Marizan v City of New York
2016 NY Slip Op 30030(U)
January 7, 2016
Supreme Court, New York County
Docket Number: 151904/12
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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MARIA MARIZAN,

Plaintiff, Index No. 151904/12

- against -

THE CITY OF NEW YORK and NEW YORK CITY TRANSIT AUTHORITY, **Decision and Order**

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

Motion sequence numbers 001 and 002 are consolidated for determination.

Plaintiff alleges that she was injured when ice and snow caused her to fall in front of a subway station entrance. The New York City Transit Authority (NYCTA) moves for summary judgment dismissing the action on the grounds that it did not create the allegedly dangerous condition, it did not have notice, and it was not obligated to clean the area where plaintiff fell because there was a storm in progress (motion sequence number 001). The City of New York (the City) moves for summary judgment dismissing the action on the ground that it is an out-of-possession owner, and for an order of indemnification against NYCTA (motion sequence number 002).

BACKGROUND

Plaintiff alleges that her accident occurred on January 19, 2011 at about 7 a.m., at an entrance of the subway station at the intersection of Dyckman Street and Broadway in Manhattan. Plaintiff says that she intended to take the A train to work when she slipped on ice and snow and fractured her ankle. Plaintiff testified that it was raining and that there was no sand or salt on the ground.

Each defendant moves on the basis that plaintiff fell on subway property. At the GML § 50 (h) hearing, on June 3, 2011, plaintiff was asked where she fell.

> Q - . . . Was it . . . on the sidewalk?
> A - No. In front of the stairs of the – in front of the entrance stairs.
> Q -. . . Are these stairs on the sidewalk level, or are they actually in the station?
> A - That's at the station, but – but the stair is below. I was going to go up the stairs when I slipped.
> Q - Up or down?
> A - Or I was going to take the stairs, yes.
> . . .
> Q - Sidewalk?
> A - In the station, but in front of the stairs.
> . . .
> Q - . . . Well, did the accident – the accident happened at the top of the steps of the stairway?
> A - On the - - on the pavement at the entrance in front of them.
> Q - . . . The pavement itself, are you referring to – is that the sidewalk, or is that a landing?

A - No. The landing at the station before you go down.
Q - Okay. At the landing? Okay. Is the landing, is it level? Is it like a sidewalk level?
...
A - Well, it was in front of the entrance. . . .
The interpreter - She's saying it goes down a little, but it's not quite on a level, but it goes down a little . . . But it's not a step. . . .
Q - Okay. Where the accident occurred, how far was it from the top of the stairway? . . . From the first step?
A - I was almost there. I was almost going to grab the handrail at the stairs . . . My right foot when I know I step, it went forward like this, . . . and I fell.
Q - . . . Well, how far was your right foot when you placed it down from the top of the stairway?
A - I was close. I was in front of them, very close to them.
. . .
A - . . . It was like three or four feet" (*id.*).

(tr at 14-18).

On November 6, 2013, plaintiff was deposed. The questioner said that it was unclear where she fell (tr at 21, 25). Plaintiff said, "I do know where I fell . . . it was right before the entrance" indicating on an exhibit (*id.* at 26). Plaintiff testified, "About two to three feet from the staircase itself . . . Directly in front of me, the stairs were" (*id.*). "When I was walking, I was almost to the staircase to go down the stairs, when one of my feet felt it bumped into something, it got caught on something, and because it was so dark, you really couldn't see, I went flying back . . ." (*id.* at 26-27).

In her notice of claim, plaintiff alleges that defendants failed to

maintain the sidewalk and sidewalk area of the entrance to the subway station. In her complaint, she alleges that she fell at the "subway station and subway station area and/or surrounding area located at the intersection of Dyckman Street and Broadway . . ." In her opposing affidavit, plaintiff says that she was injured "on the sidewalk . . . near the entrance for the Dyckman Street A subway train station." Her opposition to the motion is based on the contention that she fell on public property, that is, the sidewalk. Plaintiff testified that she fell two to three feet or three to four feet from the subway staircase. She also testified that she fell on a landing and that she was close enough to the handrail to grab it.

