Kamara v Markham Gardens L.P.
2013 NY Slip Op 30117(U)
January 27, 2013
Sup Ct, NY County
Docket Number: 104324/11
Judge: Cynthia S. Kern
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SCANNED ON 1/24/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ____________________ *Justice*

PART ______

Index Number : 104324/2011
KAMARA, MOSES
vs.
MARKHAM GARDENS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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).** ______

Answering Affidavits — Exhibits ______ | **No(s).** ______

Replying Affidavits ______ | **No(s).** ______

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

is decided in accordance with the annexed decision.

RECEIVED
JAN 24 2013
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED
JAN 24 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/23/13 ______ , **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 55

MOSES KAMARA,

Plaintiff,

Index No. 104324/11

-against-

DECISION/ORDER

MARKHAM GARDENS L.P. and PROGRESSIVE MANAGEMENT OF NY CORP.,

Defendants.

FILED
JAN 24 2013
NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : ______________________________

Papers	Numbered
Notice of Motion and Affidavits Annexed..................................	1
Answering Affidavits..	2
Replying Affidavits...	3
Exhibits...	4

Plaintiff Moses Kamara commenced the instant action to recover damages for personal injuries he allegedly sustained when he slipped and fell on snow and ice on the walkway in front of his apartment located at 32 Markham Lane, Staten Island, New York on January 12, 2011. Defendants Markham Gardens L.P ("Markham") and Progressive Management of NY Corp. ("Progressive") now move for an order pursuant to CPLR § 3212 granting them summary judgment. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. Plaintiff alleges that on January 12, 2011 at approximately 2:00 p.m., he slipped and fell on snow and ice while traversing the walkway in

front of his apartment. It is undisputed that it snowed from January 11, 2011 through the morning of January 12, 2011 and the meteorological records indicate that the snowfall stopped at approximately 6:00 a.m. on January 12, 2011 although plaintiff testified that the "heavy" snow stopped falling at approximately 1:00 p.m or "earlier that day." Although plaintiff testified that he did not observe anyone from the apartment complex removing any snow from either the sidewalk or the walkway on the day of his accident, he testified that snow had been removed from the walkway prior to his fall.

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it did not cause the condition and that it did not have actual or constructive notice of the condition. *See Branham v. Loews Orpheum Cinemas,* 31 A.D.3d 319 (1st Dept 2006). "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 permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837-838 (1986). Moreover, "a prima facie case of negligence must be based on something more than conjecture; mere speculation regarding causation is inadequate to sustain the cause of action. Conclusory allegations unsupported by evidence are insufficient to establish the requisite notice for imposition of liability." *See Mandel v 370 Lexington Ave., LLC*, 32 A.D.3d 302, 303 (1st Dept 2006).

In the instant action, defendants have established their prima facie right to summary judgment on the ground that they did not cause the condition on which plaintiff slipped and fell. Esther Alexander, Property Manager for Markham, testified that Markham maintains a snow-removal policy which requires snow removal after "1" or more of snow accumulated on the

sidewalks and calcium chloride salt will be applied to all sidewalks, porches and walkways." Ms. Alexander testified that snow removal was conducted by the maintenance staff on January 12, 2011. Plaintiff also testified that snow had been removed from the sidewalk and walkway prior to his fall. Further, Terrence Theroulde, a maintenance technician employed by Markham, affirmed that "...between 8 a.m. and 10 a.m. we engaged in snow removal from the walkway where plaintiff alleges that he fell. During the snow removal activities, we also applied calcium chloride to the walkway and sidewalks in an effort to prevent ice from forming." Finally, the Incident Report filled out subsequent to plaintiff's accident confirms that the maintenance staff worked from 7:00 a.m. until 8:00 p.m. on January 12, 2011 to clear pathways throughout the property and distribute salt around the site.

