SHORT FORM ORDER

ORIGINAL

INDEX No. 15-610904
CAL. No. 17-00279OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS WHELAN
Justice of the Supreme Court

MOTION DATE 7-13-17
ADJ. DATE 8-21-17
Mot. Seq. # 002 - MD

MORTON KINZELBERG AND MARILYN KINZELBERG,

Plaintiffs,

- against -

ST. CATHERINE OF SIENA MEDICAL CENTER,

Defendant.

GRUENBERG KELLY DELLA
Attorney for Plaintiffs
700 Koehler Avenue
Ronkonkoma, New York 11779

BOWER LAW P.C.
Attorney for Defendant
1220 RXR Plaza
Uniondale, New York 11556

Upon the following papers read on this e-filed motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers by defendant, uploaded June 14, 2017 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiffs, dated August 3, 2017 ; Replying Affidavits and supporting papers by defendant, dated August 9, 2017 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant St. Catherine of Siena Medical Center for summary judgment in its favor is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Morton Kinzelberg and his wife, Marilyn Kinzelberg, derivatively, on January 24, 2013, when he slipped and fell due to ice at the premises owned by defendant St. Catherine of Siena Medical Center ("St. Catherine's"), in Smithtown, New York. The accident allegedly occurred in the ambulance bay when plaintiff was exiting the hospital. Plaintiff claims that defendant was negligent, among other things, in removing snow and ice, and infailing to place salt and sand on the ground.

According to the deposition testimony of plaintiff, he presented to the emergency room at St. Catherine's in the late afternoon on the day of the subject accident after falling down stairs in his home. He was discharged four or five hours later, around 9:00 or 10:00 p.m. Plaintiff testified that there was snow on the ground, but not more than a foot. As he exited the building and entered the ambulance bay,

plaintiff held his wife's left hand with his right hand. Plaintiff further testified that he then slipped on ice, which he saw after he fell, and that his wife fell next to him. Plaintiff heard an unknown person yell "Oh . . . that happened again" from the doorway. The accident occurred right outside of the emergency exit where he entered the building earlier in the day. A security guard picked plaintiff up from the ground, and he and his wife walked to their car. Plaintiff was not given any further treatment that night, but returned to St. Catherine's early the next morning.

Marilyn Kinzelberg testified that she accompanied plaintiff to the emergency room at St. Catherine Hospital in the early evening after he fell down stairs at home. It was dark and cold at the time of the accident and there may have been snow on the ground, but it was not actively raining or snowing. Ms. Kinzelberg testified that she noticed "grayish" colored ice under her when she fell outside the emergency room entrance where she entered the hospital earlier. While Ms. Kinzelberg was able to get up on her own, a security guard and woman wearing scrubs helped plaintiff up. Ms. Kinzelberg and plaintiff were not offered any medical treatment immediately following the accident; however, plaintiff returned to the hospital the following morning by ambulance.

James Drevas, the director of plant operations at St. Catherine's, testified that 16 out of 18 employees within the plant operations department were responsible for snow and ice removal throughout the hospital premises. Employees from other departments were recruited to plant operations to assist in snow removal, as needed. The shift employee "on watch" would be responsible for inspecting for ice near the main entrance, emergency department entrance, and sidewalks in the immediate area of the facility; however, all plant operations employees were responsible for periodically inspecting the premises for snow and ice. The procedure for clearing snow in the ambulance bay would be to remove the snow from the area. Snow or ice remediation would be recorded in a logbook.

Kevin Kuzow, a security officer at St. Catherine's, testified that he was alerted that a man had fallen in the ambulance bay, responded to the scene, and helped plaintiff to his feet along with emergency room staff and Marilyn Kinzelberg. Plaintiff fell were ambulances pull up to the curb to unload patients. Mr. Kuzow testified that plaintiff was brought back into the emergency room to be reevaluated. Plaintiff told Mr. Kuzow that he misstepped on his right foot and fell to the ground.

