SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JAMES WEST,

Plaintiff,

-against-

AGM ENTERPRISES, INC., LAUNDRY CONNECTION, and BOUNCING BUBBLES, INC.,

Defendants.

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Index No. 57389/2018

DECISION & ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Motion Seq. #1

Hubert, J.S.C.

Plaintiff James West commenced this personal injury action after he allegedly slipped and fell on an icy sidewalk along 370 Warburton Avenue in Yonkers, New York. The accident occurred at approximately 10:30 p.m. on February 8, 2018, on the sidewalk of Glenwood Avenue near the corner of Warburton Avenue, where Defendant Bouncing Bubbles, Inc. operates a laundromat. The property is owned by Defendant AGM Enterprises, Inc. ("AGM"). The City of Yonkers owns the sidewalks abutting each side of the property. Meteorological records show that it snowed from 8:00 a.m. to 2:00 p.m. on February 7, 2018, one day before the incident.

Plaintiff's complaint alleges a cause of action for common law negligence against Defendants. The bill of particulars also alleges a theory of liability based upon a violation of City of Yonkers Code, Chapter 103, Article II, Section 103-8 through 103-12. These sections provide that property owners or occupants have a duty to keep sidewalks adjacent to their premises clear of snow, ice and dirt. The Code further provides that any snow and ice must be removed within six hours after a daytime snowfall, and by 12:00 p.m. on the day following a nighttime snowfall. If a landowner or occupant fails to comply with these provisions, the

Yonkers Commissioner of Public Works may "cause such ice and snow to be removed" and subsequently recoup its expenses, in addition to assessing fines and penalties.

On this motion, AGM and Bouncing Bubbles, Inc. (collectively, "the Defendants"), move for an Order pursuant to CPLR § 3212 granting summary judgment against Plaintiff and dismissing the complaint. Defendants contend that summary judgment is warranted based on the well-established rule that an abutting landowner of a public sidewalk is not liable for failing to remove snow or ice from the sidewalk unless an ordinance explicitly imposes liability on the landowner for personal injury for failing to do so. Defendants also contend that there is no evidence that Defendants made the "natural condition" of the sidewalk more hazardous.

Liability for injuries sustained as a result of negligent maintenance of public sidewalks is generally placed on the municipality, not on the abutting landowner. *Lagawo v. Myers*, 149 A.D.3d 1056, 52 N.Y.S.3d 487 (2d Dep't 2017). "An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty." *Pareres v. Cho*, 149 A.D.3d 1095, 52 N.Y.S.3d 496 (2d Dep't 2017), *citing Hevia v. Smithtown Auto Body of Long Is., Ltd.*, 91 A.D.3d 822, 822-23, 937 N.Y.S.2d 284 (2d Dep't 2012); *also see Tepeu v. Nabrizny*, 129 A.D.3d 935, 11 N.Y.S.3d 251 (2d Dep't 2015)("absent a statute or ordinance which clearly imposes liability upon an abutting landowner, only a municipality may be held liable for the negligent failure to remove snow and ice from a public sidewalk"); *Norcott v. Central Iron Metal Scraps*, 214 A.D.2d 660, 625 N.Y.S.2d 260 (2d Dep't 1995)(same).

However, an owner of property abutting a public sidewalk who undertakes snow and ice removal, but in doing so, makes "the natural conditions more hazardous" may be liable for any resulting injury. *Rodriguez v. County of Westchester*, 138 A.D.3d 713, 29 N.Y.S.3d 418 (2d Dep't 2016); *Herskovic v. 515 Ave. I Tenants Corp.*, 124 A.D.3d 582, 997 N.Y.S2d 907 (2d Dep't 2015)(property owners who engage in snow and ice removal must act with reasonable care in order to avoid creating a hazardous condition or exacerbating a natural hazard).

In support of their motion, the Defendants have demonstrated, *prima facie*, that no ordinance or statute placing an obligation on them to maintain the sidewalk expressly makes them liable for injuries caused by a failure to perform that duty. *See Pareres v. Cho*, 149 A.D.3d 1095, 52 N.Y.S.3d 496 (2d Dep't 2017). As noted above, although the Code of the City of Yonkers imposes a duty on abutting landowners to clear snow, ice and debris from any sidewalks abutting their properties, it does not impose tort liability on a property owner for any injuries caused by a violation of that duty. Instead, landowners are subject to costs, fines and other sanctions. *See* Chapter 103, Article XV, and Chapter 1, Article III, § 1-21.

