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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27

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JUAN CARLOS CAAMANO MONTIEL,

Plaintiff,

-against-

OWEN SAILSMAN, THE CITY OF NEW YORK and BRONXDALE REALTY, LLC,.,

Defendant.

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OWEN SAILSMAN,

Third-Party Plaintiff,

-against-

BRONXDALE REALTY, LLC,

Third-Party Defendant.

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Index No. 309598/2011

DECISION and ORDER

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Third-Party Index No. 83990/2012

Recitation, as required by CPLR 2219 (a), of the papers considered in review of these motions for summary judgment pursuant to CPLR 3212 dismissing the complaint by Defendants:

Papers	Numbered
Notice of Motion by Sailsman, Affirmation & Exhibits	1
Notice of Motion by City/NY, Affirmation & Exhibits	2
Notice of Motion by Bronxdale, Affirmation & Exhibits	3
Plaintiff's Affirmation in Opposition to all 3 motions	4, 5, 6,
Sailsman's Opposition to Bronxdale's motion for summary judgment	7
Bronxdale's Opposition to Sailman's motion & Reply	8
Bronxdale's Reply	9
Sailman's Reply	10
City's Reply Affirmation & Memorandum of Law	11, 12

Plaintiff commenced this action alleging injuries sustained when he slipped and fell on February 3, 2011 at approximately 8:00 a.m. on a sidewalk. Paragraph 2 of the Bill of Particulars dated May 31, 2012 2 reads:

> the accident occurred near or about the public sidewalk located in front of 1970 Hunt Avenue, Bronx, New York and more particularly in the driveway portion of the sidewalk and at a point approximately 60 feet north of the northeast corner of Holland Avenue and Hunt Avenue.

Paragraph 4 of the BOP states that Plaintiff was "caused to slip and fall due to an accumulation of snow and/or ice on the sidewalk in front of the premises, due to the negligence of the defendants."

Defendant **Owen Sailsman** ("Sailsman") is the owner of the premises 1970 Hunt Avenue, Bronx. Defendant **City of New York** ("the City") is the municipality entrusted with the maintenance of public sidewalks. Defendant **Bronxdale Realty, LLC** ("Bronxdale") is the owner of the vacant lot abutting the premises at 1970 Hunt Avenue, Bronx, NY.

After discovery all defendants move for summary judgment pursuant to CPLR 3212 dismissing the complaint in their favor. In support thereto, movants submit the deposition testimony of the parties, photographs and the climatological reports.

The Law:

In a premises liability action, a defendant must submit evidence that it maintained its premises in a reasonably safe condition as a matter of law, that it neither created the allegedly dangerous condition or had actual or constructive notice thereof. *Boodie v. Town Hall Foundation*, 5 A.D.3d 210 (1st Dept. 2004) and *Schmidt v. Barstow Associates*, 276 A.D.2d 784 (2nd Dept. 2000). 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 a defendant to discover and remedy it. Moreover, a general awareness that a dangerous condition may be present is not sufficient to establish notice of the particular condition which caused a plaintiff to fall. *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 492 N.E.2d 774, 501 N.Y.S.2d 646 (1986); *Rooney v. Webb Ave. Associates, Ltd.*, 1 A.D.3d 246 (1st Dept. 2003).

Motion by Owen Sailsman:

Plaintiff fell at 8:00 a.m. near or about the public sidewalk located in front of 1970 Hunt Avenue on Thursday, February 3, 2011. Defendant Sailsman submits climatological records indicating that 14 to 16 inches of snow fell on January 26-27, 2011. Sailsman presents that it snowed the Tuesday prior to the accident, February 1st , after which he shoveled his sidewalk up to the property line [Sailsman, P.53, L.18-20], and that there was an ice storm the following day, February 2nd, after which he removed the ice and

applied salt to the sidewalk [Sailsman, P.57, L.19-21; P.26,L.2-6, 16-22]. Sailsman also presents pictures taken right after Plaintiff's incident which Sailsman contends show "absolutely no snow or ice on the sidewalk in front of the property" whereas "there is a completely trodden, iced over sidewalk in front of the vacant lot adjacent" to his property [¶18 of Grisanti Affirmation].

Sailsman submits that he maintained his property in a reasonably safe condition and that he had no actual or constructive notice of an alleged hazard; assuming *arguendo* that a dangerous condition existed, he did not have a reasonably sufficient time as of 8:00 a.m. from the end of the ice storm the day before to have remedied any ice or snow condition caused by the elements.