Defendant St. Catherine's now moves for summary judgment dismissing the complaint on the grounds that plaintiff's injuries were not caused by the subject accident and that it neither created the alleged icy condition nor had actual or constructive notice of the icy condition. Defendant submits, in support of the motion, copies of the pleadings; the note of issue; the transcripts of the deposition testimony of plaintiff, Marilyn Kinzelberg, James Drevas, and Kevin Kuzow; various medical records; the incident report; and logbook maintenance records. The Court initially notes that the logbook maintenance records are inadmissible, as they were not authenticated as business records (*see* CPLR 4518 [a]). In opposition, plaintiff argues that defendant failed to demonstrate that it did not have constructive notice of the icy condition. Plaintiff submits, in opposition, the transcripts of the deposition testimony of plaintiff, Marilyn Kinzelberg, James Drevas, and Kevin Kuzow.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, evidence must be viewed in the light most favorable to the nonmoving party (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Putnam v Stout***, 46 AD2d 812, 361 NYS2d 205 [2d Dept 1974], *affd* 38 NY2d 607, 381 NYS2d 848 [1976]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). To establish liability in a slip and fall case involving snow or ice, a plaintiff must establish that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (*see* ***Devlin v Selimaj***, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; ***Viera v Rymdzionek***, 112 AD3d 915, 977 NYS2d 390 [2d Dept 2013]; ***Cruz v Rampersad***, 110 AD3d 669, 972 NYS2d 302 [2d Dept 2013]; ***Morreale v Esposito***, 109 AD3d 800, 971 NYS2d 209 [2d Dept 2013]; ***Denardo v Ziatyk***, 95 AD3d 929, 943 NYS2d 591 [2d Dept 2012]; ***Flores v BAJ Holding Corp.***, 94 AD3d 945, 942 NYS2d 202 [2d Dept 2012]; ***Medina v La Fiura Dev. Corp.***, 69 AD3d 686, 895 NYS2d 98 [2d Dept 2010]; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). To constitute constructive notice, the condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, *supra*; *see* ***Stewart v Sherwil Holding Corp.***, 94 AD3d 977, 942 NYS2d 174 [2d Dept 2012]; ***Medina v La Fiura Dev. Corp.***, *supra*). A defendant moving for summary judgment in a slip and fall case involving snow or ice has the initial burden of making a prima facie showing that it neither created the condition nor had actual or constructive notice of the condition (*see* ***Somekh v Valley Natl. Bank***, 151 AD3d 783, 57 NYS3d 487 [2d Dept 2017]; ***Burniston v Ranric Enters. Corp.***, 134 AD3d 973, 21 NYS3d 694 [2d Dept 2015]; ***Cruz v Rampersad***, *supra*; ***McCurdy v KYMA Holdings, Inc.***, 109 AD3d 799, 971 NYS2d 137 [2d Dept 2013]; ***Smith v Christ's First Presbyterian Church of Hempstead***, 93 AD3d 839, 941 NYS2d 211 [2d Dept 2012]).

St. Catherine's failed to establish, prima facie, that it did not have actual or constructive notice of the alleged icy condition in the ambulance bay. The deposition testimony of Mr. Drevas and Mr. Kuzow was insufficient to satisfy St. Catherine's initial burden as they claimed they did not have personal knowledge as to any inspection or as to the condition of the subject ambulance bay the day before or the day of plaintiff's accident (*see* ***Martinez v Khaimov***, 74 AD3d 1031, 906 NYS2d 274 [2d Dept 2010]; ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]; ***Taylor v Rochdale Vil., Inc.***, 60 AD3d 930, 875 NYS2d 561 [2d Dept 2009]). Reference to general cleaning and inspection practices is insufficient to establish lack of constructive notice without specificity as to cleaning or inspection of the subject area (*see* ***Ansari v MB Hamptons, LLC***, 137 AD3d 1174, 28 NYS3d 397 [2d Dept 2016]; ***Garcia-Monsalve v Wellington Leasing, L.P.***, 123 AD3d 1085, 1 NYS3d 228 [2d Dept 2014]; ***Rodriguez v Shoprite Supermarkets, Inc.***, 119 AD3d 923, 989 NYS2d 855 [2d Dept 2014]; ***Klerman v Fine Fare Supermarket***, 96 AD3d 907, 946 NYS2d 506 [2d Dept 2012]). Neither has defendant submitted "any evidence showing that the allegedly dangerous condition existed for an insufficient length of time for them to have discovered and remedied it, as is its burden" (***Raju v Cortlandt Town Ctr.***, 38 AD3d 874, 874-875, 834 NYS2d 211, 213 [2d Dept 2007]). As St. Catherine's did not meet its prima facie burden, the motion for summary judgment must be denied regardless of the sufficiency of plaintiffs' opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the motion by defendant St. Catherine's for summary judgment in its favor is denied.

Dated: 12/15/17

J.S.C.
Thomas F. Whelan

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION