SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ETHEL GEORGE,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY and
CITY OF NEW YORK,

Defendants.

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Index no. 159336/14

Motion seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendant NYCHA:
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Defendant New York City Housing Authority (NYCHA) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes the motion.

I. PERTINENT FACTS

On February 20, 2014, between approximately 7 and 7:30 am, plaintiff allegedly slipped and fell on ice on a pedestrian crosswalk intersecting a vehicular roadway within the Rangel Houses, a development owned and maintained by NYCHA. (NYSCEF 28).

At a 50-h examination taken on June 10, 2014, plaintiff testified, as pertinent here, that on the morning of her accident, it was not snowing or raining. As she left her apartment building, plaintiff noticed snow on the side of the sidewalk, but no ice. As plaintiff approached the crosswalk, she saw no ice on it, and observed other people walking on it without falling. When she walked onto the crosswalk, her right foot slipped and she fell. When plaintiff looked at the

ground after her fall, she saw very thin, slippery, and clear ice on it. There was no salt or sand on the crosswalk. (NYSCEF 33).

At plaintiff's deposition held on May 27, 2015, she again testified that she saw no ice on the crosswalk before she fell, but after falling, she noticed very thin, shiny, and clear ice that was free of debris or dirt. There was no precipitation in the air or on the ground while she was walking toward the crosswalk. (NYSCEF 35).

On June 10, 2015, Edwin Burgos, a NYCHA employee and supervisor of grounds for the Rangel Houses, testified that it was part of his daily duties and procedures during the winter to check the grounds for ice and snow, depending on whether the weather conditions indicated a need to do so. He would check the grounds in the morning, after he arrived for work at 8 am, and would fill out a snow removal and sanding log book and groundskeeper log book at the end of each day. There was no overnight staff working at the development in 2014, and he and other employees arrived at work no earlier than 8 am.

On February 17, 2014, three days before plaintiff's accident, Burgos's logs reflect that conditions were icy at the development and, thus, his staff performed snow and ice removal that day, and the next day, as there was snow on the ground. The walkways were also salted and sanded. Logbook entries for February 19 and 20, 2014, reflect that the highest temperature on February 19 was 46 degrees and on February 20 50 degrees. As far he knew, no complaints were received about the condition of the crosswalk before, on, or after February 20. (NYSCEF 27).

A copy of Burgos's snow removal log reflects that on February 19 and 20, 2014, no snow or ice removal action was taken or required, and no icy conditions were observed at 8 am or 4 pm on February 19. On February 20, the weather was clear with a high of 50 degrees, at 8 am, icy

conditions were observed and 11 NYCHA employees distributed sand on the grounds, and at 4 pm the icy conditions were no longer present. (NYSCEF 41).

By affidavit dated December 9, 2015, Jaime Lan, NYCHA's superintendent for the Rangel Houses, states that he fruitlessly searched for work tickets from February 13 to 20, 2014, referencing the presence of ice on the crosswalk where plaintiff fell. (NYSCEF 43).

NYCHA submits certified copies of "Quality Controlled Local Climatological Data (Final) - Hourly Observations Table for Central Park" for February 2014. The records show that on February 19, 2014 at approximately 11:50 pm, the weather was clear and the temperature was 44 degrees, and that between 12 am and 8 am on February 20, the temperature dropped from 44 degrees to 39 degrees and the sky conditions remained clear. An hourly precipitation table for Central Park reflects that on February 18, 2014, there was trace precipitation beginning at 5 am and ending at 10 am, on February 19, there was precipitation recorded between noon and 3 pm and then trace precipitation recorded at 6 and 7 pm, and that no precipitation was recorded on February 20 until 4 pm. Another climatological record shows that on February 19, 2014, the high temperature was 45 degrees and low was 34 and there was significant weather consisting of rain, mist, and haze, and on February 20, the high temperature was 51 and the low 37 degrees and the significant weather consisted of mist. (NYSCEF 42).

Plaintiff's expert, a professional meteorologist certified by the American Meteorological Society, reviewed relevant documents in this matter, including the climatological records submitted by NYCHA and other official climatological records, and relates that the records show that on February 19, 2014, rain developed in the morning and ended at 7 pm, with no additional precipitation, and that there was no precipitation on February 20, 2014. As the temperature

remained above freezing from February 18, 2014 to the time of plaintiff's accident, the expert opines that any ice present on the crosswalk formed prior to the 20th, and that it was formed by snow that fell on February 18 and was therefore present for more than 45 hours before plaintiff's accident. (NYSCEF 49).

By affidavit dated April 18, 2015, Maria Rivera, a resident of the Rangel Houses, attests that she observed plaintiff laying on the crosswalk after her fall and saw that the crosswalk was "extremely slippery, with a thin but very slippery layer of ice" on it, and that she also saw other people slipping on the walkway. (NYSCEF 48).

II. CONTENTIONS

NYCHA denies having created or having actual notice of the icy condition that caused plaintiff's fall, absent evidence of any complaints about it before plaintiff's fall, observing that their logs reflect that there were no icy conditions present at 4 pm on February 19 and the icy condition on February 20 was observed at 8 am, after her fall. NYCHA also denies having had constructive notice of the ice, as there is no evidence as to when the ice formed. Although it could have formed before NYCHA's staff began work on February 20, the staff had no reason to believe that ice would have formed overnight absent any precipitation on February 19 and as the temperature remained above freezing for February 19 and 20. Moreover, plaintiff's description of the ice as very thin and clear indicates that it could have formed very soon before her fall, especially as the crosswalk was trafficked before her fall. (NYSCEF 26).

