Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

REINA MELCHOR,

Plaintiff,

-against-

XIANG RONG LE AND
HONG MEI XIE,

Defendants.

Index No. 017195/07

Motion Date February 10, 2009

Motion Cal. No. 28

Motion Seq. No. 1

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Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained on January 15, 2006 due to a slip and fall on a snow/ice condition on the sidewalk in front of premises located at 60-34 71st Avenue, Ridgewood, in the County of Queens, City and State of New York.

Defendants move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint.

Contentions of the Parties

Defendants submit the plaintiff's deposition testimony. She testified that the accident occurred on January 15, 2006 at about 8:30a.m. while she was walking from her home to a supermarket. She had worked the day before the accident and arrived home at about 8p.m. She did not remember what the weather was like on the day before the accident nor if there was any snow or ice on the sidewalk. She recalled that it was raining a little bit. She subsequently testified, contrary to her original testimony, that she saw some ice and snow on the ground as she walked home and that it was

snowing and hailing. The next morning, the day of the accident, she observed that it was cold, raining and snowing. There was about five inches of snow on the railing to the front steps of her house. There was snow on the sidewalk which covered the entire sidewalk. She walked the distance of about two houses before she had her accident. When asked to characterize how hard it was snowing, she stated that it was a lot. None of the sidewalks had been shoveled.

She further testified that the accident occurred when her left foot "got twisted a bit" which led to her falling to the ground. She remained sitting there for two hours. There were no passers by and no one came to help her at that time. It continued to snow and a lot of additional snow accumulated. When questioned by her own attorney, plaintiff testified that when she was lying on the ground she observed what caused her to trip or slip. She saw snow and ice which was old and dark. She had seen such ice two weeks prior to her accident. The ice covered the entire sidewalk and was covered with the snow that was falling.

Defendants submit the deposition testimony of defendant Hong Nei Xie who resides at and owns the subject premises. She did not witness the plaintiff's accident nor did she recall what the weather was like on January 15, 2006 between 8:30a.m. and 10:00a.m. It was the usual practice that, after a snowfall, she or her husband would shovel the snow. Her sister and her husband's brother, who also lived there, may have also shoveled snow after any snowfall. The accident occurred on a Sunday and everybody living in the house would have been off. When she or her husband shoveled, they would always put down salt. She did not remember ever seeing any ice in front of her house before 8:30a.m. on January 15, 2006. No one ever complained of falling in front of her house and she never received any letter from the City of New York with respect to snow removal.

Defendant Xiang Rong Le testified that he is an owner of and resides at the subject premises. He reiterated his wife's testimony with respect to their snow removal procedure.

Defendants assert that it is clear from plaintiff's own testimony that there was a heavy snowstorm in progress at the time of her accident. There was five inches of snow on her railing and it continued to snow heavily at the time of

her accident and for two hours thereafter. Initially, plaintiff testified twice that snow caused her to fall. It was only when her own attorney led her by asking if ice caused her to fall did she answer yes. Defendants submit climatological reports to show that, on January 14, 2006, temperatures hit a high of 57 degrees with a low of 33 degrees. They further show that in the week preceding the accident, temperatures had not dropped below freezing but rather had been exceptionally mild. This data discredits plaintiff's claim that the ice existed for two weeks prior to her accident. In any event, plaintiff's testimony shows that she had her accident during an ongoing snowstorm. Defendants, therefore, cannot be held liable as there was a storm in progress and it cannot be shown that the ice existed for two weeks prior to the subject accident.

In opposition to the motion, plaintiff asserts that defendants repeatedly mischaracterized plaintiff's testimony regarding the weather conditions on the date of the accident. Plaintiff never testified that 5 inches of snow had fallen on the sidewalk but only that she observed 5 inches of snow on the railing of her own house. Such could have been caused by wind drift or other factors. Plaintiff testified through a Spanish interpreter and has executed an attached affidavit wherein she explains that she was confused by defense counsel's manner of questioning. Plaintiff's counsel asserts that plaintiff makes it clear that the cause of her slip and fall was the old ice on the sidewalk adjacent to and abutting the defendants' premises.

Plaintiff's attorney asserts that, contrary to the defendants' position, their weather records show that it was not snowing at the time of the accident and that there was no storm. The records set forth the weather conditions on the days before the accident date. The hourly readings show that there was no precipitation from 12:51am until the time of the accident at 8:30am although there was considerable wind. Plaintiff submits weather records from a different source to support her position that there was no snow falling at the time of the accident. Therefore, questions of fact exist with respect to whether there was, in fact, a storm in progress. Defendants' attorney mischaracterizes the testimony of the nervous, unsophisticated and intimidated plaintiff to cover the lack of any objective admissible evidence entitling defendants to judgment.

In reply, defendants assert that plaintiff testified through a Spanish interpreter and was given ample

opportunity to answer each question. Defendants rely on the plaintiff's own testimony to establish that there was a storm in progress. Unless plaintiff's counsel is questioning the credibility of his own client's testimony, there are no credibility issues in this case.

Decision of the Court

The motion by defendants for summary judgment dismissing the plaintiff's case is granted and the complaint is hereby dismissed.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

As noted by the court in Salvanti v. Sunset Industrial Park Associates, 27 AD3d 546: "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 [citations omitted]. Generally, a defendant has no duty to remove snow and ice during an ongoing storm. However, 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 [citations omitted]."

In the instant case, the defendants have established their entitlement to judgment as a matter of law. The defendants, through the submission of the plaintiff's and the defendants' deposition testimony, have demonstrated that they neither created nor had actual or constructive notice of the ice that allegedly caused the plaintiff to fall. Plaintiff's testimony showed that the sidewalk had not yet been shoveled or that any snow removal operation had begun. The plaintiff's testimony clearly states that it was snowing at the time of her fall and continued to snow for a substantial period after she fell.

The weather records submitted should have been authenticated, as plaintiff's records also should have been authenticated. CPLR 4528 and 4540(a). However, the plaintiff's own deposition testimony established the defendants' entitlement to judgment as a matter of law. Sfakianos v. Big Six Towers, Inc., 46 AD3d 665. Based thereon, it appears that there was a storm in progress at the time of her fall. The deposition testimony of defendants sets forth their usual and customary response to snow conditions as shoveling, sweeping and distributing salt to their sidewalk. Again, plaintiff's testimony clearly indicated that no shoveling had yet occurred in the area where she fell. The plaintiff's claim that the ice upon which she fell was dark and old and had existed there for two weeks prior to the accident date is insufficient to raise a triable issue of fact as to whether she fell on old ice. Chapman v. City of New York, 268 AD2d 498.

Accordingly, the motion by defendants for summary judgment is granted and the complaint is hereby dismissed.

Dated:May 18,2009

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HON. DAVID ELLIOT