[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

PATRICE MICHAEL,

Plaintiff,

-against-

FORDHAM UNIVERSITY,

Defendant.

Index No. 152891/2014

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Fordham University ("defendant") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Patrice Michael ("plaintiff"). Plaintiff cross-moves, for an order striking the Answer of defendant for its spoliation of key evidence.

Factual Background

On January 5, 2014, at approximately 10:30 a.m., plaintiff slipped and fell on a public sidewalk in front of McMahon Hall, located at Fordham's Lincoln Center campus at 155 West 60th Street, New York, New York.

Plaintiff's Deposition

Plaintiff testified that she was dropping off her daughter at defendant university's campus ("Fordham") to attend a retreat. She recalled that it was "overcast" and "misty" earlier that day, when she left that morning to drive to Fordham, and that by the time they reached the school, "it was overcast and . . . brightening [up]" (EBT at 26, lines 6 and 10; at 27, lines 19-20). Plaintiff did not recall whether there was any type of precipitation falling when she arrived at Fordham, but stated that the temperature was "[a]round . . . freezing" (*id.* at 29, line 21).

Upon arrival, plaintiff parked her car in front of McMahon Hall and exited her vehicle, "went around the back of the car, over a little bit of snow, before [she] stepped onto the sidewalk" (*id.* at 24, lines 8-10). There was no debris, trash, or puddles on the ground where she was walking. Plaintiff was in the process of discarding coffee cups in the trash can located in front of McMahon Hall, when she slipped and fell on the sidewalk at approximately 10:30 a.m.

After her fall, plaintiff realized that she had slipped on ice, which she described as "frosty, white, [and] shiny" (*id.* at 35, line 2). According to plaintiff, the ice "seemed to take up the whole part of that cement colored part of the sidewalk" (*id.* at 35, lines 4-5). The ice that she slipped on was not black ice, not dirty, and when asked if the color of the ice was cloudy, she stated, "I wouldn't say – it was cloudy in places, I guess" (*id.* at 35, lines 14-15). Plaintiff further testified, "I believe I didn't pay much attention to it, you know. It just looked like ice when I was down there, and it was cold like ice. I noticed it expanded the whole sidewalk" (*id.* at 35, lines 19-23). She did not observe any salt or sand in the area where she fell.

Deposition of George Smith

George Smith ("Smith") is defendant's Public Safety Supervisor, responsible for overseeing a contract guard force, monitoring fire burglar alarms, and the "[o]verall supervision of the Public Safety operation" (EBT at 7, lines 18-19). His department is responsible for responding to any incidents or accidents that occur on the grounds of Fordham's campus, and for writing incident reports, but has no maintenance responsibilities.

On the date of plaintiff's accident, Smith was working at Fordham's Lincoln Center campus, where McMahon Hall is located. When Smith arrived to work at 6:00 a.m., it was "drizzling" at that time (*id.* at 23, line 12). At approximately 8:30 a.m., he was receiving reports

from the security team that the rain had turned to freezing rain. At approximately 9:00 a.m., when the sidewalks started to become slippery, the Public Safety department advised the custodial staff that the rain had turned to freezing rain. Smith personally observed the freezing rain turn to ice on the sidewalk, approximately 200 feet away from where plaintiff slipped and fell. Due to the icy conditions, Smith closed off a nearby elevated plaza area of defendant's campus. At 9:10 a.m., Smith advised fire safety guard Jerry Stynze "to notify the grounds[keepers] to make sure they were treating the walkways" (*id.* at 42, lines 23-24). This action was memorialized in a log book, which is maintained by defendant's employees.

Smith learned of plaintiff's accident when he was called by a security guard who was on duty at McMahon Hall. When Smith responded to McMahon Hall, he spoke with plaintiff, who relayed to him that she fell while walking to a garbage can outside McMahon Hall. Plaintiff also indicated that ice was involved in her fall. Smith then observed the sidewalk outside of McMahon Hall there to be "very icy" (*id.* at 53, line 10); the ice "was clear. It was almost like black ice to me" (*id.* at 64, lines 4-5). Smith did not recall whether the area where plaintiff fell had been salted or otherwise treated, and stated that "[o]nce the ambulance was notified and Custodial [staff] had come out, . . . they applied further material on the sidewalk [area where plaintiff fell]" (*id.* at 54, lines 13-15).