Plaintiff contends that the climatological date indicates that the ice must have formed days before her accident, as there had been no freezing temperatures for approximately 45 hours

before her fall, and that therefore NYCHA has failed to establish, *prima facie*, that it lacked constructive notice of the ice. (NYSCEF 46).

III. ANALYSIS

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2 at 853). When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party, which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562).

An owner or occupant of premises has a duty to remove an accumulation of snow or ice inside or outside the premises which may be dangerous, or to take other measures to ensure the safety of the premises, when it has actual or constructive notice of the existence of the condition and a reasonable opportunity to act. (*See eg Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]; *Helms v Regal Cinemas, Inc.*, 49 AD3d 1287, 1288 [4th Dept 2008]; *Blackwood v New York City Tr. Auth.*, 36 AD3d 522, 523 [1st Dept 2007]; *Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735-36 [1st Dept 2005], *affd* 6 NY3d 734; *Hussein v New York City Tr. Auth.*, 266 AD2d 146, 146-47 [1st Dept 1999]; *Zonitch v Plaza at Latham LLC*, 255 AD2d

808, 808-809 [3d Dept 1998]; 86 NY Jur 2d, Premises Liability § 341; 355 [2016]; 15 NY Prac, New York Law of Torts § 12:11 [2016]).

The issue here is not whether the ice existed before plaintiff's fall, but whether it existed for a sufficient length of time for NYCHA to have discovered it or have the opportunity to discover it, i.e., whether it was "'visible and apparent' so as to enable [NYCHA's] employees to discover it and take remedial measures." (*See Tompa v 767 Fifth Partners, LLC*, 113 AD3d 466 [1st Dept 2014], *lv denied* 24 NY3d 903; *see also Harrison v New York City Tr. Auth.*, 113 AD3d 472 [1st Dept 2014] [plaintiff must demonstrate that icy condition was dangerous, was visible and apparent, and existed for sufficient length of time prior to accident to permit defendant's employees to discover and remedy it]).

Here, plaintiff did not see the ice before she fell and she described it as being very thin and clear, thus demonstrating that it was not visible and apparent. Moreover, the absence of any dirt or debris on the ice on the well-trafficked crosswalk indicates that the ice had not been there very long. (*Compare Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412 [1st Dept 2013] [triable issues raised as to defendant's constructive notice as there had been no precipitation since storm two days before accident and hazard described as patch of black ice on dirty or filthy sidewalk]).

NYCHA's evidence also reflects that no ice was observed by staff at 4 pm on February 19, that no precipitation occurred between the night of February 19 and the morning of February 20, that the temperature did not fall below freezing on either day, and that no complaints were received about ice on the grounds. NYCHA has thus established, *prima facie*, that it had no notice of or reason to know of the existence of an icy condition at 7 or 7:30 am on February 20. (*See Tompa*, 113 AD3d at 466 [defendant established lack of notice of icy condition as logs

showed routine inspections and inspection before plaintiff's fall did not show ice, and plaintiff failed to show ice was discernable, as she did not see it before she fell and it was invisible]; *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 [1st Dept 2010] [defendant sustained *prima facie* burden through evidence that plaintiff did not see black ice until after she fell, employee saw area night before accident and it was free of ice, and there had been no prior accidents or incidents]; *Kiileen v Our Lady of Mercy Med. Ctr.*, 35 AD3d 205 [1st Dept 2006] [no evidence of defendant's notice of ice condition as there were no known complaints and plaintiff did not notice black ice before he fell]; *see also Daley v Janel Tower L.P.*, 89 AD3d 408 [1st Dept 2011] [defendant met burden through records showing snow fell more than one week prior to fall and during three-day period before fall, temperatures were above freezing, which established that icy condition would not have formed under the circumstances]).

The evidence thus permits the inference that the ice, if any, formed after 4 pm on February 19 and before NYCHA's staff was available to discover it at 8 am on the February 20. (*Compare Harrison*, 113 AD3d at 472 [evidence including climatological data, recurrent dripping conditions, and freezing temperatures on day before plaintiff's accident, supported conclusion that source of ice was earlier snowstorm]; *Dominguez v 2520 BQE Assocs., LLC*, 112 AD3d 550 [1st Dept 2013] [records showed it had snowed two days before plaintiff's fall and temperatures remained freezing until accident, from which it could be reasonably inferred that ice had been present for at least two days]; *Wright v Emigrant Sav. Bank*, 112 AD3d 401 [1st Dept 2013] [description of ice as black grayish dirty snow that was circular and measured one-and-half foot wide provided some indication that condition had existed for some time, raising issue as to constructive notice]). The absence of an expert affidavit from a meteorologist is not fatal to

NYCHA's motion. (*See Saavedra v City of New York*, 137 AD3d 421 [1st Dept 2016] [defendant not required to submit expert opinion in support of summary judgment motion in case involving slip and fall on icy condition]).

However, plaintiff's expert's opinion that due to the above-freezing temperatures for approximately two days before the accident, the ice could not have formed immediately before the accident and must have been present for at least 45 hours before then, is sufficient to raise a triable issue. (*See Santiago v New York City Health and Hosps. Corp.*, 66 AD3d 435 [1st Dept 2009] [expert meteorologist's opinion, based on meteorological data, that ice condition created at least 25 hours before accident raised triable issue as to length of time it was present before accident occurred]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant New York City Housing Authority's motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC

DATED: January 11, 2017
New York, New York