Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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BI CHAN LIN,

Plaintiff,

-against-

PO YING YAM and KWANG YIU PUN,[1]

Defendants.

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Index No: 8657/05
Motion Date: 7/25/07
Motion Cal. No: 16
Motion Seq. No: 1

The following papers numbered 1 to 10 read on this motion for an order granting summary judgment.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Exhibits.....	6 - 8
Reply Affirmation.....	9 - 10

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is a negligence action to recover money damages for personal injuries allegedly sustained by plaintiff Bi Chan Lin ("plaintiff"), as a result of a trip and fall on February 7, 2005, on the sidewalk in front of premise owned by defendants Po Ying Yam ("Yam") and Kwang Yin Pun ("Pun"), located at 130-16 57th Road, Flushing, New York. Plaintiff alleges that she fell as a result of ice and snow on the sidewalk. Defendant moves for summary judgment dismissing the complaint on the ground that defendants did not create the dangerous condition or have actual or constructive notice of the condition that caused plaintiff to fall.

[1]By stipulation of the parties, the action was discontinued as against defendant Sin Wing Yam, a prior owner of the property, and Kwang Yin Pun, defendant Po Ying Yam's husband, was substituted in his place and stead. Consequently, the caption in this action hereby is amended to reflect that change, and all references previously made to the discontinued defendant shall be stricken from the record.

It is well-established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

"A landowner will be liable for a slip and fall on ice if it had actual or constructive notice of the icy condition or it created the condition (see, Olivieri v. GM Realty Co., LLC, 37 A.D.3d 569, 830 N.Y.S.2d 284; Nielsen v. Metro-North Commuter R.R. Co., 30 A.D.3d 497, 817 N.Y.S.2d 110)." Ricca v. Ahmad, 40 A.D.3d 728 (2nd Dept. 2007); Salvanti v. Sunset Indus. Park Associates, 27 A.D.3d 546 (2nd Dept. 2006)[A defendant may be held liable for a slip-and-fall incident involving snow and ice on its property only upon a showing that the defendant created a dangerous condition or had actual or constructive notice of it]. Moreover, "'[i]t is well settled that an owner of property is under no duty to pedestrians to remove ice and snow that naturally accumulates upon the sidewalk in front of his or her premises' (citation omitted). '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 dangerous' (citation omitted)." Savage v. Shah, 297 A.D.2d 795 (2nd Dept. 2002). A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that he neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. See, Santoliquido v. Roman Catholic Church of the Holy Name of Jesus, 37 A.D.3d 815, 815-816 (2nd Dept.2007)]. In order to prevail on their motion for summary judgment dismissing the complaint, defendants thus are required to demonstrate that they did not create the icy condition and had neither actual nor constructive notice of it. Olivieri v. GM Realty Co., LLC, 37 A.D.3d 569 (2nd Dept. 2007).

Defendant Pun, the husband of defendant Po Ping Yam and a co-owner of the property where plaintiff allegedly fell, testified at his deposition that he was the member of the household who cleared snow from the sidewalk and who put down sand and salt when necessary. In his affidavit in support of the motion, he averred that although he had "no specific recollection of the date of this particular claim against [them], [his] regular practice and custom was to clear away snow and ice from the entire sidewalk with a shovel and to clear down to the sidewalk, leaving no snow behind." He further averred: "I would also, depending on the depth of snow or other weather conditions, spread sand and/or snow melt after I finished shoveling." After setting forth his usual 10:30 a.m. time of departure from his home, he added "I cannot know but strongly doubt I would have inspected the sidewalk surrounding my home at or before the 9:00 A.M. time of plaintiff's claim." Also submitted in support of the motion were NOAA weather records from the weather station at LaGuardia Airport showing that the temperature never dropped below the freezing level after February 3, 2005, through the time of plaintiff's alleged slip and fall. Moreover, plaintiff's

deposition testimony sets forth that the last snowfall occurred approximately one week before her fall, that she had no problem the day before the accident walking on the sidewalk, which she used daily. With the evidence submitted, defendants made a prima facie showing that it did not create the icy condition upon which plaintiff allegedly fell and did not have actual or constructive notice of condition by offering evidence of the above-freezing weather conditions during a significant period of time prior to plaintiff's fall, as well as plaintiff's own testimony concerning her lack of observation of any ice the previous day or prior to her fall. See, Abbattista v. King's Grant Master Ass'n, Inc., 39 A.D.3d 439 (2nd Dept. 2007) [owner/manager of common elements of condominium development was not liable to townhouse owner for injuries sustained in slip and fall on ice on street outside her townhouse].

Once the moving party makes a prima facie showing of entitlement to summary judgment in its favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2001). Pursuant to CPLR 3212, summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Taft v. New York City Tr. Auth., 193 AD2d 503, 505 (1993). In opposition to defendants' prima facie showing of entitlement to judgment as a matter of law, plaintiff failed to raise a triable issue of fact with respect to whether defendants' shoveling of the snow after the snow fall a week prior to her fall made the sidewalk more hazardous or whether they had actual or constructive notice of an icy condition. See, Nielsen v. Metro-North Commuter R.R. Co., 30 A.D.3d 497 (2nd Dept. 2006)["The plaintiff's contention that the defendant failed to provide proper snow and ice control and removal was speculative and insufficient to raise a triable issue of fact."]; Grizzaffi v. Paparodero Holding Corp., 261 A.D.2d 437 (2nd Dept. 1999)[triable issues of fact exist, inter alia, as to whether the ice on which the plaintiff Josephine Grizzaffi slipped and fell was formed when the pile of snow created by the appellant melted and refroze]. See, also, Yan Quan Wu v. City of New York, __ A.D.3d __, 839 N.Y.S.2d 548 (2nd Dept. 2007); Rao v. Hatanian, 2 A.D.3d 616 (2nd Dept. 2003). Indeed, in Robinson v. Trade Link America, 39 A.D.3d 616 (2nd Dept. 2007), the Second Department, in a strikingly similar case, stated:

> In opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law, the plaintiffs failed to establish that the defendants either created the complained of condition, or had actual or constructive notice thereof (citations omitted). Significantly, the injured plaintiff stated that he did not notice any ice in the area where he fell prior to his fall, and that he safely traversed this very area only minutes before the accident occurred. In view of this testimony, as well as the other facts and circumstances of this case, the plaintiffs' contention that the defendants had notice of the "black ice" or that said condition was the result of improper snow removal was conclusory and speculative, and thus insufficient to raise a triable issue of fact (citations omitted).

Cf., Santoliquido v. Roman Catholic Church of the Holy Name of Jesus, supra [Owner of premises on which a pedestrian fell on ice on a sidewalk failed to make a prima facie showing, in support of a summary judgment motion, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it; custodian testified that he arrived at the premises about an hour before the accident, that he noticed that an icy condition had formed on the steps of a side entrance and he remedied the condition, and that he did not inspect the rest of the sidewalk]; Ricca v. Ahmad, 40 A.D.3d 728 (2nd Dept. 2007)[Although the defendants made a prima facie showing of entitlement to judgment as a matter of law, the plaintiff raised a triable issue of fact as to whether the ice on which he allegedly slipped and fell was formed when the pile of snow purportedly created by the defendants melted and refroze]. Accordingly, in light of the foregoing, no basis exists to impose liability on defendants and summary judgment is, therefore, granted in their favor, and the complaint hereby is dismissed.

Dated: September 7, 2007

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J.S.C.