| **Clark v Giametta** |
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| 2019 NY Slip Op 34788(U) |
| May 3, 2019 |
| Supreme Court, Orange County |
| Docket Number: Index No. EF006557/16 |
| Judge: Robert A. Onofry |
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

----------X

REGINA CLARK,

Plaintiff,

- against –

WILLIAM H. GIAMETTA,

Defendant.

----------X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF006557/16

**DECISION AND ORDER**

Motion Date: March 20, 2019

The following papers numbered 1 to 6 were read and considered on a motion by the Defendant, pursuant to CPLR §3212, for summary judgment dismissing the complaint.

| | |
|---|---|
| Notice of Motion- Gaztambide Affirmation- Exhibits A-H | 1-3 |
| Affirmation in Opposition- Cambareri- Exhibit 1 | 4-5 |
| Affirmation in Reply- Gaztambide | 6 |

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is denied.

**Introduction**

The Plaintiff Regina Clark commenced this action to recover damages allegedly arising from a slip and fall on ice at premises owned by the Defendant William Giametta.

The Defendant moves for summary judgment dismissing the complaint on the grounds, *inter alia*, that there was a storm in progress at the time of the slip and fall.

## Factual and Procedural Background

At her examination before trial, the Plaintiff testified that she rents an apartment at 87 Overlook Place in Newburgh, New York, from the Defendant (T-6, 14). She had lived there for approximately a year and a half (T-10). Her building is connected to another building– 85 Overlook Place (T-18). One set of steps leads up to a covered porch with two doors– one for each building (T-19). There are about five steps (T-21).

Her slip and fall occurred on Sunday, January 18, 2015, at around 9:30 or 10:00 a.m. (T-18). At the time of the fall, she was wearing a coat, sneakers, shirt and pants (T-27).

She was not aware that it was drizzling outside that morning, and did not look out the window to check on the weather conditions before leaving her apartment (T-26). Nor did she otherwise check the weather (T-26).

When she reached the porch, she observed that it was drizzling outside (T-30). No snow was falling, but there was snow on the ground (T-30). It had last snowed "maybe" a day or two before, about three or four inches (T-31). She saw no evidence that the sidewalk had been shoveled or plowed (T-31). It was very cold (T-31).

There "wasn't that much snow on the sidewalk. It just looked shiny, like it had rained" (T-32). She did not recall seeing any ice on the sidewalk (T-32).

She further testified that there was approximately two to three inches of snow on each of the steps (T-32). She didn't recall if she saw any footprints in the snow (T-35).

When she went to walk down the steps to her building, she held onto the railing on her left with her left hand (T-35). The left hand side of the railing was on the 87 Overlook Place side of the steps (T-36). As she came down the steps, she "went to take a step, and [ ] fell" (T-

36). This occurred as she was stepping down from the porch level onto the first step (T-36). She did not recall with which foot she was stepping (T-38). Both feet slipped, causing her to fall (T-38).

She then "clarified" her testimony to state that she was at the bottom of the steps when she slipped and fell (T-39). Both feet had reached the sidewalk level before she slipped and fell (T-39). She did not know if she slipped and fell on the sidewalk or the steps, or a combination of the two (T-39). She believed that she was stepping down onto the sidewalk (T-40). She did not recall if one foot was still on the steps or not (T-40).

Before she fell, she observed "[m]aybe a frost of snow, like a sprinkle of snow" on the sidewalk, but did not observe any ice (T-42).

When she slipped, she fell backwards and hit her butt, back and head first (T-41). No part of her body struck the staircase (T-41). She immediately tried to get up, but kept slipping and sliding on the sidewalk (T-43). She believed that she had two or three falls, "[r]ight after each other" (T-42). She never made it to her feet before the ambulance arrived (T-44). She ended up on the sidewalk about two feet to the right of the steps (T-47-48). She believed she was about at the middle point between 85 Overlook Place and 87 Overlook Place (T-51).

