Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 7 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

x

CHRISTIAN MANDARINO,

Plaintiff,

-against-

JP MORGAN CHASE, N.A., BRIGHTVIEW ENTERPRISE SOLUTIONS, LLC, JONES LANGLASALLE AMERICAS, INC., TBR PROPERTIES LLC d/b/a ISLAND PROPERTY MAINTENANCE and BRICKMAN FACILITY SOLUTIONS LLC,

Defendants.

x

Index No. 607150/2016

Motion Submitted: 10/30/2019
Motion Sequence: 003-010

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XXXXXXXX
Answering Papers.....	XXXXXXXXX
Reply.....	XXXXXXX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Motion (seq. no. 3) by defendant Brightview Enterprise Solutions; motion (seq. no. 4) by defendant TBR Properties; motion (seq. no. 5) by defendant Jones Long LaSalle America, Inc.; and motion (seq. no. 6) by defendant J.P. Morgan Chase Bank, N.A. for an order pursuant to CPLR 3212 directing summary judgment dismissing the complaint against the respective defendants are granted. Cross-motions (seq. nos. 7, 8, 9 and 10) by plaintiff for an order pursuant to CPLR 3212 directing summary judgment in favor of plaintiff and against each defendant are denied.

Plaintiff alleges he sustained serious injuries when he slipped and fell on snow and ice on the walkway leading from the entrance of J.P. Morgan Chase Bank while exiting the bank located at 4210 Sunrise Highway Massapequa, New York on February 16, 2017. The subject property was owned by the defendant J.P. Morgan Chase N.A. (Chase) and managed

by the defendant Jones Lang LaSalle Americas, Inc. (JLL). JLL hired the defendant Brightview Enterprise Solutions, LLC (Brightview), formerly known as Brickman Facility Solutions, LLC, to maintain the property. Brightview subcontracted the defendant, TBR Properties, LLC d/b/a Island Property Maintenance (TBR) to perform snow and ice removal services at the property.

All defendants have moved for summary judgment, dismissing the complaint in its entirety.

In support of the motion, defendants refer to the examination before trial of plaintiff who testified that on February 16, 2016, he left his apartment in Massaqequa Park at approximately 12:00 p.m. and drove to the Chase bank. Plaintiff testified that it snowed the night before February 16, 2016; and on February 16, 2016 it was gloomy. Plaintiff conceded that it was not snowing on February 16, 2016. Plaintiff parked along the roadway in front of the bank. He remained on the sidewalk for his walk up to the bank. Plaintiff asserts the sidewalk had snow and a sheet of ice on it, and that snow was sporadically around it. Plaintiff claimed that the snow on the sidewalk was two inches high and the ice was clear. He also testified that there was snow on the grass which was of similar depth as the snow on the sidewalk. He believed there was no indication that the snow had been shoveled as it was two inches high on the sidewalk. Plaintiff described the ice condition as clear that covered the entire sidewalk area. Plaintiff testified that he had no difficulty approaching the bank; and that he remained in the bank for approximately ten minutes. Plaintiff did not report any alleged snow or ice conditions when he was inside the bank. Plaintiff testified that he exited through the same door that he entered. Plaintiff testified that he walked straight along the sidewalk towards the steps of the bank when he was exiting. Plaintiff testified that as he slipped, he tried to catch himself but he heard his right ankle break and he went down on his back. Plaintiff testified that although he fell on the sidewalk, he "kind of, like, squirmished [sic] onto the grass" because he was holding his leg. (Plaintiff's tr. p. 49). He testified that his head was on the grass and the rest of his body was still on the sidewalk. Plaintiff testified that he remained on the ground until an ambulance arrived after a passerby called for one. He testified that he left his cell phone in his vehicle and did not take any pictures of the accident location. Plaintiff offered contradictory testimony about whether he remained in the same spot, i.e., half on the sidewalk, half on the grass, until an ambulance came or whether he was mostly on the grass by the time the ambulance came. At first, plaintiff testified that he remained in the same sport, i.e., half on the sidewalk, half on the grass until the ambulance came but he later testified that he was mostly on the grass by the time the ambulance arrived. Plaintiff testified that he "squirmished" while waiting for the ambulance. He did not recall telling an Emergency Services Worker that he slipped while attempting to cut across the grass.

