SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ANDREA HALL,

Plaintiff,

- against -

SHARON KING-HOLDER,

Defendant.

Index No.: 12066/2009

Motion Date: 04/07/11

Motion No.: 16

Motion Seq.: 2

- x

The following papers numbered 1 to 12 were read on this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendant and dismissing the plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 6
Affirmation in Opposition-Affidavits-Exhibits	7 - 10
Reply affirmation	11 - 12

This is an action for damages for personal injuries allegedly sustained by the plaintiff on January 11, 2009, when she slipped and fell on black ice on the landing of the exterior steps of the premises owned by the defendant located at 95-15 Liverpool Street, Jamaica, New York.

The plaintiff commenced this action by filing a summons and complaint on May 8, 2009. Issue was joined by the service of defendant's verified answer dated August 3, 2009.

The defendant moves for an order granting summary judgment and dismissing the plaintiff's complaint on the ground that the defendant cannot be charged with liability for the injuries

sustained by the plaintiff because the plaintiff has not presented any evidence on the record to show that the defendant 1)caused the alleged icy condition; or 2) had actual or constructive notice of the icy condition and a reasonable time to remedy such condition (citing Dwulit v Walters, 19 AD3d 535 [2d Dept. 2005]; Cohen v A.R. Fuel, Inc., 290 AD2d 640 [2d Dept. 2002]; DeVivo v Sparago, 287 AD2d 535 [2d Dept. 2001]; Penny v Pembrook Management, Inc., 280 AD2d 590 [2d Dept. 2001]).

In support of the motion for summary judgment, the defendant submits the deposition testimony of the plaintiff, Andrea Hall, the deposition testimony of the defendant, Sharon King-Holder, and the deposition testimony of non-party witness, Lennox McFarlane, as well as a certified copy of the climatological data for the time in question.

At her examination before trial taken on March 16, 2010, plaintiff Hall, age 45, who is employed as a certified home health aide, stated that on the date of her accident, January 11, 2009, she was a tenant, residing with her family in the second floor of the premises owned by the defendant Sharon-King Holder located at 95-15 Liverpool Street, Jamaica, New York. The defendant did not reside in the premises but lived a few houses away on the same block. The accident occurred on Sunday, January 11, 2009 at 7:30 a.m on the front exterior stairs of the premises as the plaintiff was leaving for work. The last time plaintiff had looked at the stairs was on Saturday, at approximately 6:30 p.m., when she looked out the window and observed that the snow that had been falling that day had stopped.

The plaintiff testified that the total accumulation on Saturday was about 3 - 4 inches. She stated that she had an understanding with the landlord that the landlord would shovel the front steps whenever it snowed. Plaintiff stated that she did not call the defendant prior to leaving on Sunday morning regarding the condition of the steps and she was not aware of anyone else that called. Plaintiff testified that as she was leaving the premises there was no longer any precipitation. She observed that the middle portion (approximately 75 per cent) of the top landing and the four stairs had been shoveled, creating a pathway down the stairs. The steps had been shoveled down to the bare pavement. She did not observe sand or salt on the shoveled portion. There were handrails on both sides of the steps that go from the bottom of the steps to the top of the landing. Plaintiff testified that as she opened the screen door and took two steps on the landing portion she began to slide. She attempted to grab the right handrail but could not make contact with it because she was sliding. She stated that she slid down the stairs feet first

and landed at the bottom of the stairs. Immediately after she fell she looked back at the area where she slipped and saw that there was clear or black ice all over the stairs. She testified that she did not know if anyone had observed ice on the stairs before she fell and she did not know if anyone else had complained about the ice before she fell. The plaintiff stated that she did not know how long the ice had been there. After she fell her daughter came to her assistance and she fell also despite holding onto the handrail. The plaintiff's daughter-in-law also came out as did a downstairs tenant named Joseph. After plaintiff was able to stand up she went back up the stairs being held by her daughter-in-law and by Joseph. The defendant, Ms. King-Holder, was called immediately after the plaintiff went back in the house and defendant came over about 15 minutes later.

The plaintiff pointed out the icy condition to the defendant. The plaintiff testified that the defendant told her that her husband had shoveled the stairs the night before. She stated that after her fall she observed the defendant's husband shoveling the ice and putting salt down. She also called an ambulance and was taken to the emergency room at Mary Immaculate Hospital. As a result of the fall she stated that she sustained a torn meniscus of the left knee for which she required arthroscopic surgery.

