Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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ROCHDALE INSURANCE COMPANY, as assignee of RENEE DALY, assignor,

Plaintiff,

-against-

Index No.: 701319/19
Mot. Cal. Date: 3/8/22
Mot. Seq. 3

CHIRA TAWIL, LLC, FRANCMEN TAWIL, LLC., JAMAICA AVENUE, INC., 165 JAMAICA AVENUE, INC., YOUNG HYUN KWON and BOSS BEAUTY,

Defendants.

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The following papers were read on this motion by defendants Chira Tawil, LLC and Francmen Tawil, LLC, for an order granting summary judgment in their favor, pursuant to CPLR 3212, and/or dismissing the complaint of the plaintiffs and any and all cross-claims as against them, pursuant to CPLR 3211(a)(7).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 32-43
Answering Affidavits-Exhibits.....	EF 46-48
Replying Affidavits.....	EF 50

Upon the foregoing papers, it is ordered that the motion by defendants Chira Tawil, LLC and Francmen Tawil, LLC, is denied.

The underlying action is one brought by the plaintiff Rochdale Insurance Company as assignee of Renee Daley to recover worker's compensation benefits, allegedly paid to Renee Daley, as a result of a slip and fall on snow outside the front entrance to her then employer's retail establishment, located at 89-78 165th Street, Jamaica New York (Boss

Beauty), on January 24, 2016, at 10:00 a.m. Plaintiff's assignor, Renee Daley, maintains that she sustained serious personal injuries due to the negligence of the moving defendants. It is undisputed that the subject premises were owned by defendant Chira Tawil, LLC, at the time of the subject accident.

Defendants Chira Tawil, LLC and Francmen Tawil, LLC, now move for an order granting summary judgment in their favor, pursuant to CPLR 3212, and/or dismissing the complaint of the plaintiffs and any and all cross-claims as against them, pursuant to CPLR 3211(a)(7).

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v Montrose Knitwear Corp*., 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

For the moving defendants to be liable, the plaintiff must prove that the defendants either created or had actual or constructive notice of a dangerous condition (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit a defendant to discover and remedy it (*Id*.).

Moving defendants established that there are no triable issues of fact. Moving defendants established their *prima facie* entitlement to summary judgment by showing that they neither created an unsafe condition nor had actual or constructive notice thereof

(*see Rajgopaul, et. al. v Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). In support of the motion, moving defendants presented, *inter alia*, an affidavit of Eli Tawil, who avers that he is a member of Francmen Tawil, LLC. and had previously been a member of Chira Tawil, LLC, and that Chira Tawil, LLC, was the owner of the property, located at 89-66 165th Street, Jamaica, NY, on January 24, 2016. Additionally, Mr. Tawil avers that no one from Chira Tawill, LLC. or Francmen Tawill, LLC. shoveled snow in front of the subject premises after the snowfall, on January 24, 2016, and prior to plaintiff's alleged fall. Moving defendants also submit the meteorological records and an affidavit of Consulting Meteorologist, Brett Zweiback, who averred that: as of the afternoon of January 22, 2016, there was no snow depth on, *inter alia*, any "untreated outdoor surfaces; later that same day, " a blizzard with heavy snow, gusty winds and blowing/snow," began in the evening of January 22, 2016, and continued through late night, January 23, 2016, ending by 2:28 am, January 24, 2016. He further testified that this was an "historic winter storm with record breaking snow and severe disruption to travel in and across Queens and the entire New York City Metropolitan Area. Total snowfall from this event was 30.6 inches with snowfall rates during January 23, 2016, averaging between 1 to 3 inches per hour much of the day. There was still 1-inch per hour snow rates occurring between 9pm. to 10 pm, January 23, 2016, with additional light accumulations occurring up to and past midnight. Snow ended by 2:38am, January 24, 2016."

Under the "storm in progress" rule, "a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or 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" (*Dowden v. Long Island Rail Road*, 305 AD2d 631 [2d Dept 2003]).

On a motion for summary judgment, the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case *(see Valentine v City of New York*, 57 NY2d 932, 933-934 [1982]; *Sie v Maimonides Medical Center,* 106 AD3d 900 [2d Dept. 2013]; *Lanos v Cronheim*, 77 AD3d 631 [2d Dept. 2010]). 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 (*see* Mazzella v City of

New York, 72 AD3d 755 [2d Dept. 2010]; *DeStefano v City of New York*, 41 AD3d 528 [2d Dept. 2007]). But "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" (Mazzella v City of New York, supra at 756 [*internal quotation marks omitted*]; *see Dancy v New York City Hous. Auth*., 23 AD3d 512 [2d Dept. 2005]).

Plaintiff presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. Plaintiff contends that moving defendants' meteorological records reveal that only trace amounts of snow fell after 7 p.m. on January 23, 2016, and as such, the storm was actually over at 7 p.m. Plaintiff also submits its assignor's own examination before trial transcript testimony wherein she testified, *inter alia,* that: she slipped on snow in front of moving defendants' premises, at 10:00 a.m., on the morning of January 24, 2016.

There are triable issues of fact in connection with, *inter alia*, whether a defective condition existed, whether the moving defendants had actual or constructive notice of a defective condition, whether a reasonably sufficient period of time had passed from the cessation of the storm to allow for the taking of protective measures, and whether the moving defendants acted reasonably under the circumstances (*See Gonzalez v. American Oil Co.*, 42 AD3d 253 [1st Dept 2007]. On these issues, a trial is needed and the case may not be disposed of summarily as there remains issues of fact in dispute.

Accordingly, it is

ORDERED that the summary judgment motion by defendants Chira Tawil, LLC and Francmen Tawil, LLC is denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 27, 2022

FILED
6/2/2022
COUNTY CLERK
QUEENS COUNTY

TIMOTHY J. DUFFICY, J.S.C.