The first time she slipped, she was in front of 87 Overlook Place (T-55). She slipped and fell two times (T-58).

She saw snow on the sidewalk, but "didn't know if it was ice". She saw only a "dusting" of snow (T-60). After her fall, she observed ice on the sidewalk (T-62).

The sidewalk area to the left and to the right of her building appeared to have been shoveled, and to be dry and free from ice (T-63).

She believed that someone put salt on the steps after her accident (T-69).

She had last been outside the night before her accident (T-125). It was snowing. This resulted in the two to three inches of snowfall she had mentioned earlier (T-126).

She further testified that, more than one day before her accident, she went to the store and came back. It was snowing when she came home (T-126-17).

On the day before her accident, there was also rain (T-127).

She did not complain to the Defendant about conditions on the steps or sidewalk on the day of the accident, and was not aware of anyone who had (T-152).

At an examination before trial, the Defendant William GIAMETTA testified that he owned 87 Overlook Place in Newburgh at the time of the accident, and had since about 1990 (T-10). He was a retired code compliance officer for the City of Newburgh.

At the time of the accident, he had no full-time or part-time employees (T-15). Rather, he hired independent contractors, including for 87 Overlook Place (T-16). Specifically, a man named "Francisco" (T-16). Francisco cleaned the exterior of the building, mowed, and shoveled and salted after it snowed (T-17). Francisco worked on a "per-call basis" (T-17). In the event of snow, GIAMETTA would call Francisco or Francisco would call him (T-19).

He had no independent recollection of the weather conditions on the date of the accident (T-20).

He met with the Plaintiff afer her fall (T 25).

He recalled contacting Francisco a few days before this accident. He believed it was the Sunday before the accident (which occurred on a Wednesday) (T-26). He told him that if there was snow or ice, to be sure to shovel and salt all of his buildings (T-27).

He did not recall another conversations with Francisco after that conversation but before the accident (T-27).

The tenants would also sometimes "pitch in" with snow and ice. He provided sand and salt, which he left in the common hallway (T-27).

After the accident, a second floor tenant (Jesse McLean) called and told him about the accident (T-28). She did describe the location as being on the sidewalk. However, upon further discussion, he concluded that the location being described was actually the beginning of a neighbor's driveway (T-29). The driveway was to the right (facing the street) of 85 Overlook Place, on property that was not owned by him (T-30). The tenant also recorded a video of a portion of the incident (T-31). The video does not show the slip and fall itself (T-32). Rather, in the videotape, the Plaintiff is laying on ground being tended by an ambulance crew. She is laying on property that he does not own (T-31).

GIAMETTA believes that, on the Saturday before the accident, Francisco told him that he had done "the common procedure of shoveling and salting the steps and sidewalk of our property" (T-35). If Francisco shoveled, he would always spread salt (T-36). Francisco also returned after periods of very cold weather to see if there was ice (T-37).

Prior to the accident, GIAMETTA visited a property he owned in the State of Florida. However, he returned to New York sometime after the Saturday before the accident and when he visited the scene (T-37).

He noticed that the sidewalk was shoveled and salted (T-41). It was cold, but there was no precipitation (T-43).

Prior to the date of this accident, GIAMETTA had never had any complaints from tenants

at 87 Overlook Place concerning snow or ice removal. Nor had he received any citations from the city relating to the condition of his sidewalk (T-44).

McLean told him that she witnessed the entire accident (T-46). She told him that it appeared that the Plaintiff was drinking heavily and was in a drunken stupor, and that she was trying to walk down the sidewalk but ended up falling down in the driveway.

GIAMETTA routinely visited the property one to two times a month, with at least a drive-by, and oftentimes a walk-through (T-53).

He also had a practice of inspecting his properties after a snow event to check on Francisco's work (T 53). Francisco always did a good job, and he never had any complaints at any of his buildings about Francisco's snow cleaning (T 54).

