| **Ehrenrheich v Barber** |
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| 2017 NY Slip Op 30406(U) |
| February 27, 2017 |
| Supreme Court, Kings County |
| Docket Number: 505582/2014 |
| Judge: Debra Silber |
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of February, 2017.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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ZISEL EHRENRHEICH,

Plaintiff,

- against -

BENJAMIN BARBER,

Defendant.

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DECISION/ORDER

Index No. 505582/2014

Motion Sequence Nos. 2, 3

| The following papers number 1 to 6 read herein: | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2, 3-4 |
| Opposing Affidavits (Affirmations) | 5 |
| Reply Affidavits (Affirmations) | |
| Affidavits (Affirmations) | |
| Other Papers Memo of Law | 6 |

Upon the foregoing papers, defendant, Benjamin Barber moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the verified complaint of plaintiff, Zisel Ehrenrheich. Plaintiff cross-moves for an order, pursuant to CPLR 1003 and 3025, for leave to amend the verified complaint to add an additional defendant. For the reasons which follow, both motions are granted.

***Background***

Plaintiff commenced the instant action by electronically filing a summons and verified complaint on June 18, 2014. The verified complaint alleges that, on February 9, 2014, plaintiff slipped and fell on ice on a public sidewalk near defendant's premises, located at 5719 New Utrecht Avenue in Brooklyn. A retail establishment named Elegant Linen Inc. occupies a storefront on the subject premises.[1] The pleading further asserts that the icy condition constituted a hazard, which was caused and/or exacerbated by defendant. Moreover, plaintiff claims that defendant had either actual or constructive notice of the subject hazard. Plaintiff argues that defendant's acts and omissions with respect to the icy condition constitute negligence and that such negligence proximately caused her injuries.

Defendant interposed an answer that generally denies plaintiff's allegations. Discovery ensued, and on December 22, 2015, plaintiff filed a note of issue with a jury demand, thereby asserting that the action is ready for trial. Defendant responded with a motion for summary judgment; plaintiff cross-moves for an order granting her leave to amend the complaint.

***Defendant's Arguments In Support Of His Motion***

In support of his motion, defendant first points out that a sustainable premises liability claim requires proof that the landowner either created a hazardous condition or had either actual or constructive notice of one. Defendant contends that a landowner's knowledge that

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[1] The record indicates that although defendant alone owns the subject real estate at 5719, defendant's corporation leases the property for his linen company thereon. Defendant and his business partner own the corporation, Elegant Linen, Inc.

water on the ground may freeze and turn into ice does not constitute the requisite notice. Next, defendant asserts that a landowner is not liable for snow and ice hazards while a storm is in progress. Here, defendant continues, plaintiff testified at her examination before trial that it was snowing moderately at the approximate time of her accident; defendant bolsters his point by submitting certified weather reports. Defendant reasons that, therefore, based on the so-called "storm-in-progress rule," he is not liable for plaintiff's injuries. Defendant maintains that he is thus entitled to summary judgment dismissing the verified complaint.

Alternatively, defendant argues that he (or his agents) did not create, exacerbate or have notice of any snow or ice condition in the area. Defendant notes that the deposition testimony given in this matter establishes that an Elegant Linen employee named John would generally remove snow and ice from the abutting sidewalk. Defendant points out that the record, however, contains no evidence suggesting that any snow removal efforts contributed to the subject accident. Accordingly, defendant argues that as a matter of law, he did not create or exacerbate any hazardous condition. Moreover, defendant notes that the record indicates that it began snowing in the area approximately one hour before the accident occurred. Defendant also testified that he did not observe any snow or ice on the subject sidewalk at relevant times. Given the record, defendant concludes that, as a matter of law, he did not have any notice of a snow or ice hazard on the subject sidewalk. Defendant maintains that he is entitled to summary judgment dismissing the verified complaint on this alternate ground.