According to Smith, "it was still actively freezing rain" after the subject accident and that the freezing rain stopped "[l]ate into the afternoon" (*id.* at 72, line 20). Before leaving work that day, Smith looked at the surveillance video recording of plaintiff's fall, and saved a two-minute clip of footage of the accident "so that [he] would save the images and later as per discovery, [he] loaded it onto [a] flash drive" (*id.* at 81, lines 6-7). No other footage around the time of

plaintiff's accident remains, as Smith explained, "it is a 30 day retrieval on the system" (*id.* at 80, lines 23-24). Smith did not look for anything earlier or later in the video recording.

Deposition of Vincent Kocovic

Vincent Kocovic ("Kocovic"), defendant's Facility Operations Manager, was responsible for maintaining the mechanical and custodial aspects of Fordham's Lincoln Center campus. On the date of plaintiff's accident, Kocovic was also in charge of snow and ice removal and supervised mechanics, engineers, and cleaners.

According to Kocovic, there was freezing rain on the morning of January 5, 2014, at approximately 7:00 a.m., when he left for work. Kocovic described, "it wasn't heavy rain or ice. It was in between, and it was consistent throughout the day" (EBT at 39, lines 4-6). When he arrived at work at approximately 8:00 a.m., Kocovic went to each building on defendant's campus and asked the security guards if there had been any complaints or problems relating to the inclement weather, and was told that there were none. When he walked around the campus at approximately 8:00 a.m., he did not notice any icy conditions on any of the sidewalks or entrances to the buildings. However, it was still freezing rain at that time, and after seeing on his phone that "it was going to rain, icy rain, . . . all day" (*id.* at 51, lines 4-5), Kocovic instructed a staff member to spread salt around the campus, including the public sidewalks abutting the campus. Kocovic stated that "due to the weather conditions, every time [he] salted, it would just melt and then freeze again. . . . it was just the weirdest thing. I mean, I'd walk. I'd finish. When I turned around, it started, you know – it's like I did nothing" (*id.* at 83, lines 6-11). Over the course of the morning, prior to plaintiff's accident, Kocovic and his co-workers spread "several bags" of salt over defendant's campus, including the public sidewalks (*id.* at 96, line 8). Kocovic

advised his boss, approximately 20 minutes before learning about plaintiff's accident, that they needed additional staff to assist with the icy condition on the sidewalks. Subsequently, additional employees, who had the day off, came in to assist with the salting duties.

In response to notification that someone had slipped and fallen on the sidewalk, Kocovic walked to McMahon Hall assisted his co-worker in salting the subject area.

Defendants' Contentions

In support of summary judgment, defendant argues that it owed no duty to plaintiff to clear the sidewalk on which she fell, until a reasonable time after the cessation of the storm, pursuant to the "storm in progress" doctrine. Defendant also argues that, pursuant to Administrative Code of City of NY §16-123 ("Removal of snow, ice and dirt from sidewalks; property owners' duties"), its duty to clear the sidewalk abutting its premises does not begin until four (4) hours after the cessation of a storm. Based upon the deposition testimony of its employees, Smith and Kocovic, as well as multiple certified weather reports annexed to an expert affidavit by meteorologist Howard Altschule ("Altschule"), at the time of plaintiff's accident, and for one hour prior thereto, freezing rain was falling at defendant's Lincoln Center campus, where plaintiff slipped and fell.