In further support of the motion, defendants rely on the examination before trial testimony of Nassau County Police Medic, Walter Lynch (Mr. Lynch), who testified in his capacity as a police medic and ambulance driver responding to 911 calls. Mr. Lynch

received a 911 call at 12:47 p.m. and arrived on the subject scene two minutes later at 12:49 p.m. Mr. Lynch testified that he prepares his own reports and that his reports include circumstances surrounding accidents. Mr. Lynch testified that he uses the computer in his ambulance to make his reports. He had a personal recollection of plaintiff's accident. When he arrived at the scene, he found plaintiff laying down on a slope of grass in front of the subject bank. Specifically, Mr. Lynch testified that plaintiff was not found on the sidewalk. Mr. Lynch reported that plaintiff told him that he decided to cut across the lawn when the accident occurred. Mr. Lynch identified his memo book regarding the subject accident. He is required to keep a memo book as an official police report. The first page of this memo book records the day's weather. The weather on the date of plaintiff's accident was rain and the road conditions were wet. He noted a high temperature of 52° and a low temperature of 32°. He testified that it was wet outside when he arrived on the scene and if there was snow or ice present on the date of plaintiff's accident, he would have noted it in his memo book. Mr. Lynch found plaintiff sitting on the grass and plaintiff stated that he had just left the bank when he decided to cut across the lawn when he slipped and fell because there was a slight downgrade to the lawn as it was currently raining and wet outside. He gave plaintiff Morphine at 12:59 p.m, ten minutes after he arrived on the scene. Plaintiff's health history and information was obtained before Lynch administered Morphine. He also testified that he obtained all the information from plaintiff regarding the details of plaintiff's fall on the rain-soaked grass in the ten minutes before he administered Morphine. Based on Mr. Lynch's testimony, defendants argue that plaintiff's accident occurred because he slipped and fell on a slightly downgraded lawn that was wet from rain. Mr. Lynch did not observe plaintiff lying on the sidewalk after his accident. Nor did he observe any snow or ice at the subject accident location. Further, Mr. Lynch asserts that the temperature was unseasonably mild. Defendants submit surveillance video of the exterior of the subject Chase bank and a screen shot of said surveillance video at 12:10 p.m. on February 16, 2016. The video is maintained by J.P. Morgan Chase and an affidavit authenticating the video is submitted. Defendants assert the video shows the exterior of the bank which demonstrates no ice or snow located on the sidewalk outside the bank.

Kyle Scheiner was employed by Brightview. He is its market manager whose duties include maintaining client relationships, insuring sites are up "to scope" and that service providers perform their work. Brightview had a contract with JLLA for limited snow remediation service.

Richard Dowling was a facility manager for JLLA for five years prior to the accident. Mr. Dowling testified that Brightview was only required to respond to the premises when a one to two-inch snow trigger was ascertained. Mr. Dowling also testified that should there be an issue with snow or ice at the subject premises, he would contact Brightview. According to Mr. Dowling, Brightview did not entirely assume the responsibilities to maintain the subject premises in a reasonably safe condition as that responsibility remained with JLLA and JPMC.

Thomas Rice was the owner of TBR Properties d/b/a Island Property Maintenance. Mr. Rice testified that TBR Properties performs snow remediation, including treating snow on walkways outside businesses. Mr. Rice testified that snow on a walkway is removed with either a snow blower or a snow shovel.

The subject bank was one of his clients. TBR Properties performed snow services at the subject bank in 2016. Mr. Rice testified that if his crew was sent to a site to treat snow and found ice, they would be expected to remove the ice.

Defendants also submit an affidavit by George Wright, a meteorologist who examined plaintiff's bill of particulars, plaintiff's EBT, security video on the day of plaintiff's alleged accident, photographs of plaintiff's alleged accident location, and the official weather and climatological data. Mr. Wright stated that the weather conditions that occurred at the premises during the February 14-15, 2016 period indicated that the weather was cold with no precipitation on February 14, 2016. At 7:00 a.m. on February 14, 2016, there was an average of two inches of snow/ice present on exposed, untreated (i.e., not salted) and undisturbed (i.e., not walked upon, driven upon, shoveled or plowed) ground. The temperature on this day ranged from a high of 16° to a low of 1°. Snow developed at the premises between 9:00 a.m. and 9:15 a.m. on February 15, 2016. The Snow continued to fall for the remainder of the morning and during the afternoon. The snow mixed with sleet and rain before changing to rain between 6:00 p.m. and 6:15 p.m. as the temperature warmed above freezing (i.e., 32°) to 37°. Rain continued to fall during the evening. The rain tapered off and ended between 11:30 p.m. and 11:45 p.m. The temperature was 45° at the end of the day at midnight. Approximately 1.0 inch of snow and sleet fell at the premises before the precipitation changed to rain on February 15, 2016. The NWS reported that nine-tenths of an inch (0.9-in.) of snow and sleet fell in Islip at Long Island MacArthur Airport on February 15, 2016 (Public Information Statement – Spotter Reports, February 16, 2016).

