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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ~~JAFFE~~ BARBARA JAFFE J.S.C. Justice

PART 5

Index Number : 105840/2010
CASTILLO, MAYRA
vs.
HURSTON PLACE HOUSING
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT CAL # 25

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12/23/11
DEC 23 2011

BJ
_____, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------x

MAYRA CASTILLO,

Plaintiff,

-against-

HURSTON PLACE HOUSING DEVELOPMENT FUND CORPORATION, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT AND CITY OF NEW YORK,

Defendants.

----------x

Index No. 105840/10

Motion Subm.: 10/4/11
Motion Seq. No.: 002

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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The Taub Law Firm, P.C.
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For Hurston:
Vanessa Caballero, Esq.
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By notice of motion dated July 14, 2011, defendant Hurston Place Housing Development Fund Corporation (Hurston) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims against it. Plaintiff opposes.

I. PERTINENT BACKGROUND

On February 17, 2010, at approximately 8:30 am, plaintiff was allegedly injured when she slipped and fell on ice on the public sidewalk adjacent to the building at 2906 Frederick Douglas Boulevard in Manhattan (the premises), which is owned by Hurston. (Affirmation of Vanessa Caballero, Esq., dated July 14, 2011 [Caballero Aff.], Exh. A).

According to certified climatological records, on February 16, 2010, snow began falling in the morning and ended by approximately 6:30 pm, with a total accumulation of six inches. On

December 17, 2010, no snow or other precipitation fell. (*Id.*, Exh. H).

On or about May 4, 2010, plaintiff commenced the action by serving defendants with her summons and complaint, and on or about July 1, 2010, Hurston served its answer. (*Id.*, Exh.s A, B).

At a 50-h hearing held on May 17, 2010, plaintiff testified, as pertinent here, that it had snowed on February 16, 2010, that when she was walking on the sidewalk next to the premises the following day the sidewalk appeared clean and snow was pushed to the sides but that after she fell, she touched the ground, her hands became wet, and she saw that the sidewalk was covered by a thin layer of clear, shiny, invisible, clean, and smooth ice. She saw no salt or sand on the sidewalk. (*Id.*, Exh. E).

On or about July 15, 2010, plaintiff served a bill of particulars, alleging that her accident occurred after a snow and/or ice storm struck the area a day earlier, leaving a residue of snow and ice on the ground, and that despite defendants' snow removal efforts, a residue of ice remained on the ground, causing her to fall. (*Id.*, Exh. C).

On February 16, 2011, plaintiff testified at an examination before trial that she did not see ice on the sidewalk until after she fell and that it appeared to have been formed by melting snow. (*Id.*, Exh. F).

At an examination before trial held on April 12, 2011, Malcolm Punter, the assistant director of property management for a company owned by Hurston, testified that at the time of plaintiff's accident, the premises was vacant and in the process of being rehabilitated by Aleem Construction (Aleem). He believed that pursuant to a contract between Hurston and Aleem, it was Aleem's responsibility to remove snow and ice from the sidewalks abutting the premises.

(Affirmation of Elliot H. Taub, Esq., dated Aug. 3, 2011 [Taub Aff.], Exh. B).

By report dated July 2, 2011, Howard Altschule, a certified meteorologist, states that based on his analysis of climatological records, on February 16, 2010 a winter storm ended at approximately 8:08 pm, with an accumulation of snow and ice, and between 6:28 pm and 8:28 pm, snow melted and refroze, causing new ice to form. He opines that the ice on which plaintiff fell had been there for approximately 12 to 14 hours before her fall, if not earlier, and that the last time new ice formed before her fall was at no later than 8:28 the previous night. (Taub Aff., Exhs. C, D).

II. CONTENTIONS

Hurston argues that it may not be held liable as it did not violate its duty pursuant to Administrative Code 16-123(a) to remove snow and ice from the sidewalk four hours after the end of snowfall, which does not include the period of time between 9 pm and 7 am as the weather records reflect that it stopped snowing at approximately 10 pm the day before plaintiff's accident, and it thus had no duty to clear the snow or ice until 11 am, hours after plaintiff's fall. Hurston also asserts that it had no notice of the ice, observing that plaintiff testified that the ice was clear and invisible, smooth and clean. (Mem. of Law, dated July 5, 2011).

