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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

LAURA WEINBERGER,

Plaintiff,

- v -

52 DUANE ASSOCIATES, LLC and A & E STORES, INC. d/b/a BOLTON'S,

Defendants.

Index No.: 107132/09
Motion Date: 06/28/11
Motion Seq. No.: 02
Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Defendant 52 Duane Associates, LLC moves for summary judgment dismissing this personal injury action.

Plaintiff claims that she sustained injuries to her left leg on the morning of February 13, 2008, between 8:30 A.M. and 9:00 A.M., when she fell on the sidewalk in front of 52 Duane Street, a building owned by the moving defendant and leased to co-defendant Bolton's. At her deposition, plaintiff testified as follows. On the day of her accident, "[i]t was like a steady rain, but not like torrential rain or anything like that." There

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

☐ SETTLE/SUBMIT ORDER/JUDG.

was ice but not snow on the ground. The sidewalk where she fell "wasn't a sheet of ice, it was like lumpy because it was raining and there was little puddles on the ice. There was no salt or sand or anything like that." The ice was from one to two inches high and "anywhere where there was less ice there w[ere] pools of water." The ice "was very lumpy and bumpy because it was raining." "[T]he whole sidewalk was a complete sheet of ice but it was very unlevel;" "not smooth, very bumpy." In response to the question of what she did upon seeing the sheet of ice, plaintiff said that there was nothing that she could do. "It was like that everywhere. There was no path or anything, any other place to walk. I had no choice but to walk on the ice". She stated that there were no spots she could have walked on where there was no ice.

Defendant contends that a storm was ongoing at the time of plaintiff's accident, and that it is relieved from liability under the "storm in progress" doctrine. Defendant attaches certified weather reports for February 2008 from the United States Department of Commerce, National Climatic Data Center; such data is admissible to prove the state of the weather (CPLR 4540 [a]; CPLR 4528; Flanagan v City of New York, 243 AD2d 677, 677-678 [2d Dept 1997]). The data reflects weather conditions in Central Park in New York City. Defendant's data is not accompanied by expert testimony. Plaintiff produces affidavits

from two experts and weather records from the same source as defendant in order to show that there was no storm at the time. Alternatively, plaintiff claims that the existence of a storm is an issue of fact, precluding summary judgment. Plaintiff also contends that defendant is liable because it exacerbated the dangerous condition on the sidewalk by engaging in efforts to clean up the snow and ice.

"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]). If the defendant succeeds, the burden then shifts to the plaintiff "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]). In a premises liability case, plaintiff must demonstrate the existence of "facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (Robinson v City of New York, 18 AD3d 255, 256 [1st Dept 2005], quoting Schneider v Kings Highway Hosp. Ctr., 67 NY2d 743, 744 [1986] [internal quotation marks omitted]).

In slip-and-fall incidents involving snow and ice, a property owner or possessor is not liable unless he or she

created the dangerous condition or had actual or constructive notice of it (Voss v D&C Parking, 299 AD2d 346, 346 [2d Dept 2002]). In regard to the "storm in progress" argument, "it is settled that the duty of a landowner 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, 304 [1st Dept 2007]; see also Solazzo v New York City Tr. Auth., 6 NY3d 734, 735 [2005]). 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 v MLG Hillside Assoc., 290 AD2d 345, 345-346 [1st Dept 2002]). Therefore, if the storm which produced the allegedly hazardous condition on the sidewalk in front of defendant's 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.

A defendant arguing "storm in progress" makes a prima facie case for dismissal by submitting meteorological records showing a storm ongoing at the time of the accident (Dowden v Long Is. R.R., 305 AD2d 631, 631 [2d Dept 2003]). A defendant is not required to submit the affidavit of a licensed meteorologist to

interpret the information contained in the records (id.). The court may determine, as a matter of law, whether the records and other evidence show that a storm was ongoing during the accident (see Rodriguez v New York City Hous. Auth., 52 AD3d 299, 299 [1st Dept 2008]; Prince v New York City Hous. Auth., 302 AD2d 285, 285 [1st Dept 2003]).

Defendant contends that a storm began on February 12, 2008, the day before plaintiff's accident, and continued until after the accident was over citing the meteorological data submitted in support of its application. Defendant claims that there was freezing rain when plaintiff fell. Plaintiff's expert, interpreting the same data, claims that there was no storm, as there was no freezing rain at the time that plaintiff fell. Rather, the expert states that there was a light rain and temperatures were substantially above freezing.

A defendant need not present evidence of a "major winter storm" to make a prima facie case under the "storm in progress" doctrine (see Zima v North Colonie Cent. School Dist., 225 AD2d 993, 994 [3d Dept 1996] [although no storm occurred at the time of the accident, there was an "ongoing hazardous weather condition" caused by icy rain]). The doctrine has been applied to various conditions of weather (Solazzo, 6 NY3d at 735 [sleeting and raining on and off all day causing subway steps to be wet]; Rodriguez v New York City Hous. Auth., 52 AD3d 299, 299-

300 [1st Dept 2008] [trace amounts of snow the night before the accident]; McConologue v Summer St. Stamford Corp., 16 AD3d 468, 469 [2d Dept 2005] [cold weather and rain at the time of the accident]; Prince, 302 AD2d at 285 [trace precipitation in the form of freezing rain and ice pellets, accompanied by heavy fog and widespread glaze, preceded by a month of predominantly above-freezing temperatures that had no snow or ice]; Cohen v A.R. Fuel, 290 AD2d 640, 641 [3d Dept 2002] [day before accident, freezing rain and sleet; on the day of accident, light rain and cold]; Micheler v Gush, 256 AD2d 1051, 1052 [3d Dept 1998] [ongoing at the time of the accident "a drizzling rain coupled with falling temperatures"]).

There is no dispute that there was snowfall on the day before the accident, followed by freezing rain in the early morning of the day of the accident, followed by rain and mist. Defendant here has sustained its prima facie burden of showing that a storm created the hazardous condition on the sidewalk and that the storm, as defined for purposes of liability in the aforementioned caselaw, was ongoing when plaintiff fell.

While a landlord is not obligated to clean up during a storm, if the landlord elects to do so, he or she is liable if the clean-up efforts make the area more dangerous (Gleeson v New York City Tr. Auth., 74 AD3d 616, 617 [1st Dept 2010]; Pipero v New York City Tr. Auth., 69 AD3d 493 [1st Dept 2010]). Plaintiff

submits an affidavit in which she states that the sidewalk where she fell was covered with lumpy, uneven ice. She states that the outside edges of the ice were higher than the part of the ice in between the edges, and that the in-between part looked as if someone had tried to clear a path. Plaintiff's experts state that this is evidence that defendant did not properly clear the sidewalk, thus exacerbating the dangerous condition.

Plaintiff's affidavit contradicts her deposition testimony and hence cannot create an issue of fact as to whether defendant exacerbated the hazardous condition by attempting to clear it (see Sugarman v Malone, 48 AD3d 281, 282 [1st Dept 2008]; Harty v Lenci, 294 AD2d 296, 298 [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"]). Thus plaintiff has failed to adduce facts tending to show that defendant created a hazardous condition through its snow removal efforts and no issue of contested fact remains to be tried.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted 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; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: October 13, 2011

ENTER:

DEBRA A. JAMES J.S.C.