Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

MICHAEL HENNESSEY,

Plaintiff,

-against-

91 AMERICAN GROCERY, et al

Defendant.

Index Number 28390/2000

Motion Date March 11, 2003

Motion Cal. Number 3

The following papers numbered 1 to 25 read on this motion by defendant for summary judgment dismissing plaintiff's complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross-Motion-Affidavit-Exhibits-Memorandum	5-9
Notice of Cross-Motion-Affidavit-Exhibits	10-13
Affirmation in Opp. and Support of Cross-Motion...	14-17
Reply Affidavits	18-19
Reply Affidavits	20-21
Reply Affidavits	22-23
Reply Affidavits	24-25

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

In this action, plaintiff seeks damages for personal injuries allegedly sustained on February 13, 2000, at approximately 11:00 P.M., when he slipped and fell on snow and ice on a sidewalk adjacent to premises leased by moving-defendant 91 AMERICAN GROCERY and cross-movant KAZU, INC. and owned by cross-moving defendants THOMAS BLOOM AND ALEX EDELMAN. Plaintiff testified that after he slipped, he saw snow and ice on the ground, and that it had been raining out and the weather was cold at that time. Plaintiff also testified that after he slipped, he saw a pile of snow and ice on both sides of the sidewalk adjacent to the drug store, and that the sidewalk in front of the grocery store had been completely cleared.

No local climatological records were submitted by defendant-movant or cross-movants to indicate when the last snowfall had occurred.

It is well-settled that an owner or lessee of property is under no duty to pedestrians to remove snow and ice that naturally accumulates upon the public sidewalk in front of his or her premises. (*See, Muro v. Romano,* 2003 N.Y. App. Div. LEXIS 518 [2d Dept. 2003]; *Verdino v. Alexandrou,* 253 A.D.2d 553 [2d Dept. 19981; *Stewart v Yeshiva Nachlas Haleviym,* 186 A.D.2d 731 [2d Dept. 1992]).

A failure to remove all of the snow is not negligence and liability will not result unless it is shown that the defendant made the sidewalk more hazardous through his or her removal efforts. (*See, Spicehandler v. New York,* 303 N.Y. 946 [1952]; *Yen Hsia v. City of New York,* 295 A.D.2d 565 [2d Dept. 20021; *Case v. City of New York,* 295 A.D.2d 464 [2d Dept. 2002]; *Klein v. Chase Manhattan Bank,* 290 A.D.2d 420 [2d Dept. 20021); *Palmer v. City of New York,* 287 A.D.2d 553 [2d Dept. 2001]; *Prado v. City of New York,* 276 A.D.2d 765 [2d Dept. 20001; *Alexis v. Lessey,* 275 A.D.2d 754 [2d Dept. 2000]; *Goldstein v. Moskowitz,* 271 A.D.2d 489 [2d Dept. 2000]; *Lakhan v. Singh,* 269 A.D.2d 427 [2d Dept. 20001; *Bautista v. City of New York,* 267 A.D.2d 265 [2d Dept. 1999]; *Rector v. City of New York,* 259 A.D.2d 319 [1st Dept. 1999]).

Initially, the Court will address the more crystalline issue of the liability, or lack thereof, of the cross-movants, THOMAS BLOOM and ALEX EDELMAN, the out-of-possession owners of property abutting the location of the plaintiff's fall.

Defendants THOMAS BLOOM and ALEX EDELMAN have met their burden of demonstrating their entitlement to summary judgment on the ground that, as abutting, out-of-possession landowners , they had no obligation to clear the sidewalk of snow and ice, maintained no rights of control over the lease'd premises, and that neither they nor anyone on their behalf shoveled the sidewalk. (*See, Mourounas v. Naji Abi Shahin,* 291 A.D.2d 537 [2d Dept. 20021; *Muro v. Romano, supra; Feiler v. Greystone Building Co., 2003 N.Y.* App. *Div. LEXIS* 875 *[1st Dept. 2003]; Stewart v Yeshiva Nachlas Haleviym, supra).* They further established that the lease required the tenant to maintain the sidewalk and remove snow. In opposition, the plaintiff failed to submit proof in evidentiary form sufficient to raise an issue of fact in response **to** the admissible documentary proof submitted by these defendants.

