

<b>De Los Santos v 4915 Broadway Realty LLC</b>
2008 NY Slip Op 31951(U)
July 8, 2008
Supreme Court, New York County
Docket Number: 0101499/2006
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**  
**J.S.C.**

PART 1

Index Number : 101499/2006  
**DE LOS SANTOS, ESTELA**  
VS.  
**4915 BROADWAY REALTY**  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. 101499/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

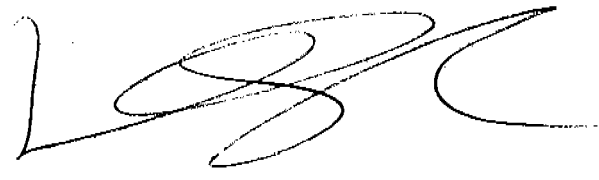
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... AH  
Answering Affidavits — Exhibits 1-2  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
JUL 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK



Dated: July 8, 2008

**MARTIN SHULMAN** J.S.C.  
**J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 1

-----X  
ESTELA DE LOS SANTOS,

Plaintiff,

INDEX NO.: 101499/06

- against -

4915 BROADWAY REALTY LLC,

Defendant.  
-----X

MARTIN SHULMAN, J.:

In this personal injury action, defendant, 4915 Broadway Realty LLC, moves for summary judgment pursuant to CPLR 3212 dismissing the complaint. For the following reasons, defendant's motion is denied.

Background

On January 23, 2005, between 7:00 A.M. and 8:30 A.M., plaintiff, Estela De Los Santos, slipped and fell while walking down the stairs outside her apartment building (the "Accident"), located at 4915 Broadway, New York, New York (the "Building"). Defendant owns the Building. As a result of the fall, plaintiff sustained a number of injuries, including a fractured patella which required surgery.

Plaintiff testified that on the day in question, she slipped on the second step down from a landing in front of the Building's main entrance (Plaintiff's dep., p. 47, Notice of Motion, Ex. F). There is no dispute that the day before the Accident it snowed several inches. While plaintiff could not recall whether it was snowing at the time of the Accident, she nonetheless testified that the steps in question had not been cleared of snow (*id.*, pp. 38, 51-52). After the fall, plaintiff observed that the steps had a few inches of snow (*id.*, pp. 51-52). Plaintiff further testified that what caused her to slip and

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fall was ice beneath the snow on the steps (id., pp. 51-54). She did not see the ice, but testified that it felt like ice (id., pp. 54-55).

Thomas Ortega, superintendent of the Building, testified that he is responsible for snow removal at the Building (Ortega dep., p. 7, Notice of Motion, Ex. G). Ortega testified that when removing the snow, his common practice is to first spread salt, then remove the snow, and then spread the salt again (id.). He continues this process until all the snow has been cleared (id., pp. 7-8, 17).

Ortega also testified that the night before the Accident, it had snowed until late in the evening (id., p. 10), and that he and the building's doorman, Jose Peralta, were clearing the snow and salting the walkways outside the Building until 1:00 A.M. (id., p. 12). Ortega testified that it had only snowed one day (id.). On the day in question, Ortega claims that he was outside at 6:30 A.M. salting the walkways at the premises (id.).

Defendant offers the affidavit of Barry Grossman ("Grossman Aff."), a meteorologist, who performed a weather analysis for the weather conditions existing at the premises on the day in question (see Grossman Aff., Notice of Motion at Exhibit H). According to Grossman, January 23, 2005 was the second day of a two-day major snowstorm, producing near blizzard conditions (id., ¶ 4). On January 22, 2005, approximately 8.5 inches of snow fell in the area and on January 23, 2005, light snow fell from 12:00 A.M. until 9:30 A.M. (id., ¶¶ 5-6). The snowfall for January 23, 2005 was approximately 5.3 inches (id., ¶ 6).

### Discussion

In order to grant summary judgment, there must be no material or triable issues of fact presented (Ayotte v Gervasio, 81 NY2d 1062 [1993]; Esteve v City of New York, 30 AD3d 212 [1<sup>st</sup> Dept 2006]). The movant must proffer admissible evidence to make a prima facie showing that establishes the cause(s) of action “sufficiently to warrant the court as a matter of law in directing judgment” (CPLR 3212 (b); see also Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Esteve, supra). Once the moving party has made this showing, the burden shifts to the opposing party to demonstrate “the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do” (Zuckerman, 49 NY2d at 562; see also Sheridan v Bieniewicz, 7 AD3d 508 [2d Dept 2004]).

Defendant bases its motion for summary judgment on the “storm in progress” defense.

“Under the so-called ‘storm in progress’ rule, a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm”

(Marchese v Skenderi, 51 AD3d 642 [2d Dept 2008]; see also Powell v MLG Hillside Assocs., L.P., 290 AD2d 345 [1<sup>st</sup> Dept 2002]). Where there is clear evidence in the record that the accident occurred while the storm was still in progress, then defendant may avail itself of the defense as a matter of law (Powell, supra).

Defendants offer the affidavit of Grossman who avers that there was a two-day snowstorm, which was continuing on the day of the Accident. However, plaintiff’s

testimony as well as Ortega's conflicts with defendant's witness. Specifically, plaintiff testified that she did not recall it snowing at the time of the Accident and Ortega testified that the storm was a one-day storm, which took place the day before the Accident. The conflicting deposition testimony raises an issue of credibility which is a factual determination for the jury (see Ramos v Rojas, 37 AD3d 291 [1<sup>st</sup> Dept 2007]; see also Elamin v Roberts Express, Inc., 290 AD2d 291 [1<sup>st</sup> Dept 2002] [conflicting deposition testimony "raises an issue of credibility inappropriate for resolution on a motion for summary judgment"] [citation omitted]).

Even if defendant had persuaded the court that no issues of fact exist as to whether the storm was still in progress when plaintiff fell, questions of fact remain as to whether defendant was responsible for creating a dangerous condition on the steps by failing to adequately remove the snow. Specifically, the law is such that "once the defendant undertakes snow removal efforts, it must do so in a reasonable manner and may be held liable for creating or exacerbating a dangerous condition" (Salvanti v Sunset Indus. Park Assocs., 27 AD3d 546 [2d Dept 2006]).

Plaintiff's testimony regarding the condition of the steps on which she fell raises a question of fact as to whether the accident was caused by ice that was not properly cleared away (see Sanchez v City of New York, 48 AD3d 275 [1<sup>st</sup> Dept 2008]; Kasem v Price-Rite Office & Home Furniture, 21 AD3d 799 [1<sup>st</sup> Dept 2005] [citation omitted]). As there remain triable issues as to whether defendant's measures to remove the snow either created or exacerbated a dangerous condition on the steps, defendant's motion for summary judgment is denied.

Accordingly, it is

ORDERED that defendant 4915 Broadway Realty LLC's motion for summary judgment is denied.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York  
July 8, 2008



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HON. MARTIN SHULMAN, J.S.C.

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