According to defendant, there are no genuine issues of material fact. Plaintiff's description of the ice on which she fell is consistent with the type of fresh ice that would form during an active freezing rainfall. Defendant further argues that plaintiff's testimony that it was sunny at the time of her accident, and that there was no precipitation, must be disregarded as a matter of law because it is not supported by any climatological records, pursuant to CPLR 4528

("Weather conditions").[1]

Defendant contends that plaintiff's expert witness, George Wright ("Wright"), confirms in his affidavit that there was ongoing freezing rain at the subject premises, approximately one hour before plaintiff's accident and at the approximate time of plaintiff's fall. Plaintiff's expert also concedes that, at the approximate time of plaintiff's accident, the sky was cloudy and the temperature was 31°F, below freezing, in the area where plaintiff fell. According to defendant, photographic evidence, taken from the surveillance video shows prior snowfall removal, and depicts plaintiff on the sidewalk at a safe distance from any accumulated snow. In addition, defendant asserts that Wright fails to address that there was a Freezing Rain Advisory on the date of plaintiff's accident, which had been in effect since 8:30 a.m., and remained in effect until after the accident. The balance of plaintiff's expert disclosure consists of speculation and, therefore, is insufficient to create a question of fact, given the existence of ongoing freezing rain. Although defendant attempted to clear the walkways on its campus, despite the fact that it owed no duty to pedestrians due to the storm in progress, plaintiff should be foreclosed from arguing that defendant's efforts to clear the walkway caused, or contributed to, her accident, since she testified that she slipped on ice, and that no sand or salt was present in the area where she fell.

Plaintiff's Cross-Motion and Opposition

Plaintiff cross-moves for sanctions based on spoliation of evidence, arguing that the lost video footage of the three days preceding the two-minute clip of plaintiff's fall would have established that the icy condition that caused plaintiff to slip and fall was not the result of a storm in progress. Defendant's failure to save the video footage, despite plaintiff's demand dated

[1] In opposition, plaintiff disputes having testified that there was no precipitation at the time of her accident.

January 28, 2014 for same, is inexcusable, due to Smith's access to the video, and his knowledge of plaintiff's accident and her transport to the hospital. Plaintiff's demand also warned that "the failure to preserve and safeguard [the video] may result in court ordered sanctions."

Plaintiff contends that striking defendant's answer is appropriate, as the subject video is the only direct and virtually incontrovertible evidence to address the key disputed issues, and plaintiff has been deprived of the opportunity to prove that:

> "1) the ice on which she slipped had been formed days earlier; 2) Defendant allowed [such] ice . . . to remain in place for at least two full days; and 3) Defendant caused and created the ice condition when it shoveled the sidewalk but allowed patches of ice to remain and failed to place salt on the sidewalk" (Aff. in Support of Cross-Motion/Opp, ¶ 16).

Alternatively, the Court may preclude defendant from challenging plaintiff's claim that the ice which caused her to slip had formed days before she fell, or mandate that an adverse inference charge be given.

Plaintiff further argues that defendant failed to establish entitlement to summary judgment. Neither the defendant nor defendant's expert addressed plaintiff's claim that the subject ice existed for two days prior to plaintiff's fall, the weather in the days preceding plaintiff's accident, or the possibility that the ice at issue could have been the result of the storm two days prior to plaintiff's fall. Also, defendant presented no evidence of when the subject sidewalk was last cleaned or inspected, or the condition of the sidewalk prior to the precipitation on the morning of January 5, 2014.

Further, an adverse inference charge to which plaintiff is entitled also defeats defendant's contention that the subject ice condition was caused by ongoing freezing rain.

Plaintiff points out that defendant's own witnesses testified that defendant undertook a

duty to clear the subject sidewalk. And, plaintiff's expert Wright indicates that the ice which caused plaintiff to slip and fall was formed by a storm two days prior to plaintiff's accident, during which approximately 6.5 to 7.5 inches of snow fell in the vicinity where plaintiff fell. According to Wright, there was no further precipitation in the subject area until "[v]ery light" freezing precipitation began sometime between 9:00 a.m. and 9:15 a.m., on the morning of January 5, 2014 (Affidavit, ¶ 9). Defendant's expert does not address precipitation or weather conditions prior to the morning of January 5, 2014, and asserts that light precipitation began at 9:08 a.m. that morning. As Wright's opinion is based upon climatological data and testimony, any conflicting opinion of defendant's expert merely raises an issue of fact.