At an examination before trial, non-party Jesse McLean testified that she lived at 87 Overlook Place, Apartment 2, in Newburgh (T-5) and had known the Plaintiff since 2008 (T-9). They were not friends.

McLean witnessed the Plaintiff's slip and fall (T-9). When the Plaintiff slipped and fell, she was already down the steps and in front of the "second side of the building" (T-12). The Plaintiff was not in front of the 85 Overlook Place side of the steps when she started sliding and falling (T-12). Rather, she "was at the end of --- she was past the other railing [for 85 Overlook Place] and everything. Past the other railing and everything. Screaming and yelling at --- there was a couple of guys out there that drink on the corner. Screaming and yelling with them. And then she started all that and went down in the driveway that belongs to 85, 84, 83 Overlook" (T-14). From the porch looking at the street, the Plaintiff fell to the right of the steps (T-16). After she fell, the Plaintiff was laying "half on grass, half on driveway" (T-16). She fell "after the

railing," and slid to her resting spot (T-17). "Like after the railing --- it's two railings. My railing. This railing. Like I said, when you're loud and you're screaming and you are intoxicated, and she did, she started sliding, whoo, whoo, whoo, whoo, whoo. And then boom" (T-17). After the Plaintiff fell, McLean went downstairs to "videotape the comedy that was going on afterwards. But I watched it from the front window. I heard the noise. That's what made me go to the window" (T-17).

At the time, it was "a hailing rain day. It was raining icy balls. It was like raining icy balls. Little slushy stuff" (T-18).

Before her fall, the Plaintiff "started sliding" (T-45). However, "it wasn't even that icy out there. She just a drama queen" (T-48).

There were no patches of ice on the sidewalk because there was "a salt bucket sitting in front of the door and in the hallway. There is no need for there to be ice when you have a salt bucket and somebody that comes and puts the salt" (T-54). She could see salt on the sidewalk, which had "just been put down" (T-54). "Jamie's boyfriend had just put the salt down" (T-54).

Two days before the accident she videotaped the Plaintiff laying on the hallway floor, "burbling bubbling words, urinating on herself, while her four-year old was standing over top of her crying" (T-23).

Mclean further testified that she and the Plaintiff were not friends. She recounted that one time, the Plaintiff told the police that McLean was at the school bus stop threatening to kill kids with a knife (T-22). She was arrested (T-22). McLean was also arrested after she threw plastic chair at the Plaintiff (T-23). The Plaintiff also obtained an order of protection against her (T-23).

McLean had called the police on the Plaintiff on several occasions. She thinks that the Plaintiff drinks and smokes crack every day (T-38).

McLean served time in prison on a federal drug charge when she was younger, and she "smacked a couple people when [she] was younger" (T-62).

**Motion at Bar**

Based upon the foregoing, the Defendant now moves for summary judgment seeking dismissal of the complaint and all causes of action asserted therein.

In support of his motion, he submits an affirmation from his attorney, Elliot Gaztambide.

Initially, Gaztambide argues, the complaint must be dismissed because the Plaintiff slipped and fell during ongoing storm activity, to wit: based on the certified weather records, together with expert analysis, it may be determined that freezing rain and sleet began to fall at approximately 8:00 a.m. on the morning of the accident, and had continued through the remainder of that day. Further, it may be determined that, at 10:30 a.m., which is just prior to when an ambulance was called to the scene, freezing rain was still falling and the temperature was 28 degrees.

Thus, Gaztambide asserts, any snow or ice that was present on the ground at the time of the accident was directly a result of the ongoing winter storm that was still in progress at the time of the accident and ice/glaze was still actively accumulating due to the below freezing ground temperatures.