According to his analysis of the weather conditions that occurred at the premises on February 16, 2016, the date of the accident, the weather was foggy and unseasonably mild during the overnight hours. The combination of the falling rain and above freezing temperatures melted all of the snow that fell on the subject walkway prior to 6:00 p.m. on February 15, 2016. This was confirmed by the security video that illustrated no snow on the walkway prior to plaintiff's alleged accident and the official weather records from Long Island MacArthur Airport and John F. Kennedy International Airport that reported there was no snow/ice present on the ground at 7:00 a.m. on February 16, 2016. The temperature warmed to 53° at 9:00 a.m. (i.e., 21° above freezing) on the day of the accident. Light rain developed between 9:15 a.m. and 9:30 a.m. (i.e., 21° above freezing). The rain continued to fall for the remainder of the morning and into the afternoon. At the premises on February 16, 2016 at approximately 12:30 p.m., light rain was falling, the temperature was 52° and the wind was blowing from the southeast at average speeds of 15 to 20 mph with gusts from 30 to 35 mph.

Mr. Wight opined in a specific and detailed analysis that there was no snow or ice present on the subject sidewalk at the time of plaintiff's accident.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it (***Sillman v Twentieth Century Fox Films Corp.***, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (***Alvarez v Prospect Hospital***, 66 NY2d 320; ***Winegrad v New York University Medical Center***, 64 NY2d 851; ***Fox v Wyeth Laboratories, Inc.***, 129 AD2d 611; ***Royal v Brooklyn Union Gas Co.***, 122 AD2d 133). The defendants have made an adequate *prima facie* showing of entitlement to summary judgment by demonstrating that weather conditions did not permit snow or ice to be on the walkway at the time of plaintiff's accident, plaintiff fell on wet grass as described by EMT Lynch and not on the sidewalk. Further, that if plaintiff did fall on the sidewalk, it was not a result of ice and snow.

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 (***Friends of Animals, Inc. v Associated Fur Mfgrs.***, *Inc.*, 46 NY2d 1065). Conclusory statements are insufficient (***Sofsky v Rosenberg***, 163 AD2d 240, *aff'd* 76 NY2d 927; ***Zuckerman v City of New York***, 49 NY2d 557; *see* ***Indig v Finkelstein***, 23 NY2d 728; ***Werner v Nelkin***, 206 AD2d 422; ***Fink, Weinberger, Fredman, Berman & Lowell***, *P.C. v* ***Petrides***, 80 AD2d 781, *app dism.* 53 NY2d 1028; ***Jim-Mar Corp. v Aquatic Construction***, *Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660).

In opposition to defendants' motions the plaintiff alleges that the testimony of non-party Nassau County Emergency Medical Technician Walter Lynch was unreliable because, although he claimed to have personal knowledge of the events surrounding the plaintiff's incident, upon further questioning he resorted to his memo log book, and his patient care report, which plaintiff argues are inadmissible hearsay, and, coupled with his "unreliable" testimony, were insufficient as a matter of law; that the plaintiff's expert report of John Lombardo, Certified Meteorologist, proves there was "trace amounts of ice" on the walkway where the plaintiff had his incident, thus proving that the defendants, specifically JLL, were negligent due to their failure to remedy the dangerous and defective condition; that the photographs marked as exhibits and (testified to by the plaintiff at his deposition) coupled with the video of the Chase Bank entrance provided to the court as an exhibit on the original papers are "unreliable" and unwarranted as a matter of law and should not be considered by the court since they do not show the exact area where the plaintiff had his incident despite showing the conditions on the surrounding area, and a portion of the walkway in front of the bank; and that JLL as property manager for the property in question, "failed to satisfy their initial burden" regarding actual or constructive notice of the "dangerous condition" and thus failed to meet its initial burden on its motion because of lack of evidence as to when or whether the area was last cleaned or inspected where the plaintiff fell.

