At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York, on the 14th day of May, 2004

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

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ROBERT MORRIS and MARJORIE MORRIS,

Plaintiffs,

vs.

JOHNSON CONTROLS WORLD SERVICES, INC. and E.E. ROOT AND SONS, INC.,

Defendants.

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**DECISION AND ORDER**

Index No. 2002-0414
RJI No. 2004-0364-M

APPEARANCES:

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**HON. JEFFREY A. TAIT**

Plaintiffs Robert and Marjorie Morris commenced this personal injury action against defendants Johnson Controls World Services, Inc. and E.E. Root and Sons, Inc., both property maintenance contractors, alleging negligence. Specifically, plaintiffs assert that at about 10:45 p.m. on December 20, 2000, plaintiff Robert Morris slipped and fell on snow and/or ice located on an internal roadway of his employer IBM's property near what is known as Parking Lot #7. Plaintiffs allege that defendants negligently failed to remove that snow and/or ice. After completion of discovery, the parties voluntarily discontinued the action against E.E. Root.[1]

Defendant Johnson Controls now moves for summary judgment pursuant to CPLR Rule 3212 on the ground that there are no material triable issues of fact concerning its liability due to the lack of actual or constructive knowledge of the allegedly dangerous condition.

In support of its motion, defendant Johnson Controls submits an affirmation from its attorney ("Fowler affirmation") and an affidavit from its Grounds and Buildings Maintenance Supervisor ("Diachuk affidavit"). The pleadings and deposition transcripts of plaintiff Robert Morris, Joan Maroni, Van Thomas Laskaris, and Stefan Diachuk are attached to the Fowler affirmation. The Diachuk affidavit asserts that defendant Johnson Controls never received notice of a problem or a dangerous condition in the roadway near Parking Lot #7, where plaintiff Robert

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[1] IBM had hired defendant Johnson Controls for property and roadway maintenance, which in turn hired defendant E.E. Root to actually perform the work, including snow and ice removal, on the IBM property. Since E.E. Root did not have the discretion to determine how or when snow or ice removal was performed, the parties agreed to, and did, voluntarily discontinue the action against it.

Morris fell.

In opposition to defendant Johnson Control's motion, plaintiffs submit an affidavit from their attorney ("Gates affidavit"), attached to which are a chart showing the climatological data for the time period and an area several miles away from the area in question and the deposition transcript of an employee of former defendant EE Root ("Wood affidavit").

According to the Gates affidavit, the climatological data shows that approximately four (4) inches of snow fell on December 19, 2000 at a point located several miles from the location of the site at issue. The Gates affidavit asserts that weather conditions for that same area improved on December 20, 2000, with the area receiving 126 minutes of sunlight and only trace precipitation, although temperatures never rose above freezing. The Gates affidavit points out that defendant Johnson Controls ,"was aware of problems involving snow melting and re-freezing," as established through the Diachuk deposition. In addition, the Gates affidavit asserts that E.E. Root personnel left the site of the accident by 9:00 am on December 20, 2000 and did not return with the salt truck until 1:00 am on December 21, 2000 (subsequent to plaintiff Robert Morris's fall).

In order to impose liability for a slip and fall upon a landowner, there must be some evidence that the defendant knew or, in the exercise of reasonable care, should have known that icy conditions existed and nonetheless failed to exercise due care to correct the situation within a reasonable time after the cessation of the storm or temperature fluctuations causing the dangerous condition (*Wimbush v. City of Albany*, 285 AD2d 706 [3d Dept 2001]). The plaintiff must be able to establish that the defendant had actual or constructive knowledge of the icy or snowy condition that caused the accident (*Wood v. Converse*, 263 AD2d 860, 861 [3d Dept

1999]). A general awareness that snow or ice might accumulate is insufficient to establish constructive notice, which requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendant to discover it and take corrective action (*see Wimbush*, 285 AD2d at 707; *see also Wood*, 263 AD2d at 861).

In support of its motion, defendant Johnson Controls cites to the testimony of Grounds Supervisor Stefan Diachuk. Diachuk testified that E.E. Root employees worked on clearing IBM's roads and parking lots from 10:00 pm on December 19, 2000 through 9:00 am on December 20, 2000 and then returned to the site at 1:00 am on December 21, 2000 for touch up plowing of the manufacturing lots.

At his deposition, Diachuk presented a "grounds maintenance assessment form" prepared by IBM, showing the results of IBM's inspection of the property at 7:00 am on December 20, 2000. There is no mention of the roadway near Parking Lot #7 where plaintiff Robert Morris fell, which, according to Mr. Diachuk, signifies that IBM noted no problem with the snow and ice removal in the subject area. Further, there is nothing in the record that shows that there was any additional accumulation.[2] Accordingly, there was no showing in the record on this motion of additional accumulation between the time of IBM's December 20, 2000 morning inspection and the time of plaintiff Robert Morris's fall later that night. Finally, the Diachuk affidavit asserts that defendant Johnson Controls never received notice of a problem or a dangerous condition in the roadway near Parking Lot #7.

