

**Zohrabian v Bowling Green Assoc., LLP**

2014 NY Slip Op 30045(U)

January 7, 2014

Supreme Court, New York County

Docket Number: 102930/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

VARTAN ZOHRABIAN,

Plaintiff,

-v-

BOWLING GREEN ASSOCIATES, LLP and  
SCOMEL INDUSTRIES, INC.,

Defendants.

INDEX No. 102930/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. No. 002

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits 23

Replying Affidavits 4

**FILED**

CROSS-MOTION:        YES  NO

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

NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 1/7/14

Donna M. Mills  
**DONNA M. MILLS, J.S.C.**

Check one:        FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----x  
VARTAN ZOHRABIAN,

Plaintiff,

-against-

Index No.  
102930/11

BOWLING GREEN ASSOCIATES, LLP and SCOMEL  
INDUSTRIES, INC.,

**FILED**

Defendants.

JAN 13 2014

-----x  
DONNA MILLS, J. :

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants Bowling Green Associates, LLP (Bowling Green) and Scomel Industries, Inc. (Scomel) move for summary judgment dismissing the complaint.

This is a personal injury/negligence action. The complaint alleges that plaintiff was injured when he tripped or slipped on a pile of snow while walking in front of the premises owned and controlled by defendants. The incident occurred on January 28, 2011, at approximately 7:30 a.m. in front of 11 Greenwich Street, New York, New York. The complaint alleges that defendants were liable for failing to maintain the sidewalk in a reasonably safe condition. Plaintiff amplified his claims in his bill of particulars, where he indicated that the condition which caused the accident was an "accumulation and piling of snow, ice and other precipitation," on the sidewalk adjacent to the premises, thereby "creating and improperly maintained unsafe, slippery and dangerous walking surface."

The bill of particulars also asserted that defendants were negligent in failing to properly and timely remove the snow and ice; failing to apply ice melting compounds; failing to completely and adequately remove the snow and ice from the sidewalk areas; and being negligent during the course of the ownership and operation of the premises abutting the sidewalk where

plaintiff's accident allegedly occurred. Statutorily, plaintiff alleged in the bill of particulars that defendants violated the following: sections 7-210 and 16-123 of the Administrative Code of the City of New York (Administrative Code); sections 27-127 and 27-128 of the Building Code of the City and State of New York; and sections 19-101.1, 19-102, 19-103, 19-110, 19-113, 19-115, 19-122, 19-146 and 19-147 of the New York City Code.

There has been discovery since the commencement of this suit. There have been depositions of witnesses, including plaintiff. At this time, defendants move for summary judgment. They contend that they are entitled to dismissal due to a lack of proof of their liability.

Referring to the alleged code violations, defendants argue that most of the violations cited by plaintiff are not relevant to the accident at bar. They claim that only sections 7-210 and 16-123 of the Administrative Code are relevant statutory claims in this case. Section 7-210 addresses issues pertaining to maintenance responsibilities for public sidewalks abutting commercial and residential premises. Section 16-123 further addresses responsibility as it applies to the removal of snow from sidewalks and the duties of owners of abutting property.

Defendants base their right to the granting of their motion on two grounds. First, they claim that they owe no duty of due care to plaintiff, primarily because he chose to step from a cleared area of sidewalk near the premises into an accumulation of snow and ice where the accident occurred. Second, defendants maintain that there is no evidence that they had any notice of a dangerous condition which caused plaintiff's accident. Defendants also argue that they followed the legal requirements in removing the snow, contending that they were not legally responsible for cleaning up an entire walkway.

Defendants provide excerpts of plaintiff's deposition testimony, where plaintiff testifies

that while walking down Greenwich Street he saw that portions of the sidewalk had been shoveled. Plaintiff described a pathway large enough for at least two people to walk having been shoveled, which narrowed to an area where there was space for only one person to walk. The accident occurred where the sidewalk path narrowed. After plaintiff shortly entered the narrowed portion of the path, he noticed a woman walking in the opposite direction. It was while plaintiff stepped to the side to allow the woman to pass that the accident occurred. He claimed to have fallen between a driveway and the door to 11 Greenwich Street, where snow was piled up after being cleared from the sidewalk. The pile was said to be 1 foot deep. It is defendants' position that, prior to the accident, plaintiff knew of the pile of snow at the side of the cleared sidewalk area, and went in the direction of the pile when stepping to the side.

Defendants discuss the weather conditions prior to the time of the accident. Plaintiff testified in his deposition that the weather on the day of the accident was probably below freezing. He stated that the last time he was in New York City was on January 26, 2011. Defendants claim that a snowstorm occurred on January 26 through January 27. They contend that there was a 19-inch snowfall in the city during the course of the storm. They assert that on the date of the accident, the depth of the snow was recorded as 20 inches.

Defendants state that, in response to the snowfall, their maintenance contractor Perfect Building Maintenance (Perfect) performed overnight snow removal on the premises. They rely on deposition testimony from one of their witnesses, Jose Gill, a superintendent, who described the manner of the snow removal procedure. He also described the condition of the sidewalk after the removal and prior to the accident. Apparently, the snow was pushed to the curb line areas, adjacent to where the City had plowed the roadways. It is defendants' position that they, through

Perfect, had performed a reasonably adequate job at removing the snow from the sidewalk. They argue that they could not remove all the snow from the area because of “extenuating circumstances,” emphasizing the large amount of snow which had fallen in the storm

Defendants argue that they had no constructive notice of any dangerous condition on the premises prior to the accident. They state that this is not a slip and fall accident, in that plaintiff detoured and tripped over a pile of snow, and that plaintiff essentially assumed the risk of harm by walking from a reasonably safe, cleared pathway to the pile of snow. For that reason, defendants seek dismissal as a matter of law.

In opposition, plaintiff asserts the existence of issues of fact precluding summary judgment. He apparently accepts defendants’ position that the only relevant code violations pertain to sections 7-210 and 16-123 of the Administrative Code. Plaintiff states that his deposition testimony, along with other evidence, shows that he was injured in a slip and fall accident which was caused by defendants’ inadequate attempt at maintaining the sidewalk in question. According to him, the cleared pathway at the premises where he fell was narrow, no more than 1 to 2 feet wide, only wide enough for one person to walk in. He considers his walking into the pile of snow to the side an unanticipated accident.

Plaintiff also relies on an affidavit from an expert, meteorologist George Wright, who states that any snow at the premises at the time of the accident must have been present and fallen prior to 4:20 a.m. on January 27, since the snow produced by the storm ended prior to that time. As a result, he avers that the snow that was present on the sidewalk in front of the premises was there for approximately 27.5 hours or more prior to the accident. Section 16-123 of the Administrative Code states that snow should be removed from the sidewalk of the owner within

4 hours after the cessation of the snowfall, excluding the hours of 9 p.m. and 7 a.m.. Plaintiff contends that there is an issue as to whether defendants failed to timely remove the snow, as well as whether they made an adequate effort at removal. Plaintiff disputes any impossibility deterring defendants from removing all of the snow from in front of their premises.

Plaintiff argues that defendants failed to make a prima facie showing for summary judgment. He asserts that the deposition transcripts of their witnesses, Gill and Benito Juarez, are unsigned and unsworn and cannot be submitted as adequate or admissible evidence for the motion. Plaintiff claims that affidavits from an expert witness, Thomas Downs, and a fact witness, Mendy Braun, submitted by defendants, are inadmissible because the individuals were not previously disclosed or identified as witnesses to plaintiff or his counsel. If this court is willing to consider these affidavits, plaintiff argues that they are lacking in probative value. Plaintiff claims that Braun has no personal knowledge about the snowfall or the snow removal procedure or any events or conditions leading up to the accident. Plaintiff also claims that Downs's knowledge of the weather conditions is not relevant since he refers to areas that were, unlike the public sidewalk, cordoned off from public activity. Plaintiff states that the sidewalk was filled with activity prior to the time of the accident. Moreover, plaintiff contends that most of Downs's conclusions about the weather conditions are unsubstantiated.

Plaintiff also contends that the deposition testimony of Gill and Juarez are based on little direct knowledge of events occurring prior to the accident. Plaintiff specifically states that one of Gill's remarks, that after removal procedures were completed, the sidewalk on the premises was completely cleared of snow, contradicts both plaintiff's and defendants' assertions that this area was not totally cleared.

Plaintiff claims that other evidence submitted by defendants, an invoice from Perfect for services performed on January 27, and time sheets for its maintenance employees, is lacking in specificity. Plaintiff states that defendants also fail to submit any evidence to establish when the area where the accident occurred was last inspected, maintained or cleaned immediately prior to the accident, or what was found during such occasions.

