SHORT FORM ORDER

INDEX No. 05-11369
CAL. No. 07-02127-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER MAYER
Justice of the Supreme Court

MOTION DATE 12-12-07
ADJ. DATE 1-15-08
Mot. Seq. # 001 - MD
002 - XMD

ANTHONY J. GALLO, Plaintiff, - against - HEALTH PORT, INC. and CRESCENT BAY COMPANY, LLC., Defendants.	ANTHONY P. GALLO, ESQ. Attorney for Plaintiff 6080 Jericho Turnpike, Suite 216 Commack, New York 11725 ZAKLUKIEWICZ, PUZO & MORRISSEY, LLP Attorneys for Defendant Health Port Inc. 2701 Sunrise Highway, Suite 2, P.O. Box 389 Islip Terrace, New York 11752 JACOBSON & SCHWARTZ Attorneys for Defendant Crescent Bay Co. 510 Merrick Road, P.O. Box 46 Rockville Centre, New York 11571

Upon the following papers in this matter: (1) Notice of Motion by Defendant Health Port, Inc, dated November 13, 2007, and supporting papers; (2) Notice of Cross Motion by Defendant Crescent Bay Company, LLC, dated November 30, 2007, and supporting papers; (3) Affirmation in Opposition by the Plaintiff, dated December 8, 2007, and supporting papers; (4) Reply Affirmation by Defendant Health Port Inc., dated December 28, 2007, and supporting papers; and (5) Reply Affirmation by Defendant Crescent Bay Company, LLC, dated January 2, 2008, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion and cross motion are decided as follows: it is

ORDERED that this motion by defendant Health Port, Inc., for summary judgment dismissing the complaint and all cross claims against it, is denied; and it is further

ORDERED that this cross motion by defendant Crescent Bay Company, Inc. for summary judgment dismissing the complaint and all cross claims against it, is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when he fell on ice in front of a store that was leased to defendant Health Port, Inc. (hereinafter

"Health") in a strip mall owned by defendant Crescent Bay Company, Inc. (hereinafter "Crescent"). On Sunday, March 13, 2005, at approximately 7:30 a.m. the plaintiff parked his truck in the defendants' parking lot intending to go into a delicatessen located in the shopping center. He exited his truck, walked toward the front of his vehicle, and slipped on ice when he stepped up on the curb of the sidewalk.

Defendant Health now moves for summary judgment alleging that it had no notice, either actual or constructive, of any icy condition that may have existed on the sidewalk at the time of the alleged accident. In support of its motion, Health submits the plaintiff's deposition testimony wherein the plaintiff testified in pertinent part that: when he stepped out of his truck, he noticed that the parking lot was wet; there was snow piled in the corners of the lot; and that there was a snow pile to his left. The plaintiff stated that the day before his accident, it had snowed four or five inches in the morning, and then the sun had come out and it was relatively warmer. He also stated that although he did not recall the temperature on the morning of his accident, it was cold. When describing the accident, the plaintiff testified to the effect that he was looking straight ahead, and that he stepped on the curb with his right foot and slipped, after which he noticed clear, rippled ice. He additionally stated that the sidewalk was approximately seven feet wide, that the ice extended approximately two feet from the curb towards the store, and that the rest of the five feet of sidewalk was clear of ice. The plaintiff further explained that there was an overhang due to a mansard roof over the five-foot clear portion of the sidewalk, but that the roof did not extend over the two-foot portion where the ice was located. The plaintiff stated that he never made a complaint to anyone with regard to the condition of the sidewalk before his accident and that he does not know of anyone else who made a complaint. Finally, he testified that he had no knowledge as to how long the ice condition existed prior to his fall.

In addition, defendant Health submits the affidavit of Goce Miloseski, its sole shareholder and owner, who alleges that under the terms of the lease, Health is required to clear that portion of the sidewalk that is directly in front of its store of any snow or ice. Mr. Miloseski states that it is indeed his usual custom and practice to shovel and salt the sidewalk whenever weather conditions require it. He further alleges that on Sundays his store is opened for business from 10 a.m. to 8 p.m. and that he arrives at the premises at approximately 10 a.m. in order to open up the store. He alleges that he was not present at the store at the time of the plaintiff's accident as the store did not open until approximately two and one-half hours after the fall allegedly occurred. Mr. Miloseski asserts that he has no knowledge of any icy conditions which may have existed on the sidewalk in front of his store at 7:30 a.m. on the day of the incident. He states that if any icy conditions or snow conditions were on the sidewalk on the day before the accident, he would have cleared that snow and ice as soon as it occurred as is his normal and customary practice. Lastly, Mr. Miloseski alleges that at the time he closed his store on the Saturday before the accident, there was no snow or ice on the sidewalk and the sidewalk was completely cleared.

