[* 1] SCANNED ON 7/26/2010

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 111736/2008

MIRANDA, MICHELLE

VS

305 SECOND AVENUE

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
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

FILED

JUL 26 2010

NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants 305 Second Avenue Associates, LP and ORB Management for summary judgment dismissing the Complaint of the plaintiff Michelle Miranda is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

Dated: This constitutes the decision and order of the Court.
7/20/10

J.S.C.
HON. CAROL EDMEAD

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: PART 35

----------X

MICHELLE MIRANDA,

Index No: 111736/08

Plaintiff,

-against-

305 SECOND AVENUE ASSOCIATES. LP and
ORB MANAGEMENT,

Defendants.

----------X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this slip and fall action, defendants 305 Second Avenue Associates, LP ("305") and ORB Management ("ORB") (collectively "defendants") move for summary judgment dismissing the Complaint of the plaintiff Michelle Miranda ("plaintiff").

Factual Background

According to her Complaint, on February 12, 2008 at approximately 2:45 p.m., plaintiff slipped and/or tripped at the premises located at 303-305 Second Avenue, New York, New York, known as the Rutherford Place Condominium. Defendant 305 is the sponsor of the building and Rutherford Place Condominium is the owner of the building. Defendant ORB is the property manager for Rutherford Place Condominium, responsible for overseeing the operations of the building (see Affidavit of William Werns ("Werns"), ORB's resident superintendent for the Rutherford Place Condominium). Plaintiff claims that "she slipped and fell while on the stairs leading to the basement" where medical offices are located and that the premises were defective due to wet steps and the absence of any mats in the lobby or around the staircase.

In support of summary judgment, defendants point out that plaintiff testified that she fell

down the steps when she was returning from her lunch hour, which began at approximately 2:30 p.m. Plaintiff walked to Dunkin Donuts located approximately three blocks away from the subject building and stated that it was snowing at that time. Plaintiff testified that it took approximately 20 minutes from the time she left for lunch to the time she returned to the building. Plaintiff testified that it was snowing when she returned. Plaintiff used the main entrance on Second Avenue to enter the building. According to the plaintiff, the incident occurred approximately 15 to 20 feet from the main entrance. Plaintiff identified the substance that she slipped on as water.

Defendants also submit Werns's affidavit, wherein he states that the stairs leading to the lower level are made of marble and have slip-grip tape on each stair. The tape is approximately one inch in depth and is stretched across every step leading down to the lower level. There are railings from the top to bottom of the steps on both the right and left hand sides. The steps are lighted by electric lights attached to the walls at the top and foot of the stairway. Prior to plaintiff's incident, neither the staff nor Werns was aware of water accumulation on the stairs leading to the lower level of Rutherford Place Condominium. Neither the staff nor Werns was advised of any complaints regarding water accumulation on the subject stairs. Furthermore, prior to plaintiff's accident, neither the staff nor Werns, in any way caused or created the wet condition on the stairs. Moreover, ORB and 305 never received any complaints about the snow removal procedure or about the lighting conditions on the subject stairwell on February 12, 2008 or any prior date. Finally, ORB and 305 never received any violations from the City of New York about the subject stairwell. Porters are responsible for maintaining and cleaning the hallways and steps. If an incident of spillage or accumulation of water occurs on this stairwell during business hours

a porter is called to clean the steps.

Defendants argue that a landowner's duty to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and for a reasonable time after it has ceased. Since a building owner cannot be held liable for an injury arising from a slip and fall while a snowstorm is progressing, the defendants are entitled to summary judgment. Defendants contend that in addition the testimony above, certified weather reports establish that snow fall began at approximately 1:51 p.m. on February 12, 2008. Such climatological data confirms plaintiff's own testimony that there was snowfall at the time of plaintiffs incident.

Additionally, defendants did not have actual or constructive notice of the alleged condition. Plaintiff did not indicate where the water came from that caused her to slip and fall. Plaintiff testified that she walked this stairwell on two prior occasions without incident on February 12, 2008. Plaintiff testified that she did not notice water on the steps when she first walked down them on the morning of February 12, 2008. Defendants were not aware of an alleged wet condition and never received any complaints or violations concerning the subject stairs on February 12, 2008. Further, based on the evidence, defendants did not create a dangerous condition; instead, it can be inferred that plaintiff created the dangerous condition by tracking in snow and water prior to the incident. Regardless, there is no liability arising from water being tracked onto the stairs while it is still snowing outside.

