STATE OF NEW YORK
SUPREME COURT **COUNTY OF RENSSELAER**

DENISE PLUNKETT,

Plaintiff,

-against-

Index No.: 211526
RJI No.: 41-0124-2006

PLANK ROAD MANAGEMENT CO., INC., Individually and d/b/a DENNY'S OF CLIFTON PARK, NEW YORK, and RONALD RIGGI,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking to recover for injuries sustained when she slipped and fell in the parking lot of the defendants' restaurant. Defendants have moved for summary judgment dismissing the action on the ground that defendants did not have any notice of the existence of ice in their parking lot.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion 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]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). In order to meet this burden when seeking dismissal of a cause of action, a party must submit evidence which negates any meritorious cause of action encompassed by the pleadings (Franceschi v Consolidated Rail Corp., 142 AD2d 915 [1988]; see also Hirsh v Bert's Bikes and Sports, 227 AD2d 956 [1996]; Wilder v Rensselaer Polytechnic Inst., 175 AD2d 534 [1991]). It is only when the movant has established a right to judgment as a matter of law that the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). The Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [1998]; Martin v Briggs, 235 AD2d 192, 196 [1997]; Simpson v Simpson, 222 AD2d 984, 986 [1995]).

In general, in order to meet their burden on a motion based upon lack of notice of a hazardous condition, a defendant is required to submit proof of the condition of the area

at or around the time of the accident, together with proof of when it was last inspected, shoveled or treated for accumulations of ice and snow or similar hazardous conditions (see Britto v Great Atl. & Pac. Tea Co., 21 AD3d 436 [2005]; Amidon v Yankee Trails, Inc., 17 AD3d 835 [2005]; Rosati v Kohl's Dept. Stores, 1 AD3d 674 [2003]; Lorenzo v Plitt Theatres, 267 AD2d 54 [1999]; Van Steenburg v Great Atl. & Pac. Tea Co., 235 AD2d 1001 [1997]). Statements of general practices with respect to cleaning and maintenance do not meet such burden (see Amidon v Yankee Trails, Inc., 17 AD3d at 836-837; Deluna-Cole v Tonali, Inc., 303 AD2d 186 [2003]; Lorenzo v Plitt Theatres, 267 AD2d at 56; Edwards v Wal-Mart Stores, 243 AD2d 803 [1997]).

Defendants have not offered any proof whatsoever with respect to inspections or maintenance, and have not offered any evidence from a person with actual knowledge of the condition of the parking lot at or near the time of plaintiff's fall. Rather they rely upon an affidavit from a meteorologist, in which he opines that because the area experienced above freezing temperatures for several hours before plaintiff's fall, there could not have been any ice for a sufficient period of time to constitute constructive notice of the condition. The Court finds that such affidavit fails to meet defendants' burden herein.

First, an expert opinion must be based upon personal knowledge or evidence on the record (see Pitkin v McMahon, 243 AD2d 958, 961 [1997]; Davis v Pimm, 228 AD2d 885 [1996]). A failure to submit the records upon which the expert's opinion is based

renders the opinion inadmissible (Jemmott v Lazofsky, 5 AD3d 558, 560 [2004]). The meteorologist indicated that he relied on a number of different weather records in formulating his opinion. However, no weather records whatsoever have been submitted.

In addition, the expert failed to indicate that he had considered, nor did he address, the fact that there had been a significant snowfall of in excess of one foot only four days before plaintiff's fall. There is no indication that he was aware of how much hard packed snow and ice was present on the parking lot surface before the warm spell began. It is unclear whether he considered photographs taken two days after the accident which showed the continued presence of hard packed snow and ice in the parking lot. There is also no indication that the expert considered the fact that there was a period of several days of minimum temperatures near or below zero for days before the snowfall which preceded the accident. Such weather could have reduced the temperature of the ground to the point that snow melt could freeze even when air temperatures were above freezing. The meteorologist's failure to consider or address these issues renders the opinion of no probative value (see Hubert v Tripaldi, 307 AD2d 692 [2003]). Indeed, the substance of the meteorologist's opinion actually supports a finding of constructive notice as it shows that the condition testified to by plaintiff and her non-party witness must have existed for several days (see Dickerson v Troy Hous. Auth., 34 AD3d 1003 [2006]).

The Court further finds that the meteorologist's alternative explanation for the presence of ice and snow is entirely speculative and contrary to the meteorologist's own

conclusions. He stated that the ice and snow may have fallen off a customer's car soon before plaintiff's fall, negating any constructive notice. However, he stated that the weather had been well above freezing for 19 hours before plaintiff's fall, with a high temperature in the upper forties. Any accumulations of snow or ice would have dropped off vehicles long before plaintiff's fall.

Defendants have also failed to offer any proof that the ice upon which plaintiff fell was not caused by their affirmative negligence of placing snow banks where they would melt into the parking lot. Contrary to defendant's contentions, such theory of recovery is still viable (see Dickerson v Troy Hous. Auth., 34 AD3d at 1005). Indeed, the case that defendants primarily rely upon specifically distinguished the situation in which plaintiffs "allege that defendant's clearing of the walkway created piles of snow that then melted and refroze on the steps to produce the ice on which plaintiff fell" (DiGrazia v Lemmon, 28 AD3d 926, 928 [2006]).

It is therefore determined that defendants have failed to meet their burden of establishing an absence of liability. Even if they had, plaintiff's submissions show the existence of issues of fact as to how long the snow and ice had been present in the parking lot, and the pictures show continuing snow melt from large piles of snow creating wet and potentially icy areas adjacent to the entrance to the restaurant.

Accordingly it is

ORDERED that the motion for summary judgment dismissing the complaint is

hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the plaintiff, who are directed to enter this Decision/Order without notice and to serve the attorneys for defendants with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
March 30 ,2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated January 3, 2007; Affidavit of Eugene Daniel Napierski, Esq. sworn to January 3, 2007 with Exhibits A-G annexed; Affidavit of Howard Altschule sworn to December 8, 2006 with Exhibit annexed;
Memorandum of Law;

Affidavit of David J. Kavanaugh, Esq. sworn to January 17, 2007 with Exhibits A-G annexed;
Affidavit of Denise Plunkett sworn to January 17, 2007 with Exhibits A-B annexed;

Reply Affidavit of Eugene Daniel Napierski, Esq., sworn to January 22, 2007;
Supplemental Memorandum of Law.