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

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CECY THOMAS, Administratrix of the ESTATE OF THOMAS SANTOS,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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DECISION/ORDER

Index No.: 156815/2014

Mot. Seq. 002

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

MEMORANDUM DECISION

This is an action for personal injury. Defendant, New York City Housing Authority ("Defendant" or "NYCHA") now moves pursuant to CPLR 3212 to dismiss the amended complaint ("Complaint") of plaintiff, Cecy Thomas, Administratrix of the Estate of Thomas Santos ("Plaintiff" or "Santos").

Factual Background

Plaintiff alleges that on January 5, 2012, Santos was walking along a walkway owned by Defendant when he slipped on a "slippery snowy/icy condition" (Bill of Particulars, ¶¶1-4). Plaintiff further alleges that Defendant was negligent for failing to remediate the slippery condition (*see id.*).

Defendant's Motion

In support of its motion for summary dismissal, Defendant argues that there was a storm in progress at the time of Santos' accident, and therefore it is not liable to Plaintiff for failing to clear the snow/ice along the subject walkway. Defendant submits the transcripts of Santos'

General Municipal Law §50-h statutory hearing and his deposition, wherein Santos testified that

he slipped on ice located on the walkway leading from the entrance of his building between 12:00 p.m. and 1:30 p.m. (Bass Aff., Ex. A, 33:7-20; *id.* Ex. E, 24:25-25:1]). Santos further testified at both his statutory hearing and deposition that at the time of his accident that the weather was "really bad" and the subject walkway was "slippery," "covered in ice" and looked like a "mirror" (Ex. A, 42:17, 51; 21-22; 53:19; Ex. E, 35:1-23; 53:3-19, 35:24-25:73).

Defendant submits the report of Howard Altschule ("Altschule"), a Certified Consulting Meteorologist, analyzing the weather conditions at the location of Santos' accident on January 5, 2014, which Defendant argues demonstrates that there was a storm in progress at the time of Santos' accident, or ceased within one half hour of the accident. Defendant further submits the Certified Climatological Records from the National Climatic Data Center of Observations ("Climatological Records"), which Defendant argues demonstrates that no precipitation fell on January 4, the day before Santos' accident. Defendant further contends that the Climatological Records indicate that on the day of Santos' accident, freezing precipitation fell from 8:00 a.m. to 1:00 p.m., during which time the temperature remained below freezing (i.e. 32 degrees).

Defendant also argues that Santos inconsistently testified that it was snowing at the time of his accident at his statutory hearing and that it was not snowing at his deposition. Moreover, Defendant argues that Santos testified that it was snowing the day before his accident, when the Climatological Records demonstrate that no precipitation fell that day.

Plaintiff's Opposition

In opposition, Plaintiff first argues that Defendant failed to demonstrate the applicability of the storm in progress doctrine since Defendant did not establish that the snow/ice condition on the subject walkway did not accumulate from a prior snowstorm. Plaintiff contends that the Altschule report is deficient as it fails to address the weather conditions on the ground at the time

and location of Santos' accident and whether snow/ice existed on the ground from a prior snowstorm.

Further, Plaintiff argues that the icy condition was present on the subject walkway from a prior snowstorm. Plaintiff submits the report of Dick Mancini ("Mancini"), Certified Consulting Climatologist, which contends that the snow/ice condition Santos slipped on accumulated from the snowstorm on January 2 and 3 (Mancini Aff., Ex. 2). Specifically, Mancini states that the weather data indicates that on January 2 and 3 approximately seven inches of snowfall accumulated in the area where Santos fell. Mancini also indicates that from January 3 until January 5 there was no precipitation at the location where Santos fell, and that temperatures were below freezing during this time. Mancini further affirms that the freezing rain of January 5 only added a light icy glaze to the top of the already existing snow/ice. Mancini concludes that the snow and ice from the January 2 and 3 snowstorm would not have melted by January 5. Mancini further states that the photographic evidence shows that the snow/ice condition that Santos slipped on was "several feet wide, irregular, raised, hard-packed, uneven and bumpy" and that it was not a product of the light freezing rain of January 5 (*id.* at 2).

Moreover, Plaintiff argues that the storm in progress doctrine is inapplicable, as Defendant undertook some snow removal. Plaintiff submits the deposition testimony of Kenneth Torres ("Torres"), a caretaker employed by Defendant, indicating that he cleared ice he found on the walkways as a result of the January 5 freezing rain (Torres tr at 49-50).