In addition, Werns attested that the procedure of the staff of Rutherford Place Condominium on February 12, 2008 was to place mats and cones in the lobby of the building during rain and snowstorms. A cone is also placed at the top of the stairwell that leads to the lower level. Plaintiff states that there were mats out in the lobby when she returned from lunch

on February 12, 2008 at approximately 3:00 p.m. Therefore, plaintiff corroborates Werns's testimony regarding the procedure of Rutherford Place Condominium to place mats out on the lobby floor during rain and snowstorms.

In opposition, plaintiff contends that she testified that the lighting in the subject stairwell was dim. Plaintiff used the same subject staircase when she left her basement office on the day of her accident. As plaintiff walked up the stairs to get to the lobby of defendants' building, she observed "bubbles of water" on the subject stairs. Plaintiff observed water on each step as she ascended to the lobby. Upon reaching the lobby on her way out for lunch, and prior to her accident, plaintiff told the doorman that the interior stairs to the basement were wet. After notifying the doorman of water on the interior staircase, plaintiff walked to a Dunkin Donuts approximately 3 blocks away and upon returning approximately 30 minutes later, plaintiff proceeded to the interior staircase leading to the basement and slipped and fell on the same water that she previously informed the doorman of. There were no puddles anywhere in the lobby as Ms. Miranda returned from her lunch break.

At his deposition, Werns could not recall the condition of the subject stairs prior to plaintiff's accident. Werns testified that one nighttime porter who works from 8:00 p.m. to 4:30 a.m. is responsible for inspecting and cleaning the subject stairs. There is no inspection schedule for the subject stairs for any of the stairways in defendants' building. Werns could not recall if a doorman told him of water on the subject stairs on the date of plaintiff's accident. However, Werns acknowledged that complaints would often be made to the doormen of the building. Werns had no knowledge as to whether anyone had complained to him personally about the water on the subject stairs, or the last time the subject stairs were inspected prior to plaintiff's

accident As defendants' witness offered no knowledge of the condition of the stairs at any time prior to plaintiff's accident, defendants failed to meet their burden for summary judgment as a matter of law.

Defendants also fail to establish a lack of notice. Werns offers no evidence as to the condition of the subject stairs prior to plaintiff's accident. Defendants cannot circumvent Werns' testimony by including his affidavit stating that neither he nor his staff were aware of any water accumulation as such statement is in direct contradiction to his prior testimony. A party's affidavit that contradicts his own prior sworn testimony creates only a feigned issue, insufficient for purposes of a summary judgment motion. As such, Werns affidavit prepared solely for the purposes of this motion and in direct contradiction to his previous sworn testimony, must be disregarded by this Court.

Further, the storm-in-progress rule is inapplicable as defendants had actual notice of the dangerous condition. A landowner cannot be charged with having constructive notice upon the start of inclement weather. The storm-in-progress rule simply extends that period of time during which a reasonable landowner should take notice of and remedy a dangerous condition. The storm-in-progress rule, however, does not supersede the basic tenet that, in a slip and fall case, a defendant must establish that it had neither actual nor constructive notice of the dangerous condition. Plaintiff's undisputed testimony establishes that defendants' had actual notice of the dangerous condition. Defendants offer no evidence that the steps were inspected or cleaned during the approximate 30 minutes between when plaintiff gave defendants' employee actual notice and when plaintiff slipped. Coincidently, defendants make no acknowledgment of plaintiff's above testimony in their moving papers. As defendants cannot dispute plaintiff's

actual notice, the storm-in-progress rule is inapplicable to the instant matter.

Plaintiff further contends that the climatological evidence does not indicate that the condition was caused by water being tracked in. Although plaintiff testified that it was snowing when she left the building on her lunch break, her testimony indicates that there was no water accumulations by the entrance of the building, as there were no puddles of water. Defendants fail to submit any evidence or explanation as to how water from outside weather conditions could bypass the entrance of the building and find its way to the stairs past the lobby. There is no evidence that weather caused the dangerous condition. Defendants' claim that water was tracked into the building, past the lobby, and onto all of the stairs leading to the lower level is entirely speculative and unsupported by any evidence. In fact, plaintiff's testimony supports the inference that weather did not contribute to her accident; plaintiff testified that there were no caution signs when she left and returned to the lobby, and there were no wet puddles on the lobby floor when she returned from lunch. The storm-in-progress rule is not applicable also because there is no causal relationship to the condition of the stairs and the light snow outside.