Again in the alternative, defendant claims that plaintiff's action should be dismissed because the record establishes that she did not slip and fall on the sidewalk abutting his

property, but on the adjacent property. Specifically, defendant points out that plaintiff testified that she did not fall exactly in front of the linen store. Defendant claims that when plaintiff, during her deposition, was asked to mark the location of the accident on photographs, she indicated that she fell in front of 5717 New Utrecht Avenue, and not in front of his property. Defendant asserts that Bed Gevant Corp., owned by defendant and his business partner[2] own 5717 New Utrecht Avenue, but plaintiff has not brought suit against this corporation. Defendant states that, in any event, he is not personally liable for a premises liability claim that arose on a parcel he does not personally own. Lastly, defendant concludes that he is entitled to summary judgment dismissing the verified complaint on this basis. The photographs with plaintiff's marks are included in the motion papers.

***Plaintiff's Arguments In Support Of Her Cross Motion***

In support of her cross motion, and in opposition to defendant's motion, plaintiff first asserts that this court should grant her leave to amend the summons and complaint to include Bed Gevant Corp. (Bed Gevant) as a defendant. This corporation is the owner of 5717 New Utrecht Avenue and the building thereon. Plaintiff claims that it was not apparent, prior to the depositions in this case, that she fell in front of 5717 New Utrecht Avenue. Plaintiff states that, because of this development, the instant action is properly brought against Bed Gevant, the owner of the adjacent premises. Moreover, plaintiff continues, since defendant Barber is a fifty-percent owner of Bed Gevant Corp. and of Elegant Linen Inc., and is the owner of the property at 5719 New Utrecht Avenue, and since he testified that he was

[2] Who together also own and operate Elegant Linen Inc..

personally responsible for sidewalk maintenance for both properties, defendant should remain in this action irrespective of which property plaintiff fell on.

Plaintiff also argues that since defendant is a fifty percent owner of the proposed additional defendant, Bed Gevant Corp. thus received adequate notice of the facts of this action. Accordingly, plaintiff reasons, there is no surprise or prejudice to any party. Noting that leave to amend pleadings should be freely given, plaintiff concludes that this court should grant her leave to serve and file her proposed amended pleadings.[3]

Next, plaintiff argues that defendant has failed to demonstrate prima facie entitlement to judgment as a matter of law. Plaintiff claims that a landowner, such as defendant herein, has a non-delegable duty to maintain an abutting sidewalk in a safe condition. In cases involving snow or ice accumulation, plaintiff continues, landowners must exercise reasonable care to prevent dangerous conditions from arising on the sidewalk abutting their property.

Moreover, plaintiff contends, a landowner who moves for summary judgment in a premises liability matter has the burden of establishing lack of notice of a hazardous condition. Plaintiff points out that moving defendants typically meet this burden by submitting sworn testimony of the most recent pre-accident inspection of the relevant area. In contrast, plaintiff continues, defendant herein has submitted no evidence of when the accident site was last cleared of snow and ice or last inspected. Indeed, maintains plaintiff, defendant's testimony indicates only that, as a custom and practice, after a significant

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[3] Plaintiff has submitted a proposed supplemental summons and amended complaint with her notice of motion.

snowfall, a person named "John"[4] would generally clear snow and ice from the relevant area. Absent specific information about the snow-clearing during the time period relevant herein, says plaintiff, defendant has not met his summary judgment burden.

Also, and in response to defendant's "storm-in-progress" argument, plaintiff claims that the record indicates that defendant failed to adequately remove snow and ice that had accumulated during storms prior to the date of the accident. Plaintiff notes that according to the climate data, there was a snow fall on February 5, 2014—four days prior to the accident—and temperatures remained below freezing until the date of the accident. Thus, reasons plaintiff, the trier of fact could reasonably infer that defendant failed to clear the sidewalk of a hazardous snow and ice condition that preceded the snowfall on the day of the accident by several days. Plaintiff asserts that such a failure to maintain the sidewalk constitutes negligence, and defendant's motion should be denied on this additional ground.

***Defendant's Arguments In Opposition***

In opposition to plaintiff's arguments, defendant first claims that the motion for leave to amend should be denied. Defendant points out that the deposition of plaintiff was taken on October 13, 2015, and it was on that date that she learned that the accident occurred in front of Bed Gevant's property—not defendant's. However, continues defendant, plaintiff did not move for leave to amend her pleadings until July of 2016—well after her deposition, and more than seven months after her note of issue was filed. Defendant asserts that plaintiff

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[4] This person is otherwise unidentified; plaintiff claims that neither defendant nor his employees had John's contact information.

is required to show a reasonable excuse for this delay, and has not. Describing plaintiff's actions as dilatory, defendant concludes that the motion for leave to amend should be denied.

