SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM

Justice

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DONNA LAROCCA

Plaintiff,

- v -

242 WEST 38TH STREET, LLC,

Defendant.

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INDEX NO. 154399/2016

MOTION DATE 04/01/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55

were read on this motion to DISMISS.

Bailly & McMillan, LLP, White Plains, New York (Richard DePonto of counsel), for plaintiff.
Cartafalsa, Slattery, Turpin & Lenoff, New York City (Carolyn Comparato of counsel), for defendant.

Gerald Lebovits, J.:

In this personal-injury action, plaintiff Donna LaRocca alleges that she slipped and fell on the sidewalk in front of the building owned by defendant 242 West 38th Street, LLC, and sustained serious physical injuries, including a mild traumatic brain injury. Pursuant to the instant motion (motion sequence no. 002; NYSCEF Doc. No. 37), defendant seeks to dismiss plaintiff's complaint under CPLR 3212 on the basis that the alleged incident occurred while a storm was in progress. For the reasons below, the summary judgment motion is denied.

In a summary-judgment motion, a movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing is made, the burden then shifts to the party opposing the motion to produce evidentiary proof sufficient to establish the existence of material issues of fact which require a trial of the action (*id.*). In weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Where different conclusions may reasonably be drawn from the evidence, the motion should be denied (*Jaffe v Davis*, 214 AD2d 330 [1st Dept 1995]).

In an action alleging injuries sustained on an icy sidewalk, a defendant may establish a prima facie case by submitting certified climatological data showing that a storm was in progress at the time of the plaintiff's injury (*Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]). Based on this "storm in progress" defense, the duty of a defendant landowner

"to make reasonable measures to remedy a dangerous condition caused by a storm is suspended while a storm is in progress, and does not commence until a reasonable time after the storm has ended" (*id.* at 619 [citations omitted]).

In this case, plaintiff's deposition testimony (Plf. Dep.) reflects that she slipped and fell on January 9, 2015, at approximately 8:30 a.m. on the sidewalk in front of defendant's building on her way to her office (located at 246 West 38th Street, New York City), which is two doors away from defendant's premises (Plf. Dep.; NYSCEF Doc. No. 43, at 13). To invoke the "storm is in progress" defense, a certified copy of the weather report for the relevant days in the month of January 2015 (Def. Weather Report; NYSCEF Doc. No. 48) is annexed as exhibit J to defendant counsel's affirmation in support of the motion (Comparato Aff.; NYSCEF Doc. No. 38, ¶ 22). The deposition testimony of Mahendra Mangroo (Mangroo Dep.; NYSCEF Doc. No. 46), the superintendent for defendant's building whose job responsibilities include, inter alia, the removal of snow and ice on the sidewalk, is annexed as exhibit G.

Based on page 9 of the Def. Weather Report, which reflects data gathered at the weather station located in Central Park, New York City, defendant asserts that it was snowing at the time of plaintiff's incident: "trace amounts during the 7 a.m. hour, then 0.04 inches during the 8 a.m. hour and the snow continued through the 10 a.m. hour, then stopping" (Comparato Aff., ¶ 22). Defendant also asserts that pages 9 and 26 of the Def. Weather Report show that the temperature on that day "had a high of 33 degrees and a low of 19 degrees [and] at the time of the alleged fall it was 23 degrees" (*id.*, ¶ 23).

In opposition, plaintiff submits a one-page certified weather report to show temperature and precipitation data at Central Park from January 1-10, 2015 (Plf. Weather Report; NYSCEF Doc. No. 54), a copy of which is attached as exhibit D to plaintiff counsel's affirmation (DePonto Aff.; NYSCEF Doc. No. 50). Referencing the Plf. Weather Report, plaintiff asserts that on January 6, 2015 (three days before her injury), "there was a storm resulting in both snow and a wintery mix accumulation . . . [and] over an inch of snow remained on the ground the following day" and that "there was some melting [of snow] but the high temperature for January 7th and January 8th was only 23 and 21 degrees, respectively" (DePonto Aff., ¶ 25).