Defendants cannot meet their burden on summary judgment by submitting evidence of their general procedures, but must come forward with the actual practices that were employed on the date of the accident. Werns's attestation that on the date of the accident, defendants placed cones at the top of the subject stairs contradicts his previous testimony, that he did not know if anyone put any signs up on February 12, 2008. Any attempt to claim that, three months after his testimony, Werns now recalls the practices defendants employed on the date of the accident are completely contradictory to his prior testimony and feigned solely for the purpose of this motion.

A court need not address the sufficiency of opposing papers if a movant has not met their burden on summary judgment. In any event, plaintiff establishes a *prima facie* case of negligence against defendants. When viewed in a light most favorable to plaintiff, plaintiff establishes that defendants had actual notice of the dangerous condition and failed to take reasonable measures to remedy it. Even if this Court accepts the contradictory, self-serving affidavit submitted by Werns, plaintiff's contradictory testimony as to notice and whether a sign/cone was out at the time of the accident presents genuine issues of fact. Defendants fail to establish a lack of actual or constructive notice in the instant matter, as their employee/building manager had no knowledge of the condition of the subject stairs prior to and at the time of Plaintiff s accident. Werns's affidavit is insufficient for the purposes of summary judgment. Further, defendants fail to offer evidence of how - in light of the distance from the entrance to the interior subject staircase and the condition of the lobby - the weather conditions in any way caused the dangerous condition on the stairs, or was tracked in by others. Even if defendants met their burden, plaintiff testified to giving actual notice 30 minutes prior to her accident. The reasonableness of defendants' actions in regard to remedying the dangerous condition creates a triable issue of fact to be determined by a jury.

In reply, defendants contend that Werns's affidavit does not contradict his previous testimony. The affidavit sets out the procedures of the Rutherford Place Condominium during snowstorms. Nor does caselaw hold that a defendant does not meet its burden on summary judgment by submitting evidence of its general procedures. Plaintiff corroborates Werns's testimony of the procedure to place mats out on the lobby floor during rain and snowstorms. Therefore, Werns's affidavit indicates that these were the procedures followed on the date of

incident.

Plaintiff has not submitted evidence indicating where the water came from that caused her to slip and fall. Plaintiff's testimony provides nothing more than mere speculation as to the cause of the incident and offers nothing to indicate that defendant created or had notice of the hazard. Plaintiff testified that the steps were wet and she had no idea how long the water was on the steps or how it got there. Defendants attach certified weather reports to establish that snow fall began at approximately 1:51 p.m. on February 12, 2008, confirming plaintiff's testimony that there was snowfall at the time of the incident.

This case is a classic "storm in progress" case. By plaintiff's own admission, it was still snowing at the time of her accident. More specifically, it was snowing from the time plaintiff left for her lunch break at approximately 2:30 p.m. to the time she returned to the building approximately 20 minutes later. The snow was ongoing up and until the time of the incident.

Discussion

Where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980];

Silverman v Perlbinder, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

To establish a *prima facie* case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant created the dangerous condition which caused the accident or that the defendant had actual or constructive notice of that condition and failed to remedy it within a reasonable time (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d

646 [1986]; *see also Segretti v Shorenstein Co., East, LP*, 256 AD2d 234, 682 NYS2d 176 [1st Dept 1998]; *O'Rourke v Williamson, Picket, Gross, Inc.*, 260 AD2d 260, 688 NYS2d 528 [1st Dept 1999]). Thus, a defendant, as the proponent of a summary judgment motion, when attempting to make its requisite *prima facie* showing, must submit evidence in admissible form that shows it did not create nor had actual or constructive notice of the dangerous condition (*see Colt v Great Atlantic & Pacific Tea Co.*, 209 AD2d 294, 618 NYS2d 721 [1st Dept 1994]; *see also Giuffrida v Metro North Commuter Railroad Co.*, 279 AD2d 403, 720 NYS2d 41 [1st Dept 2001]; *Gordon v Waldbaum, Inc.*, 231 AD2d 673, *supra*).

However, landowners may be excused from liability altogether for hazardous conditions caused by an ongoing storm (*Pacelli v Pinsley*, 267 AD2d 706, 699 NYS2d 530 [3d Dept 1999]). It is established that "[a] party in possession or control of real property has a reasonable period of time after the cessation of a storm in which to take protective measures to correct *storm-created hazardous ice and snow conditions*" (*Spicer v Estate of Ondek*, 60 AD3d 1234, 875 NYS2d 614 [3d Dept 2009] (emphasis added)). Thus, it has been generally held that to succeed on a motion to dismiss a slip and fall cause of action allegedly occurring during a snow storm, defendants are required to establish either that it did not have actual or constructive notice of the dangerous condition resulting from the snowfall *or* that the accident occurred during the storm in progress (*Ioele v Wal-Mart Stores, Inc.*, 290 AD2d 614, 736 NYS2d 130 [3d Dept 2002]).