Further, Plaintiff argues that Defendant had constructive notice of the snow/ice condition on the subject walkway, since there was snow/ice from the snowstorm days earlier in the area where Santos slipped. Plaintiff finally argues that the Mancini report suggests that Defendant failed to timely clear the snow/ice from the walkway.

Defendant's Reply

In reply, Defendant first argues that Climatological Records and the Altschule report demonstrate that there was a storm in progress at the time of Plaintiff's fall. Next, Defendant argues that there is no evidence refuting that the storm in progress on January 5 was cause of the snow/ice that caused Santos' accident. Further, Defendant argues that neither the weather data, nor photographs, nor the Mancini report raise an issue of fact that the snow/ice Santos slipped on accumulated from a prior storm. Specifically, Defendant argues that Mancini fails to consider the snow removal undertaken to remove the snow from the January 2 and 3 snowstorms and Santos' testimony that he observed NYCHA staff clearing snow on January 3. Defendant also argues that the Supervisor of Caretaker's logbook indicates that NYCHA staff undertook snow removal on January 3 and 4. Further, in a footnote, Defendant argues that notice of the alleged dangerous condition is irrelevant in determining the application of the storm in progress doctrine.

Next, Defendant argues that Santos' testimony at his statutory hearing and deposition describing the conditions of the snow/ice that caused his fall is consistent with the conditions caused by the ice storm of January 5. Moreover, Defendant argues that the photographic evidence lacks probative value, since Santos testified that the subject walkway and entrance to his building were covered in ice at the time of his accident, but the photographs depict that those areas were not covered in ice. Defendant further argues that Santos' explanation as to why the photographs depicting the walkway appear to be without ice is incredible. Specifically, Santos' testified that NYCHA cleaned the area in within 15-20 minutes after his accident and immediately before the photographs were taken.

Discussion

The proponent of a motion for summary judgment must make *a prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 A.D.3d 606, 607, 957 N.Y.S.2d 88, 91 [1st Dept 2012], quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986] and *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Sokolowsky*, 101 A.D.3d 606). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v. Steward M Muller Constr. Co.*, 46 N.Y.2d 276, 281-282 [1978]; *Carroll v. Radoniqi*, 105 A.D.3d 493 [1st Dept 2013]). The Court views the evidence in the light most favorable to the non-moving party, and gives the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v. Stop & Shop, Inc.*, 65 N.Y.2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 [1978]).

Storm in Progress

"[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 N.Y.*, 43 A.D.3d 303, 304 [1st Dept 2007]; *see Solazzo v. N.Y.C. Tr. Auth.*, 6 N.Y.3d 73, [2005]; *Simeon v. City of N.Y.*, 41 A.D.3d 344, 344 [1st Dept 2007]). The rule is designed to relieve workers of any

obligation to shovel snow while continuing precipitation renders the effort fruitless (*Powell v. MLG Hillside Assoc, L.P.*, 290 A.D.2d 345, 345 [1st Dept 2002]). Where a defendant establishes such a circumstance, it has no duty to remedy the storm-related snow and ice conditions alleged to have caused the plaintiffs injuries (*see Levene v. No. 2 W. 67th St., Inc.*, 126 A.D.3d 541, 542 [1st Dept 2015] [defendants established entitlement to summary judgment because meteorologist affidavit and certified weather records established storm in progress]).

Here, Defendant makes a *prima facie* showing of its entitlement to a judgment as a matter of law by submitting the Climatological Records and Altschule report indicating that on January 5, light freezing rain fell from approximately 8:21 a.m. through 1:02 p.m., causing just under 1/10th of an inch of new ice/glaze where Santos slipped (*see Weinberger v. 52 Duane Associates, LLC*, 102 A.D.3d 618 [1st Dept 2013] [dismissal warranted where there was sleeting and a "slow rain" at the time of plaintiff's fall]; *see also Prince v. New York City Hous. Auth.*, 302 A.D.2d 285 [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, the Altschule and Mancini reports along with the photographic evidence depicting the area where Santos fell demonstrates that a triable issue of fact exists as to whether the snow/ice Santos slipped on was present prior to the freezing rain on January 5 (*see Bagnoli v. 3GR/228 LLC*, 147 A.D.3d 504, 505 [1st Dept 2017] [holding, *inter alia*, that a triable issue of fact existed as to the whether the ice patch on which plaintiff fell was caused by a prior storm, where plaintiff described the ice as non-clear, whitish-to-gray coloration, with some thickness to

