

**Natale v Alexander's Dept. Stores of
Lexington Ave., Inc.**

2009 NY Slip Op 30009(U)

January 6, 2009

Supreme Court, New York County

Docket Number: 106750/05

Judge: Jane S. Solomon

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: _____

PART 85

Index Number : 106750/2005

NATALE, WILLIAM

vs.

ALEXANDER'S DEPARTMENT STORES

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/6/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3

4-6

7

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed memorandum decision and order.

FILED

JAN 07 2009

COUNTY CLERK'S OFFICE

NEW YORK

Scheduled

N.B. ① Pre-trial conference for 2/2/09 at 2 PM.

② Oral argument of motion to designate # 003, submitted today, will be heard with 2nd conference. Plaintiff to notify all defendants of the same

Dated: 1/6/09

[Signature]

JANE S. SOLOMON

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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
WILLIAM NATALE and JOANNE NATALE,

Plaintiffs,

Index No.: 106750/05

-against-

DECISION AND ORDER

ALEXANDER'S DEPARTMENT STORES of
LEXINGTON AVENUE, INC., VORNADO
REALTY TRUST, BUILDING MAINTENANCE
SERVICE LLC and BLOOMBERG, L.P.,

Defendants.

-----x
SOLOMON, J.

FILED

JAN 07 2009

COUNTY CLERK'S OFFICE
NEW YORK

FACTUAL BACKGROUND

Plaintiff instituted the current action for injuries allegedly sustained when he slipped on some ice on premises owned and managed by defendants on March 2, 2005. Plaintiff's wife has also sued for loss of consortium.

Defendants Alexander's Department Stores of Lexington Avenue, Inc., the landlord of the premises on which the incident allegedly took place, and Vornado Realty Trust, the manager of the premises (collectively, defendants) move for summary judgment, pursuant to CPLR 3212. Previously, the action against Bloomberg, L.P. (Bloomberg), the tenant of the premises, was dismissed.

Plaintiff was employed by the company retained by Bloomberg to service the equipment on the portion of the subject

premises leased by Bloomberg, and part of plaintiff's duties was to check and maintain the refrigeration equipment throughout this leased portion of the building. On the day in question, at approximately 8 A.M., plaintiff was making rounds on the ninth-floor overhanging roof of the building. When plaintiff opened the door to the roof, he testified that he noticed an accumulation of snow that he says had built up over the previous week, but he saw footprints in the snow which he used to access the equipment room. Upon completing his inspection, plaintiff attempted to return to the roof door, and allegedly slipped on the ice and snow on the roof.

Plaintiff testified that he had complained to his supervisor prior to the day in question about the ice and snow build-up, but there is no record of any such complaint. According to the procedures in place at the time, if a worker noticed an unsafe condition, he or she was to notify a supervisor who would, in turn, notify Bloomberg. Bloomberg would then notify defendants, who were responsible for maintaining the jointly-used portions of the building. The ninth-floor overhanging roof was one such portion of the building.

In his opposition, plaintiff provides copies of the records of the National Oceanographic and Atmospheric Administration of the National Climatic Center for the New York City Metropolitan Area for the months of February and March of

2005. The records show precipitation for each day on an hourly basis, specifying amounts as little as two one hundredths of inch or indicating a "T" for lesser amounts, which apparently refers to a trace of snow fall less than two one hundredths of an inch. These records indicate a snowfall of 3.5 inches on February 21, 2005; a snowfall of 4 inches on February 24, 2005; a snowfall of 2 inches on February 25, 2005; and an additional snowfall of 4.8 inches on February 28, 2005. Further, there was another 2.9 inches of precipitation on March 1, 2005, ending at approximately 7 A.M. on the morning of March 1, 2005. In its reply, defendants argue that the last date for precipitation was the morning of March 2, 2005, just hours before the alleged accident. Indeed, the records indicate a "T" for March 2, from 3 to 4 A.M., suggesting less than two one hundredths of an inch of snow fell that morning.

DISCUSSION

"The 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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a

genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

"For liability to be imposed upon a landowner for a slip and fall, it must be established that the landowner knew, or in the exercise of reasonable care, should have known that a dangerous condition existed but, nevertheless, failed to remedy the situation within a reasonable time period. On the issue of constructive notice, it must be shown that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendants to discover it and take corrective action, and a general awareness that snow or ice might accumulate is insufficient [internal quotation marks and citations omitted]."

Martin v RP Associates, 37 AD3d 1017, 1017 (3d Dept 2007); see also *Moss v City of New York*, 5 AD3d 312 (1st Dept 2004).

The facts presented indicate that it had been snowing for the week prior to the alleged accident, and the roof was used to check the equipment on a daily basis, which could lead to the inference that defendants should have had constructive notice of the alleged accumulation of snow and ice on the roof.

In opposition, defendants argue what is referred to as the "storm in progress defense."

"The storm in progress defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean the walkways. The

rule is designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering the effort fruitless. Where the evidence in the record is clear that the accident occurred while the storm was still in progress, defendants may avail themselves of the rule as a matter of law [internal quotation marks and citations omitted]."

Powell v MLG Hillside Associates, L.P., 290 AD2d 345, 345 (1st Dept 2002).

In the case at bar, the records of the weather observations taken by a government agency (the National Oceanographic and Atmospheric Administration) were submitted by plaintiff, which is deemed to be prima facie evidence of the facts stated therein. *Martin v RP Associates, supra*. According to these records, significant snow fell during the week before the accident, and there was a lull on March 1, beginning more than 24-hours before the alleged accident.

"Once there is a period of inactivity after cessation of the storm, it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable. In some instances a period of as much as 30 hours could be viewed as *insufficient* to establish negligence. On the other hand, a reasonable period after cessation of the storm does not mean until the snow has melted in spring [internal quotation marks and citations omitted]."

Powell v MLG Hillside Associates, L.P., 290 AD2d at 346.

Consequently, there is an inference that a sufficient period of time may have existed before the alleged accident so as to permit its discovery and remediation. *Rodriguez v 326-338 East 100th*

Street Partners, 40 AD3d 439 (1st Dept 2007). Plaintiff testified that he fell on a walkway covered with six to seven inches of snow and ice with footprints in it. Evidence that a trace of snow fell a few hours before Natale's accident does not, as a matter of law, relieve Vornado of its duty to clear an existing accumulation of snow and ice where it is undisputed that there was a lull in the storm. Despite defendants' assertions, there is evidence to indicate that this is not a situation in which the storm in progress defense would automatically preclude recovery by plaintiff (see *Parker v Rust Plant Services, Inc.*, 9 AD3d 671 [3d Dept 2004]), because plaintiff has met his burden to show that the snow and ice condition existed before the "storm", i.e., the trace amount of snow that fell on March 2.

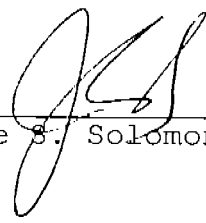
Based on the foregoing, summary judgment must be denied because questions of material fact exist as to whether defendants had actual or constructive notice of the snow and ice build-up so as to be able to remedy these conditions within a reasonable period of time. Accordingly, it hereby is

ORDERED that the motion for summary judgment by defendants Alexander's Department Stores of Lexington Avenue, Inc. and Vornado Realty Trust is denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55 on February 2, 2009 at 2 P.M.

Dated: January 6, 2009

ENTER:



Jane S. Solomon, J.S.C.

JANE S. SOLOMON

FILED

JAN 07 2009
COUNTY CLERK'S OFFICE
NEW YORK