Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Enio Angelo,

Plaintiff,

- against -

Salvador Vargas, Nelly Vargas and City of New York,

Defendants.

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Index Number: 29746/09

Motion Date: 3/6/12

Motion Cal. Number: 4

Motion Seq. No.: 3

The following papers numbered 1 to 11 read on this motion by defendants, Salvador Vargas and Nelly Vargas, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Plaintiff's Affirmation in Opposition-Exhibits.....	5-7
City's Affirmation in Opposition.....	8-9
Reply.....	10-11

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

Motion by Vargas for summary judgment dismissing the complaint against them is granted.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof, in admissible form, to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Vargas have met their burden.

Plaintiff allegedly sustained injuries as a result of slipping and falling upon a patch of ice on the public sidewalk abutting the premises 41-48 Case Street in Queens County on February 7, 2009. The unrebutted evidence presented is that said abutting premises is a one-family home occupied by Vargas.

Nelly Vargas testified in her deposition that prior to an impending snowfall, her husband and son would put down salt "all over the place", then after the snow had come down, would shovel the area completely, leaving it very clean, and then would sprinkle

salt "one more time". When asked where they would put the snow after they shoveled it, Mrs. Vargas replied, "Down the walk on the street itself." She stated that the snow would be deposited "on the end where the cars go by". She also testified that she was unaware of anyone falling on ice or snow prior to February 7, 2009 and never received any complaints.

Salvador Vargas, in his deposition, also described his snow removal procedures. When he would hear a weather report of a predicted snowfall, he would sprinkle the entire area with salt. After the snowfall, he and his son would clean everything. He would push the snow all the way down into the street and make a big pile in the center of the street, where "the machine who picks up" [sic], just picks it up and takes everything away." He thereafter elaborated upon what he meant by the "machine": "And then the cleaning department comes with the big – with the truck and takes it all over" [sic]. When asked if he spread salt only one time before it snowed, he replied in the negative and explained that after he cleans everything he spreads salt all over again.

Climatological data submitted indicates that there was a snowfall accumulation of 2.5 inches on February 3, 2009, with 3 inches of snow on the ground on February 4, 2009. No snow or precipitation occurred thereafter through the date of the accident.

Plaintiff testified in his deposition that he slipped and fell in the middle of the sidewalk and indicated on photographs marked as defendant's Exhibit A for the deposition where precisely he slipped.

An abutting homeowner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the homeowner created the defective 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]).

A homeowner 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]).

However, if the defendant makes a prima facie showing that he did not create the icy condition of the sidewalk, the burden shifts to plaintiff, in opposition, to demonstrate that the defendant's snow or ice removal efforts created the condition (see Christal v.

Ramapo Cirque Homeowners Assoc., 51 AD 3d 846 [2nd Dept 2008]).

Vargas made a prima facie showing that they did not create the allegedly icy condition of the sidewalk by way of their deposition testimony that it was their custom and practice to shovel the sidewalk completely and put salt on the sidewalk both before and after shoveling, and that they would deposit the snow they shoveled into the street (see Gjoni v. 198 Rego Developers Corp. (48 AD 3d 514 [2nd Dept 2008] [see appellate brief for defendant, 2007 WL 4981738, which indicates that the prima facie showing of defendants in that case that they did not create the condition consisted of their deposition testimony that it was their custom and practice to shovel the sidewalk and put salt on the sidewalk]).

Neither plaintiff nor the City proffer any competent evidence in opposition so as to raise an issue of fact as to Vargas' creation of an icy condition through their snow removal activities. The opinion of plaintiff's expert, Howard Altchule, a meteorologist, set forth in his affidavit annexed to plaintiff's opposition papers, that the ice present on the subject sidewalk at the time of the accident was formed by runoff from snow that was shoveled adjacent to the sidewalk and that melted and re-froze the day before is not based upon objective evidence but is speculative.

The only portion of Altchule's opinion that was based upon objective data was his general view that any snow that existed, especially snow that had been piled up, after the snowfall on February 3-4 would have melted on February 6, re-frozen that evening and, if left untreated, remained frozen at the time of the accident on the morning of February 7.

Relying upon climatological data which recorded temperatures below freezing from February 4-6, and temperatures from 23-32 degrees on February 6, he concluded that the rise in temperature plus radiation from direct sunshine caused some of the snow and ice that was present to melt, produce puddles and runoff, especially from adjacent snow that had been shoveled into piles, and then to re-freeze in areas where left untreated as the sun began to get lower in the horizon, between 4:19 pm and 6:19 pm. He stated, "Thus, as air temperatures rose into the low 30s on February 6, 2009, some of the snow and ice that was present melted and caused areas of standing water, puddles, runoff and wet surfaces to accumulate. This was especially the case in any depressions, low lying areas or surfaces adjacent to any snow or ice that had been pushed, plowed or shoveled into piles following earlier storms. As the sun began to get lower in the horizon about one hour before sunset (with air temperatures already below freezing), these areas of standing water and runoff where left untreated refroze to ice on

exposed surfaces." He further opined that "the new ice that formed between 4:19 pm and 6:19 pm on February 6, 2009 and left untreated would have remained and been in existence at 8:45 am on February 7, 2009."