it and weather data indicating that less than 1/10th of an inch of freezing rain had fallen in the storm that was occurring at the time of plaintiff's fall, which would have only accounted for a clear glaze on the sidewalk]; *Bogdanova v. Falcon Meat Mkt.*, 107 A.D.3d 638, 639, [1st Dept 2013] [holding that plaintiff's climatological records and meteorologist's affidavit indicating that it snowed 10 inches two days prior to plaintiff's accident raised an issue of fact as to whether defendant failed to clear snowfall from days prior]; *Tubens v. New York City Hous. Auth.*, 248 A.D.2d 291, 292 [1st Dept 1998] [noting that the weather data documenting an accumulation of several inches of snow days before plaintiff's accident and plaintiff's first hand observation of the condition of the steps at the time of her fall provided sufficient evidence from which a jury could infer that her fall was caused by the pre-existing ice]; *see also Penn v. 57-63 Wadsworth Terrace Holding, LLC*, 112 A.D.3d 426, 426 [1st Dept 2013]; *Bojovic v. Lydig Bejing Kitchen, Inc.*, 91 A.D.3d 517, 518, [1st Dept 2012]).

The Mancini report indicates that two days prior to Santos' accident approximately seven inches of snow fell and the temperature remained below freezing through the time of Santos' accident. Mancini further indicates that the weather conditions of January 5 would have only accounted for a light icy glaze. The Altschule report indicates that from January 2-3, it snowed 6.7 inches and that the temperature remained below freezing from January 3 through the afternoon of January 5, at which point the temperature was at or just above freezing (*see Rivas v New York City Hous. Auth.*, 261 A.D.2d 148 [1st Dept 1999] [weather conditions, including temperatures consistently around freezing for the three-day period before plaintiff's accident, supported conclusion that plaintiff fell on preexisting ice, not fresh snow]). Importantly, the Altschule report indicates that on January 4, "[a] melting and refreezing process occurred" which "caused new areas of ice to form in addition to the snow and ice that was already on the ground

from the original storm(s)" (Altschule Aff., Report, 6). Further, Defendant failed to submit any evidence as to the condition of the specific walkway where Santos slipped prior to his accident. Additionally, Santos marked the photograph depicting a partial view of the walkway where his accident took place to pinpoint the exact area where he fell, which appears to be partially covered with white snow and ice (Mancini Aff. Ex. B; Bass Reply Aff., Ex. C; Ex. E, 98:6-99:17). Accordingly, the subject photograph clearly depicts more precipitation than the 1/10th of an inch of new ice/glaze as was reported to have fallen on the day of Santos' accident.

Defendant's argument that the photographic evidence lacks probative value is unavailing. Even if Santos' testimony is incorrect, and no ice was present on the cleared portion of the subject walkway, his claim alleges that he fell on the side of the walkway with snow/ice present. Moreover, nothing in Santos' testimony suggests that the photographs do not accurately depict the condition of the area covered by the snow/ice (*i.e.*, where Santos fell).

Further, an issue of fact exists as to whether Defendant had constructive notice of the allegedly dangerous condition, as it failed to submit any evidence as to when its staff last inspected the walkway or the walkway's condition before the accident (*see Mike v. 91 Payson Owners Corp.*, 114 A.D.3d 420, 420 [1st Dept 2014]; *Bojovic v. Lydig Bejing Kitchen, Inc.*, 91 A.D.3d 517, 518 [1st Dept 2012]; *see also Rodriguez v. Bronx Zoo Rest., Inc.*, 110 A.D.3d 412, 412 [1st Dept 2013]; *Lebron v Napa Realty Corp.*, 65 A.D.3d 436, 437 [1st Dept 2009]). Moreover, the photographic evidence depicting the patch of snow/ice where Santos slipped is sufficient to infer that the slippery snow/ice 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*, 110 A.D.3d 412 [1st Dept 2012]).

CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of Defendant, New York City Housing Authority, for summary judgment is denied. It is further

ORDERED that Defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 15, 2017

Hon. Carol Robinson Edmead, J.S.C.

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