SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JAMES MUZIO,

Plaintiff,

-against-

LEVITTOWN UNION FREE SCHOOL DISTRICT, NORTHSIDE ELEMENTARY SCHOOL,

Defendants.

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IAS Part 17
Index No. 602177/2015
Mot. Seq. No. 001

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following papers, addition to any memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Notice of Motion of Defendant Levittown Union Free Sch. Dist., Affirmation & Exhibits 1
Plaintiff's Affirmation in Opposition & Exhibits.....2
Defendant's Reply Affirmation.....3

This is an action for personal injuries following plaintiff's alleged slip and fall on the evening of January 9, 2014, on an icy portion of a horseshoe driveway in front of the Northside Elementary School. The school is one of multiple school buildings within the Levittown School District ("the District"). Plaintiff asserts that after he watched his son's basketball game that was held in the building he slipped and fell on a patch of ice while walking to his car that was parked in the driveway. The District now moves for summary judgment dismissing the complaint. Plaintiff opposes the application.

On a motion for summary judgment the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that it is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Where the movant fails to meet its initial burden the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065 (1979); *Werner v. Nelkin*, 206 A.D.2d 422 (2d Dept. 1994). The facts must be viewed in the light most favorable to the opposing party, and every available inference must be drawn in the opposition's favor. *Torres v. Jones*, 26 N.Y.3d 742, 763 (2016).

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Yioves v T.J. Maxx, Inc.*, 29 A.D.3d 572, 572 (2d Dept. 2006); *see also Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 A.D.3d 436 (2d Dept. 2005). Only after the movant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition. *See Joachim v 1824 Church Ave., Inc.,* 12 A.D.3d 409 (2d Dept. 2004).

"A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice thereof." *Robinson v. Trade Link Am.*, 39 A.D.3d 616, 616-17 (2d Dept. 2007) (internal citations omitted). "To provide constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendants to discover and remedy it." *Medina v. La Fiura Dev. Corp.*, 69 A.D.3d 686, 686-87 (2d Dept. 2010)(internal citations omitted). "Significantly, defendant's general awareness that icy conditions might have existed is insufficient to establish constructive notice of the specific condition that resulted in plaintiff's injuries." *Pierson v. North Colonie Cent. School Dist.*, 74 A.D.3d 1652 (3d Dept. 2010).

There is no dispute that the District is responsible for the snow removal in the area where plaintiff alleges that he fell. Defendant argues that plaintiff cannot establish that it created the condition or had actual or constructive notice of the condition. Plaintiff contends

that the District's snow removal efforts were inadequate and that the area had not been properly inspected given the weather conditions.

Plaintiff testified that he did not see any snow or ice patches on the driveway before the accident, either on his way into the building or as he exited. He testified that after falling he looked to see what he fell on and only then did he see the patch of ice on the ground. Joseph Muzio, plaintiff's brother, also testified that when he entered the school building and when he exited with the plaintiff he did not notice any patches of ice in the location where plaintiff fell. At the time of the accident there was no precipitation.

There is no evidence in the record that the District had actual notice of the condition that allegedly caused plaintiff to slip. *See Hall v. Staples the Off. Superstore E., Inc.,* 13 A.D.3d 706 (2d Dept. 2016). Plaintiff's own testimony reflects that he did not observe the ice at the location until after he slipped, and there is no evidence of any prior complaint that would have put the District on notice of the icy condition.

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the District's employees to discover and remedy it." *See D'Esposito v. Mateo Hill Auto Serv., Inc.,* 150 A.D.3d 817, 818 (2d Dept. 2017); *Gordon v. Am. Museum of Natural History*, 67 N.Y.2d 836, 837-38 (1986). There is no evidence in the record that the District had constructive notice of the condition. Christopher Milano testified at his deposition that there are "no trouble spots" on the bus loop where water might collect. Each of the witnesses that were in the vicinity just prior to the incident testified that they did not see any ice in the area prior to the fall. Significantly, plaintiff himself as well as his brother testified that they had safely passed through the area prior to the accident and did not notice the ice. *See Kulchinsky v. Consumers Warehouse Center, Inc.,* 134. A.D.3d 1068 (2d Dept. 2015); *Kaplan v. DePetro,* 51 A.D.3d 730 (2d Dept. 2008). Therefore, the ice that allegedly caused plaintiff to slip was not visible and/or apparent. *Perez v. New York City Housing Authority,* 75 A.D.3d 629 (2d Dept. 2010).

To the extent that plaintiff contends that the District had an ongoing duty to continue to inspect the area days after a snowstorm, "it is well settled that general awareness that an icy condition might exist is not sufficient, without more, to constitute notice of a particular condition." *Stoddard v. G.E. Plastics Corp.*, 11 A.D.3d 862 (3d Dept. 2004), *see also*

Carricato v. Jefferson Valley Mall Ltd. Partnership, 299 A.D.2d 444 (2d Dept. 2002) ("general awareness that water can turn to ice is legally insufficient to constitute constructive notice of the particular condition that caused the plaintiff to fall.")

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff's expert, Mark Kramer, a forensic meteorologist, contends that the icy condition was the result of precipitation that had occurred days before. But the District presented evidence that it had taken steps remove any slush or snow following the precipitation. Mr. Kramer further speculates that plaintiff slipped on ice that had been there for at least two days prior to the incident. But even if this were true the ice had to be visible and apparent to constitute constructive notice on the part of the District. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986); *Kulchinsky v. Consumers Warehouse. Center, Inc.,* 134. A.D.3d at 1069. As found above, the evidence submitted reflects that the ice was not visible.

Accordingly, the motion for summary judgment is granted and the complaint is dismissed.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: January 17, 2018
Mineola, New York

ENTERED

JAN 19 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

LEONARD D. STEINMAN, J.S.C.