trust #1*, 90 A.D.3d 633 [2nd Dept. 2011]). Defendant, thus, cannot rely on subject lease provisions alone to establish entitlement to summary judgment.

In order to impose liability on a property owner in a slip and fall cause pursuant to §7-210, a plaintiff must still prove that the owner either created the condition, or had actual or constructive notice of its existence (*see Spector v. Cushman & Wakefield, Inc.*, 87 A.D.3d 422 [1st Dept. 2011]). In support of a motion for summary judgment dismissing such a cause of action, the property owner has the initial burden of demonstrating *prima facie*, that it did not create the condition, and had no actual or constructive notice of it for a sufficient length of time to discover and remedy it (*see Garcia v. City of New York*, 99 A.D.3d 491 [1st Dept. 2012]; *Gyokchyan v. City of New York*, 106 A.D.3d 780 [2nd Dept. 2013]).

In this matter, Defendant failed to establish that it lacked constructive notice of the allegedly hazardous condition. Defendant provided no evidence from someone with personal knowledge as to any sidewalk maintenance activities on the day of the accident, including when the area was last inspected (*see Spector, supra, see also De La Cruz v. Lettera Sign & Elec. Co.*, 77 A.D.3d 566 [1st Dept. 2010]). Further, the plaintiff's description of the ice patch - grey with a

"bubble" and "things in it," or "whitish" in color, stretching across the length of the sidewalk, (50-h hearing, at 31) and ½ to 3/4 of an inch in depth, is sufficient to infer that the condition had been there for a sufficient amount of time for Defendant to discover and remedy the condition (*see Perez v. New York City Housing Authority*, 114 A.D.3d 586 [1st Dept. 2014]; *Rodriguez v. Bronx Zoo Restaurant, Inc.*, 110 A.D.3d 412 [1st Dept. 2012]). Moreover, as noted *supra*, the testimony of the plaintiffs do not conclusively resolve the issue of whether the ice condition was or was not present in the area the day before this accident.

For the foregoing reasons, Defendant's motion for summary judgment is denied.

Defendant City of New York

Defendant City has established entitlement to dismissal of the Plaintiffs' complaint, and all cross-claims, pursuant to CPLR 3212. Under Administrative Code §7-210, the City is not responsible for maintaining sidewalks abutting real property, aside from one, two, or three-family residential real property that is in whole or in part owner occupied, and used exclusively for residential purposes. It is not disputed that the real property abutting the sidewalk at issue is commercial property, and was not owned by the City. Accordingly, pursuant to §7-210, the City cannot be held liable for any hazardous condition on the sidewalk, unless there is evidence that the City caused or created the condition through an affirmative act of negligence, or that the condition arose out of the City's special use of the sidewalk (*see Harkidas v. City of New York*, 86 A.D.3d 624, 627 [2nd Dept. 2011]). Here, the City's witness testified that the Department of Sanitation did not clear snow or ice from this particular location, although they did clear crosswalks in the area. In opposition, Plaintiffs failed to raise an issue of fact. The cases cited in support of their opposition papers are inapplicable as they were decided before the enactment of Administrative Code §7-210. Further, Plaintiffs have not offered a sufficient legal argument for their contention that the applicable Administrative Code is unconstitutional.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that defendant Emil Mosbacher Real Estate, LLC.'s motion for summary judgment is denied, and it is further,

ORDERED, that defendant City of New York's motion for summary judgment is granted, and the complaint and any cross-claims asserted against the City are dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 11/10/15, 2015

Hon. Mary Ann Brigantti, J.S.C.