Plaintiff does not clearly indicate whether she fell on property that is part of the subway or on the public sidewalk. The papers before the Court do not permit this issue to be decided as a matter of law. The site of the accident and its ownership are issues of fact (*see James v 1620 Westchester Ave., LLC*, 105 AD3d 1, 4 n 1 [1st Dept 2013]).

DISCUSSION

The party moving for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st

Dept 2007]). If the moving party succeeds in making a prima facie case for summary judgment, the opposing party bears the burden of producing evidentiary proof showing the existence of material issues of fact that are in dispute and that must be decided at trial (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]). The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Corprew v City of New York,* 106 AD3d 524, 525 [1st Dept 2013]).

I. Assuming that plaintiff fell on property that is part of the subway station

"Under a 1953 lease agreement between the City of New York and the New York City Transit Authority, 'the City relinquished possession and control of all of its transit facilities to the Transit Authority'" (*Spreiregen v New York City Tr.,* 2013 WL 2408681, *2, 2013 NY Misc LEXIS 2274, *3, 2013 NY Slip Op 31149[U], *2 [Sup Ct, NY County 2013], quoting *McGuire v City of New York*, 211 AD2d 428, 429 [1st Dept 1995]; *see also Wozniak v City of New York*, 35 Misc 3d 1242[A], 2012 NY Slip Op 51108[U], *1

[Sup Ct, NY County 2012]). NYCTA has a duty of care towards those using its transportation system, including the duty to safely maintain the means of ingress and egress (*see Garcia v New York City Tr. Auth.*, 63 AD3d 1100 [2d Dept 2009]; *Echevarria v New York City Tr. Auth.*, 45 AD3d 492, 492-493 [1st Dept 2007]; *Huerta v New York City Tr. Auth.*, 290 AD2d 33, 36, 38 [1st Dept 2001]; *Allison v Transit Auth.*, 2013 WL 6219013 [Sup Ct, NY County 2013]).

According to the storm in progress doctrine, the duty of a landowner or tenant in possession to take measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]; *see also Fernandez v City of New York,* 125 AD3d 800, 801 [2d Dept 2015]). Not until "the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation," may an owner or occupant be held liable for injuries caused by accumulated ice or snow (*Powell v MLG Hillside Assoc., L.P.*, 290 AD2d 345, 345-346 [1st Dept 2002]). What constitutes a "sufficient time" for defendants to remove snow and ice after a storm varies with the amount of snow, the temperature, and the overall

state of the weather (*see Valentine v City of New York,* 86 AD2d 381, 384 1st Dept 1982], *affd* 57 NY2d 932 [1982]; *Rabinowitz v Marcovecchio,* 2013 WL 6569427, 2013 NY Misc LEXIS 6672, 2013 NY Slip Op 33733[U], * 4 [Sup Ct, Suffolk County 2013], *affd* 119 AD3d 762 [2d Dept 2014]). A landowner or a tenant in possession who negligently engages in snow removal during or right after the storm and thereby exacerbates any dangerous condition caused by the storm or who creates a dangerous condition may be held liable (*Fernandez*, 125 AD3d at 801).

As evidence of a storm in progress, NYCTA submits reports from the NOAA memorializing the weather conditions recorded at the three recording stations for New York City, Central Park, LaGuardia Airport, and JFK Airport, on January 18 and 19, 2011. The Court refers to the record of Central Park, which is closer to the accident site than the other stations, according to NYCTA, and the site most referred to by both sides.