In response, plaintiff has failed to raise an issue of fact as to whether defendants caused the condition. Plaintiff's assertion that defendants caused the condition because they did not place salt on the walkway prior to plaintiff's accident is without merit. The only evidence plaintiff presents to support this assertion is that when plaintiff fell, neither he nor the other residents who offered him help saw any salt on the walkway. However, Mr. Theroulde affirmed that after plaintiff's accident, he conducted an inspection of the location "and determined that the salt that [defendants] had applied that day had been washed away by water which was caused by snow melting off the roof of the building, traveling down the walkway and washing away the calcium chloride which had been applied that morning." Further, the fact that no salt was visible at 2:00 p.m. does not raise an issue of fact as to whether defendants placed salt on the walkway at 10:00 a.m. Thus, defendants' motion for summary judgment on the ground that they did not create the condition is granted.

Additionally, defendants have established their prima facie right to summary judgment on the ground that they did not have actual or constructive notice of the condition. Defendants have established that they did not receive any complaints about snowy or icy conditions on the walkway where plaintiff fell. Mr. Theroulde affirmed that "[a]t the time [defendants] completed [the snow removal] process, no ice or snow remained on the walkway and [they] received no notice of any snow or ice condition on any sidewalk prior to Mr. Kamara's fall." Further, Mr. Theroulde has affirmed that no notice was received "...from anyone that this snow melt condition was occurring or that the water which was melting on the roof of the building was causing the applied salt to be washed away."

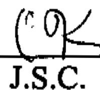
In response, plaintiff has failed to raise an issue of fact as to whether defendants had actual or constructive notice of the condition. As an initial matter, plaintiff has failed to show that he complained to anyone about snow or ice on the walkway prior to his accident. Further, plaintiff has failed to show that defendants knew about the icy condition after they shoveled and salted the walkway in the hours prior to plaintiff's accident. Moreover, to establish constructive notice of an alleged defect, it must (1) be visible and apparent and, (2) exist for a sufficient length of time prior to the accident to permit (a) discovery of the defect and (b) time to remedy the defect. *See Gordon*, 67 N.Y.2d at 837-38. As an initial matter, plaintiff has failed to raise an issue of fact as to whether the defect was visible and apparent. Plaintiff's own testimony demonstrates that the snow or ice on which he fell was clearly not visible as he testified that he "didn't observe anything until [he] slip[ped]" and that before he fell, he "looked on the ground...[he] was cautious" but that he saw nothing. Further, plaintiff has failed to raise an issue of fact as to whether the snow or ice on which he fell existed for a sufficient length of time prior

to his accident to allow defendants to discover the condition and allow for time to remedy the condition. Any finding as to when the snow or ice developed would be based solely on speculation which is not enough to support an allegation of constructive notice. *See Penny v. Pembrook Mgmt.*, 280 A.D.2d 590 (2d Dept 2001)(holding that because injured plaintiff testified that she did not see patch of ice in parking lot anytime before her accident, any finding as to when the ice patch formed is pure speculation, and thus insufficient to support allegation of constructive notice of the ice patch.)

Plaintiff's assertion that defendants' placement of salt on the walkway after plaintiff's accident is evidence of defendants' negligence and should defeat summary judgment is without merit. Evidence of subsequent measures taken by a defendant to remedy a defective condition complained of by a plaintiff is inadmissible to prove negligence. *See Hualde v. Otis El. Co.*, 235 A.D.2d 269 (1st Dept 1997)("evidence of subsequent repairs is not discoverable or admissible in a negligence case."). Further, the court declines to address that portion of defendants' motion for summary judgment on the ground that a storm was in progress at the time of plaintiff's accident as the court has already granted defendants' motion on other grounds.

Accordingly, defendants' motion for an Order pursuant to CPLR § 3212 granting them summary judgment is granted. The Clerk is directed to enter judgment in favor of defendants and against plaintiff. This constitutes the decision and order of the court.

Dated: 1/23/13

Enter: 
J.S.C.

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