Mr. Lynch testified that his handwriting contained the narrative regarding what plaintiff told him directly, Lynch testified he wrote what plaintiff told him:

> [j]ust left the bank when he decided to cut across the lawn and he slipped and fell (thee is a slight downgrade to the lawn and it is currently raining when outside) and he states his legs slipped out from underneath him, he heard his right ankle pop."

Plaintiff argues that Mr. Lynch was not present when the incident occurred; but as he testified, his duties and responsibilities are to respond to situations such as the one that presented itself involving this plaintiff. Plaintiff argues he had no opportunity to review the patient care report. Plaintiff also alleges either Mr. Lynch misinterpreted or misunderstood him. Defendants assert Mr. Lynch's duties were to treat the patient and create the business report as part of his job duties and responsibilities. Plaintiff argues that the content contained within the patient care report was inadmissible hearsay. This court can review the record, which Mr. Lynch created as part of the requirement of his job. This is a business record that was contemporaneous with his sense impressions and which, in its entirety, was germane to the treatment and immediate care of the plaintiff.

The present sense impression exception to the hearsay rule applied when the declarant describes events as he or she is perceiving the event or condition, or immediately thereafter (*see* ***People v Vasquez***, 88 NY2d 561 575; ***People v Brown***, 80 NY2d 729, 732; ***Talisveyber v Motor Veh. Acc. Idem. Corp***. 16 AD3d 425, 426) This exception is premised on the likelihood that the subject declaration is reliable "because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory" (***People v Vasquez***, *supra* at 547; ***People v Brown***, *supra* at 732-733). Moreover, the ambulance report may be introduced into evidence under the business records exception to the hearsay rule (*see* CPLR 5818[a][c]). The full entry, and its reference to the grass and information "heard his ankle pop" are part of Mr. Lynch's duties as a medic and 10-year EMT. Plaintiff argues that Mr. Lynch had no "personal knowledge" as to where exactly the plaintiff fell and did not know how much time passed from when plaintiff fell to when Mr. Lynch arrived on the scene. Plaintiff asserts when making the statements to Mr. Lynch, due to the administration of Morphine, his memory may have been hazy or compromised. Mr. Lynch testified from custom and practice spanning a 10-year career as to the manner in which he would administer Morphine to a person the plaintiff's size. Also, in the patient care report he indicated that when the plaintiff was brought to the hospital for further treatment, he was "alert and oriented X4."

The entries by Mr. Lynch demonstrate he regarded the plaintiff to be coordinated as to time of day, the date, place and the event.

The plaintiff, in at least five instances, explained that the entire area he walked on had two inches of snow and a sheet of ice that existed on the entire walkway that he had walked up and 10 minutes later after making his car payment inside the bank, that he attempted to walk down. In contrast, the common sense impression of non-party Mr. Lynch revealed that although he did not walk on the sidewalk/walkway leading to the bank entrance he made general observations beginning at 12:49 p.m. (approximately 20 minutes after plaintiff had his incident) that there was no snow or ice anywhere. The video from the day of the incident provides the best record regarding this issue. The security video annexed to the original moving papers that is a copy of video footage obtained by the exterior reveals no snow present and no ice present on the subject walkway.

> "is a true, fair and accurate copy of video footage obtained by the exterior security camera at the front of the subject branch on February 16, 2016 from 12:010 p.m. to 1:10 p.m. It is free from any tampering." (Motion seq. no. 4, Halka Aff., Exh. N and Affidavit of Patricia York).

Plaintiff's testimony that there was snow and ice and "maybe two inches of snow" coupled with a "sheet of ice" on the walkway "throughout it" on the subject walkways is inconsistent with and contrary to the physical evidence which shows a plain, wet, walkway.

Mr. Schreiner testified he would "monitor" service providers for snow removal suc as possibly inspecting the work after it was done or follow up with phone calls or emails regarding same and would receive a copy of a document known as "Actual Tasks Report" which is a computer generated spreadsheet through Brightview. This document revealed that the subcontractor TBR Properties checked into Chase branch #144014 through "an app" known as Field Tech Connect and completed "full service" on February 15, 2016 at 6:00 p.m. precluding plaintiff's argument that defendants had actual or constructive notice of the alleged condition and failed to remedy it.