Further, he asserts, the complaint must be dismissed because the Defendant lacked actual or constructive notice of the alleged dangerous and defective condition at issue. Indeed, he notes, the Plaintiff herself testified that she did not see the alleged icy condition until after she slipped,

and she presented no evidence concerning the length of time that the ice was on the ground before her fall, or that the Defendant received a prior complaint about the condition. Gaztambide notes that the Defendant denied that he was given notice of the alleged condition.

In addition, he argues, in light of the eyewitness testimony of McLean, it is clear that the Plaintiff actually slipped and fell on property that was not owned by the Defendant.

Appended as exhibits to Gatzambide's affirmation are, *inter alia*:

(1) A Compuweather weather analysis (Exhibit F). The analysis concludes, *inter alia*: "approximately 0.5 inch of snow and ice cover was present on untreated, undisturbed, and exposed outdoor surfaces at 10:30 AM EST on January 18, 2015 (date and time of the incident), at 87 Overlook Place, Newburgh, NY 12550 (site of the incident)."

(2) Photographs of the accident site (Exhibit G).

In opposition to the Defendant's motion, the Plaintiff submits an affirmation from counsel, Mark Cambareri.

Cambareri argues that the Defendant failed to demonstrate a *prima facie* entitlement to judgment as a matter of law. Rather, he asserts, there is conflicting testimony in the record as to how and where the slip and fall occurred.

Further, he notes, although the Defendant argues that there was a storm in progress at the time of the slip and fall, he submitted photographs and a video taken of the Plaintiff while was laying on the ground, neither of which portray precipitation.

In addition, Cambareri asserts, the Defendant testified that he was in Florida for approximately one week prior to the date of the accident (Sunday), and did not travel to the premises until midweek. Thus, he argues, the Defendant presented no evidence of a specific

inspection of the property prior to the time of Plaintiff's accident, or that the area had been salted.

In reply, Gaztambide argues that the Defendant clearly met his initial burden of demonstrating that a storm was in progress at the time of the Plaintiff's slip and fall, and that the Defendant lacked actual or constructive notice of the alleged icy condition at issue. Indeed, he asserts, the expert weather evidence is corroborated by McLean's video footage.

**Discussion/Legal Analysis**

A property owner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all of the attendant circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. *Sawyers v. Troisi*, 95 A.D.3d 1293 [2nd Dept. 2012].

Whether a dangerous or defective condition exists on property so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. *Sawyers v. Troisi*, 95 A.D.3d 1293 [2nd Dept. 2012].

In general, a real property owner or a party in possession or control of real property will be held liable for injuries sustained on its property only if it created the alleged dangerous and defective condition giving rise to the same, or had actual or constructive notice of the condition for a sufficient length of time to have discovered and remedied it. *Sartori v. JP Morgan Chase Bank*, 127 A.D.3d 1157 [2nd Dept. 2015]; *Devlin v. Selimaj*, 116 A.D.3d 730 [2nd Dept. 2014].

In general, for a slip-and-fall accident involving snow and ice, it must be shown that a reasonably sufficient time had lapsed since the cessation of a weather event for a defendant to have taken protective measures. *Fenner v. 1011 Route 109 Corp.*, 122 A.D.3d 669 [2nd Dept. 2014]. Under the so-called "storm in progress" rule, a property owner will not be held

responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm. *Fenner v. 1011 Route 109 Corp.*, 122 A.D.3d 669 [2nd Dept. 2014]. A lull in the storm does not impose a duty to remove the accumulation of snow or ice before the storm ceases in its entirety. However, if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied. *Fenner v. 1011 Route 109 Corp.*, 122 A.D.3d 669 [2nd Dept. 2014]. This may be shown by climatological data, or testimony from persons with competent knowledge of the facts. *Fenner v. 1011 Route 109 Corp.*, 122 A.D.3d 669 [2nd Dept. 2014].

An owner or party in possession or control of real property may be held liable for a slip-and-fall accident involving snow and ice only when it created the dangerous condition which caused the accident, or had actual or constructive notice of the same for a sufficient length of time to have discovered and remedied it. *Ross v. Half Hollow Hills Cent. School Dist.*, 153 A.D.3d 745 [2nd Dept. 2017].