Defendant's expert affidavit does not address how the color of the ice described by plaintiff as cloudy could have been formed within one hour and twenty minutes of slight intermittent precipitation, at a temperature just one degree below freezing. And, defendant's expert expressly asserted, and Wright agreed, that ice caused by freezing rain would "form a coating of glaze upon the ground," however, the ice described by plaintiff was not a "glaze" but, rather, was "frosty," "white," "shiny," and "cloudy in places."

Defendant's own witnesses confirm that the ice on which plaintiff slipped was not formed by the slight freezing precipitation on the morning of the accident. The deposition testimonies of Smith and Kocovic indicate that the subject sidewalk was salted before plaintiff's fall, and the salt would have continued to melt snow and ice at below freezing temperatures. As both parties' expert witnesses agreed that the temperature was only one degree below freezing on the morning of January 5th, a large area of "frosty," "white," and "shiny" ice that was "cloudy in places" could not have been caused by the precipitation that morning, given that the subject area was salted.

According to Wright, such ice would be consistent with ice that had formed days before, and such ice, which had been in place for days, would not have melted as a result of being treated with salt.

Further, plaintiff contends that defendant caused or exacerbated the condition through its negligent, improper, or deficient clearing of the sidewalk, since the subject sidewalk had been cleared, ice was allowed to form, and it did not appear that the sidewalk had been treated.

And, plaintiff did not claim, as defendant misleadingly represents, that all precipitation had ended by the time she fell; plaintiff recalled that it seemed as if the sun was briefly breaking through at the time of her accident, and her testimony that it was "overcast" and "misty" on the morning of her accident is entirely consistent with the weather records.

Defendant's Reply/Opposition to Cross-Motion

In reply, defendant contends that Wright's expert affidavit is contradicted by the weather data, and is improperly based on information that was not solicited during discovery. The certified weather records confirm that by the time of the accident, one-tenth of an inch of ice was present on the subject sidewalk, and new ice was actively forming and accumulating.

Plaintiff also failed to establish that defendant's snow removal efforts made the condition in front of McMahon Hall more hazardous. Plaintiff testified that there was no snow on the sidewalk in front of McMahon Hall at the time of her accident, and the video footage and photographs show that the subject sidewalk had been cleared of snow. Thus, the claim that defendant negligently removed snow from a prior storm is not supported by the record.

Also, there is no testimony indicating that the sidewalk in front of McMahon Hall had been salted at the time of plaintiff's fall. Nor is there evidence that defendant's salting efforts, if

any, made the condition in front of McMahon Hall more hazardous.

In addition, plaintiff failed to prove that the particular patch of ice upon which she fell was formed prior to the accident. Plaintiff's use of the words "frosty," "white," and "shiny," were not used to describe the specific patch of ice that caused her to fall, and she testified that she "didn't pay much attention" to the particular patch of ice at issue (EBT at 35, lines 19-20). Defendant's expert Altschule opined that, since plaintiff fell on ice on a sidewalk where there was no macadam or blacktop pavement underneath the ice to give it a black appearance, the ice on the cement would have appeared "frosty, white, and shiny." Further, plaintiff testified that the sidewalk appeared "fine" (*id.* at 38, line 2), and the defendant's witnesses confirm that there was no snow found on the sidewalk in front of McMahon Hall.

In the absence of evidence that the subject sidewalk was salted before the accident, Wright's opinion is flawed and should not be considered by this Court. Further, plaintiff's expert affidavit fails to raise a triable issue of fact because it only establishes that there may have been snow "in the immediate vicinity" of the subject area, as opposed to the exact location where plaintiff fell. Moreover, there is no evidence to support Wright's conclusions.

Defendant asserts that Kocovic testified that, although there are no written records of inspections, inspections are made on a daily basis by the Facilities Department and, during inclement weather, inspections are made and addressed on an hourly basis. Moreover, the failure of a landowner "to remove all snow and ice from a sidewalk or parking lot does not constitute negligence" and does not constitute the creation of a hazard. That a prior snowfall occurred in the days prior to plaintiff's accident does not impose a duty upon defendant to remove every inch of snow or ice on the sidewalk. Furthermore, defendant's ability to establish the last time snow

removal efforts were made prior to the freezing rain on the date of plaintiff's accident is irrelevant, given that there was an ongoing storm in progress during plaintiff's accident, which yielded one-tenth of an inch of ice by the time of plaintiff's fall.