John Lombardo, plaintiff's meteorological expert hired to provide an opinion that snow and/or ice existed on the walkway in questions, where the plaintiff had his incident, opined that areas of snow that were pushed, shoveled or plowed into piles remained on the ground in some locations and according to the plaintiff's verified bill of particulars, that "it was alleged the defendants created the dangerous condition in failing to timely and properly remove snow and ice causing the plaintiff to fall." Mr. Lombardo concludes, that if the ice that was present at the time the incident had been adequately treated any time after the ice last formed 90 to 92 hours prior to the time of the incident, then it would not have been present. No explanation as to cause and effect, rationale for the alleged trace amounts of snow/ice, and/or investigation is provided. The court is being asked to accept Mr. Lombardo as an expert based upon his review of meteorological records, but he does not reference the

video that had been previously provided to plaintiff prior to October 15, 2019, or the photographs that were marked at plaintiff's deposition and authenticated by the plaintiff himself. Defendants assert that a meteorologist with over 10 years of experience would provide references to the calculations and photographs, and possibly tie into his opinion, other than a single reference to the plaintiff's verified bill of particulars alleging negligence. Mr. Lombardo does offer proof that is outside his expertise. He has no experience as an engineer. There is no way for him to have knowledge of the snow or ice condition on the grounds in the weeks before the accident or whether the snow or ice was "properly removed or treated." His conclusions are speculative. Furthermore, he does not reference the area 7-10 steps from the front entrance. No explanation using proof as to how he determined that the atmospheric conditions could have properly allowed a half-inch of remnant ice to exist over the entire surface area of the walkway is present in any of his opinions. Other than conceding the fact that it was 54° at the time of the incident, and somehow opining that ice could "exist somewhere in some areas" where it had been "previously shoveled and/or piled," no further explanation is provided.

Howard Altschule, Mr. Lombardo's colleague submitted an expert report dated September 11, 2018. Defendants argue that Mr. Altschule's resources are unreliable and subjective, including several data sets complied by "volunteer weather observers." Mr. Altschule's opinion that TBR Properties exacerbated the unsafe ground conditions that existed as early as eleven (11) days pre-accident is not supported by the record. He concludes that the icy condition that caused plaintiff's accident was the result of a melting and refreezing cycle that occurred between February 10, 2016 and February 12, 2016 – four (4) days before the accident. Mr. Altschule fails to explain how and from where he obtained the data pertaining to snow and ice conditions on the ground. He fails to substantiate his findings regarding snow removal efforts throughout the week preceding the alleged accident and the specificity with which he was able to reach those findings without first-hand knowledge. Mr. Altschule stated that the "areas of snow that were previously pushed, shoveled, or plowed into piles following snow events as far back as February 5, 2016 remained on the ground in some locations." Mr. Altschule's conclusion is speculative and unsubstantiated. Defendants' expert reaches his conclusion and findings based upon entirely objective data. Unlike Mr. Altschule, Mr. Wright uses data obtained from identified and objective sources to set forth the way he reached his ultimate conclusion – that the combination of the falling rain and above-freezing temperatures melted all of the snow that fell on the subject walkway prior to 6:00 p.m. on February 15, 2016. Mr. Wright does not assume the weather or ground conditions at any point in his evaluation. He cites official meteorological data at each step of his analysis. In doing so, Mr. Wright's findings and conclusion are admissible, as he not once resorts to speculation in reaching same. Plaintiff does not address the insufficiencies of Mr. Altschule's report as highlighted by the defendants.

Unsubstantiated conclusory allegations of experts hold no weight when determining issues before the court (*see* ***Hotaling v City of New York***, 55 AD3d 396, *aff'd* 12 NY3d 862; ***Rivas-Chirino v Wildlife Conservation Soc'y***, 64 AD3d 566).

The submissions demonstrate that none of the defendants had actual or constructive notice of the alleged dangerous condition. Further, plaintiff failed to prove that TBR Properties is liable to plaintiff under any of the three exceptions to the general rule of tort liability as set forth in ***Espinal v Melville Snow Construction***, 98 NY2d 136 and its progeny; *see also* ***Santos v Deanco Serus***, 142 AD3d 137.

All proceedings under Index No. 607150/16 are terminated.

Dated: December 18, 2019
Mineola, NY

Karen V. Murphy
J.S.C.
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ENTERED
DEC 19 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE