SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: KELLY O'NEILL LEVY JSC PART 19
Justice

Index Number : 155894/2014
VALENTINI, GEORGE
vs
PCV ST OWNER LP
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Decided in accordance
with the accompanying
memorandum decision/order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/14/17

Kelly O'Neill Levy, J.S.C.
KELLY O'NEILL LEVY
JSC

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

----------X

GEORGE VALENTINI

Plaintiff,

- v -

PCV ST OWNER LP,

Defendant.

INDEX NO. 155894/2014

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this application to/for

Upon the foregoing documents, it is

Defendant PCV St. Owner LP moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing plaintiff George Valentini's complaint. Plaintiff opposes.

BACKGROUND

On February 14, 2015, Plaintiff allegedly slipped and fell on snow and ice while descending an exterior stairway as he exited a building located at 309 Avenue C in Manhattan. According to Plaintiff's deposition testimony, he first ascended the stairway to access a control room in the building in order to turn on the heat. Upon exiting the control room, he placed his right foot on the landing of the stairway and slipped and fell on the snow and ice covering the stairway landing, thereby sustaining injuries.

Plaintiff claims that Defendant was negligent in the ownership, operation, control, management, maintenance, supervision and inspection of the premises. Defendant contends that it is entitled to summary judgment because the incident occurred during an ongoing snowstorm and its duty to remove snow or ice was not triggered until the storm either ended or sufficiently subsided such that it would have been reasonable for it to perform snow and ice removal. Defendant also argues that any contention that Plaintiff slipped on preexisting snow or ice is speculative and that pursuant to New York Administrative Code Section 16-123(a), any obligation that Defendant had to clear snow or ice would not have begun until 11:00 a.m. Defendant does not deny that it was responsible for snow and ice removal at the subject location.

DISCUSSION

Standard

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

To impose liability upon a defendant in a slip and fall action, there must be evidence tending to show (1) the existence of a dangerous or defective condition and (2) that the defendant

either created the condition or had actual or constructive knowledge thereof. *Peso v. Am. Leisure Facilities Mgmt. Corp.*, 277 A.D.2d 48, 48–49 (1st Dep't 2000); *Bock v. Loumarita Realty Corp.*, 40 Misc. 3d 1232(A), 3-4 (N.Y. Sup. Ct., New York County 2013).

A duty to either remove accumulated snow or ice from premises or to take alternative measures to ensure the safety of the premises arises when such an accumulation may pose a danger to people entering the premises and the owner or occupant of the premises has actual or constructive notice of the existence of the condition and a reasonable opportunity to act. *Morris v. The City of New York*, WL 4053090 (N.Y. Sup. Ct., New York County 2010) (citing *Solazzo v. New York City Transit Auth.*, 21 A.D.3d 735 (1st Dep't 2005), *affd* 6 N.Y.3d 734, 810 N.Y.S.2d 121, 843 N.E.2d 748 (2005).

However, no such duty exists during the continuation of a storm or for a reasonable amount of time following a storm's cessation. *Solazzo v. New York City Transit Auth.*, 6 N.Y.3d 734 (2005) (owner or occupant of premises "will not be held liable for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter"); *Pippo v. City of New York*, 43 A.D.3d 303, 304 (1st Dep't 2007) (the duty "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"). Evidence of the continuation of a storm is prima facie evidence of the absence of the owner's duty and is "especially persuasive when based upon the analysis of a licensed meteorologist." *Powell v. MLG Hillside Assocs., L.P.*, 290 A.D.2d 345, 345 (1st Dep't 2002).

Although "a temporary lull or break in the storm at the time of the accident would not necessarily establish a reasonable opportunity to clear away the hazard[,] .... if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable

accumulation, then the rationale for continued delay abates, and [common sense] would dictate that the [storm in progress] rule not be applied." *Ndiaye v. NEP W. 119th St. LP*, 124 A.D.3d 427, 428 (1st Dep't 2015) (quoting *Powell v. MLG Hillside Assoc.*, 290 A.D.2d 345, 345–346 [1st Dep't 2002]).

Finally, pursuant to New York City Administrative Code § 16-123(a), every owner of a building in New York City that abuts a street with a paved sidewalk is required to remove snow from the sidewalk within four hours after the snow ceases falling, excluding the hours of 9:00 p.m. through 7:00 a.m. New York City Administrative Code § 16-123(a); *Morris v. The City of New York*, WL 4053090 (N.Y. Sup. Ct., New York County 2010).