To constitute constructive notice, a defect must be visible and apparent, and must have existed for a sufficient length of time prior to the accident to have permitted the defendant to have discovered and remedied it. *D'Esposito v. Manetto Hill Auto Serv., Inc.*, 150 A.D.3d 817 [2nd Dept. 2017].

Thus, 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 have discovered and

remedied it. *Ross v. Half Hollow Hills Cent. School Dist.*, 153 A.D.3d 745 [2nd Dept. 2017]; *see e.g., Ross v. Half Hollow Hills Cent. School Dist.*, 153 A.D.3d 745 [2nd Dept. 2017][the defendant met burden of proof with testimony from a custodian who stated that, approximately 1 ½ hours prior to the subject accident, he inspected the walkway at issue and observed a mixture of salt and sand thereon, but no ice]; *Somekh v. Valley Nat. Bank*, 151 A.D.3d 783 [2nd Dept. 2017][the defendant met burden of proof with testimony from a branch manager that neither he nor his employees had received notice of the icy condition at issue, and that no customers had complained of the same, and with the plaintiff 's testimony that he did not see ice before his fall]; *see contra, Torre v. Aspen Knolls Estates Home Owners Ass'n, Inc.*, 150 A.D.3d 789 [2nd Dept. 2017][the defendant failed to meet its burden because it did not submit any evidence as to when the area of the roadway at issue was last inspected or cleaned prior to the subject accident].

Here, the various grounds for summary judgment argued by the Defendant will be addressed *in seriatim*.

The Defendant demonstrated a *prima facie* entitlement to judgment as a matter of law dismissing the complaint on the ground that the Plaintiff's accident did not occur on property owned by him with the testimony and video footage from McLean, both of which indicate that the Plaintiff was on adjacent property not owned by the Defendant when she slipped and fell.

However, in opposition, the Plaintiff raised a triable issue of fact with her testimony that she slipped and fell at the base of the steps to 87 Overlook Place, and that she came to rest some distance away from that location due to her efforts to get to her feet. The Court does not find this testimony incredible as a matter of law. *Kerzhner v. New York City Transit Authority*, 170 A.D.3d 982 [2nd Dept. 2019]. Rather, it raises issues of credibility for the jury.

The Defendant failed to demonstrate a *prima facie* entitlement to judgment as a matter of law based on the storm-in-progress rule.

Here, there is evidence of snow activity in the days before the slip and fall, and the Plaintiff testified as to accumulations of snow and ice on the steps and ground where she allegedly slipped and fell. The Court does not find that the climatological evidence submitted by the Defendant demonstrates, *prima facie*, that this alleged dangerous and defective condition was the result of weather that occurred on the morning in question and that was still in progress, rather than previous weather activity. The Court notes that McLean's video footage shows some accumulation of snow in the area (and snow did not fall the morning in question) and what appears to be rain falling at the time that the ambulance crew is attending to the Plaintiff.

Finally, the Defendant failed to demonstrate, *prima facie*, that the action must be dismissed because he lacked actual or constructive notice of the alleged dangerous and defective condition. As noted *supra*, there is evidence of snow activity in the days before the slip and fall, and the Plaintiff testified as to accumulations of snow and ice on the steps and ground where she allegedly slipped and fell.

Further, as noted by the Plaintiff, the Defendant did not demonstrate, *prima facie*, that any snow fall that occurred prior to the date of the accident had otherwise been cleared.

In sum, the Defendant's motion is denied.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is denied; and it is further,

ORDERED, that the parties are directed to appear, through respective counsel, for a Pre-Trial/Settlement Conference on Wednesday, June 5, 2019, at 9:15 a.m., at the Orange County

Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: May 3, 2019
Goshen, New York

**ENTER**

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