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

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MARIE ZARRA,

Plaintiff,

-against-

HILTON MANAGEMENT, LLC and CDL (NEW YORK) LLC,

Defendants.

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DECISION/ORDER

Index no. 151097/2016

Mot Seq. 002

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

MEMORANDUM DECISION

This is an action for personal injury. Defendants, Hilton Management, LLC and CDL (New York), LLC ("Defendants"), now move pursuant to CPLR 3212 for summary dismissal of the Complaint of plaintiff, Marie Zarra ("Plaintiff").

Factual Background

Plaintiff alleges that on February 13, 2014, at approximately 7:45 a.m., she was walking on the sidewalk abutting the Millennium Hotel ("Hotel"), located at 55 Church Street, New York, New York, when she slipped on ice. Defendant CDL owns the property on which the Hotel is located and defendant Hilton Management, LLC operates the Hotel. Plaintiff alleges that the slippery condition was caused by Defendants' "improper snow and ice removal creating a trap beneath freshly fallen snow" (Bill of Particulars, ¶3) and that Defendants "previously partially removed snow from said sidewalk, without removing all of the snow" (*id.*, ¶5).

Defendants' Motion

In support of its motion for summary judgment, Defendants argue that a storm in progress was taking place at the time of Plaintiff's accident. In support of their argument,

Defendants submit Plaintiff's deposition testimony, wherein she testified that it was snowing immediately prior to her accident (Miller Aff., Ex., N, 58:5-7). Defendants also submit the Certified National Weather Reports for February 2014, which demonstrates that snow and precipitation was falling during the morning of the accident (*id.*, Ex., K). Defendants further argue that they did not create or have notice of the alleged condition that caused Plaintiff's accident. Defendants contend that the subject sidewalk was not icy prior to the morning of Plaintiff's accident, as Plaintiff testified that she did not observe any snow or ice on the subject sidewalk on the evening of February 12, 2014 (*see id.*, Ex. N, 69:3-70:20; 61:13-62:24). Defendants also submit the testimony of Steven Foster ("Foster"), the Hotel's director of Housekeeping, wherein he testified that during a heavy snowfall, Defendants' employees would salt and clear a path on the sidewalk, and that snow was always shoveled toward the street and not toward the Hotel (*id.*, Ex., R, 29:12-18), and that a manager inspected the work of an employee assigned to shovel or salt the sidewalk (*id.*, 77:22-78:9). Defendants also submit the "Extra Pay Log," which Defendants contend demonstrate that a hotel employee shoveled or salted the sidewalks adjacent to the hotel on January 31, 2014, as well as February 3, 4, 5, 6, 8, 9, 10, 12 and 13 of 2014 (*id*, Ex. M).

Plaintiff's Opposition

In opposition, Plaintiff first argues that a question of fact exists as to whether Defendants created or had notice of the alleged defective condition. In support of their argument, Plaintiff submits her testimony, wherein she indicates that she slipped on ice located on the subject sidewalk. Plaintiff also submits a photograph depicting the subject sidewalk and the location where Plaintiff's accident allegedly took place (Traub Aff., Ex. O). The photographic evidence depicts the sidewalk where Plaintiff allegedly fell on the left and a plaza on the right, and in

between, what appears to be a dark strip on the ground. Plaintiff circled the area where she fell: on the sidewalk, immediately left of the dark strip. Plaintiff also submits the expert affidavit of Vincent Pici, PE ("Pici"), a Professional Engineer, wherein Pici states that Defendants incompletely removed the snow from the January 21, 2014 through February 8, 2014 snowfalls (Pici Aff., ¶10) and that Defendants failed to properly remove snow during February 13, 2014 snowstorm (*id.*, ¶¶19-22).

In further support of Plaintiff's argument that the allegedly icy condition pre-existed the February 13, 2014 snowstorm, Plaintiff submits the Certified National Weather Reports from January 21, 2014 through February 13, 2014. The reports indicate the inches of snowfall as follows: January 21, 11 inches; January 22, .5 an inch; January 25, 1 inch; January 28, .8 an inch; February 3, 8 inches; February 5, 4 inches; February 9, 1.2 inches; and February 13, 9.5 inches (Opp. Aff., Ex. 1; 2). The report from February also indicates that the temperature from February 6 through February 13, 2014 never rose above freezing and that the temperatures were above freezing and below freezing on January 26, 27, 31, 2014, February 1, 2, 3, 4 and 5, 2014 (*id.*). Plaintiff also contends that there is no evidence that Defendants inspected the subject sidewalk. Moreover, Plaintiff argues that Extra Pay Log demonstrates that Defendants found ice on an abutting sidewalk, albeit not on the street which Plaintiff fell, the day before Plaintiff's accident.

Additionally, while Plaintiff concedes that she did not see the ice on February 12, 2014, Plaintiff submitted an "errata sheet," wherein she stated that she did not see any ice on the evening prior to her accident and that she was not "looking for patches of ice or snow" (*id.*, Errata Sheet, 137).[1]

[1] The errata sheet was signed and notarized on December 2, 2015, the same day as Plaintiff's transcript. Further, the Court notes that Defendants do not dispute Plaintiff's testimony contained in the errata sheet.

Defendants' Reply

In reply, Defendants argue that Plaintiff fails to raise an issue of fact as to whether snow or ice existed prior to the February 13, 2014 snowstorm. In support of their argument, Defendants, contend that only an inch of snow remained on the ground in untreated areas by the end of January 2014 and that there was very little snow remaining on the ground by February 3, 2014. Further, Defendants assert that there is no evidence that it piled the snow from prior snowfalls in the area where Plaintiff fell. Defendants contend that the hotel shoveled the sidewalks during or immediately after each of the snowstorms from January 21, 2014 through the date of Plaintiff's accident, and that the snow was shoveled toward the street, not toward the Hotel. Defendants also cite to Plaintiff testimony wherein she states that she did not see snow or ice or anything on the subject sidewalk on either February 11 or 12, 2014.