The defendant also submits a copy of the transcript of the examination before trial of the defendant Sharon King-Holder, age 47, taken on March 16, 2010. The defendant testified that she is a joint owner with her husband, Elvin, of the premises located at 95-15 Liverpool Street which is a two family home. On the date of the accident two tenants were residing in the house and defendant lived in another house on the same street. The second floor tenant was the plaintiff and her family who resided there without a written lease. She stated that her husband would shovel the steps and the sidewalk on the occasions when it snowed. She testified that typically when it snowed she or her husband would wait until the snow ended completely and then about one half hour later would clean the stairs and sidewalk completely using a snow shovel. She stated that she received a call at 7:53 a.m. from the first floor tenant telling her that Andrea had fallen on the stairs. The defendant immediately proceeded to the location. She stated that she remembered that it had snowed approximately 2 or 3 inches on Saturday ending about 8:30 p.m. When she arrived she saw the plaintiff sitting on the stairs leading to the second floor. She observed the steps had been shoveled and the landing next to the front door was completely shoveled.

The defendant testified that she and her husband both shoveled the stairs at 9:30 p.m. on Saturday night, they used a broom on the landing and then applied salt. She stated, "we swept the top landing, we shoveled the stairs and the walkway and the sidewalk" and then salted the complete area. Defendant stated that when she arrived she didn't notice any ice but she noticed the steps were wet. She said that she inspected the landing and observed that it was dry. However, after the accident her husband put additional salt on the steps.

The defendant also submitted a copy of the transcript of the examination before trial of Lennox McFarlane, age 20, taken on July 12, 2010. Mr. McFarlane is the son of the plaintiff Andrea Hall. He testified that at the time of his mother's accident he lived on the second floor of the premises with his mother and his siblings. He stated that Joy and her family lived on the first floor. He testified that he learned of the accident when he received a call at work telling him his mother was in the hospital. He stated that the morning of the accident he left the house at about 6:45 a.m. He recalled that the night before the accident when he got home at about 8:30 p.m. the walkway appeared to have been shoveled but the steps were not shoveled and were icy and the platform or landing was slippery. He did not notify the landlord about the condition. He stated that he did not know how long the ice had been on the stairs but he believed it was there as a result of the snow that had fallen on Saturday. He stated that when he left for work on Sunday morning, prior to his mother's accident, the ice was still on the stairs.

In her affirmation in support of the motion for summary judgment, defendant's counsel, Nancy S. Goodman, Esq., contends that the plaintiff's complaint must be dismissed because the plaintiff has not adduced any evidence to establish that the defendant caused the alleged icy condition or had actual or constructive notice of the icy condition and a reasonable time to remedy it. Counsel contends that the defendant testified that she cleared the landing of snow the evening prior to the accident and applied salt to the area. Counsel also contends that the climatological records indicate that after the defendant cleared the steps that there had been additional snow and mist and freezing rain immediately prior to the plaintiff's accident and therefore, due to an ongoing storm, the defendant did not have sufficient time to remedy the icy condition prior to the plaintiff's accident.

In opposition, the plaintiff submits that the defendant has failed to make prima facie case establishing its entitlement to judgment as a matter of law because the evidence submitted by the

defendant in support of the motion demonstrates the existence of triable issues of fact as to whether it was negligent (citing Doxtader v Middle Country Cent. School Dist. at Centereach, 81 AD3d 685 [2d Dept. 2011]).

The plaintiff also submits an affidavit dated February 17, 2011 in opposition to the motion in which she states that as she was leaving for work at 7:30 a.m. on January 11, 2009, she observed that the snow had not been entirely removed from the landing. She states that the snow had merely been pushed to the sides of the landing, creating a "very slippery icy path going from the front door across the landing to the front steps." She states that, "the path was completely covered with ice and ran from the front door to the steps." She did not observe any salt, sand or any type of de-icing compound on the landing and she stated that, "it appeared that no effort whatsoever was made to remove the ice from the landing."

Plaintiff's counsel contends that the defendant failed to make a prima facie case as the plaintiff's deposition testimony raised a question of fact as to whether there was a dangerous icing condition on the landing and whether the landlord's snow removal efforts did not cause, create or otherwise increase the allegedly hazardous icy condition which resulted in the plaintiff's injuries (citing Levy v Cumberland Farms, Inc., 269 AD2d 361 [2d Dept. 2000; Karalic v City of New York, 307 AD2d 254 [2d Dept. 2003]).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]). A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see Arzola v. Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; also see Bruk v Razaq, Inc., 60 AD3d 715 [2d Dept. 2009]). To provide constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]).

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto, this court finds that the deposition testimony of both the plaintiff and defendant submitted by the defendant in support of the motion for summary judgment failed to make prima facie case establishing its entitlement to judgment as a matter of law because the deposition testimony demonstrates the existence of triable issues of fact as to whether the defendant was negligent.

