Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Lyudmila Faradzheva,

Plaintiff,

- against -

Yong Ping Guan and The City of New York,

Defendants.

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Index Number: 6789/10

Motion Date: 9/12/11

Motion Cal. Number: 10

Motion Seq. No.: 2

The following papers numbered 1 to 11 read on this motion by defendant, Yong Ping Guan, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition(Pltf)-Exhibits.....	5-7
Affirmation in Opposition(City).....	8-9
Reply.....	10-11

Upon the foregoing papers it is ordered that the motion is decided as follows:

As a preliminary matter, this Court is deciding the instant motion since it was referred to this Court pursuant to the memorandum of Justice Martin E. Ritholtz issued on September 12, 2011. The papers were received in chambers on September 26, 2011.

Motion by Guan for summary judgment dismissing the complaint and all cross-claims against him is denied.

Plaintiff allegedly sustained injuries as a result of slipping and falling upon ice on the sidewalk on Wetherole Street between 65th Road and 66th Avenue abutting the premises 95-02 65th Road in Queens County on January 11, 2009. It is uncontested that Guan owns said abutting premises.

Plaintiff testified in her statutory 50-h hearing that the sidewalk and roadway were “smooth” like “glass”. “Everything was

smooth. It was like glass." The ice was dark in color and she observed it before she fell. Snow was accumulated on the side where the grass was and it was "frozen like stone or rock".

Guan moves for summary judgment upon the grounds that he does not own the premises 95-02 Wetherole Street but 95-02 65th Road, that even if he was the abutting property owner, there is no evidence that he created the condition or had actual or constructive notice of it and that he was not obligated to perform ice removal prior to the time of plaintiff's accident because he did not have sufficient time to do so after cessation of precipitation as a matter of law.

An abutting homeowner is not liable for injuries sustained by a pedestrian as a result of a dangerous condition of the public sidewalk unless the homeowner created the condition or caused it through some special use, or unless a statute charges the homeowner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the homeowner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §§19-152 and 16-123 of the Administrative Code of the City of New York and §2904 of the New York City Charter. This obligation includes the removal of snow and ice. Moreover, liability for injuries sustained by pedestrians as a result of a violation of these sections, as of September 14, 2003, was transferred from the City, which owns the sidewalks and hitherto had a non-delegable duty to maintain them, to the abutting property owner pursuant to §7-210 of the Administrative Code, except if the abutting premises are owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]).

However, §7-210 is not a strict liability statute. Rather it only imposes liability upon abutting owners for their negligence (see Faulk v. City of New York, 2007 NY Slip Op 51346 [U] [Sup Ct, Kings Co 2007]). The ordinary rules of premises liability were not altered. Rather, the statute merely shifted that liability with respect to the negligent failure to maintain sidewalks from the owner thereof, the City, to the adjoining property owner.

In order for property owners to be found liable for a defective or dangerous condition on their premises, it must be shown that they either created the condition or, where the condition was not actually created by them but came about as a result of a failure to maintain the premises, that they had actual

or constructive notice of the hazardous condition and that they had an adequate opportunity to remedy it but failed to do so (see Danielson v. Jameco Operating Corp., 20 AD 3d 446 2nd Dept 2005]).

The same standard of liability applies to slip and fall sidewalk accidents arising from an accumulation of snow or ice (see Martinez v. City of New York, 20 AD 3d 513 [2nd Dept 2005]).

An obvious corollary to the above-cited statutes and case law is that no duty can be imposed upon the owner of premises to maintain a sidewalk that does not abut his or her property. Guan's counsel argues that Guan is entitled to summary judgment because he does not own the property address in front of which plaintiff claims to have fallen, to wit, 95-02 Wetherole Street, but rather 95-02 65th Road. However, plaintiff has shown undisputed evidence that Guan's premises, 95-02 65th Road, is a corner building that abuts both 65th Road and Wetherole Street. In particular, the deed to said premises shows that the property runs northerthy along the easterly side of 65th Road for 21 feet and easterly along the northerly side of Wetherole Street for 67.33 feet. Plaintiff's notice of claim against the City alleges that plaintiff fell on Wetherole Street between 65th Road and 66th Avenue on the sidewalk abutting the premises 95-02 65th Road. Her complaint alleges that she fell on a portion of the sidewalk along the side of the premises 95-02 65th Road and although her bill of particulars alleges that she fell "near the front gate of the building number 9502 Wetherole Street Queens, New York", her amended bill of particulars alleges that the accident occurred "on that portion of the premises known as 95-02 65th Road, Flushing, New York which borders Wetherole Street between 65th Road and 66th Avenue County of Queens."