Plaintiff contends that based on her expert's analysis, the ice on which plaintiff fell had been there since the night before her accident, and that Hurston's snow removal efforts created the ice or, having cleared the snow, Hurston failed to remove the ice. Plaintiff also asserts that Hurston is liable for any negligent snow removal performed Aleem. (Taub Aff.).

In reply, Hurston argues that there is no evidence that any snow removal efforts caused the ice on which plaintiff fell, as plaintiff's expert opines only that the general weather conditions

would have allowed ice to melt and refreeze on the day of plaintiff's accident, without addressing the specific origin of the ice on which plaintiff fell. (Reply Affirmation, dated Aug. 26, 2011).

III. ANALYSIS

The party seeking summary judgment must show prima facie entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the prima facie showing by submitting admissible evidence, demonstrating the existence of factual issues that requires a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, denial of the motion is required, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 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).

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

Here, the certified climatological data submitted by Hurston, which 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"]), establishes that snow began falling the day before plaintiff's accident and stopped falling at approximately 6 pm. Given the statutory grace period permitted property owners (Administrative Code § 16-123[a]), Hurston has demonstrated, *prima facie*, that it had no obligation to remove the ice before plaintiff's accident. (*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 am, defendant had until 11 am at the earliest to complete snow removal]; *Karpilovskaya v Badiner*, 2009 WL 6700535 [Sup Ct, Kings County 2009] [even if court relied on plaintiff's weather report showing that snow stopped falling at 7 am, plaintiff's accident happened at approximately 10:30 am and thus defendant not liable]).

However, while a premises owner will not be held liable for failing to remove snow or ice from an abutting sidewalk, it may be held liable when its removal efforts have created or exacerbated a dangerous condition. (*Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462 [1st Dept 2007]).

Here, plaintiff's evidence demonstrates that after the snow ceased falling on February 16, the temperatures rose, permitting snow to melt and then re-freeze, and thus, along with her testimony that snow was piled on both sides of the sidewalk, plaintiff has raised a triable issue as to whether snow removal efforts caused ice to form. (*See Smith v County of Orange*, 51 AD3d 1006 [2d Dept 2008] [plaintiff raised triable issue regarding whether ice on which she slipped was formed when snow piles created by defendant's snow removal efforts melted and refroze]; *Vargas v Cent. Parking Sys.*, 35 AD3d 255 [1st Dept 2006] [issue of fact as to whether ice caused

by melting and refreezing of runoff from pile of snow on sidewalk next to defendant's premises that was created by defendant's employees]; *Santiago v New York City Hous. Auth.*, 274 AD2d 335 [1st Dept 2000] [defendant denied summary judgment as factual issue as to whether ice on which plaintiff slipped was formed by snow piled on either side of pathway, created by defendant in removing snow from pathway, which melted and refroze]).

Even assuming that Aleem and not Hurston removed the snow, having contracted with Aleem to do so, Hurston may be held liable. (*See Sarisohn v 341 Commack Rd., Inc.*, 89 AD3d 1007 [2d Dept 2011] [summary judgment denied as property owner did not eliminate triable issues regarding whether snow removal efforts of company it hired for that purpose caused, created, or exacerbated icy condition on sidewalk and parking lot]; *Olivieri v GM Realty Realty Co., LLC*, 37 AD3d 569 [2d Dept 2007] [defendant owner denied summary judgment as triable issue existed as to whether ice formed as result of melting of snow that had been negligently piled on sides of walkway by snow removal contractor]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Hurston Place Housing Development Fund Corporation's motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE J.S.C.

DATED: December 23, 2011
New York, New York

DEC 23 2011

FILED

JAN 10 2012

NEW YORK
COUNTY CLERK'S OFFICE