SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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INDEX NO. 158866/2018

GERSHON SUERO and PRISIA GRISMILDA SUERO-MATOS,

Plaintiffs,

MOTION SEQ. NO. 002

- v -

MARK ESSEX, LLC, GEORGE ESSEX, LLC, SHAHNAZ ESSEX, LLC, RONIT ESSEX, LLC, SAM ESSEX, LLC, SHAHLA ESSEX, LLC, WEX LLC, and THE CITY OF NEW YORK,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action commenced by plaintiffs Gershon Suero ("plaintiff") and Prisia Grismilda Suero-Matos ("Ms. Suero-Matos") (collectively "plaintiffs"), defendants Mark Essex LLC, George Essex, LLC, Shahnaz Essex, LLC, Ronit Essex, LLC, Sam Essex, LLC, Shahila Essex, LLC, and Wex LLC (collectively "movants") move, pursuant to CPLR 3212 to dismiss all claims against them. Plaintiffs oppose the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

Plaintiff claims that he was injured on March 21, 2018 when he slipped and fell on snow and/or ice on a sidewalk adjacent to 49 Essex Street in Manhattan which was allegedly owned,

operated, controlled, and/or managed by movants. Doc. 1. Ms. Suero-Matos alleges a claim for loss of consortium. Doc. 1.[1]

Plaintiff appeared for a 50-h hearing at which he testified, inter alia, that he slipped because the sidewalk was uneven and covered with black ice. Doc. 58 at 13-14, 18-21. He did not know how long the black ice had been present before he fell but described the sidewalk as "dirty and hard." Doc. 58 at 14. He also said that the snow that day ended about two hours before he fell. Doc. 58 at 12.

At his deposition, plaintiff testified, inter alia, that he slipped on "black ice and then snow." Doc. 38 at 13, 18-21. He again stated that he did not know how long the black ice had been present before he fell but that the sidewalk was "dirty and hard." Doc. 38 at 14. He also said that it had stopped snowing approximately two hours before he fell. Doc. 38 at 12.

Movants now seek summary judgment pursuant to CPLR 3212, asserting that the complaint must be dismissed on the grounds that: 1) there was a storm in progress at the time of the incident; and 2) there is no evidence that they had actual and/or constructive notice of the allegedly dangerous condition. Docs. 31-43. In support of the motion, movants submit, inter alia, the affidavit of a Thomas M. Else, AMS, CCM, a meteorologist, who opines that, based on his review of certified weather records, there was a storm in progress at the premises at the time of the incident. Doc. 40. He also represents that "there was no snow or ice cover present at the subject location" at the time of the alleged incident and that any snow or ice remaining from the last snowstorm on March 14, 2018 was gone. Doc. 40.

In opposition, plaintiffs argue that the motion must be denied because issues of fact exist regarding whether the sidewalk itself was defective. Doc. 44. They further contend that movants

[1] Plaintiffs' claims against the City of New York were dismissed by decision and order (Sweeting, J.) entered November 2, 2020. Doc. 69.

failed to establish that they did not create or have actual and/or constructive notice of the hazardous condition. Doc. 44. Additionally, they assert that, since plaintiff testified that he fell due to black ice, issues of fact exist regarding constructive notice. Doc. 44.

Plaintiff submits an affidavit in opposition to the motion, in which he attests that it stopped snowing approximately two hours before he fell; that there was "dirty black ice and some snow" on the sidewalk in the area where he fell; and that the sidewalk was "defective and uneven" in that area. Doc. 46.

In reply, movants assert that the storm in progress doctrine applies herein since "[t]here is no evidence to support plaintiff's testimony that it stopped snowing two (2) hours before the subject incident." Doc. 48. They also contend that plaintiff's testimony that he fell due to a defective sidewalk is "dishonest" since he testified that he fell on black ice. Doc. 48. Additionally, movants maintain that, since the last snowstorm prior to the incident occurred on March 14, 2018, "it was scientifically impossible for black ice to [have been] present on the sidewalk before the onset" of the storm allegedly in progress at the time of the incident. Doc. 48.

It is well settled that on a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing is made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324).

This Court finds that movants established their prima facie entitlement to summary judgment by submitting Else's affidavit, in which he concluded, based on certified weather records, that there was a storm in progress at the time of the alleged incident. This doctrine, set

forth in section 16-123 of the New York City Administrative Code, requires that a property owner remove fallen snow from sidewalks adjoining its premises within four hours after a snowfall ends.

In opposition, however, plaintiffs raise a triable issue of fact by submitting the testimony and affidavit of plaintiff, which reflect that the ice in the area in which he fell was dirty. In opposing the motion, plaintiffs correctly rely on *Guzman v Broadway 922 Enterprises, LLC*, 130 AD3d 431 (1st Dept 2015). In that case, the Appellate Division, First Department determined that, despite defendant's argument that it was not liable based on the storm in progress doctrine, plaintiff's testimony that there was "dark" and "dirty" black ice where the fall occurred was, "standing alone . . . sufficient to raise an issue of fact [regarding] whether the ice had been [present] long enough to have been discovered and remedied by defendant" (*Guzman*, 130 AD3d at 431 [citations omitted]).

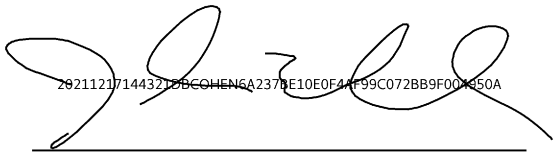
The contentions in movants' reply papers are without merit. Although they assert that there is "no evidence" that the snow stopped two hours before plaintiff fell, plaintiff testified to this effect at his 50-h hearing and at his deposition, and also confirmed this in his affidavit in opposition to the motion. Statements made under oath are clearly competent evidence which this Court can consider on a motion for summary judgment. Further, although they contend that plaintiff's testimony that he fell due to a defective sidewalk is "dishonest", it is well settled that credibility issues are not to be resolved on a motion for summary judgment (*See S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Almonte v 638 W. 160 LLC*, 139 AD3d 439 [1st Dept 2016]). Finally, movants maintain that, since the last snowstorm prior to the incident occurred on March 14, 2018, "it was scientifically impossible for black ice to [have been] present on the sidewalk before the onset" of the storm allegedly in progress at the time of the incident. Since a layman such as movants' counsel cannot submit a scientific opinion such as this, it was incumbent upon

Else to make this representation in his affidavit, which he did not. Moreover, since Else was not at the premises when the alleged incident occurred, there is no basis for his representation that "there was no snow or ice cover present at the subject location" at the time of the occurrence, especially given that he admits that there had been a snowstorm the previous week.

Accordingly, it is hereby:

ORDERED that the motion by defendants Mark Essex LLC, George Essex, LLC, Shahnaz Essex, LLC, Ronit Essex, LLC, Sam Essex, LLC, Shahila Essex, LLC, and Wex LLC seeking summary judgment is denied; and it is further

ORDERED that the parties are to appear for a status/settlement conference in this matter on February 15, 2022 at 10:30 a.m.



12/17/2021
DATE

DAVID B. COHEN, 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