Plaintiff points out that she testified that on the day of her injury, she "slipped after stepping on ice that was covered by snow on the sidewalk … which defendant failed to clean," and that "it was not snowing [at the time of her fall] . . . there was no precipitation … and the sun was out" (DePonto Aff., ¶ 7; paraphrasing Plf. Dep. at 17, 18 and 24). Plaintiff also notes that her testimony is corroborated by Steve Louridas, a man who works in the same building as plaintiff but who had neither met nor known her before the accident, and witnessed her fall. Louridas's notarized statement (Witness Statement; NYSCEF Doc. No. 51) indicates that "[i]t was a clear cold day. There was snow on parts of the sidewalk" (DePonto Aff., ¶ 10; Witness Statement at 1).

A close analysis of the climatological data from the Def. Weather Report shows that it was snowing at the time of plaintiff's injury, although she testified that it had stopped snowing, the sun was out and there was no precipitation at that time (Plf. Dep. at 18). Indeed, the Def. Weather Report shows that from 8:02 a.m. to 8:51 a.m., about 0.14 inches of snow fell, and the

visibility dropped from 1.00 mile at 7:38 a.m. to 0.25 mile at 8:30 a.m., which then improved to 3.00 miles after 9 a.m., and eventually to 10.00 miles after 10.51 a.m. (Def. Weather Report at 9). The Witness Statement indicating that "it was a clear cold day" is not sufficient because it does not state whether the weather was clear (i.e. whether it was not snowing) at the time of plaintiff's slip and fall. Thus, based on the Def. Weather Report, defendant has successfully established the "storm in progress" defense (*Pipero v New York City Transit Auth.*, 69 AD3d 493 [1st Dept 2010] [certified weather records admissible as proof of the storm in progress defense]).

It has been held by the courts that a plaintiff may defeat a summary judgment motion (based on the storm in progress defense) that the accident causing the injury was not due to the accumulation of snow and/or ice on the ground from an ongoing storm, but was due to the accumulation from an earlier storm, and that the defendant had actual or constructive notice of the existence of the snow and/or ice and did not remedy the condition (*Bagnoli v 3GR/228 LLC.* 52 Misc 3d 1206 [A] [Sup Ct NY County, July 8, 2016], *affd* 147 AD3d 504 [1st Dept 2017]). Indeed, the appellate decision, the First Department held that, based on the proffered facts and the circumstances presented, the defendants' motion for summary judgment was properly denied by the trial court because "triable issues of fact exist as to whether plaintiff's fall was caused by an ice condition associated with the prior snow, and whether defendants had a reasonable time to remedy it before the accident" (147 AD3d at 505, citing *Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431 [1st Dept 2015]).

Likewise, in *Guzman*, the plaintiff sued the defendant for injuries she sustained when she allegedly slipped and fell due to ice in front of the defendant's deli, and the defendant raised the storm in progress defense (*Guzman*, 130 AD3d at 431). The First Department affirmed the denial of the defendant's summary judgment motion, stating that the record "raises issues of fact whether the ice was caused by either defendant's improper cleaning after past storms or from the melting and refreezing of snow in the early morning hours preceding the accident and whether defendant's earlier cleaning of the area caused or exacerbated the hazardous condition" (*id.* at 432 [citations omitted]). In the instant action, plaintiff cites to both *Bagnoli* and *Guzman*, among other cases, in support of her opposition to defendant's motion for summary judgment (DePonto Aff,, ¶¶ 27-33).

To show that defendant was not negligent in clearing snow and/or ice from its building's sidewalk, defendant relies on Mangroo's deposition testimony. Specifically, defendant asserts that Mangroo testified, inter alia, that he would arrive at 7 a.m. on snow days, and would clear the snow and salt the sidewalk promptly thereafter (Comparato Aff., ¶ 17; referencing Mangroo Dep. at 22-23, 25, 55). Defendant further asserts that Mangroo would monitor the snow and decide whether it needed to be cleared from the sidewalk, such that the snow "is not melting and refreezing" (*id.*, ¶ 18; referencing Mangroo Dep. at 30-31, 60-62). Based upon the Def. Weather Report and Mangroo's testimony, defendant asserts that "snow was falling at the time of plaintiff's alleged fall" and its "duty to clear the snow and ice had not yet arisen," and thus, defendant has established a prima facie entitlement to summary judgment (*id.*, ¶ 28).