Accordingly, the Defendants may be held liable for a hazardous snow and ice condition on the sidewalk only if they undertook snow and ice removal efforts that made the naturally occurring condition more hazardous or caused the defect to occur because of a special use. *See Hausser v. Giunta*, 88 N.Y.2d 449, 452-53, 646 N.Y.S.2d 490 (1996); *Lee v. Ilyasov*, 95 A.D.3d 1205, 945 N.Y.S2d 150 (2d Dep't 2012).

The Defendants contend that "there is no evidence that [they] undertook steps that made the natural conditions more hazardous." In support of their argument, the Defendants rely on a Decision & Order issued by the Hon. Terry Jane Ruderman in *Hernandez v. Lopez*, Index. No.

53667/2015, dated February 19, 2019. In that case, involving nearly identical facts under Yonkers City Code § 103-8 *et. seq.*, Judge Ruderman granted summary judgment to the defendants, on the grounds that "no evidence has been submitted by plaintiff that would support a finding that the moving defendants 'undertook snow and ice removal effort which made the natural conditions more hazardous.'" *Rogers v. Homestead Renovations, LLC*, 119 A.D.3d 668, 990 N.Y.S.2d 527 (2d Dep't 2014).

The Court notes, however, the proponent of a summary judgment motion bears the initial burden of coming forward with evidence showing its *prima facie* entitlement to judgment as a matter of law. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985). "[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." *River Ridge Living Ctr., LLC v. ADL Data Sys., Inc.*, 98 A.D.3d 724, 726, 950 N.Y.S.2d 179 (2012) (internal quotation marks omitted).

Accordingly, it is the Defendants' burden to establish that they "did not increase or exacerbate the hazardous condition of the public sidewalk beyond that which would have naturally occurred in the absence of any snow removal efforts." *Rogers v. Homestead Renovations, LLC*, 119 A.D.3d 668; *see Bleich v. Metropolitan Mgt., LLC*, 132 A.D.3d 933, 19 N.Y.S.3d 527 (2d Dep't 2015)(reversing summary judgment where defendant established that no statute or ordinance imposed tort liability on it, but failed to make a *prima facie* showing "any snow and ice removal efforts undertaken by it, or by persons on its behalf, did not exacerbate the hazardous condition which allegedly caused the injured plaintiff to fall").

Here, the Defendants submitted no evidence about ice removal efforts undertaken prior to

Plaintiff's alleged accident on February 8, 2018. In support of their motion, Defendants submitted, *inter alia*, copies of relevant pleadings, deposition transcripts of Mario Campoverde, the owner of Bouncing Bubbles, Inc.; James Mazzella, the president of AGM; Albert DePierro, City of Yonkers Code enforcement supervisor; and the Plaintiff. The deposition testimony of Mario Campoverde, which was not a model of clarity, established, at best, that he inspected the sidewalks on a daily basis cleared the sidewalks of snow and ice using a snowblower and by shoveling, and used salt when necessary. Campoverde also testified that he had never received any complaints or violations from the City of Yonkers concerning the laundromat's snow and ice removal efforts. He had no recollection of clearing the property of snow and ice prior to February 8, 2018.

In sum, the Defendants established that no statute or ordinance imposed tort liability on them, but failed to make a *prima facie* showing that there were no efforts to clear the sidewalk on the date of the injured plaintiff's accident or that any snow and ice removal efforts undertaken by them did not exacerbate a hazardous condition which allegedly caused Plaintiff to fall. *See Rodriguez v. County of Westchester*, 138 A.D.3d 713, 29 N.Y.S.3d 418 (2d Dep't 2016).

Finally, AGM states that the causes of action asserted against it should be dismissed based on the lease agreement between AGM and the laundromat, which provides that the tenant is responsible for removing snow and ice from the premises. "An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct." *Alnashmi v. Certified Analytical Group, Inc.*, 89 A.D.3d 10, 18, 929 N.Y.S.2d 620 (2011). However, AGM has failed to establish, *prima facie*, that it was an out-of-possession landlord.

The copy of the lease submitted is illegible, and AGM does not offer any specific proof on this issue. It is not the Court's duty to comb the record for evidence that a party fails to highlight in its moving papers.

Since the Defendants failed to satisfy their *prima facie* burden, the Court does not consider the sufficiency of Plaintiff's opposition papers. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853. Accordingly, for the foregoing reasons, it is hereby:

ORDERED, that Defendants' motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint is DENIED; and it is further

ORDERED, that this matter is referred to the Settlement Conference part, Courtroom 1600, at 9:15 a.m. on March 17, 2020 for a Pre-Trial Conference.

Dated: White Plains, New York
January 30, 2020

James W. Hubert
Supreme Court Justice