Plaintiff argues that there is sufficient evidence to raise an issue as to whether defendants had notice of a dangerous condition. He states that even if the condition was open and obvious, it does not preclude a finding of liability for defendants for failing to maintain a safe premises. He avers that the open and obvious nature of a condition is relevant only as to the issue of plaintiff's comparative negligence. He also avers that sections 7-210 and 16-123 of the Administrative Code do require defendants to completely clear their sidewalk.

In reply, defendants assert that, although the deposition transcripts were not executed, they were deemed accurate and truthful. As for the new witnesses, Braun and Downs, defendants state that Braun was identified as the managing agent of the premises by Gill during his deposition, and is being used by defendants to verify Gill's testimony concerning the snow removal. Accordingly, defendants argue that Braun's presence as a witness is not prejudicial to plaintiff. As for Downs, defendants argue that this expert witness was not retained until defendants chose to move for summary judgment. They claim to have subsequently served their Rule 3101 (d) response applicable to Downs, and this response is well in advance of trial and is, thus, timely. Defendants moreover state that, unlike plaintiff's expert witness, Downs is simply providing the public record with respect to weather conditions during the period of the accident. Defendants insists that plaintiff would not be prejudiced by the inclusion of Downs's affidavit.

Defendants take the position that the very nature of the snowstorm made it impossible to clear the snow entirely from the sidewalk at that time. Thus, they claim that they lacked a reasonable opportunity to remedy the condition. They agree with plaintiff's expert witness that the snow depth on the day of the accident was 20 inches. They state that they had no option to dispose of the snow since they were precluded from pushing the snow into the roadway areas that the City usually plows. As for the testimony of Gill, they contend that he testified as to the condition of the premises after the removal of the snow, providing proof that some observations were made of the area prior to the accident.

“It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues.” *Birnbaum v Hyman*, 43 AD3d 374, 375 (1<sup>st</sup> Dept 2007). “The substantive law governing a case dictates what facts are material, and ‘[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal citation omitted].’” *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008). “Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law.” *Flores v City of New York*, 29 AD3d 356, 358 (1<sup>st</sup> Dept 2006). “Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment.” *Id.*

A defendant who moves for summary judgment in a case like this has the initial burden of making a prima facie showing that it neither created the alleged hazardous condition nor had

actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. *See Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

The first matter concerns the procedural admissibility of defendants' evidence. The transcripts of Gill and Juarez are said to be unsworn and not admissible. However, these papers have been certified by a notary and are admissible for this motion. *See Martin v City of New York*, 82 AD3d 653, 654 (1<sup>st</sup> Dept 2011). The affidavit from Braun is admissible, as Braun's testimony has been used to verify and supplement that of Gill in his deposition. As for the expert Downs, defendants have submitted proof of a CPLR 3101 (d) response, dated October 11, 2013, within which they disclose Downs as their expert witness. Thus, Downs's affidavit is admissible for this motion.

The next matter concerns the probative value of the witnesses' testimony and assessments. Except for plaintiff, none of the witnesses observed the accident. None of the witnesses directly observed the removal of the snow on the evening preceding the accident. Gill testified as to his observations after the removal of snow on the premises. His credibility has been questioned by plaintiff. No individual has disputed the amount of snow on the ground on the day of the accident. Also, no individual has disputed the existence of the cleared pathway or the pile of snow on the side of the pathway. The question is whether the pathway cleared by defendants was reasonably safe. Defendants have also questioned plaintiff's credibility as to the events involving plaintiff's walk and detour in that area.

Issues as to witness credibility are not appropriately resolved in a motion for summary judgment. *See Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 (1<sup>st</sup> Dept 2002). In this regard, the court shall deny this motion, as the issue of credibility of Gill and plaintiff are factual

in nature and will require a trier of fact to resolve.

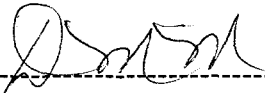
Moreover, defendants have failed to establish, as a matter of law, that plaintiff would not have been able to prove that defendants, by their own snow removal efforts, created or exacerbated the allegedly dangerous condition which resulted in plaintiff's injuries. *See Sut v City Cinemas Corp.*, 71 AD3d 759 (2d Dept 2010).

Accordingly, it is

ORDERED that defendants Bowling Green Associates, LLP and Scemel Industries, Inc.'s motion for summary judgment is denied.

DATED:

ENTER:



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J.S.C.

**DONALD H. MILLS, J.S.C.**

**FILED**

JAN 13 2014

NEW YORK  
COUNTY CLERK'S OFFICE