As to spoliation, defendant asserts, and plaintiff does not dispute, that defendant exchanged a copy of the surveillance footage which captured the accident, and plaintiff never objected to the footage as deficient or unresponsive. Plaintiff's alleged demand letter was never produced prior to the instant motion, and there is no proof that the letter was ever sent by plaintiff, or received by defendant. Moreover, plaintiff never served a demand for the specific surveillance footage that she now claims has been spoliated, and has never addressed it through depositions or any other discovery device. And, plaintiff cannot now claim sanctions based on discovery, given that plaintiff filed her Note of Issue and Certificate of Readiness, indicating that all discovery had been provided. Thus, as a matter of law, plaintiff waived her right to seek relief related to additional discovery. Defendant argues that plaintiff also failed to establish prejudice to support sanctions under CPLR 3126. The only pertinent time frame includes the moments before and during plaintiff's accident, and plaintiff has sufficient evidence to present her case.

Plaintiff's Reply

Defendant's argument regarding proof of mailing of plaintiff's letter demanding preservation of the video is irrelevant, since defendant does deny receipt of said letter. A mailed letter is presumed to have been received, plaintiff's counsel averred that the letter was sent by plaintiff's counsel's office. Further, plaintiff also made a formal demand for such video footage during discovery. And, as defendant's witness, Smith, only saved the two-minute recording and the remaining video was erased, there was no reason to seek the additional video footage, as it

could not be turned over, and thus, CPLR 3126 is not implicated.

Plaintiff disputes defendant's assertion that there is no spoliation issue herein, since that portion of video recording which defendant failed to preserve went to heart of the issues raised in defendant's motion for summary judgment. Given that defendant's entire motion is predicated on the proposition that the ice on which plaintiff slipped was caused by ongoing freezing rain around the time she fell, and not the result of an earlier storm, plaintiff argues that the absence of the additional surveillance recording deprives plaintiff of "the opportunity to prove her claims through direct observation by a witness or the viewing of video" to demonstrate that the ice on which she slipped had been formed days earlier, that defendant allowed the ice on which she slipped to remain in place for at least two full days, and that defendant caused and created the ice condition when it shoveled the sidewalk but allowed patches of ice to remain and failed to place salt on the sidewalk (Plaintiff's Reply Aff., ¶ 8). The fact that defendant saved a two-minute clip of the surveillance video does not absolve defendant of its spoliation of key evidence. Further, defendant did not address how such video would not have been directly relevant to the issues raised on its motion for summary judgment, which plaintiff contends "speaks volumes" and shows that the video was key evidence, the destruction of which was extraordinarily prejudicial to plaintiff's case (*id.*).

Discussion

A defendant moving for summary judgment must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148,

875 NYS2d 820 [Sup Ct, New York County 2008]). As the proponent for summary judgment, defendant must make a *prima facie* showing by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR 3212 [b]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d at 927; *Meridian Management Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 894 NYS2d 422 [1st Dept 2010]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Cabrera v Rodriguez*, 72 AD3d 553, 900 NYS2d 29 [1st Dept 2010]; *Casper v Cushman & Wakefield*, 74 AD3d 669, 904 NYS2d 385 [1st Dept 2010]).

