SHORT FORM ORDER

INDEX NO. 04-01016
CAL. NO. 06-01896-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-24-06 (#004)
MOTION DATE 9-14-06 (#005)
ADJ. DATE 11-20-06
Mot. Seq. # 004 - MG
Mot. Seq. # 005 - MG; CASEDISP.

ROBERT WINGARD, Plaintiff,	SIBEN & SIBEN Attorneys for Plaintiff 90 East Main Street Bay Shore, NY 11706
– against –	AHMUTY, DEMERS & McMANUS Attorneys for Defendant 130 E. Main St. 200 I.U. Willets Road Albertson, NY 11507
130 EAST MAIN STREET REALTY, LLC and ROSLYN BANCORP., INC., Defendants.	MORENUS, CARDOZA et al. Attorneys for Defendant Roslyn Bancorp. 58 South Service Road, Suite 350 Melville, NY 11747

Upon the following papers numbered 1 to 35 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 17 - 33; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 34 - 35; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant 130 East Main Street Realty Corp., LLC for summary judgment and the motion by defendant Roslyn Bancorp., Inc. for summary judgment are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant 130 East Main Street Realty Corp. for summary judgment dismissing the complaint and the cross claims against it is granted; and it is

ORDERED that the motion by defendant Roslyn Bancorp. for summary judgment dismissing the complaint and the cross claim against it is granted.

Plaintiff Ronald Wingard commenced this action to recover damages for personal injuries allegedly sustained at approximately 9:00 a.m on December 5, 2002, when he slipped an fell while walking in front of premises known as 130 East Main Street, Bay Shore, New York. The subject premises is owned by defendant 130 East Main Street Realty, LLC and leased by defendant Roslyn Bancorp, Inc. At a pretrial deposition conducted on June 27, 2005, plaintiff testified that his foot slipped as he was walking across the sidewalk to the curb, and that it was snowing at the time he fell. By his bill of particulars, plaintiff alleges that defendants were negligent, among other things, in failing to keep the sidewalk free of ice and snow.

Defendant 130 East Main Street Realty now moves for summary judgment dismissing the complaint and the cross claims against it, arguing that it did not have any notice of the alleged dangerous condition on the sidewalk. Defendant Roslyn Bancorp seeks summary judgment in its favor on the ground that it did not owe plaintiff a duty of care. Plaintiff opposes the motions, alleging that defendants failed to demonstrate prima facie their entitlement to judgment as a matter of law. In particular, plaintiff argues that the "storm in progress" defense asserted by defendant 130 East Main Street Realty must be rejected, as it failed to submit climatological records showing a snow storm was occurring at the time of the accident.

Summary judgment dismissing the claim and the cross claims against 130 East Main Street Realty is granted. As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see*, ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also*, ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2003]). Further, to establish liability for a dangerous or defective condition on property, a plaintiff must establish that the defendant created the condition which caused the injury or had actual or constructive notice of its existence (*see*, ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Dulgov v City of New York***, 33 AD3d 584, 822 NYS2d 298 [2d Dept 2006]; ***Singer v St. Francis Hosp.***, 21 AD3d 469, 799 NYS2d 742 [2d Dept 2005]; ***Cappolla v City of New York***, 302 AD2d 547, 755 NYS2d 100 [2d Dept], *lv denied* 100 NY2d 511, 766 NYS2d 165 [2003]). To constitute constructive notice, the defect must be visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner to discover and remedy it (*see*, ***Gordon v American Museum of Natural History***, *supra*; ***Curiale v v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Lee v Bethel First Pentecostal Church of Am.***, 304 AD2d 798, 762 NYS2d 80 [2d Dept 2003]). Moreover, the owner or proprietor of a nonresidential 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" (***Whitt v St. John's Episcopal Hosp.***, 258 AD2d 648, 648, 685 NYS2d 789 [2d Dept 1999]; *see*, ***Lee-Pack v 1 Beach 105 Assocs.***, 29 AD3d 644, 814 NYS2d 275 [2d Dept 2006]; ***Fahey v Serota***, 23 AD3d 335, 806 NYS2d 70 [2d Dept 2005]; ***Gor v High View Estates Owners Corp.***, 17 AD3d 316, 793 NYS2d 98 [2d Dept], *lv denied* 5 NY3d 709, 803 NYS2d 29 [2005]).

The evidence submitted by defendant 130 East Main Street Realty is sufficient to establish prima facie that it did not create the alleged dangerous condition on the sidewalk, and that it lacked actual or constructive notice of such condition (*see*, ***Yannotti v Four Bros. Homes at Heartland Condominium I***, 24 AD3d 659, 808 NYS2d 363 [2d Dept 2005]; ***Edwards v DeMatteis Corp.***, 306 AD2d 309, 760 NYS2d 658 [2d Dept 2003]). Defendant 130 East Main Street Realty's submissions, which include plaintiff's pretrial deposition testimony, also demonstrate that there was an ongoing snow storm at the time of plaintiff's accident (*see*, ***Solazzo v New York City Tr. Auth.***, 6 NY3d 734, 810 NYS2d 121 [2005]; ***Aguilar v Reckson Assocs. Realty Corp.***, 26 AD3d 449, 810 NYS2d 513 [2d Dept 2006]; ***Colon v New York City Hous. Auth.***, 23 AD3d 425, 805 NYS2d 601 [2d Dept 2005]; ***Fahey v Serota***, *supra*; ***Washington v Community Mut. Sav. Bank***, 308 AD2d 444, 764 NYS2d 191 [2d Dept], *lv denied* 1 NY3d 504, 775 NYS2d 781 [2003]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact. Plaintiff's submissions fail to raise a triable issue as to whether defendant 130 East Main Street Realty had notice of the alleged dangerous condition on the sidewalk, or whether it had a sufficient opportunity to ameliorate such condition.

Defendant Roslyn Bancorp's motion for summary judgment on the ground that it owed no duty of care to plaintiff also is granted. It is undisputed that pursuant to a lease agreement between the defendants, defendant 130 East Main Street Realty was responsible for removing snow and ice from the sidewalk in front of the premises at 130 East Main Street. Further, deposition testimony shows that defendant 130 East Main Street Realty, as landlord, would hire a third-party contractor to remove ice and snow from the sidewalk in front of the leased premises on an as-needed basis. As it undisputed that defendant 130 East Main Street Realty retained control over the sidewalk in front of the leased premises, defendant Roslyn Bancorp cannot be held liable for the alleged dangerous condition on the sidewalk (*see*, ***Gillardi v Incorporated Vil. of Nyack***, 247 AD2d 439, 668 NYS2d 679 [2d Dept 1998]; *cf.*, ***Welwood v Association for Children with Down Syndrome***, 248 AD2d 707, 670 NYS2d 556 [2d Dept 1998]; ***Millman v Citibank, N.A.***, *supra*).

Dated: MAR 0 5 2007

J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**