SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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SAMUEL J. ALTAMURA,

Plaintiff,

- against -

SLEEPY HOLLOW REALTY CORPORATION,

Defendant.

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DECISION & ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Index No: 50415/2019

Motion Seq. 1

Hubert, J.S.C.

Plaintiff Samuel J. Altamura commenced this action to recover for personal injuries he sustained on March 9, 2018, when he allegedly slipped and fell on ice in the parking lot of his building at 46 Jackson Avenue in Eastchester, New York. The building, for senior citizens and older adults, is owned by Defendant Sleepy Hollow Realty Corporation. Plaintiff suffered a fractured leg, a hip fracture, and other injuries. The complaint alleges that Defendant was negligent in allowing and permitting ice to accumulate in the parking lot; in failing to remove ice from the parking lot; in failing to place sand or other abrasive materials on the parking lot, and in failing to provide a safe means of ingress and egress. Plaintiff alleges both actual and constructive notice of the icy pavement.

On this motion, Defendant moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's complaint on the grounds that it lacked actual or constructive notice of the icy condition. Defendant also argues that it is entitled to judgment as a matter of law under the "storm in progress" doctrine.

The standard for granting summary judgment is well established. In order to make a prima facie showing of entitlement to judgment as a matter of law, the moving party must tender

sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). The parties' competing contentions must be viewed in a light most favorable to the non-moving party. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763, 27 N.Y.S.3d 468 (2016). If the moving party meets its burden, the burden shifts to the nonmoving party to establish, through admissible evidence, that there are disputed issues of material facts for trial. CPLR § 3212 (b); *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). The non-moving party must produce evidence in the record and may not rely on conclusory statements or contentions that are not credible. However, if the moving party fails to sustain its burden, the court need not address the adequacy or sufficiency of the opposing party's proof. *Grant v. 132 W. 125 Co., LLC*, 180 A.D.3d 1005, 120 N.Y.S.3d 345 (2d Dep't 2020).

With respect to the issue of notice, "[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 of its existence." *Coelho v. S&A Neocronon, Inc.*, 178 A.D.3d 662, 115 N.Y.S.3d 91 (2d Dep't 2019). Insofar as constructive notice is concerned, a defendant has constructive notice of a dangerous condition on its premises when the condition is visible and apparent, and has existed for a sufficient length of time prior to the accident to permit the Defendant the opportunity to discover and correct it. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646 (1986); *Gani v. Avenue R Sephardic Congregation*, 159 A.D.3d 873, 72 N.Y.S.3d 561 (2d Dep't 2018).

In order to meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior

to the plaintiff's accident. *Carro v. Colonial Woods Condominiums,* 178 A.D.3d 893, 112 N.Y.S.3d 540 (2d Dep't 2019). Mere reference to general practices, without any evidence about specific cleaning or inspection of the area in question is insufficient to establish a lack of constructive notice. *See Butts v. SJF, LLC*, 171 A.D.3d 688, 97 N.Y.S.3d 219 (2d Dep't 2019).

In an affidavit in support of the motion, the Defendant's property manager, James Romero, states that snow removal and salting services for the premises were carried out by Anmar Contracting. Anmar removed snow from the premises when there was an accumulation of one inch or more of snow. In the event of a snowfall of less than one inch of accumulation, Anmar would apply salt to the premises if necessary. The building employees were responsible for clearing snow in between parking spaces. Romero further states that Anmar's invoices for the winter of 2017-2018 reflect that Anmar applied salt to the parking lot on March 6, 2018, and did not return to the property until March 21, 2018.

The court finds this evidence insufficient to show that Defendant lacked constructive notice of the icy condition alleged by Plaintiff. Romer's affidavit fails to indicate when the area where Plaintiff allegedly fell was last inspected or cleaned relative to the accident. The invoices from Anmar, which is not a party to the action, are offered for the truth of the matter asserted--to show that work was performed on certain dates on Defendant's property. Records offered pursuant to the business record exception to the hearsay rule must be supported by testimony of a custodian or another qualified witness, stating that the records are kept in the course of a regularly-conducted business activity, and it was the regular practice of the business to make the records. *Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 14 N.Y.S.3d 283 (2015). Here, the Court declines to consider the invoices submitted by Defendant under the

business-record exception because it has not submitted the necessary foundation for admissibility. Nor has Defendant submitted any evidence with respect to the issue of actual notice.