With regard to the plaintiff's claim of defective lighting, which is purportedly supported by the plaintiff's affidavit in opposition to the within motion for summary judgment, the Court finds that it contradicts his earlier deposition testimony, in

which he stated that he did not have any difficultly seeing while he was walking before his accident. *(See,* examination-before-trial of plaintiff, Michael Hennessey, at p. 32, line 20). This affidavit is apparently an attempt to raise feigned factual issues designed to avoid the consequences of his deposition testimony, and will not be considered. *(See, e.g., Fontana* v. *Fortunoff,* 246 A.D.2d 626 [2d Dept. 19981; *Semple* v. *Sterling Estates, LLC.,* 751 NYS2d 306 [2d Dept. 20021; *Christopher* v. *N.Y.C.T.A.,* 752 N.Y.S.2d 76 [2d Dept. 20021).

Accordingly, the cross-motion of defendants THOMAS BLOOM and ALEX EDELMAN is *granted,* and plaintiff's complaint and all cross-claims and counter claims against them are hereby dismissed.

The Court next addresses the contentions of the cross-movant, defendant KAZU, INC D/B/A ROCKAWAY BEACH PHARMACY. This defendant urges that the case of *Archer v. City of New York,* (752 NYS2d 698 [2d Dept. 2002]), is controlling in the instant matter, and is thereby entitled to precedential application. However, a careful examination of the factual scenario in *Archer* demonstrates that it *is* readily distinguishable from the within fact pattern. In *Archer,* plaintiff claimed to have fallen *in the vicinity of a curb cut* at the intersection of 31st Street and Church Avenues in the County of Kings while *trying to gain access to the adjacent sidewalk* where snow had been affirmatively cleared by the lessees of the store adjacent to the sidewalk. *(Emphasis added).* In the case at bar, plaintiff claims to have fallen *on the adjacent sidewalk* itself, where both defendants affirmatively admit having cleared the snow. *(Emphasis added).* In *Archer,* the defendant-lessee of the store adjacent to the sidewalk was able to submit evidence which demonstrated "that they undertook no snow removal efforts in the area where the plaintiff fell and did not otherwise exacerbate the snow and ice condition at that location". *(See, Archer, supra.)* By contrast, defendants herein concede having undertaken snow removal efforts in the area in which plaintiff claims to have fallen. The Court likens the instant factual predicate to the case of *Goldstein v. Moskowitz,* (271 A.D.2d 489 [2d Dept. 2000]), wherein "the defendants admitted that someone shoveled the sidewalk in front of their premises and put salt on the sidewalk the day before the accident". In that case, the Second Department held that "this admission provides evidence from which a jury could conclude that the defendants, having undertaken to shovel the sidewalk, did so in a manner which left it more hazardous than it would have been had it not been shoveled at all." *(Goldstein* v. *Moskowitz, supra.)* In the case at bar, the resolution of the issue of the sufficiency of the efforts by defendants to remove the snow and ice cannot be determined on this motion for summary judgment. *(See*

also, ***Lopez v. City*** *of* ***New York,*** 290 A.D.2d 539 [2d Dept. 20021). If plaintiff's testimony to the effect that the area in which he fell appeared to have been shoveled is accepted at trial, it may be inferred that defendants were negligent in their failure to clear the sidewalk of snow and ice, and that defendants' negligence directly or indirectly caused plaintiff's injuries.

As a general rule, the owner or proprietor of non-residential premises may await the end of a snow or ice storm and for a reasonable time thereafter before undertaking protective measures to correct storm-created, hazardous conditions caused by accumulated ice and snow upon its outside walks and steps ***(See,*** *Whitt* ***v. St. John's Episcopal Hospital,*** 258 A.D.2d 648 (2d Dept. 1999]; ***see generally, Simmons v Metropolitan*** *Life* ***Ins.*** Co., 84 N.Y.2d 972 (1994]]; IA NY PJI3d 573 [2003]; 86 NY Jur, ***Premises Liability,*** s 300). The Court notes that neither of the moving defendants have submitted a climatological report on the issue of whether they took protective measures within a reasonable period of time after the cessation of the last snowfall in order to correct any hazardous snow and ice conditions. The question whether the owner-possessor acted reasonably both as to time and as to measures taken presents issues of fact for the trier-of-fact.