"[I]t is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended" (*Pippo v City of New York*, 43 AD3d 303, 304, 842 NYS2d 367, 368 [1st Dept 2007]; *see Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 [2005]; *Simeon v City of New York*, 41 AD3d 344, 344, 838 NYS2d 560, 561 [1st Dept 2007]). "In addition, pursuant to Administrative Code of the City of New York § 16–123(a), building owners have four hours after a snowfall stops to remove snow and ice from abutting sidewalks, excluding the hours between 9 P.M. and 7 A.M." (*Rodriguez v New York City Hous. Auth.*, 52 AD3d 299, 300, 859 NYS2d 186, 187 [1st Dept 2008]).[2] Here, it is undisputed that there was ongoing freezing rain approximately one hour prior to, and during the time that plaintiff fell. Under such circumstances, defendant established that it did not have a duty to remedy the storm-related snow and ice conditions which allegedly caused plaintiff's injuries (*see Weinberger v 52 Duane Associates, LLC*, 102 AD3d 618, 959 NYS2d 154 [1st Dept 2013] (dismissal warranted where there was sleeting and a "slow rain" at the time of plaintiff's fall); *Kinberg v New York City Transit Auth.*, 99 AD3d 583, 583-84, 952 NYS2d 540, 541 [1st Dept 2012] (finding property owner not liable for injuries sustained by plaintiff when she slipped and fell on ice and snow on stairs, where a snowstorm was in progress at the time of the accident, absent evidence "that a reasonable time elapsed from the cessation of the storm sufficient to impose a duty on defendant to remedy the condition"]; *see also, Prince v New*

[2] Administrative Code of City of NY §16-123 (a) provides, in relevant part, as follows:

"Every owner, lessee, tenant, occupant, or other person, having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall, within four hours after the snow ceases to fall, or after the deposit of any dirt or other material upon such sidewalk, remove the snow or ice, dirt, or other material from the sidewalk and gutter, ..."

York City Hous. Auth., 302 AD2d 285, 756 NYS2d 158 [1st Dept 2003] (stating that "Defendant established that it owed plaintiff no duty to remove the ice on its walkways where the meteorological evidence established that "trace" precipitation in the form of freezing rain and ice pellets . . . accompanied by heavy fog and widespread glaze, began falling in the region at 5:00 A.M., two hours before plaintiff's fall")).

However, plaintiff raised an issue of fact as to whether the dangerous condition upon which she fell existed prior to the storm in progress, and whether defendant created or had constructive notice of the condition (*see Lebron v Napa Realty Corp.*, 65 AD3d 436, 437, 884 NYS2d 37 [1st Dept 2009]). Neither the deposition testimony of defendant's employees, nor the surveillance video recording establish, as a matter of law, that the ice upon which plaintiff allegedly fell did not exist prior to the precipitation of freezing rainfall on the day of plaintiff's accident. Furthermore, defendant did not supply evidence as to when the last time snow was removed from the subject sidewalk prior to the freezing rain storm on the day of plaintiff's accident, and the video recording does not clearly show the condition of the sidewalk where plaintiff fell due to the quality of the recording. And, defendant's employees did not testify as to the condition of the specific sidewalk area where plaintiff fell, prior to the accident. Thus, while Kocovic's deposition testimony establishes that defendant did not have actual notice of the alleged *preexisting ice*, the record does not establish that defendant lacked constructive notice of the alleged preexisting ice condition.

In any event, the parties' conflicting expert affidavits as to whether the ice that allegedly caused plaintiff's accident was formed before the storm, or was created by the precipitation from the storm in progress, raises an issue of fact concerning constructive notice of the icy condition

that caused plaintiff's injury (*see Mike v 91 Payson Owners Corp.*, 114 AD3d 420, 979 NYS2d 332 [1st Dept 2014] [conflicting expert affidavits raised triable issues as to whether the ice was formed before the storm, or by the storm in progress]; *Sanchez v City of New York*, 48 AD3d 275, 276 [1st Dept 2008] [differing opinions offered by the parties' meteorological experts raised issues of fact]).

According to plaintiff, she fell on ice that was "frosty, white, shiny" (EBT at 35, line 2), and "cloudy in places" (*id.* at 35, lines 14-15), which covered the whole sidewalk area where she fell. Plaintiff's expert opines that ice that is "frosty," "white," and "cloudy" in appearance would not have formed on the morning of January 5, 2014, but "would only have been formed by the winter storm that produced between 6.5 and 7.5 inches of snow at the [subject location] on January 2-3, 2014, since ice that is 'frosty, white' and 'cloudy' in appearance is not formed in less than two hours by freezing rain" (Wright Aff. ¶ 18). Plaintiff's expert further opines, "since the precipitation was very light and intermittent, there was not a sufficient amount of precipitation after 9:00 a.m. on January 5, 2014 to cover large portions of the 'whole sidewalk' in ice or to significantly contribute to the pre-existing slippery condition on the sidewalk where she fell" (*id.*).