Defendant Health argues that based upon the facts which are borne out by the deposition testimony of the plaintiff and the affidavit of Mr. Miloseski, there can be no liability imposed upon it since it did not have actual or constructive notice of the icy condition. Thus, contends Health, it is entitled to summary judgment.

Defendant Crescent cross-moves for summary judgment and adopts the arguments made by

Health in its motion papers. In further support, Crescent submits the lease and the assignment of the lease to Mr. Miloseski as evidence that it was the obligation of Health to clear the sidewalk of snow and ice. Crescent argues that based upon Mr. Miloseski's affidavit, Health had no time to remove the ice in question from the sidewalk. Crescent additionally submits the deposition testimony of Robert Gordon, a principal of Crescent, and points to that portion of Mr. Gordon's testimony wherein he stated that he had never received any complaints from anyone regarding the condition of the sidewalk prior to March 13, 2005. Mr. Gordon stated that Crescent was responsible for the snow and ice removal of the parking lot and all the tenants were responsible for snow and ice removal on the sidewalk in front of their stores. Mr. Gordon also explained that a mansard roof extends over the sidewalk with a 45 degree angle sloping downward. He testified to the effect that there are no gutters on the edge of the roof. When asked if he had ever seen water, either by rain or melting snow, dripping off that roof, Mr. Gordon answered, "I think I have." In addition, Mr. Gordon testified that he had never received any complaints at any time prior to the plaintiff's accident from tenants regarding water coming off the slope of the roof. Defendant Crescent asserts that it is clear from the testimony of Mr. Gordon and the affidavit of Mr. Miloseski that no liability exists against it.

The plaintiff opposes the defendants' motion arguing that the defendants in fact had notice of the dangerous condition. The plaintiff maintains that Mr. Miloseski, a long time tenant of the shopping center, was well aware of the problem with the sidewalk icing during the winter months. The plaintiff claims that the icing was caused by the melting and re-freezing of ice and snow as it flows off the mansard roof, which falls about two feet short of covering the entire width of the sidewalk. The plaintiff submits photographs of the sidewalk and points to a prominent rust stain running along the length of sidewalk alleging that the rust stain clearly demarcates where the melting snow and ice run off the roof and onto the sidewalk. The plaintiff also submits local climatological data to show that the weather conditions the day before his accident fluctuated from snow and below freezing temperatures in the early morning hours, to well above freezing temperatures in the late afternoon, to below freezing temperatures in the late evening. The plaintiff contends that since Mr. Miloseski left the location the night before the accident, it is more than reasonable to conclude that the mounds of snow piled up on the sidewalk immediately adjacent to the site of the accident and whatever snow remained on the mansard roof, would have started to melt and accumulate in front of Health. The plaintiff alleges that a reasonable person would have realized that this accumulation of melting snow and ice, with freezing temperatures to come over night, would form a dangerous condition.

The plaintiff also submits the affidavit of John Burns, whose pharmacy was a former tenant of the shopping center. Mr. Burns alleges in pertinent part that all the tenants who occupied the shopping center were aware of the problem of the two feet strip of sidewalk, which was left uncovered by the mansard roof overhang, repeatedly becoming icy. Mr. Burns states that every time it rained or snowed during the winter, the tenants would have to shovel, salt, or sand the pedestrian walkway at least twice a day due to the melting snow and ice flowing from the mansard roof onto the walkway. He maintains that this runoff would freeze during the overnight hours and posed a problem first thing in the morning if sand or salt was not place out the night before.

The plaintiff argues that the record thus far establishes that at the very least, both defendants had notice of the dangerous icy condition of the sidewalk. Additionally, the plaintiff contends that both defendants had a hand in creating the dangerous icy condition upon which he fell. He submits the

deposition testimony of Mr. Miloseski and points to the portion of testimony wherein Mr. Miloseski testified to the effect that it was his practice to shovel the snow off the sidewalk in front of his store every time it snowed and that he did so with respect to the last snowfall which occurred prior to the accident. The plaintiff also submits the deposition testimony of Mr. Gordon and highlights that portion of testimony wherein Mr. Gordon testified that Crescent was responsible for the snow and ice removal of the parking lot and that the parking lot had been plowed some time during the week prior to the accident. The plaintiff further submits photographs of the area taken the day of the accident and alleges that such photographs show that the snow was removed from both the sidewalk by Health and the parking lot by Crescent and then negligently piled up on the sidewalk immediately adjacent to where he fell. The plaintiff claims that given the location of the snow pile and the warming and freezing weather conditions, it is reasonable to conclude that the ice upon which he slipped and fell was formed, at least in part, by the melting and then re-freezing of the snow that had been negligently piled on and around the sidewalk. The plaintiff asserts that based upon this evidence, a prima facie case of negligence against the defendants is established.