Altchule, however, then leaps to the conclusion that the ice that plaintiff describes was present on the sidewalk was formed by the re-freeze of runoff from melted snow piled up by Vargas on his driveway which ran down the driveway and froze. This opinion is not only without factual foundation but ignores the very evidence cited by Altchule in his affidavit.

The Court notes that Altchule did not examine the area of the accident personally or observe the ice or snow that plaintiff alleges was present on the date of his accident. Other than the climatological record, Altchule only states that his opinion is based upon a review of plaintiff's deposition testimony, his understanding of Vargas' testimony that he cleared the entire area in front of his home and pushed the snow into the street, and photographs of the location provided to him by plaintiff's counsel, which photographs were taken on a subsequent date when there was no snow or ice on any surface.

Altchule's conclusion is based upon his observation that the meteorological data showed that "there was no longer any untreated and undisturbed snow from the February 3, 2009 and/or prior snow event(s) on the exposed ground on February 7, 2009", that Vargas testified that he cleared the entire area in front of his home by the afternoon after the snowfall, pushing the snow into the street, that, consequently, "[a]ny snow remaining in that area would be that which was being shoveled or pushed into piles towards the street", and that the photographs of the area show a driveway that "slants down" from Vargas' premises to the street and "thus, runoff from the melt of any snow/ice in or bordering the driveway would tend to run down towards the sidewalk and street. With refreeze, runoff collecting in the sidewalk would form into ice." Based upon the foregoing, his final conclusion was that the ice complained of "was formed by runoff from snow that was pushed, plowed or shoveled into piles on or adjacent to the sidewalk, which subsequently refroze the day before."

However, there is no evidence that Vargas shoveled snow into piles on the sidewalk or driveway, or that the driveway "slants down" so as to cause runoff. The only evidence proffered concerning where Vargas deposited the snow he shoveled was Vargas' testimony that he cleared everything in front of his home and deposited the snow in piles in the middle of the street. Altchule does not dispute Vargas' testimony but, indeed, opines that "[a]ny snow

remaining in that area would be that which was being shoveled or pushed into piles towards the street" (emphasis added). Thus, Altchule's statement that snow was deposited "into piles on or adjacent to the sidewalk" is not based upon any facts and is not only speculative but is a conclusion that amounts to a non-sequitur. The only evidence cited by him concerning Vargas' disposition of the snow he shoveled not only fails to support, but contradicts, his conclusion that the ice in question was formed by piles of snow made by Vargas which melted, ran down the driveway and froze.

Also without factual basis is Altchule's opinion that the ice was frozen runoff formed due to the slope of the driveway which caused the melted snow piled-up on the driveway to run down onto the sidewalk and freeze. Altchule averred that the photographs of the area show a driveway that "slants down" from Vargas' building to the street and "thus, runoff from the melt of any snow/ice in or bordering the driveway would tend to run down towards the sidewalk and street. With refreeze, runoff collecting in the sidewalk would form into ice."

There is no evidence that Vargas' driveway "slants down" so as to allow for runoff of melting snow, even if snow had been deposited thereon, of which no evidence has been presented. Altchule did not inspect the area or make any measurements of the slope, if any, of the driveway. The Court cannot discern from examining the photographs annexed to plaintiff's opposition papers that there is an obvious "slant" of the driveway area. Although the photographs do show a slope of the driveway apron portion that starts from approximately the middle of the sidewalk and extends downward to the street, plaintiff testified that he slipped in the middle of the sidewalk itself, not anywhere on the driveway apron, or any portion thereof that was "downstream" from any piles of snow. Moreover, the exact location where plaintiff stated he slipped, and which he marked in pen on the photographs, is neither on any portion of the driveway or the sidewalk in front of the driveway at all, but on the sidewalk in front of the walkway to Vargas' front door and in between his driveway on the right and his neighbor's driveway on the left.

Even had Altchule shown by objective measurements that the area above where plaintiff slipped slanted down towards the street, Vargas' uncontested testimony, as heretofore mentioned, which Altchule does not dispute yet avoids in his analysis, was that he deposited all the snow into the street. There is no testimony or other evidence that Vargas piled snow "upstream" from where plaintiff states that he fell. Any such suggestion would require the absurd conclusion that the homeowner, having undertaken to

clear snow from the front of his premises, decided to pile it all on his walkway directly in front of his front door or in the middle of his driveway, a scenario which the undisputed testimony establishes that Vargas did not do.

Therefore, even though there was an objective basis, in the form of climatological data, for Altchule's general opinion that any snow remaining from precipitation on February 3 and 4, 2009 melted during the day on February 6, 2009 and then re-froze, there is no basis for his opinion that the ice that plaintiff alleges was on the subject sidewalk was the result of runoff from piles of snow deposited by Vargas.

Thus, plaintiff has failed to proffer any competent evidence that Vargas' snow and ice removal created the specific icy condition that caused plaintiff to slip and fall.

In the absence of any evidence that Vargas created the icy condition of the sidewalk or made it more dangerous by their snow removal efforts, the only other ground for liability against them for the icy condition of the sidewalk would be pursuant to §7-210 of the New York City Administrative Code, but only if that section were applicable and Vargas had actual or constructive notice of the condition.

Section 7-210 of the Administrative Code imposes liability upon property owners for injuries resulting from their failure to maintain and repair the public sidewalks abutting their properties, including the failure to remove snow and ice. That section, however, specifically excludes owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]). The undisputed evidence, on this record, is that Vargas' premises is a one-family home owned and occupied by them. Without merit is the argument of plaintiff's counsel that Vargas' rental of their driveway to an individual who does not reside in the premises to park his personal vehicle raises a question of fact as to whether the premises satisfies that prong of the exception to §7-210 exempting only property "used exclusively for residential purposes". The mere rental by Vargas of space on their driveway to a person to park his car would not constitute non-residential use that would disqualify them from the exemption to §7-210, as counsel for plaintiff urges. Section 7-210 was enacted to protect small property owners of limited financial resources who reside at such property from exposure to exclusive liability with respect to sidewalk maintenance and, therefore, it is clear that the New York City Council did not intend to disqualify Vargas from the exemption under that section merely for renting out the driveway of their one-family home in which they live to someone to park his car (see

Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193; Vargas v. Rodriguez, 2007 NY Slip Op 32638 [U] [Supreme Ct, Queens County]).

Therefore, since plaintiff has failed to rebut Vargas' prima facie showing that they did not create the icy condition of the sidewalk and that their abutting premises is an owner-occupied exclusively residential premises of less than four families, Vargas are entitled to summary judgment as a matter of law.

Finally, since Vargas had no statutory duty to maintain the sidewalk and keep it clear of snow or ice and did not otherwise create the icy condition of the sidewalk, the issue of whether they had actual or constructive notice of the condition is irrelevant. Such issue would arise only where the property owner had a duty to maintain the sidewalk abutting his property and was liable for his breach of that duty.

In any event, even were Vargas exposed to liability under §7-210, or even if their snow removal caused the ice in question to form two days later, they have demonstrated that they neither had actual nor constructive notice of the ice patch upon which plaintiff allegedly slipped. Awareness of the presence of snow or ice in general does not constitute actual or constructive notice of the particular condition that caused plaintiff to fall (see Kaplan v. DePetro, 51 AD 3d 730 [2nd Dept 2008]). Plaintiff has failed to proffer any evidence that Vargas had actual or constructive notice of the specific ice patch that he alleges caused him to slip and fall.

Vargas testified that they completely cleared the area in front of their home and spread salt both before the impending precipitation and after shoveling, and that they did not receive any complaints about snow or ice in front of their property. Indeed, plaintiff does not dispute that Vargas did not have actual notice of the alleged ice patch.

With respect to constructive notice, plaintiff presented no evidence that the ice patch was visible and apparent and had existed for a sufficient period of time prior to the accident so as to have afforded Vargas a reasonable opportunity to have discovered and remedied the hazard (see Christal v. Ramapo Cirque Homeowners Assoc., 51 AD 3d 846, supra). Indeed, the testimony of plaintiff that he did not see an ice patch that he needed to avoid before he fell and that the presence of snow and ice in the area was minimal indicates that there was no constructive notice of the condition (see Kaplan v. DePetro, 51 AD 3d 730, supra; Robinson v. Trade Link America, 39 AD 3d 616 [2nd Dept 2007]). Also, Altchule's averment

in his affidavit that ice would not have formed until two days after the last snow event on February 4th, and that the ice would have formed between 4:19 pm and 6:19 pm on February 6th, coupled with the fact that plaintiff's slip and fall occurred, according to plaintiff, at approximately 8:45 am the next morning, February 7th, establishes that even if Vargas' snow removal eventually led to the formation of ice, he would not have had a reasonable time to discover the ice and remedy the condition during the overnight hours before the time of the accident at 8:45 am.

Therefore, in the absence of any evidence that they either created the icy patch condition or that they were both statutorily obligated to maintain the sidewalk and that they had actual or constructive notice of the icy condition, Vargas are entitled to summary judgment as a matter of law.

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed as against Vargas.

Dated: March 15, 2012

KEVIN J. KERRIGAN, J.S.C.