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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 116772/2009

MARZAN, SENA

VS

CITY OF NEW YORK

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

CAL # 8 L

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read 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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAY 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/18/11

BJ

BARBARA JAFFE J.S.C.

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

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

----------x

SENA MARZAN,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 116772/09
Motion Date: 3/22/11
Motion Seq. No.: 001
Calendar No.: 82

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Stephen Jacobson, Esq.
Hecht, Kleeger, *et al.*
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212-490-5700

For defendant:
Andrew Lucas, ACC
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Corporation Counsel
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By notice of motion dated September 30, 2010, defendant City moves pursuant to CPLR 3211 and/or 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes the motion.

I. BACKGROUND

On February 22, 2009, plaintiff allegedly slipped and fell on ice on the sidewalk and curb at the northeast corner of Thayer and Broadway Streets in Manhattan. (Affirmation of Andrew Lucas, ACC, dated Sept. 30, 2010 [Lucas Aff.], Exhs. A, B). On or about February 27, 2009, plaintiff served on City a notice of claim. (*Id.*).

At a 50-h hearing held on November 19, 2009, plaintiff testified that she fell at 9 p.m on February 22, 2009, while walking on the sidewalk, and that at the curb, she slipped on black ice which she had not seen before she fell, realizing it was ice only when she was laying on it. The

ice was clear and she could see the cement portion of the sidewalk through it. She saw no ice on any other part of the sidewalk where she fell, nor could she see where the ice originated. She also testified that it was chilly outside, that there was no snow or ice accumulation on the ground, and that it had neither snowed nor rained before her accident. (*Id.*, Exh. B).

On or about November 23, 2009, plaintiff served on City her summons and complaint, and on or about December 20, 2009, City served its answer. (*Id.*, Exhs. C, D).

On or about August 18, 2010, plaintiff filed her note of issue. (Lucas Aff.).

II. CONTENTIONS

City denies having had notice of the icy condition on the sidewalk and observes that plaintiff testified that there was no accumulation of snow or ice on the sidewalk before she fell and that the ice on which she slipped was clear, thereby conceding that the ice was neither visible nor apparent. City also submits certified climatological records which reflect that on the date of plaintiff's accident, the average temperature was above freezing, thus surmising that as the ice could not have formed until the temperature fell below freezing, City did not have enough time to discover and remedy the condition. As the records also indicate that on February 22, 2009, rain and other precipitation commenced at 9 a.m. and ended at 6 p.m., City maintains that a reasonable time had not elapsed between the cessation of the storm and plaintiff's accident for it to remedy the condition. (Lucas Aff., Exh. F).

Plaintiff contends that City failed to establish, *prima facie*, that the ice could not have existed for a sufficient period of time for it to be discovered absent expert testimony interpreting the climatological data and as City did not address the weather conditions in the days before the accident. Plaintiff submits an affidavit from a forensic meteorologist, who examined various

climatological records and opines that the icy condition that caused plaintiff's fall was created by precipitation that fell on February 18 and 19, 2009 and froze between February 19 and February 21, 2009. (Jacobson Aff., Exhs. F, G). Plaintiff also submits her affidavit and the affidavit of her friend who witnessed the accident, in which both state that plaintiff fell on the sidewalk which was covered with a thick sheet of ice approximately two feet wide and very thick, rough, and dirty. (*Id.*, Exhs. C, D). Plaintiff thus argues that there are triable issues as to whether the icy condition occurred days before her accident and whether City had a reasonable amount of time to discover and remedy it. (*Id.*).

In reply, City contends that plaintiff's affidavit is tailored to avoid her sworn testimony, that plaintiff did not identity the meteorologist as an expert until after her note of issue was filed, that the meteorologist's opinion is based in part on plaintiff's new and contradictory testimony and is thus unreliable, and that as the climatological records are self-authenticating, City was not required to offer an expert affidavit. (Reply Affirmation, dated Jan. 26, 2011).

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." (*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).

In order to hold a municipality liable for accidents caused by the presence of ice or snow on a sidewalk, the plaintiff must establish that the ice or snow constituted an unusual or dangerous obstruction to travel and that the municipality either created the condition or a sufficient time had elapsed for it to discover and remedy it. (*Mazzella v City of New York*, 72 AD3d 755 [2d Dept 2010]; *Valentine v City of New York*, 86 AD2d 381 [1st Dept 1982], *lv denied* 57 NY2d 710).