Motion by Bronxdale Realty, LLC:

Bronxdale contends that it did not owe any duty to Plaintiff and cannot be found liable for Plaintiff's alleged accident because by Plaintiff's own testimony and his markings on the photographs, Plaintiff did not fall on the property owned by Bronxdale, but rather fell on the adjacent property owned by Sailsman. Bronxdale also presents that it employs maintenance workers who make daily visits to the property who shovel, remove snow and debris as necessary.

Motion by The City of New York:

The City presents that due to rapidly fluctuating weather conditions involving snow and ice in the days preceding Plaintiff's accident on Feb. 3, 2011, there was insufficient time for the City to have received sufficient notice to have remedied such condition. The City argues that *Valentine v. City of New York* and its progeny is applicable herein. 86 A.D.2d 381 (1st Dep't 1982) aff'd. 57 N.Y.2d 932 (1983). *Valentine* stands for the proposition that a municipality is not liable for injuries sustained on a public roadway or sidewalk unless the condition was both dangerous and unusual, and the municipality had a reasonable amount of time after the cessation of the storm to

remedy it. The City points to the climatological records annexed by Defendant Sailsman indicating that on January 26-27, 2011 there fell 14 to 16 inches of snow. The City attached its own climatological reports indicating that .5 inches of snow fell on Feb. 1, 2011 and that .07 inches of "water equiv" was logged. On Feb. 2, 2011 the weather included rain, drizzle, freezing rain and mist," and .69 of "water equiv" was logged through the midnight of Feb. 2nd. The temperature on Feb. 1, 2011 was listed as a maximum of 33 degrees and a minium low of 25 degrees. On February 2, 2011 the high temperature was a maximum 39 degrees and a minimum 27 degrees through that midnight. On February 3, 2011 the maximum temperature was listed as 34 degrees and the minimum was 24 degrees. The City argues that weather preceding the two days of Plaintiff's accident on February 3, 2011 included freezing rain, snow and ice pellets, and thus, it cannot be held liable for the naturally occurring winter conditions over which it has no control, and where there was insufficient time to have removed any snow or ice.

The City further posits that it is entitled to summary judgment as a matter of law regardless of whether Plaintiff fell on the sidewalk abutting 1970 Hunt Avenue or the adjacent vacant lot. If Plaintiff fell on the sidewalk abutting 1970 Hunt Avenue, then the City is not liable because of the weather conditions preceding Plaintiff's fall pursuant to *Valentine,* Id. If the Plaintiff fell on the sidewalk abutting the vacant lot, then §7-210 of the Administrative Code of the City of New York shifts the responsibility "to remove snow, ice, dirt or other material from the sidewalk" to the owner of the property abutting the sidewalk.

In opposition to the Moving Defendants' motion and cross-motions, Plaintiff submits his deposition testimony wherein he described falling on compressed snow or ice which was approximately two inches thick which was dirty and gray [Pgs. 35 -43], and which did not appear to be salted [Pg. 60]. At the time of his fall it was not snowing and snow had not fallen within 24 hours thereof [Pg. 26].

It is well settled that the moving party on a motion for summary judgment has the burden of demonstrating a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Apollon v. City of New York*, 45 Misc.3d 1213, 2014 WL 5642361 (Sup. Ct. Qns. Co. 2014), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y..2d 851, 852 (1985). Once the movant has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. *Apollon*, Id. citing *Alvarez v. Prospect Hospital*, 86 N.Y.2d 320, 324 (1986).

After consideration of the Defendants' submissions, the Court finds that Defendants Sailsman and Bronxdale failed to establish entitlement to summary judgment as a matter of law. Rather, the submissions by Defendants Sailsman and Bronxdale present issues of fact and credibility, *including but not limited to*, which Defendant owned the site where Plaintiff slipped and fell, and whether one or both Defendants failed to properly clean his sidewalk free of snow and ice after the 16-inch snow storm ending on January 27, 2011, including salting as necessary, and continuing through February 3, 2011.

The Daily Weather Summary prepared by Meteorologist/James R. Nobile does not sustain summary judgment in Sailsman's favor. While helpful in specifying the temperature and precipitation levels on February 1 through February 3, 2011, Mr. Nobile does not have personal knowledge which areas of the sidewalk in question were "treated" and "cleared away." Rather, by his own account, Mr. Nobile notes that "isolated to scattered ice patches probably existed in these areas, and this was due to prior and on-going melting and freezing involving adjacent areas of snow and ice cover." Consequently, Mr. Noble's summaries and projections are proper for direct and cross-examination at trial. Similarly, the pictures submitted by Sailsman do not sustain summary judgment in his favor as a matter of law, as the condition(s) depicted in the

pictures are subject to varying interpretations, and the Court defers said interpretation(s) to the trier of fact.