In her 50-h hearing, plaintiff testified that she was at a client's house at 65-65 Wetherole Street and was asked to go shopping. She left that address and walked along Wetherole Street on her way to the store which was on "63rd". She slipped and fell on the sidewalk on Wetherole Street on the same side of the street as her client's house. Although she did not know the distance she walked from her client's house before she fell, when asked whether there were any other buildings as she walked from her client's house, she responded that "there is another little house, and then the last three-story building, this is where I fell, next to it." When asked if she knew the street number of the abutting building, she responded, "Maybe 9502." When asked, "Would that be 9502 Wetherole?" she replied, "Wetherole, yes." The photographs that she identified at her 50-h hearing, while of poor quality, show a corner premises. A photograph of a door with the address "95 02" on it was identified by plaintiff as the door of the building abutting

the sidewalk where she fell. Moreover, she marked on a photograph the location where she alleges she fell, and that location abuts the side of said corner premises.

Therefore, in light of the foregoing, and in consideration of plaintiff's obvious difficulty in communicating in the English language, the Court does not interpret her testimony in which she merely responded, "Wetherole, yes" as a definitive statement by her that she fell in front of a premises known as 95-02 Wetherole Street and therefore that she contradicted her allegations in her complaint and amended bill of particulars that the premises that abutted the sidewalk where she fell was 95-02 65th Road. The papers on this motion at least raise a question of fact as to whether plaintiff allegedly fell on the sidewalk abutting Guan's premises. The Court also notes that Guan does not deny that the premises identified by plaintiff in the photographs were his premises or that the door bearing the numbers 95 02 was his door, and he does not aver whether or not an address 95-02 Wetherole Street even exists.

Guan does not argue that he is exempt from liability for failing to maintain the sidewalk under the exception to §7-210. Indeed, neither plaintiff nor Guan address the applicability of §7-210 to the facts of this case. Guan merely avers in his affidavit in support of the motion, inter alia, that he is the owner of 95-02 65th Road, that said premises is a three-family exclusively residential home and that a tenant by the name of David resided on the first floor on the date of the accident. There is no averment or allegation that the premises was owner-occupied.

The only issues presented on this motion, assuming that Guan's premises abutted the sidewalk where plaintiff allegedly fell, are whether he created the icy condition or whether he failed to remedy it within a reasonable time after acquiring actual or constructive notice of it.

With respect to the first issue, a property owner may be found liable if it is shown that he made the condition on the public sidewalk more hazardous by his ice and snow removal (see Crowder v. Leichter, 282 AD 2d 423 [2nd Dept 2001]; Booth v. City of New York, 272 AD 2d 357 [2nd Dept 2000]).

Guan averred in his affidavit that his first floor tenant at the time of the accident, by the name of David, performed sidewalk snow removal in exchange for a rent reduction, that he, Guan, generally inspected the area after David removed snow and ice, that David's consistent custom and practice was to promptly and completely remove snow and ice from the sidewalk and apply salt

after snow removal and that he carefully maintained the sidewalk under all weather conditions.

Therefore, Guan met his burden of demonstrating that he did not create or render more hazardous the icy condition of the sidewalk through his testimony concerning his tenant's practice of completely removing snow and ice from the sidewalk and spreading salt and his inspection of the area after his tenant removed snow and ice.

In opposition, plaintiff failed to proffer any evidence that any snow and ice removal by Guan's tenant created the specific icy condition that caused plaintiff to slip and fall.

However, notwithstanding that Guan has presented sufficient unrebutted evidence that he did not create the alleged dangerous icy condition, he has failed to meet his initial burden of establishing his lack of actual or constructive notice of the icy condition (see Park v. Caesar Chemists, Inc., 245 AD 2d 425 [2nd Dept 1997]).

Guan makes no mention in his affidavits in support of the motion whether or not he observed the ice on the sidewalk alleged by plaintiff and, thus, has failed to proffer any evidence that he did not have actual notice of the condition.