Analysis

Defendant has made a prima facie showing of its entitlement to a judgment as a matter of law by submitting weather data, including the certified report of Senior Forensic Meteorologist Thomas M. Else, indicating that it had snowed the two days prior to Plaintiff's incident and throughout the day of the alleged incident. *See Pipero v. New York City Transit Auth.*, 69 A.D.3d 493 (1st Dep't 2010) (holding that "Defendant made a prima facie showing that plaintiff fell during a storm in progress by submitting certified weather records showing that snow began the day before plaintiff's accident and, while the intensity decreased, continued through the end of the day of plaintiff's fall"); *Rapone v. Di-Gara Realty Corp.*, 22 A.D.3d 654 (2d Dep't 2005) (holding that defendant "made a prima facie showing of its entitlement to judgment as a matter of law by submitting weather data indicating that 0.5 inches of snow fell throughout the day of the alleged accident"). However, notwithstanding the foregoing, Defendant's weather data, along with Plaintiff's testimony, are sufficient to raise triable issues of fact as to the applicability of the "storm in progress" rule and as to whether Defendant had a reasonable time to remedy the

snow and ice condition on the subject stairway. *See Pipero v. New York City Transit Auth.* at 493 (1st Dep't 2010) (holding that "plaintiff raised a triable issue of fact as to whether a storm was in progress at the time of the accident based on his deposition testimony [there was] not [snowfall] on the day of his accident and that the snow had existed since the previous day").

According to the report of Mr. Else, on the day of the incident, snowfall initially ended sometime between 5:15 a.m. and 5:45 a.m. Later that day, trace amounts (less than one-tenth of an inch per hour) of snow fell between 11 a.m. and 3 p.m. and steady snowfall occurred between 3:30 p.m. and 7 p.m. In total, 2.0-2.5 inches of snow accumulated on the day of the incident. Further, Mr. Else found that there was steady snowfall at 4 p.m.—the approximate time of the incident—while Plaintiff testified that there was no snowfall at such time.

Thus, per Mr. Else's report there had been varying degrees of snowfall throughout the day of the incident, including over a five-hour period where it did not snow and a four-hour period where only trace amounts of snow fell just prior to Plaintiff's incident. Additionally, Plaintiff testified that it was not snowing at the time of his incident. Accordingly, this record presents issues for the trier of fact. *See Ndiaye v. NEP W. 119th St. LP*, 124 A.D.3d 427, 428 (1st Dep't 2015) (finding that "triable issues of fact exist as to whether plaintiff's accident occurred while the storm was still in progress or whether there was a significant lull in the storm, and whether the three hours that elapsed between the last freezing rain and plaintiff's accident afforded defendant a reasonable opportunity to clear the steps"); *see also Vosper v. Fives 160t h, LLC*, 110 A.D.3d 544 (1st Dep't 2013) (finding triable issues of fact when two hours before the incident "there was only trace or light rainfall, with hourly accumulations of less than one-tenth of an inch"); *Powell v MLF Hillside Associates, L.P.*, 290 A.D.2d 345 (1st Dep't 2002) (finding that the "record calls for determination by a trier of facts, not a rote application of a rule of law"

when "only trace amounts fell during the two to three hours prior to plaintiff's accident and defendants' custodian was present"); *compare Santiago v. New York City Housing Authority*, 150 A.D.3d 545, 546 (1st Dep't 2017) (defendant entitled to summary judgment where evidence showed "that freezing rain and snow started falling approximately one hour before the accident, as temperatures were decreasing from 34 to 31 degrees").

Moreover, the record presents issues of fact as to whether the condition that caused Plaintiff's fall existed prior to the snowfall that began at 11:00 a.m. and whether Defendant lacked notice of the preexisting condition. According to Mr. Else's report, at approximately 7:00 a.m. on the day of the incident, "exposed, undisturbed and untreated ground surfaces were covered with approximately 10.0-11.0 inches of naturally precipitated snow and ice from all prior storms." Certified Comprehensive Past Weather Report of Thomas M. Else, pg. 7 of 22, Ex. F. Mr. Else's report also states that at around the time of the incident, "[e]xposed, undisturbed and untreated ground surfaces were covered with approximately 10.0-10.5 inches of naturally precipitated snow and ice from this storm and all prior storms." *Id.*; *see Ndiaye v. NEP W. 119th St. LP* at 428 (1st Dep't 2015) (finding that "the record presents triable issues of fact as to whether the icy condition that caused plaintiff's fall existed prior to the storm, and whether defendants lacked notice of the preexisting condition" when expert's affidavit "states that at the start of the day on which the accident occurred 'approximately 17 inches of snow and ice cover was present on untreated, undisturbed and exposed outdoor surfaces in the vicinity of the subject area'"). Defendant also failed to offer sufficient evidence to establish that it lacked notice of the alleged condition before the incident. *See Ndiaye v. NEP W. 119th St. LP* at 428-29 (finding that "superintendent's testimony about [defendant's] general cleaning procedures alone is insufficient

to establish that defendant lacked notice of the alleged condition before the accident"); *Penn v. 57-63 Wadsworth Terrace Holding, LLC*, 112 A.D.3d 426 (1st Dep't 2013).

Furthermore, New York City Administrative Code Section 16-123(a) is not applicable in the instant case because it does not apply to an owner's own property such as an exterior stairway. *See, e.g., Vosper v. Fives 160th*, LLC, 110 A.D.3d 544, 544 (1st Dep't 2013) (explaining that "Section 16-123, by its plain language, only governs property owners' duty to remove snow, ice, and other debris from public sidewalks; it does not apply to their own property").

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Defendant PCV St. Owner LP motion, pursuant to CPLR 3212, for an order granting it summary judgment dismissing plaintiff George Valentini's complaint is denied.

This constitutes the decision and order of the court.

8/14/2017
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[X]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	DO NOT POST			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE