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

PRESENT: HON. PAUL WOOTEN Justice

PART 7

ANNA EVANGELISTA,

Plaintiff,

- against -

THE CHURCH OF ST. PATRICK, THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, and ST. PATRICK'S SCHOOL,

Defendants.

INDEX NO. 107648/2009

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 4, were read on this motion by defendants for summary judgment, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2, 3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

Plaintiff Anna Evangelista (Evangelista) sues the defendants The Church of St. Patrick (Church), The Roman Catholic Archdiocese of New York (Archdiocese) and St. Patrick's School (School) (together, defendants) for injuries suffered in a slip and fall on a public sidewalk adjacent to the School. Defendants move, pursuant to CPLR 3212, for summary judgment on the ground that they did not create, or have actual or constructive notice of, a hazardous condition.

BACKGROUND

On March 19, 2007, Evangelista drove to the School which is located on Staten Island, to pick up her grandchildren. She parked one block away and began walking towards the School when she saw a student walking directly towards her, not looking where she was going. While trying to avoid the student, Evangelista slipped on a patch of ice and fell at approximately 2:20 P.M. Subsequently, Evangelista commenced this action against the defendants in May of 2009.

Both parties submitted climatology reports showing that snow fell on March 17, 2007 (Morello Aff., exhibit I and Lever Aff., exhibit F). No additional precipitation fell from March 17 through March 19. On March 19, at all times after 10:00 A.M., the temperature was well above freezing (*id.*).

At her examinations before trial (EBT), Evangelista first stated that she did not see any ice before she slipped, but then explained that she had seen patches of ice on the sidewalk 30 seconds prior to her fall, from half a block away (Evangelista EBT, Lever Aff., exhibit A, at 45).

The defendants' superintendent Thomas Murphy (Murphy), testified that he is in charge of general maintenance at the Church and School, which includes snow removal (Murphy EBT, Morello Aff., exhibit G). He stated that on Saturday, March 17th, in order to prepare the Church for Sunday services, he and his staff cleared away the snow that fell and put down rock salt, and, on Monday, March 19th, upon arrival to work at 6:30 A.M. he inspected the sidewalks and put down more salt (*id.* at 20, 30). This is his routine for every day that there is snow on the ground (*id.* at 39). At 1:30 P.M., he reinspected the sidewalk in preparation for school recess but did not need to remove any snow or ice, and did not need to resalt (*id.* at 30). Finally, he stated that he investigated the area after Evangelista fell and he observed no ice on the sidewalk (*id.* at 36).

The School's principal, Sister Mary Ferro (Ferro), confirms that Murphy's general practice in snowy conditions is to check the status of the sidewalks at the start of the school day and again before lunch or dismissal (Ferro EBT, Morello Aff., exhibit H, at 18-19). She recalls that the snow had been cleared before Monday and that Murphy inspected the sidewalk Monday morning (*id.* at 27). Neither Ferro nor Murphy received complaints about ice or slippery conditions (*id.* at 31; Murphy EBT, at 45).

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184,185-186 [1st Dept 2006]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardlessof the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79

AD3d 518, 519 [1st Dept 2010]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to allow the defendant to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500; *Rodriguez*, 79 AD3d at 519).

DISCUSSION

Defendants argue that based on the foregoing testimony, there is no evidence to suggest that they had actual or constructive notice of the condition on which Evangelista slipped, or that they created the hazard. Defendants further proffer that Evangelista has not provided any evidence that the sidewalk was not properly tended and maintained, and contend that the climatological data conclusively establishes that, at the time of the incident, it was too warm for any snow melt to have pooled and frozen into ice.

The Court finds that defendants established their prima facie entitlement to summary judgment as they tendered evidence establishing the absence of notice. Specifically, Murphy testified that at about 1:30 P.M., approximately 50 minutes prior to plaintiff's accident, he inspected the area where plaintiff fell and did not clear away additional snow, remove any ice from the area and put down more rock salt, nor did he see any patches of ice on the sidewalk (Murphy EBT, Morello Aff., exhibit G, at 30) (*see Roman v Met-Paca II Assoc., L.P.*, 86 AD3d 509 [1st Dept 2011] [defendant's superintendent testified that approximately two hours prior to plaintiff's accident, he did not see any ice on ramp where plaintiff claims she fell thereby establishing the absence of actual notice]; *Ross*, 86 AD3d at 421 [1st Dept 2011] [defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident and that the dangerous condition did not exist when the area was last

inspected]).

In opposition, Evangelista cites to her own deposition testimony where she states that she saw multiple patches of ice on the sidewalk before she slipped (Evangelista EBT, at 31 and 49). She references three photographs taken two days after the accident, which show the sidewalk outside of the School in good order (Lever Aff., exhibit D). Finally, she supplies the expert affidavit of Howard Altschule (Altschule), a certified meteorologist (Lever Aff., E).

Evangelista contends that a triable issue of fact remains because defendants admit that they had knowledge of the hazard. She contends that Murphy's testimony that he put salt down in the morning implies that defendants knew that there was ice on the sidewalk. However, the "general awareness that icy conditions might have existed is insufficient to establish constructive notice of the specific condition that resulted in plaintiff's injuries" (*DiGrazia v Lemmon*, 28 AD3d 926, 927 [3rd Dept 2006]; *see also Yery Suh v Fleet Bank, N.A.*, 16 AD3d 276, 277 [1st Dept 2005] ["general awareness that water can turn to ice is legally insufficient to constitute constructive notice of the particular condition that caused plaintiff to fall"]; *Segretti v Shorenstein Co., E.*, 256 AD2d 234, 235 [1st Dept 1998]). Moreover, Murphy's statement does not impliedly admit that there was ice on the sidewalk where Evangelista fell. In fact, he repeatedly denies the presence of ice there (Murphy EBT, at 31, 35-6, 44). His testimony does not establish a question of fact that defendants had actual knowledge of an ice hazard where Evangelista fell.

Evangelista also argues that the defendants have a statutory duty to keep the sidewalk well maintained and free from hazards (Administrative Code of the City of New York §§ 7-210 and 16-123). However, not only do defendants never denied this duty, rather they contend that it was sufficiently discharged.

Evangelista further proffers that Altschule's affirmation creates a question of fact with

regard to notice. In his affidavit, Altschule states that the air temperature was above freezing all day on the day before the incident but dropped below freezing at 12:51 A.M. on the 19th, where it remained until 2:51 A.M. Without accounting for the intervening time, Altschule then states that from 9 A.M. until 2:20 P.M. (the approximate time of the accident), the air temperature remained above freezing, at around 40 degrees Fahrenheit (*id.*, ¶ 20-21),[1] and that three inches of snow and ice were present on "exposed, untreated and undisturbed surfaces" (*id.*, ¶ 22). Citing this data, he opines that ice formed during the two-hour period of sub-freezing overnight temperatures, and that ice remained 12 hours later (*id.*, ¶ 27), was not treated, and caused Evangelista to slip.

Evangelista maintains that this creates a question of fact as to whether the ice was present long enough to establish constructive notice. In support, she cites to *Fernandez v 1330 Third Avenue Corp.* (10 Misc 3d 1057[A], 2005 NY Slip Op 51995[U] [Sup Ct, NY County 2005]), where the court denied summary judgment seeking to dismiss a slip and fall on refrozen melted snow. However, the facts in *Fernandez* supported a reasonable inference that melted water refroze and remained frozen at the time of the accident because meteorological data showed that the temperature at the time of the accident was, in fact, sub-freezing. Here, that is not the case. Moreover, there is no evidence to support the position that the sidewalk was untreated (i.e., not shoveled or salted). The uncontested testimony is that the sidewalk was cleared of snow, and was salted and inspected multiple times each day, in accordance with the regular maintenance practices of the School and Church. The photographic evidence (Lever Aff., exhibit D) shows a well-shoveled and clear sidewalk. It does not establish a question of fact.

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[1] Altschule argues that the climatology data provided by the defendants should be unpersuasive because it comes from a data location 17 miles away, while his comes from one only seven miles away. This argument is meritless. Defendants' data is nearly identical to Altschule's.

Evangelista next contends that the defendants created or exacerbated the hazard because they left snow negligently "piled high" along the grassy curb strip of the sidewalk. There is no evidence of this in the record, and so, the argument is speculative. To the extent that this argument posits that a landowner must completely clear the property of all snow (including snow banks flanking the sidewalk) to escape liability, the law imposes only the obligation to take reasonable measures to remedy a hazardous condition (*see Toner v National R.R. Passenger Corp.*, 71 AD3d 454, 455 [1st Dept 2010]). She also argues that the defendants must have negligently removed the ice or insufficiently salted the sidewalk because, if it had been properly salted, the ice would have melted and she would not have fallen (*see e.g.* Altschul Affidavit, Lever Aff., exhibit E, ¶ 29). This argument is unsupported, conclusory, and entirely speculative.

Her claim that defendants have not supplied proof that they reasonably maintained the sidewalk is incorrect (*see* Murphy and Farro EBTs). Her claim that Murphy's and Farro's testimonies are self-serving and should be ignored is unpersuasive. Finally, her assertion that a triable issue of fact exists because defendants did not keep date-stamped maintenance activity logs is unsupported by any case law.

CONCLUSION

Defendants have sustained their prima facie burden that they had no knowledge of, and did not create, the hazard on which Evangelista allegedly slipped. In opposition to this prima facie showing, Evangelista has failed to raise a triable issue of fact. There is no non-speculative basis to conclude that defendants' snow removal activities may have caused or exacerbated the alleged hazard. Likewise, there is no evidence that defendants had actual or constructive knowledge of the hazard.

Accordingly, it is hereby

ORDERED that the motion of defendants, The Church of St. Patrick, The Roman Catholic Archdiocese of New York and St. Patrick's School, for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that defendants shall serve a copy of this order, with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: Jan. 6, 2012

Paul Wooten J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

FILED
JAN 18 2012
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