With respect to constructive notice, the condition must have been visible or apparent for a sufficient period of time to have reasonably allowed Guan, in the exercise of reasonable care, to have discovered and remedied the condition (Gjoni v. 108 Rego Developers Corp., 48 AD 3d 514 [2nd Dept 2008]; Scala v. Port Jefferson Free Library, 255 AD 2d 574 [2nd Dept 1998]; see also Danielson v. Jameco Operating Corp., 20 AD 3d 446 [2nd Dept 2005]). As the proponent for summary judgment, it was Guan's burden to proffer evidence that he did not have constructive notice of the condition (see Park v. Caesar Chemists, Inc., supra). He has failed to do so.

Guan presented no admissible evidence that the icy condition of the sidewalk was not visible or apparent and had not existed for a sufficient period of time prior to the accident so as to have afforded him a reasonable opportunity to have discovered and remedied the hazard. Indeed, plaintiff testified in her 50-h hearing (the transcript of which is annexed to Guan's moving papers) that the sidewalk was covered in ice, which was dark, and that she saw it before she fell. She also testified that it was not snowing at the time of her accident but that the last time it snowed was "sometime on the 10th." Thus, not only has Guan failed

to profer any evidence that he had no constructive notice of the condition of the sidewalk, but he has proffered evidence through plaintiff's 50-h testimony that there was constructive notice of the condition (see e.g. Kaplan v. DePetro, 51 AD 3d 730 [2nd Dept 2008]; Robinson v. Trade Link America, 39 AD 3d 616 [2nd Dept 2007]).

Plaintiff testified that her accident occurred shortly after 8:00 A.M. Guan contends that there was freezing rain and drizzle on the night of January 10th and continued until approximately 8:15 A.M. and, therefore, he was not obligated to remove the accumulation of ice because he did not have sufficient time to do so. It is well-established that a property owner may not be held liable for injuries resulting from an accumulation of snow or ice on his premises until after a reasonable time has passed for taking protective measures after cessation of precipitation (Newsome v. Cservak, 130 AD 2d 637 [2nd Dept 1987]). Furthermore, pursuant to §16-123 of the New York City Administrative Code, an abutting property owner has four hours after the snow ceases to fall to remove snow or ice from the sidewalk, which period of time does not include the hours between 9 P.M. and 7 A.M.

In support of his contention that there was precipitation until 8:15 on the morning of plaintiff's accident, he annexes to his moving papers a copy of what purports to be a weather report entitled, Site Specific Weather Analysis Report" prepared by a company by the name of CompuWeather, Inc. This document is not in admissible form and does not constitute competent evidence.

Guan's argument that the report is admissible pursuant to CPLR 4528 is without merit. CPLR 4528 provides, "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." This provision merely expands upon the hearsay exception for public records with respect to recorded observations by the United States Weather Bureau by designating such records as prima facie evidence (see Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book7B, CPLR 4528). They are, however, not self-authenticating unless they meet the requirements of CPLR 4540 (see id.). Pursuant to CPLR 4540(a), in order for a copy of a public document to be admissible as prima facie evidence of such record, it must be authenticated. Moreover, it is authenticated only if "attested as correct by an officer or deputy of an officer having legal custody of an official record of the United States or of any state, territory or jurisdiction of the United States, or of any of its courts, legislature, offices, public bodies or boards".

The copy of the weather analysis report annexed to the moving

papers is not attested or certified as correct by any officer having legal custody of it. Indeed, it is not signed by anyone. But in any event, the provisions of CPLR 4528 and 4540 are inapplicable to this document since it is not an official record of any governmental body, but the product of a private entity. The argument of Guan's counsel that the weather analysis report by CompuWeather qualifies as an official record because it states (in hearsay form) that it relies upon data from the Weather Bureau is without merit. Even were the report to be considered an official record of the Unites States Weather Bureau, as heretofore stated, it is not attested as being correct and is, therefore, inadmissible.

Finally, the Court notes that the report states that it was prepared by CompuWeather's forensic meteorologists on behalf of Guan's attorneys. This report, however, is entirely anonymous and not signed by anyone. It is not in the form of an affidavit by any "forensic meteorologist" setting forth his or her credentials as an expert qualified to render an opinion on meteorology or perform any meteorological analysis. Therefore, it is also inadmissible as being incompetent and the Court may not consider it.

Accordingly, the motion is denied.

Dated: September 29, 2011

KEVIN J. KERRIGAN, J.S.C.