Despite defendants' contention that they were not aware of an alleged wet condition and never received any complaints or violations concerning the subject stairs on February 12, 2008, plaintiff testified that she advised the doorman of "that the steps were wet" as she leaving the building I told the doorman. Plaintiff's testimony raises an issue of fact as to whether

defendants' were on notice of the alleged wet condition that caused plaintiff's fall.

With respect to defendants' storm-in-progress defense, defendants' proof, including a meteorological record of the accident area at the time of this accident and plaintiff's own testimony that it was snowing before she left for lunch and when she returned, establishes that there was a snowstorm in progress immediately prior to and during plaintiff's accident. Defendants' duty to "correct hazardous *snow and ice-related conditions* created while the storm was in progress" was suspended until a reasonable period of time had elapsed from the cessation of the storm. Thus, as the evidence here undoubtedly demonstrates that the accident occurred while the storm was still ongoing, a time during which defendants had no duty to clear the area of water accumulation (*Solazzo v New York City Transit Auth.*, 21 AD3d 735, 800 NYS2d 698 [1st Dept], *affd.* 6 NY3d 734 [2005]), it would appear, at first blush, that defendants established that the storm-in-progress defense is applicable here and that defendants have presented a *prima facie* case for dismissal.

However, under the "storm-in-progress" defense, espoused by defendants, a landowner's duty to remedy a dangerous condition is suspended while a storm is in progress and for a reasonable time after it has ceased, where such condition is *caused by* a storm (*Bell v New York City Housing Auth., citing Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345 [1st Dept 2002] (stating "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"); *Spicer v Estate of Ondek*, 60 AD3d 1234, 875 NYS2d 614 [3d Dept 2009] ("A party in possession or control of real property has a reasonable period of time after the cessation of a storm in which to take protective measures to correct *storm-created hazardous ice and snow*

conditions") (emphasis added)). The duty of landowners is such that they are not required to provide a constant, ongoing remedy when an alleged slippery condition *is said to be caused by moisture tracked indoors during an ongoing storm* or for a reasonable time thereafter (*Beyda v New York City Transit Auth.*, 16 Misc 3d 1116, 847 NYS2d 895 [Sup Ct Kings County 2007] *citing Solazzo v New York City Transit Auth.*, 6 NY3d at 735 (it had been snowing, sleeting and raining on and off all day and the *steps down into the subway were exposed* to those weather conditions); *Bell v New York City Housing Auth.*, *supra* (stating that if the snow storm *which produced the allegedly hazardous condition on the steps* of plaintiff's apartment building was still in progress at the time of plaintiff's fall, defendant was not, as a matter of law, afforded the time in which to ameliorate the condition, and bears no liability to plaintiff)).

Evidence that it was snowing immediately before and during plaintiff's alleged fall, in and of itself, is insufficient to establish, as a matter of law, that the storm-in-progress defense applies under the circumstances alleged herein. Plaintiff's fall occurred on an interior stairwell leading to the basement, which stairwell was located past the lobby and elevators where no water or puddles allegedly existed; and, the record indicates that mats were located on the lobby floor. As intimated by plaintiff, there is no testimony or documentary evidence indicating that the water on the interior stairwell was in fact "tracked in" from outside. Instead, plaintiff testified that there were "small puddles" of water in "certain spots" along the staircase, and that she did not know where the water came from. Plaintiff did not notice any puddles of water on the steps when she first arrived at work that morning. Therefore, it cannot be said, as a matter of law, that the water condition on the interior stairs was caused by moisture tracked indoors during the ongoing snow storm, so as to relieve defendants of their alleged duty to rectify the hazardous

water condition of which they had actual notice (*cf. Gibbs v Port Auth. of New York, supra* (stating that because the evidence in this case strongly suggests that any water on the floor had been tracked into the building by the persons immediately preceding plaintiff on the line, or the umbrellas they were carrying, no inference of constructive notice arose, and defendant did not have an obligation to provide a constant remedy to the problem of water being tracked into a building in rainy weather)).