In contrast, defendant's expert avers that plaintiff's "descriptions of the ice covering the entire area, the shiny appearance to the ice, and the other statements . . . are consistent with the freezing rain storm that [was] in progress causing ice to accumulate" (Aff. in Support, Exh. I, Aff. of Altschule, ¶ 26), and that "[t]he ice that was present at the time of [plaintiff's] slip and fall incident was a direct result of the freezing rain and winter storm that was in progress" (*id.*, ¶ 27). According to defendant's expert, plaintiff's description of the ice as "frosty," "white," and

"shiny," is consistent with how ice that resulted from the storm in progress would have appeared on the cement sidewalk, since there was no macadam or blacktop pavement underneath the ice to give it a black appearance.

Thus, defendant's motion for summary judgment is denied.

Plaintiff's cross-motion for sanctions based on spoliation of evidence is also denied.

"Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). Courts have defined spoliation as the intentional or negligent destruction of "key" or "crucial" evidence, and have held that sanctions are warranted when "crucial items of evidence" are destroyed (*Kirkland*, *supra*; *see also Atlantic Mutual Insurance Co. v Sea Transfer Trucking Corp.*, 264 AD2d 659, 660 [1st Dept 1999]; *Squitieri, supra*; *Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Condition Corp.*, 221 AD2d 243 [1st Dept 1995]). "In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing" (*Duluc v AC & L Food Corp.*, 119 AD3d 450, 451-52 [1st Dept 2014] [internal quotation marks and citations omitted], *lv denied* 24 NY3d 908 [2014]).

Here, plaintiff failed to establish that the lost video depicting the subject area three days prior to plaintiff's accident "is key evidence without which [she] will be 'substantially prejudiced'" (*New York City Hous. Auth. v Pro Quest Sec., Inc.*, 108 AD3d 471, 473 [1st Dept 2013] [citations omitted]). Moreover, plaintiff is not without means to prove her claim, since she

can testify at trial about how the accident occurred and, significantly, and present the video footage of the sidewalk conditions immediately prior to, and at the time of her accident (*see Scansarole v Madison Square Garden, L.P.*, 33 AD3d 517 [1st Dept 2006] [holding that the motion court appropriately refused to strike defendant's answer for spoliation of evidence of lost surveillance video, where such video was not crucial to plaintiff's case]). In fact, the video footage that was saved depicts plaintiff exiting her car and walking on the sidewalk before her accident, and the recording continues until well after her fall. Thus, it cannot be said that the lost footage of video surveillance preceding the saved video recording deprives plaintiff of the opportunity to prove her claims.

Although "the negligent erasure of [video] can certainly give rise to the imposition of spoliation sanctions under New York's common-law spoliation doctrine[] if the alleged spoliator was 'on notice that the [video] might be needed for future litigation'" (*Strong v City of New York*, 112 AD3d 15, 22 [1st Dept 2013]), plaintiff's assertion herein that defendant was on such notice is unavailing, because plaintiff did not demonstrate that the lost video constitutes key evidence that is crucial, the loss of which is prejudicial to plaintiff. Thus, the severe sanction of striking defendant's Answer is unwarranted.[3]

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of defendant Fordham University for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Patrice Michael

---

[3] Contrary to defendant's assertions, plaintiff is correct that CPLR 3126 is not implicated herein, "since CPLR 3126 covers refusal to comply with a discovery order or a willful failure to disclose, neither of which is applicable here" (*Strong v City of New York*, 112 A.D.3d 15, 21 [1st Dept 2013]).

is denied; and it is further

ORDERED that plaintiff's cross-motion for an order striking defendant Fordham University's Answer based on spoliation of evidence is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for defendant.

This constitutes the decision and order of the Court.

Dated: January 6, 2016

Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.