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[2] The climatological data, which confirms that there was no additional accumulation, is derived from observations and measurements taken several miles from the subject area.

In light of the foregoing, defendant Johnson Controls has met its initial burden of establishing that it lacked actual or constructive notice of the alleged snowy or icy condition (*see Wimbush*, 285 AD2d at 707).

In their opposition papers, plaintiffs essentially assert two bases in support of their assertion that defendant Johnson Controls had actual or constructive notice of a snowy or icy condition.

First, plaintiffs point out that the salt trucks left the IBM site on December 20, 2000 at 9:00 am and then returned to the site at 1:00 am on December 21, 2000, subsequent (although not in response) to plaintiff Robert Morris's December 20th 10:45 pm fall and despite the fact that no new precipitation fell in the interim. Plaintiffs assert that the condition that caused plaintiff Robert Morris to fall was there because defendant Johnson Controls either left it there or caused it to form there.

The plaintiffs cite to fellow employee Joan Maroni's deposition testimony for the proposition that there was snow and there may have been ice on the road at the time plaintiff Robert Morris fell. However, Ms. Maroni also testified that she concluded that the area might be slippery because she saw plaintiff Robert Morris fall (out of the corner of her eye at a distance of about 50 feet) and that she did not look down or go back to the location where plaintiff Robert Morris had fallen. The case law is clear that, in any event, a general awareness that a dangerous condition might exist is insufficient to establish that a defendant had constructive notice of the injury-producing condition (*Lewis v. Bama Hotel Corp.*, 297 AD2d 422 [3d Dept 2002]).

Further, at his deposition, plaintiff Robert Morris was asked to describe what he noticed about the condition of the road he was crossing just before the accident occurred. He answered:

A: There was, it was not snow covered. It was black. I didn't presume that it was icy. I didn't notice any kind of anything on, there was no, it was not sanded or anything that I could tell. It didn't look like it was any kind of a problem to me.

Q: You didn't observe snow on the roadway?

A: No.

Q: And before you fell did you observe ice on the roadway?

A: Not that I noticed, no.

(Morris deposition at p. 40). Accordingly, plaintiff Robert Morris's deposition testimony is insufficient to raise an issue of fact as to whether a visible condition existed for a sufficient period of time to put defendant Johnson Controls on constructive notice (*see Wimbush*, 285 AD2d at 707; *see also Wood*, 263 AD2d 862; *Orr v. Spring*, 288 AD2d 663, 664 [3d Dept 2001]).

Second, plaintiffs rely on the fact that defendant Johnson Controls was generally aware of "problems involving snow melting and re-freezing." However, defendant Johnson Controls's general awareness of this problem does not constitute notice (*see Wood*, 263 AD2d at 861-862).[3] "Even assuming that [defendant] possessed a general awareness of any icy condition and the corresponding need to salt the area, such notice would be insufficient to impute actual or

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[3] In *Wood*, the defendant's acknowledgment of a general awareness that runoff from melting snow crossed her driveway in certain places, coupled with the plaintiff's testimony that there was a "glaze of ice where [she] fell," was not enough to raise a question of fact (*see id.* at 861-862). Rather, the Third Department affirmed the lower Court's decision granting summary judgment to the defendant, noting that the plaintiff had also testified that she had not noticed any ice in the driveway and had no reason to believe there was any ice at the location where she fell (*see id.* at 862). A rationale for this holding that general awareness of a freeze-thaw cycle does not constitute notice is likely that freeze-thaw cycles are not regularly predictable, dependent as they may be on so many variable weather conditions.

constructive notice of the specific hazardous condition allegedly existing where [plaintiff] fell" (*Convertini v. Stewart's Ice Cream Co., Inc.*, 295 AD2d 782, 784 [3d Dept 2002]). Further, the chart attached to the Gates affidavit showing the climatological data in an attempt to show that defendant Johnson Controls had constructive notice of the condition causing the accident is too speculative to raise an issue of fact as to that matter (*see Wimbush*, 285 AD2d at 707 [holding that the affidavit of plaintiff's meteorological expert opining that freeze/thaw cycles in the days prior to the accident could have caused the ice patch to form was too speculative to raise an issue of fact as to the defendant's constructive notice of the alleged dangerous condition]).

Because plaintiffs failed to raise an issue of fact as to whether the snowy and icy condition was visible, apparent, and had existed for a sufficient period of time to permit defendant to discover and correct it, defendant's motion for summary judgment is granted (*see Robinson v. Albany Housing Auth.*, 301 AD2d 997, 998 [3d Dept 2003]).

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: July 8, 2004
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Broome:

- Notice of Motion dated March 31, 2004
  - Affirmation of Margaret J. Fowler, Esq. dated March 30, 2004
  - Affidavit of Stefan Diachuk sworn to March 25, 2004
- Affidavit of Service of Notice of Motion and supporting documents sworn to March 31, 2004
- Affidavit of Gregory A. Gates sworn to May 7, 2004
- Affidavit of Service of responding papers sworn to May 7, 2004