In the cases cited by defendants where the Court applied the storm-in-progress defense, plaintiff's fall occurred under circumstances where there was clear evidence that the hazardous condition was either outdoors or, where inside of a building, caused by precipitation tracked from outside *(see Espinell v Dickson*, 57 AD3d 252, 869 NYS2d 42 [1st Dept 2008] (plaintiff slipped and fell on a patch of ice *on the sidewalk* in front of defendants' building); *Pippo v City of New York*, 43 AD3d 303, 842 NYS2d 367 [2007] (plaintiff allegedly fell on vegetables and broken pallet skids *under snow*); *Solazzo v New York City Transit Auth.*, 21 AD3d 735, 800 NYS2d 698 [2005] (plaintiff fell on wet, slippery station floor while storm was still ongoing and plaintiff's engineer testified that "most of the water on the floor was deposited there *by persons entering from the street*"); *Gibbs v Port Auth. of New York*, 17 AD3d 252, 794 NYS2d 320 [1st Dept 2005] (plaintiff, after waiting 30 minutes in the rain, slipped and fell on a wet floor in a hallway located at Madison Square Garden, where she noticed a "lot of water" on the floor, which "must have been *scattered [there] from the umbrella[s] and people [who] were walking* in" and recalling "the whole area [as] covered with water"); *Rodriguez v 520 Audubon Assocs.*, 71 AD3d 417, 895 NYS2d 406 [1st Dept 2010] (plaintiff's testimony that *the water would be tracked onto the interior stairs* held insufficient to establish constructive notice)).

Ordinarily, for plaintiff to defeat defendants' summary judgment motion premised upon this "storm-in-progress" defense, and support their claim that it was not precipitation from the ongoing storm which caused this fall, plaintiffs have the burden of producing admissible evidence that the ice that caused plaintiff's slip and fall existed prior to the storm in progress, and that defendants had actual or constructive notice of the hazard (*Pacelli v Pinsley*); *Spicer v Estate of Ondek*, 60 A.D.3d 1234, 875 NYS2d 614 [3d Dept 2009] (Where a defendant meets its initial burden by demonstrating that a storm was in progress when the accident occurred, a plaintiff is thus required "to establish that the accident was caused by ice that existed prior to the storm ... rather than precipitation from the storm in progress," as well as that the defendant had actual or constructive notice of the preexisting condition)).[1] However, since defendants failed to meet their burden to establish that plaintiff's fall was caused by water related to the ongoing storm, the Court need not address the sufficiency of plaintiff's opposition papers (*Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 718 NYS2d 287 [1st Dept 2000] (The failure of the moving party to make a showing of entitlement to summary judgment will result in the denial of the motion, regardless of the sufficiency of the opposing papers) *citing Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985, 599 NYS2d 526; *Winegrad v New York Univ. Med.*

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[1] It is noted that plaintiff's reliance on *Espinell v Dickson* (57 AD3d 252, 869 NYS2d 42 [1st Dept 2008]) for the proposition that defendants must also establish that they lacked notice in addition to establishing the presence of an on-going storm, is misplaced. In *Espinell*, plaintiff slipped and fell on a patch of ice on the sidewalk, at the curb in front of defendants' building at 8:45 a.m. The evidence established "that it had rained, snowed and sleeted during the preceding day and night, that any precipitation that could have caused the icy condition, including the freezing drizzle of the early morning hours, had ceased by 6:00 a.m., and that snow flurries fell until approximately 7:00 a.m." Thus, the Court held, "The record is devoid of evidence that defendant created or was aware of the icy condition on the sidewalk with sufficient time to correct it, or that the condition existed long enough that defendant should have been aware of its existence." Evidently, the precipitation had already ceased almost two hours prior to plaintiff's alleged fall, and consistent with the *Pacelli, (supra),* when a snow storm has ceased prior to a plaintiff's fall, the plaintiff has the burden of showing that the water/ice that caused plaintiff's slip and fall existed prior to the storm in progress, and that defendants had actual or constructive notice of the hazard.

Ctr., 64 NY2d 851, 853, 487 NYS2d 316; *see Diaz v Nunez*, 5 AD3d 302 [1st Dept 2004] [motion for summary judgment should have been denied regardless of the sufficiency of plaintiff's opposing papers]). Therefore, the Court does not reach the merits of plaintiffs' opposing contentions.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants 305 Second Avenue Associates, LP and ORB Management for summary judgment dismissing the Complaint of the plaintiff Michelle Miranda is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 20, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD