Morris v City of New York
2010 NY Slip Op 32779(U)
October 4, 2010
Supreme Court, New York County
Docket Number: 102322/09
Judge: Barbara Jaffe
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SCANNED ON 10/7/2010
[* 1]

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

PRESENT: JAFF BARBARA JAFFE J.S.C. *Justice*   PART 5

Index Number : 102322/2009
MORRIS, ERNEST
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT
CAL #70

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/4/10
OCT 04 2010

J.S.C.
BARBARA JAFFE

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

ERNEST MORRIS,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY HOUSING AUTHORITY ,

Defendants.

Index No. 102322/09
Motion Date: 8/10/10
Motion Seq. No.: 001
Calendar No.: 70

DECISION & ORDER

FILED
OCT 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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By notice of motion dated April 20, 2010, defendant New York City Housing Authority (NYCHA) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes the motion.

I. PERTINENT BACKGROUND

On February 22, 2008, at approximately 10:45 a.m., plaintiff allegedly slipped and fell on snow and/or ice on the sidewalk between 159-30 and 159-40 Harlem River Drive in Manhattan. (Affirmation of Deborah Bass, Esq., dated Apr. 20, 2010 [Bass Aff.], Exh. B). It is undisputed that NYCHA owns the properties that abut the sidewalk where plaintiff fell. (*Id.*).

Certified climatological records, based on hourly observations in Central Park, reflect that on the day of plaintiff's accident, snow began to fall at 1 a.m. and continued unabated until 6 p.m., with an accumulation of six inches. (*Id.*, Exh. E). An uncertified weather record, based on

observations taken in Bronx County, reflects that on that day, precipitation continuously fell from 2 a.m. to 6 p.m. with an approximate accumulation of six inches of snow and ice. (*Id.*). Unofficial observations reflect snowfall throughout the state that day, and according to an event record from the National Climate Data Center, it was a snowstorm constituting "the biggest event for the tri-state area during the 2007-2008 winter season" with "snow developing around daybreak, moderate to heavy at times, before ending in the evening." (*Id.*).

On July 29, 2008, plaintiff testified at a 50-h hearing that on the day of his accident, he was a tenant at 159-44 Harlem River Drive, and left his apartment that morning at approximately 10:45. It had been snowing the night before but it was no longer snowing when he went out. The pathway in front of his building and the sidewalk on which he slipped were covered with snow, with six inches of it on the sidewalk and there was no indication of any effort to shovel, salt or sand. According to plaintiff, he thus slipped on the snow on the sidewalk. (*Id.*, Exh. A).

On or about February 19, 2009, plaintiff filed his summons and complaint, and on or about March 30, 2009, NYCHA served its answer. (*Id.*, Exhs. B, C).

II. CONTENTIONS

NYCHA argues that as plaintiff's accident occurred while a snowstorm was in progress, it had no to duty to remove the snow, relying on the certified climatological records which show that snow was falling at the time of plaintiff's accident and continued to fall until later that day. (Bass Aff., Exh. E). It also submits an affidavit from a certified meteorologist, who examined that day's meteorological data and concludes that snow fell continuously at a light to moderate intensity from between 12:45 a.m. and 1:15 a.m. through noon. (*Id.*, Affidavit of George Wright, dated Apr. 9, 2010, Exhs. 1-3). The data on which the meteorologist relies was measured in

Central Park, which, he states, is approximately 2.9 miles southwest of the location of plaintiff's accident, and other locations, including Bronx County. Based on weather conditions before February 22, 2008, he opines that the snow on which plaintiff fell was not deposited there by a prior storm. (*Id.*).

Even if plaintiff's testimony that it was not snowing at the time of his accident is credited, NYCHA claims, it only shows that there may have been a lull in the storm, which does not restore its suspended duty to remove the snow, and that pursuant to New York City Administrative Code § 16-123(a), no duty arose until four hours after the storm's cessation. NYCHA also maintains that as plaintiff testified that he observed no snow removal efforts, there is no factual basis for a claim that it created or aggravated the hazard through negligent efforts at snow removal. (Bass Aff.).

In opposition, plaintiff alleges that as the distance between Central Park and the location of his accident is more than 10 miles, NYCHA has failed to show, *prima facie*, that snow was falling at the location of his accident at the time he fell or thereafter. (Affidavit of Anthony J. Emanuel, Esq., dated July 9, 2010 [Emanuel Aff.]). He submits an affidavit in which he states that during the evening of February 21, 2008, he saw falling snow, and that between 7 a.m., when he awoke on February 22, and 10:45 a.m., he saw no snow falling. (*Id.*, Exh. 1). He thus contends that there is a triable issue as to whether there was a storm in progress at the time of his accident and, if the storm had ceased, whether NYCHA had a reasonable opportunity to remedy the hazard and failed to do so. Finally, plaintiff asserts that as discovery has not yet commenced and as a NYCHA employee may have observed the storm abate, summary dismissal is premature.

In reply, NYCHA argues that as its meteorologist's opinion was based not only on data from Central Park but also on multiple publications and reports for both New York County and Bronx County, it has established that there was a storm in progress at the location of plaintiff's accident when he fell. (Reply Affirmation, dated July 21, 2010). It denies that the distance between Central Park and Harlem River Drive is 10 miles, and asserts that plaintiff's counsel's claim that weather observations made in Central Park do not accurately reflect weather conditions in Upper Manhattan is unfounded and meritless. NYCHA also argues that plaintiff's affidavit contradicts, and is clearly tailored to avoid the negative impact of, his prior testimony, and that even if considered, his testimony shows only a lull in the storm, absent any evidence that the snowfall did not resume after his accident. Finally, NYCHA denies that discovery is needed as plaintiff's belief that a NYCHA employee may have observed the snowfall is speculative, and observes that plaintiff has sought no discovery since serving its answer in March 2009.

III. ANALYSIS

"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." (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the

existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must "lay bare" its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); "unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d 557, 562).

An owner or occupant of premises has a duty to remove an accumulation of snow or ice inside or outside the premises which may be dangerous to those entering the premises, or to take other measures to ensure the safety of the premises, when it has actual or constructive notice of the existence of the condition and a reasonable opportunity to act. (86 NY Jur 2d, Premises Liability § 341 [2010]; 15 NY Prac, New York Law of Torts § 12:11 [2010]; *see eg Solazzo v New York City Transit Auth.*, 21 AD3d 735 [1st Dept 2005], *affd* 6 NY3d 734; *Helms v Regal Cinemas, Inc.*, 49 AD3d 1287 [4th Dept 2008]; *Blackwood v New York City Transit Auth.*, 36 AD3d 522 [1st Dept 2007]; *Hussein v New York City Transit Auth.*, 266 AD2d 146 [1st Dept 1999]; *Zonitch v Plaza at Latham LLC*, 255 AD2d 808 [3d Dept 1998]).

However, an owner or occupant of premises "will not be held liable for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter." (*Solazzo v New York City Transit Auth.*, 6 NY3d 734 [2005]; 15 NY Prac, New York Law of Torts § 12:11]). Thus, the duty "to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended." (*Pippo v City of New York*, 43 AD3d 303 [1st Dept 2007]). Evidence of a storm in progress constitutes *prima facie* evidence of the absence of a duty, and is "especially persuasive when based upon the analysis of a licensed meteorologist." (*Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345 [1st Dept 2002]).

Moreover, a lull in the storm does not impose a duty on an owner to remove an accumulation of snow until the storm ceases in its entirety. (*DeStefano v City of New York*, 41 AD3d 528 [2d Dept 2007]; *Iole v Wal-Mart Stores, Inc.*, 290 AD2d 614 [3d Dept 2002]; *Powell*, 290 AD2d at 345). It is not until "the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation," that an owner or occupant may be held liable for injuries caused by accumulated ice or snow. (*Powell*, 290 AD2d at 345).

Finally, pursuant to New York City Administrative Code § 16-123(a), every owner of a building in New York City, abutting a street with a paved sidewalk, is required to remove snow from the sidewalk within four hours after the snow ceases falling, although the time between 9 p.m. and 7 a.m. is not included in the four-hour period.

Here, the certified climatological data and plaintiff's expert meteorologist's analysis, the latter of which was based on weather observations made in various locations throughout New York City, reflect that snow began to fall the night of February 21, 2008 and continued unabated during and after plaintiff's accident, and that the snowfall was widespread throughout numerous counties in New York, including New York County. NYCHA has thus established, *prima facie*, that there was a storm in progress when plaintiff fell. (CPLR 4528 ["any record of the observations of the weather, taken under the direction of the United States weather bureau, is *prima facie* evidence of the facts stated"]; *see Boynton v Eaves*, 66 AD3d 1281 [3d Dept 2009] [affidavit of meteorologist sufficient to establish storm in progress]; *Simeon v City of New York*, 41 AD3d 344 [1st Dept 2007] [defendant granted summary judgment as plaintiff slipped and fell during snowstorm; snowfall confirmed by climatological records]; *DeStefano*, 41 AD3d at 529 [defendant established entitlement to judgment by submitting proof, including climatological

data, that storm was in progress]; *Hassanein v Long Island Rail Road Corp.*, 307 AD2d 954 [2d Dept 2003] [defendant made *prima facie* showing as matter of law that storm was in progress at time of plaintiff's accident by submitting climatological reports and affidavit of meteorologist]).

In opposition, plaintiff fails to submit any evidence to support his contention that the weather reports do not accurately reflect the weather conditions at the location where he fell. (*Compare Martin v Wagner*, 30 AD3d 733 [3d Dept 2006] [defendants met burden of establishing storm in progress based on meteorological records taken at location approximately seven and one-half miles from plaintiff's residence; court rejected plaintiff's meteorologist's statement that two locations could have received differing amounts of snowfall]; *Thompson v Menands Holding, LLC*, 32 AD3d 622 [3d Dept 2006] [plaintiff's accident took place in Villlage of Menands in Albany County; defendant's meteorologist analyzed records for, among other areas, City of Albany]; *Kasem v Price-Rite Office and Home Furniture*, 21 AD3d 799 [1st Dept 2005] [plaintiff's climatological records, based on observations taken several miles from accident site, sufficient to raise issue of fact as to icy condition at site]; *Lopez v Picotte Cos.*, 223 AD2d 823 [3d Dept 1996] [while weather report based on observations made at location several miles from defendant's property, it indicated that precipitation was widespread and covered several counties, including defendant's], *with Buroker v County View Estate Condominium Ass'n, Inc.*, 54 AD3d 795 [2d Dept 2008] [meteorologist's review of climatological data from other towns insufficient to establish, *prima facie*, that there was snow in town where plaintiff fell]; *Duffy-Duncan v Berns & Castro*, 45 AD3d 489 [1st Dept 2007] [climatological reports taken in neighboring counties not dispositive as to conditions in Bronx where accident occurred]; *DeGregorio v State*, 13 Misc 3d 1090 [Ct Cl 2006] [weather records did not definitively show

weather at accident location as records based on weather at location over 50 miles away]; *Calix v New York City Transit Authority*, 14 AD3d 583 [2d Dept 2005] [although data taken in Central Park, John F. Kennedy Airport, and LaGuardia Airport showed precipitation in those locations, there was conflicting testimony as to whether there was storm in Brooklyn, where plaintiff fell, as weather conditions could have been different there]; *Smith v Leslie*, 270 AD2d 333 [2d Dept 2000] [climatological reports based on weather conditions at location two counties away from defendant's residence insufficient to raise triable issue as to conditions at residence]; *Schleifman v Prime Hospitality Corp.*, 246 AD2d 789 [3d Dept 1998] [meteorological report was of little evidentiary value as it detailed weather at location 20-30 miles away from accident location]).

Moreover, even if plaintiff's testimony and affidavit are credited, he stated only that the storm had ceased between 7 a.m. and 10:45 a.m and does not indicate whether or not any snow fell after his accident. Consequently, he does not controvert NYCHA's evidence that snow continued to fall until at least noon. At most, plaintiff establishes a lull in the storm prior to and at the time of his accident, which is insufficient to impose a duty on NYCHA. (*See Boynton*, 66 AD3d at 1282 [plaintiff's statement that it was not snowing at time she fell showed only lull in storm which was insufficient to defeat summary judgment]; *Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153 [4th Dept 2006] [plaintiff failed to raise issue of fact by testimony that it was not snowing on morning of his accident; defendant submitted records showing snowfall continued for four days after accident]; *Iole*, 290 AD2d at 616 ["testimony that it was not snowing at the time of the accident establishes, at best, that the accident occurred during a lull in the snowstorm"; records showed lull lasted three hours]; *Krutz v Betz Funeral Home, Inc.*, 236 AD2d 704 [3d Dept 1997], *lv denied* 90 NY2d 803 [plaintiff's meteorologist's statement that

storm likely had lulls, which was consistent with plaintiff's testimony that it was not snowing when he fell, insufficient to show storm had ceased]).

Finally, NYCHA's duty to clear the snow did not begin until 7 a.m. (Admin. Code 16-123[a]) and four hours had not elapsed by the time of plaintiff's accident. Thus, NYCHA had no duty to clear the snow before plaintiff fell. (*See Rodriguez v New York City Housing Auth.*, 52 AD3d 299 [1st Dept 2008] [accepting plaintiff's testimony that snow had stopped falling by time of her accident at 8:20 a.m., defendant had until 11 a.m. at the earliest to complete snow removal]; *Karpilovskaya v Badiner*, NYLJ, March 11, 2009, at 28, col 1 [Sup Ct, Kings County] [even if court relied on plaintiff's weather report showing that snow stopped falling at 7 a.m., plaintiff's accident happened at approximately 10:30 a.m. and thus defendant not liable]).

For all of these reasons, plaintiff has failed to demonstrate the existence of any triable issues as to whether NYCHA had a duty to clear the snow from the sidewalk before his accident. As the only discovery plaintiff seeks is testimony from a NYCHA employee as to whether he or she observed that the snow had stopped falling the morning of his accident, and as such testimony would be insufficient to impose a duty on NYCHA absent evidence that the storm had totally ceased, plaintiff has not shown that a summary disposition is premature.

IV. CONCLUSION

Accordingly, it is hereby

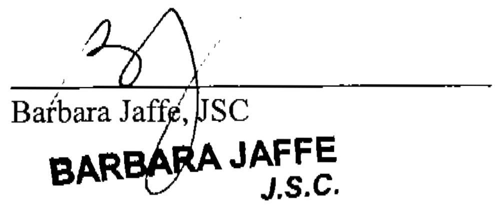
ORDERED, defendant New York City Housing Authority's motion for summary judgment is granted in favor of defendant and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

[* 11]

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of this action shall continue.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: October 4, 2010
New York, New York

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