Defendant Bronxdale failed to establish entitlement to summary judgment as a matter of law in the first instance for failure to establish when the sidewalk abutting its property was last inspected or cleaned of snow and ice. Mr. Perretta had no personal knowledge when the "superintendent and his team" shoveled the sidewalk abutting the Bronxdale property [Pg. 13], except that it was their daily routine to do so [Pg. 12]. However, "in cases involving slip and falls on icy sidewalks, a defendant moving for summary judgment must proffer evidence from a person with personal knowledge as to when the sidewalk was last inspected or as to its condition before the accident." *Rodriguez v. Bronx Zoo Restaurant, Inc.,* 110 A.D.3d 412, 972 N.Y.S.2d 31 (1st Dep't 2013). Mr. Perretta's reliance on his staff's general procedures, standing alone, does not satisfy the initial burden of proof for summary judgment that the sidewalk had been cleared of snow and ice on a specific day and time, or that it had been cleared in an appropriate manner, prior to Plaintiff's fall. *Rodriguez,* Id.

Bronxdale's reliance on Plaintiff's and Sailsman's testimony as exonerating Bronxdale from liability is misplaced; Bronxdale points to pages 31-34, 35-37, 41-42, 44, 51-52 and 54 of Plaintiff's deposition transcript and the corresponding pictures as establishing that Plaintiff fell on Sailsman's property rather than Bronxdale's. However, the pictures before the Court are not dispositive as to whether Plaintiff fell on Sailsman's or Bronxdale's property. While Bronxdale points to the "chain link fence" as the reference point distinguishing the properties, in actuality Mr. Perratta did not know who owned the chain link fence and simply assumed it divided the property line [Tr. P.15]. Notably, neither Sailsman or Bronxdale submitted a survey map in admissible form to shed light as to the property lines.

However, the Court finds that the City established entitlement to summary judgment as a matter of law based upon *Valentine,* i.e., on the ground that a municipality

is not liable for injuries sustained on a public roadway or sidewalk unless the condition was both dangerous and unusual, and the municipality had a reasonable amount of time after the cessation of the storm to remedy it. *Valentine v. City of New York*, 86 A.D.2d 381 (1st Dep't 1982) aff'd. 57 N.Y.2d 932 (1983). In *Valentine* the City experienced a severe ice storm "described as the second worse in the preceding 50 years" and which deposited "between two and three inches of precipitation." 86 A.D.2d at 383. In the instant case, the weather conditions preceding February 3, 2011, *included but were not limited to*:

> the 16/17 inch snow storm one week earlier on January 26/27, 2011. On Feb. 1, 2011 there was .5 inch of snow .07 inches of "water equiv" was logged; the temperature was a high of 33 degrees and a low of 25 degrees. On Feb. 2, 2011 the weather included rain, drizzle, freezing rain and mist" and .69 of "water equiv" was logged; the temperature recorded was a high of 39 degrees and a low of 27 degrees. On February 3, 2011 at 8:00 a.m. Plaintiff stated it was not snowing; the high on Feb. 3rd was 34 degrees and the low was 24 degrees.

The instant action presents the winter conditions and scenario contemplated in *Valentine*, *to wit*: a fall "on a private residential street, not in immediate proximity to any intersection or crosswalk," which would not be deemed a "priority" by the City. *Valentine*, 86 A.D.2d 381 at 386. Under these circumstances, the City's duty to clear the sidewalk did not arise in the six days after the 16/17 inch snow storm of January 27, 2011.

The Court finds that Plaintiff failed in his burden of rebuttal with respect to the City by failing to raise an issue of fact: (a) whether the City had a reasonably sufficient time to have cleared the sidewalk from the last snow fall and before Plaintiff's accident, and/or (2) whether the City was negligent in clearing the sidewalk from ice and snow; these are Plaintiff's claims with respect to Defendants Sailsman and Bronxdale. The issue whether the City was negligent in the clearing of snow does not arise because the

City's witness, **Ramon Rollins,** a supervisor at the Department of Sanitation, testified that the City had not removed the snow from the sidewalk after the storm in January 27, 2011 [Pgs. 11 -12].

Plaintiff argues that "between January 26 and February 3, 2011" the snow and ice never melted away completely. Specifically, Plaintiff posits that the icy condition was pre-existing from earlier storms on January 25, 26 and 27, 2011; that 17 inches of snow remained on the ground on January 31, 2011 when temperatures dropped below freezing through February 1, 2011, that temperatures rose to 38 degrees on February 2, 2011 contributing to a thawing and refreezing of pre-existing ice [¶25 of Plaintiff's Affirmation]. However, Plaintiff did not submit an expert's affidavit to support Plaintiff's interpretation of the climatological data, to distinguish the existing weather on February 3, 2011 as "dangerous and unusual" and distinct from normal winter conditions.