In response, plaintiff points out that Mangroo testified only about his "general cleaning procedures" regarding snow removal, but was "unable to testify as to his specific actions on the date in question . . . did not recall the condition of the sidewalk when he first got to work on the

morning of January 9, 2015 . . . could not recall what the weather was like overnight January 8th to January 9th" and that "he does not create or maintain any logbooks memorializing when he sands or salts the sidewalk … nor are there any documents whatsoever memorializing what maintenance he performs to the sidewalk at any given time" (DePonte Aff., ¶¶ 13 and 14; referencing Mangroo Dep. at 25, 29, 50-51, and 58-59).

Plaintiff argues that (1) given the data in the Plf. Weather Report that "the area where plaintiff fell experienced a storm only a few days prior to the accident;" (2) plaintiff's testimony that "she slipped on ice that was covered by a layer of snow that defendant failed to clear from the night before;" (3) defendant's inability to establish lack of notice of the dangerous condition because there is "no evidence as to when the sidewalk was last inspected or cleaned prior to the accident;" and (4) Mangroo's testimony indicated that he only spoke about "his general cleaning practice [but] could not recall the condition of the sidewalk on the morning of January 9, 2015;" triable issues of fact exist as to whether "defendant improperly cleaned [the sidewalk] after past storms so as to allow the melting and refreezing of snow in the early morning hours prior to the accident" (DePonte Aff., ¶¶ 32-36).

In its reply (Reply Aff.; NYSCEF Doc. No. 55), defendant does not rebut plaintiff's assertion that Mangroo only testified as to his general practices for the removal of snow and ice, and that Mangroo failed to testify as to what he did on the day of plaintiff's injury or to provide documentation reflecting what he did on that day and the days immediately prior thereto. Instead, defendant contends, in a conclusory manner, that "it is obvious from Mr. Mangroo's testimony and his timesheet that he was present in the morning [on the day of the accident] and appropriately cleared any snow and salted the sidewalk" (Reply Aff., ¶ 15).

That contention is insufficient to support defendant's summary judgment motion, which may be granted in its favor only in the absence of disputed facts. Also, defendant does not dispute the law pronounced by the First Department in the above cases. Instead, it contends that all cited cases "had expert testimony regarding the allegation that the ice condition had been present before the snow fall at the time of the accident," but that "plaintiff does not submit any such affidavit or evidence," and thus "plaintiff provides nothing to establish that snow created the subject ice condition" Reply Aff., ¶ 8. Notably, however, defendant also does not have expert testimony or affidavit to rebut plaintiff's allegation, which defendant characterizes as "nothing but speculation" (*id.*, ¶ 15). Indeed, all cited cases involved both sides (*i.e.* plaintiffs and defendants) submitting expert testimony or affidavits, which, in effect, reflected the colloquial "battle of the experts;" and the cases resulted in a denial of summary judgment due to the existence of disputed facts.

Finally, relying on a decision from the Third Department, defendant argues that its motion for summary judgment should be granted because "Plaintiff blindly states that defendant has to establish [that] the [icy] condition did not arise from a prior storm, however the case law states the opposite" (Reply Aff., ¶ 13, citing *Boynton v Eaves*, 66 AD3d 1281 [3d Dept 2009]). In *Boynton*, the Third Department granted the defendant's summary judgment motion because it found that the plaintiff's statement was contrary to her earlier deposition testimony, which indicated that there had been a couple of feet of snow within the preceding week, "after which the sidewalk had been shoveled," was insufficient to raise a triable issue of fact regarding

"whether a preexisting condition, rather than the storm in progress at the time of the accident, caused her injury" (*id.* at 1282).

Defendant's reliance on *Boynton* is misplaced because, in this case, plaintiff argues that Mangroo failed to testify as to what he specifically did in clearing the sidewalk of snow and/or ice on the day of plaintiff's alleged injury and the days immediately prior thereto, which is distinguishable from *Boynton*, where the plaintiff had testified that "the sidewalk had been shoveled" after the prior snowfall. In any event, as also discussed above, defendant does not dispute the applicable law of the First Department regarding the standard for granting summary judgment in "slip and fall" and "storm in progress" cases (*see e.g., Bagnoli*, 52 Misc 3d 1206(A) at *3, *affd* 147 AD3d 504 [1st Dept 2017] ["Although defendants have proven that a storm was in progress at the time of the accident, an issue of fact exists as to whether plaintiff Emilio Bagnoli's accident was a result of defendants' negligence."].)

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the parties appear for a status conference in Part 7 of this court, Room 345, 60 Centre Street, on January 29, 2020, at 10:00 a.m.

11/26/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE