

<b>Weinwurm v City of New York</b>
2019 NY Slip Op 33094(U)
October 17, 2019
Supreme Court, New York County
Docket Number: 157474/2014
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK** PART 52

*Justice*

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INDEX NO. 157474/2014

LISA WEINWURM,

MOTION DATE 10/16/2019

Plaintiff,

MOTION SEQ. NO. 004 005

- v -

THE CITY OF NEW YORK, HUGH L. CAREY BATTERY  
PARK CITY AUTHORITY, THE NEW YORK CITY  
DEPARTMENT OF PARKS AND RECREATION, THE  
BOROUGH OF MANHATTAN COMMUNITY COLLEGE

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 206

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 165, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 205

were read on this motion to/for JUDGMENT - SUMMARY

This action arises out of alleged injuries sustained by the plaintiff as a result of a slip and fall on snow and ice on December 17, 2013, while ascending from the sidewalk to the stairway of the Chambers Street bridge at the West Street entrance in the County and State of New York.<sup>1</sup>

Defendants, The City of New York, The New York City Department of Parks and Recreation, and The Borough of Manhattan Community College (City), move for summary judgment on the grounds that it neither controlled or maintained the subject area and in the alternative, that there was a storm in progress. Defendant, Hugh L. Carey Battery Park City Authority (BPCA), moves for summary judgment primarily on the grounds that there was a

<sup>1</sup> The Court would like to thank Amanda Gerstman for her assistance in this matter.

storm in progress. Plaintiff opposes both motions. Both motions are denied for the reasons stated below.

### Testimony

Plaintiff testified that the incident occurred on the stairs of the pedestrian bridge over the West Side Highway which connects Chambers Street to Stuyvesant High School. Plaintiff further testified that it was snowing at the time of the incident and that she slipped on ice covered by snow on the stairs. Plaintiff testified that there was no salt or sand on the stairs and she did not see anyone shoveling or clearing the stairs.

Plaintiff produced the affidavit of an expert, Steven Roberts, who provided information regarding the weather in the days leading up to the accident. Mr. Roberts, testified, through his affidavit, that at the time of the accident, a light snow was falling, only a trace amount had fallen at the time of the accident and the temperature was 25-26 degrees Fahrenheit. Further, Mr. Roberts testified that prior to the accident, there had not been any precipitation for over 48 hours and that the last significant precipitation occurred on December 14, 2013, when 4.7 inches of snow, sleet, freezing rain and rain fell during a 12-hour period ending at approximately midnight. Mr. Roberts opined that due to melting and compaction, approximately 1.5 inches of snow and ice cover were present at midnight on December 17, 2013, on untreated surfaces. The temperature was below freezing from 4:00 a.m. on December 16 through the time of the accident, over 26 hours. The plaintiff's expert thereby concluded that any ice cover forming after that period would have remained frozen through the time of the incident.

Bruno Pomponio provided deposition testimony on behalf of the BPCA. Pompino testified and it is undisputed that there is an agreement between BPCA and the City defendants

regarding the Tribeca Bridge and Stuyvesant Plaza. The location where the incident occurred was a "primary" area, which dictated that BPCA completely clear all areas associated with the Tribeca Bridge to "create and maintain clear access to Stuyvesant High School." It further specifically directs BPCA to "[m]aintain all staircases, bridge landings, walkways and elevators to insure safe access."

### Discussion

Both defendants contend that their *prima facie* burden has been met as a result of the storm in progress doctrine, however this Court finds that defendants have failed to establish entitlement to summary judgment based on the storm in progress doctrine. The undisputed record establishes that at the time of the incident, there was no storm but rather only trace amounts of snow, thus the storm in progress doctrine does not apply (*Haraburda v City of NY*, 168 AD3d 485, 486 [1st Dept 2019] internal citations omitted). Consequently, as the storm in progress doctrine does not apply, to establish *prima facie* entitlement to summary judgment the defendants must establish that they did not cause or create the condition, nor did they have actual or constructive notice of such condition.

While the City does in fact establish that it did not cause and create the condition because it did not undertake snow or ice removal efforts in the area and it is undisputed that pursuant to a contract BPCA was responsible for snow removal, the City as owners of the area in question have a non-delegable duty to the plaintiff. The City has not established that it did not have actual or constructive notice of the condition in question. While the City may in fact be entitled to indemnification, as the owner of the subject premises, it is in fact a proper party to the instant action.

Additionally, BPCA did not provide any evidence of snow removal in the area at any point before the incident although it undisputedly had the obligation to conduct such removal. As plaintiff correctly points out in its opposition, BPCA bases its motion solely on the plaintiff's testimony that snow was falling when she fell and, according to the "storm in progress" doctrine and N.Y.C. Admin. Code §16- 123, it did not have a duty to clear the steps during an ongoing storm. Notably, BPCA did not present any climatological data or any expert analysis to support this assertion.

It is well established that contractual obligation will generally not give rise to tort liability to a third party unless an exception to that rule exists, such as if a contracting party fails to perform its duties with reasonable care thereby exacerbating or creating a dangerous condition (*Barrett v Aero Snow Removal Corp.*, 167 AD3d 519, 520 [1st Dept 2018] internal citations omitted).

In sum, questions of fact exist regarding actual and/or constructive notice, and whether the BPCA had a duty to the general public, including plaintiff.

Accordingly, it is hereby

ORDERED that the motions for summary judgment by defendants are denied.

This constitutes the decision and order of the Court.

10/17/2019

DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

LYLE E. FRANK, J.S.C.

HON. LYLE E. FRANK  
J.S.C.