Here, the certified climatological data constitutes *prima facie* evidence of the weather conditions before and at the time of plaintiff's accident. (*See* 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"]; *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 v City of New York*, 41 AD3d 528 [2d Dept 2007] [defendant established entitlement to judgment by submitting proof, including climatological data, that storm was in progress]). City was thus not required to offer an expert affidavit.

As the climatological records and plaintiff's testimony establish that no significant rain or precipitation had accumulated the day of plaintiff's accident and that the temperature was above freezing, that there was no snow or ice on the ground in the area of plaintiff's accident other than

the ice on which she fell, and that the ice was clear and invisible to plaintiff until she fell on it, City has demonstrated, *prima facie*, that sufficient time had not elapsed for it to discover and remedy the condition. (*See Bonney v City of New York*, 41 AD3d 404 [2d Dept 2007] ["City established its entitlement to summary judgment by submitting meteorological data showing that, although there was a snowstorm four days before (plaintiff's) accident, temperatures rose above freezing in the two days prior to the accident, and there was no further significant precipitation during that time"]; *Clapp v City of New York*, 302 AD2d 347 [2d Dept 2003] [as climatological data showed that temperature in days before accident never dropped below freezing, plaintiff failed to establish that ice patch was caused by earlier snowstorm]; *see also Carpenter v J. Giardino, LLC*, 81 AD3d 1231 [3d Dept 2011] [defendant showed lack of notice through plaintiff's testimony that patch of ice was not visible and only became apparent after plaintiff had fallen on it]; *Pierson v N. Colonie Cent. School Dist.*, 74 AD3d 1652 [3d Dept 2010], *lv denied* 15 NY3d 715 [no triable issue as to notice absent evidence that icy condition was visible or apparent as plaintiff testified that condition only became obvious after she fell and was lying on ground]; *Carricato v Jefferson Valley Mall Ltd. Partnership*, 299 AD2d 444 [2d Dept 2002] [no proof of constructive notice of ice as plaintiff testified that she did not see ice before she fell and it was very thin and without color]; *compare with Meehan v Barksdale Tenants Corp.*, 73 AD3d 514 [1st Dept 2010] [plaintiff's testimony that patch of ice was grey or white and evidence that temperature had not been above freezing for two days before accident sufficient to raise triable issue as to constructive notice]).

Plaintiff's new testimony that the ice was thick, dirty, and rough contradicts her earlier testimony that it was clear and invisible and reflects an attempt to bolster her current claim that

the ice was caused by a storm that had occurred two or three days earlier, and is thus insufficient to defeat summary judgment. (*See Garcia-Martinez v City of New York*, 68 AD3d 428 [1st Dept 2009] [plaintiff's affidavit in opposition in which she stated that entire path was covered with ice contradicted her deposition testimony describing narrower patch of ice and created feigned issue of fact insufficient to defeat motion]; *Wu v City of New York*, 42 AD3d 451 [2d Dept 2007] [plaintiff's affidavit containing "new and contrived allegations concerning the location of his fall and the nature of the condition on which he fell" was designed to raise feigned factual issues]; *Ruck v Levittown Norse Assocs.*, LLC, 27 AD3d 444 [2d Dept 2006] [while plaintiff stated in affidavit in opposition to motion that puddle of water on which he fell was dirty and grey and had footprints around and through it, it contradicted deposition testimony where plaintiff did not describe puddle that way]; *Harty v Lenci*, 294 AD2d 296 [1st Dept 2002] ["A party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"]).

And, as plaintiff's expert's opinion is based in part on plaintiff's new testimony, specifically that the ice on which she fell was thick and hard, it likewise is insufficient to raise a triable issue. (*See Telfeyan v City of New York*, 40 AD3d 372 [1st Dept 2007] [as expert opinion was inexorably connected to plaintiff's feigned testimony, it did not constitute competent evidence creating factual issue]). The expert also failed to address City's contention that the above-freezing temperatures would have melted any ice remaining from the prior storm. Thus, plaintiff has failed to raise a triable issue as to whether the icy condition was created by a storm days before her accident.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted and the complaint is hereby dismissed as against defendant City of New York, and the Clerk is directed to enter judgment in favor of said defendant.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 18, 2011
New York, New York

FILED

MAY 20 2011

NEW YORK
COUNTY CLERK'S OFFICE