In reaching its conclusions herein the Court is guided by *Rodriguez v. Woods*, where Plaintiff sued the City after she fell on December 23, 2008 on a sidewalk area which was "dirty" with "snow layers on top of layers." 121 A.D.3d 474, 994 N.Y.S.2d 583, 584 (1st Dep't 2014). The City was granted summary judgment dismissing the complaint and the Plaintiff appealed; the Appellate Division reversed the Supreme Court and reinstated the Complaint. In *Rodriguez* the parties agreed on the following history:

> that four inches of snow fell on December 19th (four days before the accident), one-half inch on December 20th (three days before) and two/tenths of an inch on December 21st (two days before). After the third snowfall, non-freezing rain fell, and temperatures remained above freezing for several hours. On the day of the accident, the average temperature was 25 degrees, with a high of 31 degrees and a low of 18 degrees."

121 A.D.3d at 475; 994 NYS2d at 584.

In *Rodriguez* the Appellate Division rejected the application of *Valentine*, supra,

on the ground that there was "no suggestion that the storm that allegedly precipitated plaintiff's fall [in *Rodriguez*] was comparably severe such that it would have been impossible for the City to clear the sidewalk within a four-day period" 121 A.D.3d at 476; 994 N.Y.S.2d at 586. By contrast, whereas the maximum amount of snow in *Rodriguez* was four inches of snow four days before the accident, in the instant case there remained 17 inches on the ground on January 31, 2011,[1] three days before the accident, conditions which bring City life to a halt and are "comparably severe" as the snow storm in *Valentine*.

The *Rodriguez* decision states that "summary judgment in a snow or ice case is proper where a defendant demonstrates, through climatological data and expert opinion, that the weather conditions would preclude the existence of snow or ice at the time of the accident." *Rodriguez*, supra, quoting *Massey v. Newburgh W. Realty, Inc.*, 84 A.D.3d 564, 566, 923 N.Y.S.2d 81 [1st Dept. 2011]. However, as noted by the dissent in *Rodriguez*, in *Massey* the issue was whether snow or ice existed, which is not an issue in the instant case. Indeed, in *Massey* Plaintiff alleged she slipped and fell on a sheet of ice on the sidewalk in front of Defendant's store; Defendant moved for summary judgment and annexed certified climatological records and a Meteorologist's affidavit opining that the temperatures on the days preceding Plaintiff's fall "would have melted any residual snow or ice remaining on the ground" by the date of Plaintiff's fall. Ultimately, the Meteorologist's opinion was deemed "speculative, insofar as it failed to take into account Plaintiff's testimony concerning the nature of the ice, nor did it address Plaintiff's photograph showing ice at the accident location." *Massey*, 84 A.D.3d at 566, 923 N.Y.S.2d at 83 (cite omitted). In *Massey* Defendant was denied summary judgment for the additional reason that it failed to submit evidence of when the sidewalk was last inspected. Inasmuch as the City did not submit an expert's opinion in the instant case, the requirement of an expert's opinion is not a consistent requirement in snow and ice cases.

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[1] See ¶4 of McGannon Affirmation in Opposition to City's Motion.

Cf. *Daley v. Janel Tower, L.P.*, 89 A.D.3d 408, 931 N.Y.S.2d 865 (1 Dept. 2011); *Epstein v. City of New York*, 250 A.D.2d 547, 673 N.Y.S.2d 141 (1st Dep't 1998); *Martinez v. Columbia Presbyterian Med. Center*, 238 A.D.2d 286, 656 N.Y.S.2d 271 (1st Dep't 1997). See also *Spector v. Cushman & Wakefield, Inc.*, 87 A.D.3d 422, 928 N.Y.S.2d 9 (1st Dep't 2011) (in ice and snow case Defendant denied summary judgment for failure to proffer evidence when the sidewalk was last inspected; lack of an expert's affidavit not raised as a ground for denial of motion).

The Court further agrees with the City that in the event the trier of fact determines that Plaintiff fell on Bronxdale's property, then §7-210 of the Administrative Code of the City of New York shifted the responsibility "to remove snow, ice, dirt or other material from the sidewalk" from the City to Bronxdale, releasing the City from this case.

For the foregoing reasons, the City's motion for summary judgment is **granted**, and therefore it is

ORDERED that the complaint and all cross-claims are dismissed as against the City of New York.

However, motions for summary judgment by Defendants Sailsman and Bronxdale are **denied** for failure to meet their prima facie burden of proof in the first instance, as hereinabove discussed.

Dated: Bronx, New York
January 5, 2015

Hon. Julia I. Rodriguez, J.S.C.