An owner of real property has a duty to maintain the property in a reasonably safe condition (see Basso v Miller, 40 NY2d 233 [1976]). In order to establish a prima facie case of negligence for a dangerous snow and ice condition, plaintiff must prove that the defendant either created the condition, or had notice of the condition, and had a reasonably sufficient time after the conclusion of the snowfall or temperature fluctuation to remedy the situation caused by the elements" (Simmons v Elmcrest Homeowners' Ass'n., 11 AD3d 447 [2d Dept. 2004]; also see Bergen v. Carlin, 297 AD2d 692 [2d Dept. 2002]; Penny v Pembrook Mgmt., Inc., 280 AD2d 590 [2d Dept. 2001]). Further while the landlord is under no obligation to clear the steps while the subject snowstorm was in progress (see Kaehler-Hendrix v Johnson Controls, Inc., 58 AD3d 604 [2d Dept. 2009]; McConologue v Summer St. Stamford Corp., 16 AD3d 468 [2d Dept. 2005]; Myrow v City of Poughkeepsie, 3 AD3d 480 [2d Dept. 2004]), once they elected to do so, they were required to act with reasonable care and liability may result if it is shown that they made the area more hazardous(see Hilpert v. Village of Tarrytown,81 AD3d 781 [2d Dept. 2011]; Krichevskaya v. City of New York, 30 AD3d 471 [2d Dept. 2006]; Friedman v Stauber, 18 AD3d 606 [2d Dept. 2005]), and they could be held liable if their efforts "created a hazardous condition or exacerbated a natural hazard created by the storm" (Gibbs v Rochdale Vil., 282 AD2d 706 [2d Dept. 2001]).

Here, the plaintiff testified that it had snowed on Saturday, the day prior to her accident and that when she looked out the window at 6:30 p.m. it had stopped snowing. She did not know if it had snowed again prior to her leaving the premises on Sunday morning but there was no precipitation as she was leaving. Plaintiff did observe that the snow on the steps had been shoveled to the bare pavement, but she did not see any evidence of salt on the stairs. She stated that the landing was shoveled as well but there was snow piled on the sides. The defendant also testified that it had snowed on Saturday and stated that it had stopped snowing at approximately 8:00 - 8:30 p.m. She stated that she and her husband had shoveled the stairs at approximately 9:30 p.m and that they had completely cleared all of the snow from the

landing and the stairs. She stated that they used a broom to sweep the landing and then shoveled the stairs and walkway. The defendant stated that after they finished shoveling they salted the entire area.

The parties' conflicting testimony and meteorological evidence demonstrate that questions of fact exist as to whether a storm was in progress at the time of plaintiff's accident, which, if there was, would have suspended defendant's duty to remedy any alleged dangerous conditions for a reasonable period of time after the storm had ceased (see Wood v Schenectady Mun. Hous. Auth., 77 AD3d 1273 [3d Dept. 2010]). The defendant submitted climatological information indicating that there was freezing rain and freezing drizzle after the defendants shoveled at 9:30 p.m. However, the defendant testified that no snow had fallen during the night prior to the accident and that it was not snowing at the time of the accident. The climatological records as well as the testimony of the defendant creates a question of fact as to whether there was a storm in progress at the time and location of the accident, and whether the plaintiff slipped on ice accumulated during an ongoing storm (see Lester v Ackerman, 82 AD3d 847 [2d Dept. 2011]; Verleni v City of Jamestown, 66 AD.3d 1359 [4th Dept. 2009]).

Further, it is clear that the defendant undertook snow removal efforts about one hour after the snow storm had abated. The deposition testimony of the defendant and the plaintiff also raises questions of fact as to whether the snow removal activities did not cause, create, or otherwise increase the allegedly hazardous icy condition which resulted in the plaintiff's accident(see Karalic v City of New York, 307 AD2d 254 [2d Dept. 2003]; Mahoney v Affrunti, 297 AD2d 717 [2d Dept. 2002]; Giamboi v Manor House Owners Corp., 277 AD2d 201[2d Dept. 2000]; Baillet v Auerbach, 277 AD2d 335 [2d Dept. 2000]). Although the defendant testified that she merely used a push broom to clear he snow on the landing, she stated the steps and landing were completely cleared of snow. The plaintiff testified however, that the landing and steps were not completely cleared and that there was snow on the sides of the landing and the stairs. In addition, the defendant testified she salted the entire area immediately after she shoveled the stairs, whereas the plaintiff indicated that no salt was present on the landing at the time she slipped. Therefore, it cannot be determined as a matter of law that the defendant did not create or exacerbate a hazardous condition on the premises (see Figueroa v West 170th Realty, Inc., 56 AD3d 299 [1st Dept. 2008]; Salvanti v. Sunset Indus. Park Assoc., 27 AD3d 546 [2d Dept. 2006]; Chaudhry v. East Buffet & Rest., 24 AD3d 493 {2d Dept. 2005]).

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that the defendant's motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: June 27, 2011
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.