Defendant 91 AMERICAN GROCERY contends that the fact that the plaintiff has listed the locations of the premises of both adjacent defendant-lessees, to wit, 90-17 *and* 90-19, in his bill of particulars, as the location of the accident, mandates dismissal for failure of the plaintiff to pinpoint the exact location of his accident. ***(Emphasis*** *added.)* However, the Court finds that the cogency of this argument is belied by the photograph annexed to this defendant's moving papers as Exhibit "D", wherein the plaintiff has marked the location where he fell with an "X". It appears from the photograph that the plaintiff may have fallen on the sidewalk between the stores leased by both defendants. Thus, it was prudent on the part of the plaintiff to list both locations, and to allow the jury to determine from the evidence presented at trial, including prospectively the marked photograph, which abutting property lessee's sidewalk the plaintiff fell on, and whether the snow-removal efforts of either or both defendants exacerbated the hazardous condition of the area.

In conclusion, in this case, moving defendant **91** AMERICAN GROCERY and cross-moving defendant KAZU, INC. have failed to present competent evidence demonstrating their entitlement to summary judgment as a matter of law. Since the defendants failed to meet their burden, it is not necessary to consider whether the plaintiff's papers in opposition to the motion were sufficient to raise a triable issue of fact. *(See, Alvarez v* ***Prospect*** *Hosp.,* ***68***

N.Y.2d 320, 324 [1986]; *Balanca v. M. Foschi & Sons, Inc.*, 2003 N.Y. App. Div. LEXIS 1383 [2d Dept. 20031). Even assuming, *arguendo*, that the defendants met their burden, the plaintiff's deposition testimony and affidavit in opposition to the within motion nonetheless raises triable issues of fact as to the propriety of the defendants' admitted snow-removal efforts. *(See, Goldstein* v. *Moskowitz, supra)*.

Turning to the plaintiff's cross-motion to amend his bill of particulars to allege a violation of Administrative Code 27-318, the Court finds as follows. Although leave to amend a complaint should be freely granted *(See,* CPLR 3025 [a]), the movant must make some evidentiary showing that the proposed amendment has merit, since a proposed amendment that is plainly lacking in merit will not be permitted. *(See, Curran v. Auto Lab Serv. Ctr.*, 280 A.D.2d 636 [2d Dept. 20011; *Heckler Elec. Co. v Matrix Exhibits-N. Y.*, 278 A.D.2d 279 [2d Dept. 20001; *Bonnen v. Chin Hua Chiang*, 272 A.D.2d 357 [2d Dept. 20001; *West Branch Realty Corp. v Exchange Ins. Co.*, *260* A.D.2d 473 [2d Dept. **19991).** While it is true that a landowner has a duty to provide reasonable illumination to the exterior portions of his or her premises, *(See, Gallagher v St. Raymond's R.C. Church,* 21 N.Y.2d 554 [1968]), and may be liable for inadequate exterior lighting where there is a defect or hazard that couid not be seen due to the lack of lighting, *(See, e.g., Miccoli v. Kotz,* 278 A.D.2d 460 [2d Dept. 20001; *see also, Hesson* v. *Coppola,* 753 N.Y.S.2d 775 [4th Dept 20031; *Peralta v. Henriquez,* 292 A.D.2d 514 [2d Dept. 2002]), plaintiff has failed to make any evidentiary or legal showing that either this duty extends to public sidewalks, or that the Administrative Code provision in question was intended to be applicable to the facts presented at bar. Accordingly, plaintiff's cross-motion to amend must be denied.

Accordingly, defendant **91** AMERICAN GROCERY's motion for summary judgment is *denied;* defendant KAZU, INC.'s cross-motion seeking the same relief is also *denied;* the cross-motion of defendants THOMAS BLOOM and ALEX EDELMAN seeking summary judgment is *granted* and the complaint and all cross-claims and counter claims against them are dismissed; and the plaintiff's cross-motion to amend his bill of particulars is *denied.*

Dated: March 14, 2003

JANICE A. TAYLOR, J.S.C.