Accordingly, Defendant has failed to eliminate all triable issues of fact as to whether it created the alleged icy condition or had actual or constructive notice of it. *See Soloveychik v. Sea Isle Owners, Inc.*, 160 A.D.3d 782, 73 N.Y.S.3d 607 (2d Dep't 2018). Since Defendant did not establish its prima facie entitlement to judgment as a matter of law, the Court does not consider Plaintiff's opposition papers with respect to the issue of notice. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985).

Defendant next contends that it is not liable for failing to remedy the icy condition alleged by Plaintiff because there was a storm in progress at the time of his accident. Under the "storm in progress" rule, a property owner is relieved of the obligation to shovel show or clear ice if continuing precipitation or high winds re-cover pavement as fast as it is cleaned, rendering any such efforts fruitless. *Wroblewski v. Williams*, 173 A.D.3d 1120, 103 N.Y.S.3d 154 (2d Dep't 2019), *citing Powell v. MLG Hillside Assocs.*, 290 A.D.2d 345, 345, 737 N.Y.S.2d 27 (1st Dep't 2002). Thus, while landowners have a duty to maintain their property in a reasonably safe condition, they are not liable for a plaintiff's injuries caused by icy conditions occurring during an ongoing storm or for a reasonable time thereafter. *Sherman v. New York State Thruway Auth.*, 27 N.Y.3d 1019, 32 N.Y.S.3d 568 (2016), *quoting Solazzo v. New York City Tr. Auth.*, 6 NY3d 734, 735, 810 NYS2d 121 (2005); *see also Rabinowitz v. Marcovecchio*, 119 A.D.3d 762, 762, 989 N.Y.S.2d 305 (2d Dep't 2014)("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").

Defendant argues that precipitation falling at the time of Plaintiff's accident would account for any icy condition that allegedly caused him to fall, and based on the weather conditions, it had no duty to ameliorate any dangerous condition in the parking lot. In support of its argument, Defendant relies on certified weather records from the United States Department of Commerce. The documents, which contain recorded weather conditions from the Westchester County Airport, indicate that no precipitation was recorded from approximately 3:00 a.m. on March 8, 2018, through approximately 5:00 a.m. on March 9, 2018. From approximately 6:00 a.m. on March 9, 2018 through 7:45 a.m., there were trace amounts of snow.[1] Defendant also relies on records from the Westchester Volunteer Ambulance Corps that transported Plaintiff to the hospital. Those records indicate that there was a snow shower and "ice conditions" when the ambulance arrived at the site of Plaintiff's accident. The Court notes, however, that Defendant has not established that the ambulance records are admissible under the business records exception to the hearsay rule, or otherwise.

In any event, Defendant has also submitted Plaintiff's deposition testimony in support of its motion. Plaintiff testified that there was snow on the pavement and in between vehicles parked in the middle of the parking lot from a prior snowfall, but there was no precipitation falling when he slipped and fell. Defendant's own submissions therefore raise a triable issue of

[1]There is no evidence in the record as to the distance between the Westchester County airport and the location of Plaintiff's accident or whether the airport conditions would be representative of the conditions at that location. *See, e.g, Duffy-Duncan v. Berns & Castro*, 45 A.D.3d 489, 490, 847 N.Y.S.2d 36 (1st Dep't 2007)("certified climatological reports submitted by defendants, and unaccompanied by an expert opinion, were insufficient to demonstrate a lack of constructive notice inasmuch as the reports. . . were taken in neighboring counties, and are not dispositive as to the conditions of the site of plaintiff's fall").

fact as to whether there was a storm or inclement weather at the time of Plaintiff's accident. *See Cartolano v. Cornwell Ave. Elementary Sch.*, 183 A.D.3d 689, 121 N.Y.S.3d 895 (2d Dep't 2020); *Govenettio v. Dolgencorp of N.Y., Inc.*, 175 A.D.3d 1805, 109 N.Y.S.3d 796 (4th Dep't 2019)(defendants' own submissions raise an issue of fact as to whether there was a storm in progress by submitting the deposition testimony of plaintiff, who testified that it was overcast but not snowing or raining); *also see See Coelho v. S & A Neocronon, Inc.*, 115 N.Y.S.3d 91, 93 (2d Dep't 2019).

Since Defendant has not met its prima facie burden with respect to the storm in progress rule, the Court does not address the sufficiency of Plaintiff's opposition papers. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985).

Accordingly, for the foregoing reasons; it is hereby:

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

ORDERED, that this matter is referred to the Settlement Conference Part, Courtroom 1600, on a date to be determined by that Part.

Dated: White Plains, New York
September 11, 2020

Hon. James W. Hubert
Supreme Court Justice