In reply, both Health and Crescent contend that the affidavit of John Burns should be precluded from consideration because this witness was never disclosed and was not revealed until the note of issue was filed and these summary judgment motions were brought. Crescent also claims that the weather reports attached to the plaintiff's opposition papers are not certified and therefore cannot be considered.

It is well settled that in a slip-and-fall case involving snow and ice, a property owner or possessor is not liable unless such property owner or possessor created the defect, or had actual or constructive notice of its existence (***Voss v D & C Parking***, 299 AD2d 346, 749 NYS2d 76 [2002]). Evidence that a defendant created the condition may be sufficient to establish that the defendant had actual notice thereof (***Petri v Half Off Cards, Inc.***, 284 AD2d 444, 727 NYS2d 455 [2001]; *see also*, ***Patterson v New York Transit Authority***, 5 AD3d 454, 773 NYS2d 417 [2004]). Moreover, a "defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition" (***Osorio v Wendell Terrace Owners Corp.***, 276 AD2d 540, 714 NYS2d 116, 117 [2000]). Furthermore, once a defendant undertakes snow removal activities, it must do so in a reasonable manner, and such defendant may be held liable if the snow removal activities create a dangerous condition (***Salvanti v Sunset Industrial Park Associates***, 27 AD3d 546, 813 NYS2d 110 [2006]).

In this case, both Health and Crescent fail to establish a prima facie case for summary judgment. Whether the snow removal procedures that the defendants used created the icy condition is a material question of fact (***Knee v Trump Village Construction Corp.***, 15 AD3d 545, 791 NYS2d 576 [2005]; ***Karalic v City of New York***, 307 AD2d 254, 762 NYS2d 271 [2003]). Moreover, neither defendant addresses the plaintiff's claim that the ice was formed, in part, by the melting and re-freezing snow pile that was on and around the sidewalk. In addition, Crescent's submission of Mr. Gordon's deposition testimony reveals a triable issue of fact as whether it had actual knowledge of a recurring condition of rain and melting snow running off the gutterless roof and collecting on the sidewalk below and refreezing, and thus, whether it may be charged with constructive notice of each specific recurrence of that condition (*see*, ***Sewitch v LaFrese***, 41 AD3d 695, 839 NYS2d 114 [2007]; ***Migli v Davenport***, 249 AD2d 932, 672 NYS2d 551 [1998]). "Such actual knowledge 'is qualitatively different from a mere "general awareness" that a dangerous condition may be present'" (***Loguidice v Fiorito***, 254 AD2d 714,

678 NYS2d 225 [1998], *quoting* ***Chin v Harp Mktg***, 232 AD2d 601, 602).

In addition, even disregarding the plaintiff's uncertified climatological reports (*see*, ***Sangiacomo v State of New York***, 13 Misc3d 1246A, 831 NYS2d 362 [2006]) and disregarding the affidavit of Mr. Burns due to the plaintiff's failure to properly disclose (*see*, ***Andujar v Benenson Investment Company***, 299 AD2d 503, 750 NYS2d 636 [2002]), the plaintiff has nonetheless met his burden by demonstrating the existence of a triable issue of fact as to the defendants' creating a dangerous condition and as to constructive notice, by the submission of photographs. Two of the photographs show snow piled near the area of the sidewalk where the plaintiff fell. Other photographs show the roof with no gutters overhanging a portion of the sidewalk which has apparent water stains (*see*, ***Mondello v DiStefano,*** 16 AD3d 637, 792 NYS2d 177 [2005]; ***Colbourn v ISS International Service Systems, Inc.***, 304 AD2d 369, 757 NYS2d 291 [2003]).

Accordingly, the motion by Health and the cross motion by Crescent for summary judgment dismissing the complaint and cross claims against them, are denied.

Dated: 5/19/08

Peter H. Mayer
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**