Next, defendant argues that plaintiff's sworn testimony belies her arguments concerning defendant's notice of a purported hazardous snow and ice condition. Specifically, defendant continues, she testified merely that the sidewalk was wet on the date of the accident; she also testified that she did not know what caused it to be wet. Moreover, defendant points out that although there were approximately nine-inch high piles of snow near the store front, plaintiff was able to enter the store without incident and, when inside, did not inform any store employee of a snow or ice hazard outdoors. Defendant reiterates that according to both the plaintiff's testimony and relevant climate data, it was snowing when the accident occurred; defendant concludes that the storm-in-progress rule thus relieved him of any duty to remove snow or ice from the sidewalk. Also, defendant notes that plaintiff testified that she did not observe the substance that caused her to fall and that preexisting ice may have contributed to the accident. Lastly, defendant reiterates that nothing in the record suggests that he or his agents created or exacerbated a hazardous condition. Accordingly, defendant argues that he is entitled to summary judgment dismissing the complaint.

***Discussion***

The owner of the subject premises owes those on the premises a duty of reasonable care under the circumstances to maintain the premises in a safe condition (*Tagle v Jakob*, 97 NY2d 165 [2001]; *see also Backiel v Citibank*, 299 AD2d 504, 505 [2002] ["the owner has a nondelegable duty to provide the public with a reasonably safe premises and a safe means

of ingress and egress"]). Moreover, "'[a] landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk'" (*Romano v Omega Moulding Co. Ltd.*, 57 AD3d 873, 874 [2d Dept 2008], quoting *Peralta v Henriquez*, 100 NY2d 139, 144 [2003] and *Basso v Miller*, 40 NY2d 233, 241 [1976]; *see also Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept 2003]). Lastly, abutting landowners such as defendant are ultimately responsible for the repair and maintenance of public sidewalks and not the commercial tenant (Administrative Code of City of New York § 7-210; *see also Martinez v Khaimov*, 74 AD3d 1031, 1032 [2d Dept 2010] [tort liability exists against landowner defendants "for the negligent failure to remove snow and ice from the sidewalk abutting their property"]). The lease agreement between the commercial tenant and the owner may address the issue of indemnification, which is not relevant herein.

In this matter, defendant Barber herein has established prima facie entitlement to judgment as a matter of law. As evidenced by plaintiff's cross-motion and the "X" on the photos, plaintiff has conceded that she fell on the property known as 5717 New Utrecht Avenue, which was owned by Bed Gevant Corp. on the date of her accident.

Defendant's motion is, therefore, granted and the action is dismissed as against Benjamin Barber. Whether or not Mr. Barber was the property manager, he cannot be personally held liable for accidents on property owned by a corporation.

Turning to the cross-motion, the court grants plaintiff's motion for leave to amend her pleadings. CPLR 3025 ("Amended and supplemental pleadings") states, in applicable part:

> "(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

Leave to amend pleadings should be freely granted absent surprise or prejudice to the opposing party (*G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 99 [2d Dept 2007], *affd* 10 NY3d 941 [2008]; *see also Longo v Long Is. R.R.*, 116 AD3d 676, 677 [2d Dept 2014]; *Ferdico v Zweig*, 82 AD3d 1151, 1154 [2d Dept 2011]; *Surgical Design Corp. v Correa*, 31 AD3d 744, 745 [2d Dept 2006]). The authority to grant leave to amend a pleading is committed to the sound discretion of the trial court (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]; *see also Murray v City of New York*, 43 NY2d 400, 404-405 [1977]).

Here, and contrary to defendant's argument, the proposed amendment contains no new facts that might prejudice any of the parties; indeed, it is undisputed that defendant is a fifty percent owner of the proposed additional defendant (*see e.g. O'Connell v Consolidated Edison Co. of New York, Inc.*, 276 AD2d 608 [2d Dept 2000]). Moreover, the fact that additional discovery may be required does not establish prejudice (*see e.g. Smith v Industrial Leasing Corp.*, 124 AD2d 413, 414 [1986]). Lastly, the court notes that plaintiff's causes of action were not time-barred when the motion was made. For these reasons, the court grants plaintiff's cross motion.