Additionally, as to constructive notice, Defendant argues that plaintiff's reliance on the maintenance logs is misplaced, since the logs do not show that there was ice on the ground where Plaintiffs accident took place. Defendants contend that there is no evidence that the allegedly icy condition was caused by a prior snow fall. Defendants further argue that the affidavit submitted by Plaintiff, wherein she states that after the accident, she observed that "only a portion of the sidewalk had been cleared of previous snow/ice" should not be considered, since it contradicts her prior testimony that she did not see snow or ice at the premises on the evening before her accident.

Next, Defendants argue that the Pici Affidavit fails to raise an issue of fact. First, Defendants argue that the Pici Affidavit speculates that snow or ice was present on the subject sidewalk or plaza prior to the February 13, 2014 snowstorm, since he did not have personal knowledge of the condition of the subject sidewalk prior to Plaintiff's accident and there is no

evidence that Defendants did not remove snow from prior snowfalls. Moreover, Defendants contend that there is no evidence about a metal drain or the condition of the plaza prior to the date of the accident, and no photographs depicting the snow on the plaza. Next, Defendants argue that the Pici Affidavit fails to establish that the practice of applying salt to the sidewalk violated an industry standard.

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 Enter., Inc. v Sokolowsky*, 101 A.D.3d 606, 607 [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]).

"For plaintiff's to defeat defendants' summary judgment motion premised upon this 'storm in progress' defense, and support their claim that it was not precipitation from the ongoing storm which caused this fall, plaintiffs have the burden of producing admissible evidence that the ice that caused plaintiff's slip and fall existed prior to the storm in progress, and that defendant [] had actual or constructive notice of the hazard" (*Pacelli v. Pinsley*, 267 A.D.2d 706, 707 [3d Dept 1999] [citations omitted]; *see Baumann v. Dawn Liquors, Inc.*, 148 A.D.3d 535, 537 [1st Dept 2017]; *Penn v. 57-63 Wadsworth Terrace Holding, LLC*, 112 A.D.3d 426 [1st Dept 2013]; *Meyers v. Big Six Towers, Inc.*, 85 A.D.3d 877, 878 [2d Dept 2011]; *Pipero v. New York City Tr. Auth.*, 69 A.D.3d 493 [1st Dept 2010]).

Here, Defendants meet their *prima facie* burden by submitting the Certified National Weather Reports indicating that snow began falling at 1:00 a.m. on February 13, 2014, and

continued falling through the time of Plaintiff's accident, and Plaintiff's testimony that it was snowing just before her accident.

In opposition, Plaintiff raises an issue of fact as to whether the Defendants had constructive notice of the alleged icy condition that caused her injury. Despite Plaintiff's testimony that the evening before her accident she walked on the subject sidewalk and indicated that "there was nothing on the ground," Plaintiff's additional testimony describing the condition that caused her to slip as "ice, a lump of old ice" that was approximately four inches high (Miller Aff., Ex., N, 77:21-78:4), and the weather reports demonstrating that it snowed four days before the accident, along with the fact that temperatures did not rise above freezing for a week prior to the accident are sufficient to raise an issue of fact on constructive notice.

Defendants have failed to meet their burden with respect to constructive notice of the ice because it proffered no affidavit or testimony based on personal knowledge as to when its employees last inspected the subject sidewalk or the sidewalk's condition before the accident (*see Spector v. Cushman & Wakefield, Inc.*, 87 A.D.3d 422, 423 [1st Dept 2011] [holding that defendant failed to meet their burden with respect to notice of the ice "because it proffered no affidavit or testimony based on personal knowledge as to when its employees last inspected the sidewalk or the sidewalk's condition before the accident"]).

Further, Plaintiff's claim that the condition was created by the improper snow removal during the February 13, 2014 snowstorm is unpursuasive. In support of this claim, Plaintiff submits the Pici Affidavit, where Pici states that applying salt during a snow storm is a deviation of accepted industry and safety practices. However, Pici fails to cite to any industry standards which prohibit the application of salt during an ongoing snowstorm, and is thus not considered

by the Court (*see Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 545 [1st Dept 2002]; *Cicero v. Selden Ass'n*, 295 A.D.2d 391, 392 [2d Dept 2002]).

Second, Pici's opinion that salting the sidewalk and plaza caused the snow to melt and become wet and slushy, clogging a "metal drain" and refreezing, causing a layer of ice to form or a slippery condition that mimicked black ice, is speculative and unsupported by the record. There is no evidence that the metal drain was clogged with slushy snow or that Defendants shoveled snow on top of the metal drain, especially in light of Foster's testimony that Defendants' employees would shovel the snow to the street (*see Espinal v. Jamaica Hosp. Med. Ctr.*, 71 A.D.3d 723, 724 [2d Dept 2010] [noting that "an expert's opinion must be based on facts in the record personally known to the witness, and that the expert may not assume facts not supported by the evidence in order to reach his or her conclusion"]; *Bacent v. Greenberg*, 74 A.D.3d 500 [1st Dept 2010]). Additionally, the expert's opinion that the metal drain became slippery and mimicked ice is not supported by the evidence, since Plaintiff testified that she slipped on ice, and not a metal drain.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Defendants, Hilton Management, LLC and CDL (New York), LLC for summary dismissal of the Complaint is denied; and it is further

ORDERED that Defendants, Hilton Management, LLC and CDL (New York), LLC shall serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry.

This constitutes the decision and order of the Court.

Dated: May 8, 2018

Hon. Carol Robinson Edmead, J.S.C

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