While the court has concluded that the defendant is not the proper defendant, as the accident took place on the adjacent property, there would be no point to grant the cross motion to amend the pleadings if plaintiff's claims would be dismissed when the new defendant, a corporation owned by the moving defendant, would make the identical motion. Therefore, while it is merely dicta, it is the court's determination that defendant has not made a prima facie case for summary judgment dismissing the action on the substantive grounds set forth in the defendant's motion.

Although "the mere happening of an accident, in and of itself, does not establish liability of a defendant" (*Scavelli v Town of Carmel*, 131 AD3d 688, 690 [2d Dept 2015], citing *Foley v Golub Corp.*, 252 AD2d 905, 908 [3d Dept 1998]), "the issue of whether a dangerous or defective condition exists depends on the particular facts and circumstances of each case, and is properly a question of fact for the jury" (*Riser v New York City Hous. Auth.*, 260 AD2d 564, 564 [2d Dept 1999]; *see also Fisher v JRMR Realty Corp.*, 63 AD3d 677 [2d Dept 2009]; *DeLaRosa v City of New York*, 61 AD3d 813 [2d Dept 2009]; *Herring v Lefrak Org.*, 32 AD3d 900 [2d Dept 2006]).

One method of establishing prima facie entitlement to judgment as a matter of law in a premises liability matter is to provide "some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2d Dept 2008]). Here, however, defendant has not done so. Nor is there any evidence in admissible form with regard to the snow removal activities actually performed on the sidewalk in question. Therefore, for these reasons, defendant has failed to demonstrate, prima facie, that he lacked notice of a

dangerous snow or ice condition or that the property owner did not cause or create such a condition.

With regard to the defendant's claim that the action must be dismissed as the storm was "in progress," a defendant may submit climatological data to show that a storm was in progress when the accident occurred (*see e.g. Baker v St. Christopher's Inn, Inc.*, 138 AD3d 652, 653 [2d Dept 2016]). Indeed, "[u]nder the so-called 'storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*Marchese v Skenderi*, 51 AD3d 642, 642 [2d Dept 2008]).

However, the climate data in this action supports a finding that "the injured plaintiff slipped and fell on old snow and ice that was the product of a prior storm, as opposed to precipitation from the storm in progress" (*Burniston v Ranric Enters. Corp.*, 134 AD3d 973, 974 [2d Dept 2015]). Specifically, the trier of fact could reasonably conclude that plaintiff slipped on ice that pre-dated the accident by several days, since the data indicates that it snowed on February 5, 2015, followed by four days of below-freezing temperatures. Moreover, the "trace" precipitation indicated on the certified weather report (for the weather station at Kennedy Airport, the closest to the place of the accident) which only started on the day in question shortly before the accident added no measurable accumulation to the sidewalk at the hour of the accident (*see e.g. Dancy v New York City Hous. Auth.*, 23 AD3d 512, 513 [2d Dept 2005] [weather service reports prima facie admissible for facts stated therein]). For this reason, defendant has failed to

demonstrate, prima facie, that there was a storm in progress at the time of plaintiff's accident.

***Conclusion***

Accordingly, it is

ORDERED that the motion of defendant, Benjamin Barber is granted; and it is further

ORDERED that the cross motion of plaintiff, Zisel Ehrenrheich, is granted in part; and it is further

ORDERED that the Note of Issue is hereby stricken; and it is further

ORDERED that within thirty days of service of a copy of this decision and order with notice of entry, plaintiff shall file and serve a supplemental summons and amended verified complaint substantially in the same form as the proposed pleadings submitted with her notice of cross motion, except naming as the sole defendant the proposed additional defendant, Bed Gevant Corp., and it is further

ORDERED that the parties shall appear in the Intake Part for a Preliminary Conference on May 3, 2017.

The foregoing constitutes the decision and order of the court.

**E N T E R,**

**Hon. Debra Silber, J.S.C.**

Hon. Debra Silber
Justice Supreme Court