For January 18, 2011, the day before the accident, the NOAA record shows:

> 12 a.m. - light snow, 25 degrees;
> 1:51 a.m. - light snow and mist, 25 degrees;
> 3:51 a.m. - mist, 0.09 inches of precipitation, 25 degrees;
> 4:49 a.m. - light freezing rain and mist, 28 degrees;
> 10:47 a.m. - rain and mist, 0.07 inches, 34 degrees;
> 3:51 p.m. - mist, 0.09 inches, 40 degrees;

6:51 p.m. - mist, 0.01 inches, 37 degrees;
8:51 p.m. - last mist of the day, 35 degrees.

The NOAA record states that significant weather for the day was rain, freezing rain, snow, mist, and unknown precipitation.

For January 19, the NOAA record shows:

midnight - 36 degrees;
4:51 a.m. - mist, 0.01 inches, 37 degrees;
5:51 a.m. - light rain and mist, 0.04 inches, 36 degrees;
6:51 a.m. - 0.01 inches, 37 degrees;
7:51 a.m. - mist, 37 degrees;
8:51 a.m. - mist, 37 degrees.

The NOAA record states that the significant weather for the day was rain, mist, and unknown precipitation.

Plaintiff says that she fell at 7 a.m. on the 19th of January. The last rain on the 18th was 0.01 inches at 6:51 p.m. That is one-tenth of one inch of rain (*see Powell,* 290 AD2d at 346), undoubtedly light rain. The last mist on the 18th was at 8:51 p.m. No more precipitation was recorded until mist and 0.01 inches of rain at 4:51 a.m on the 19th. The rain increased slightly. At 6:51 a.m., the rain was 0.01 inches again. Thereafter, there was mist. Plaintiff and NYCTA agree that there was a storm on the 18th. NYCTA contends that a storm was still ongoing the next day when plaintiff fell. Plaintiff contends that the storm had stopped and that NYCTA should have

cleaned the area by the time that she fell.

Application of the storm in progress doctrine is not limited to extreme weather conditions. However, it cannot be said here, as a matter of law, that there was an ongoing or continuing storm in progress at the time of the alleged accident so as to mean that there was no duty to have cleaned the snow that had fallen the previous day. The rainfall storm in progress cases do not appear to to deal with a situation where a snowfall had abated and was followed, after a significant gap, by rain. For example, in one case where rain constituted a storm in progress, the rain was falling all day (*Rijper v City of New York*, 2013 WL 1494998, *2, 2013 NY Misc LEXIS 1363, *2-3, 2013 NY Slip Op 30672(U), *4 [Sup Ct, NY County 2013]) or in another it had been "raining hard and non-stop for, at minimum, 2 hours before and during her accident" (*Bush v Duane Reade Holdings, Inc.*, 2012 WL 2154978, 2012 NY Misc LEXIS 2683, *6, 2012 NY Slip Op 31505[U], *5 [Sup Ct, NY County 2012]). The defendant was entitled to summary judgment where "drizzling rain coupled with falling temperatures - which were ongoing at the time of the accident" created a "storm in progress" (*Micheler v Gush,* 256 AD2d 1051, 1052 [3d Dept 1998]). The defendant established a prima facie case with evidence of "freezing drizzle" and

"freezing rain" which amounted to an "ongoing ice storm" (*Thompson v Menands Holding, LLC,* 32 AD3d 622, 624 [3d Dept 2006] [quotation and citation marks omitted]; *Cohen v A.R. Fuel,* 290 AD2d 640, 641 [3d Dept 2002] [the defendant established a prima facie case where "a continuing condition of rain, sleet, freezing rain and icy roads" began on the night before the accident and continued for at least an hour after the accident]; *Prince v New York City Hous. Auth.*, 302 AD2d 285, 285 [1st Dept 2003] [the defendant was entitled to summary judgment where "'trace' precipitation in the form of freezing rain and ice pellets, accompanied by heavy fog and widespread glaze, began falling at 5:00 a.m., two hours before plaintiff's fall"]; *Mateo v Yuen,* 35 Misc 3d 1242[A], 2012 NY Slip Op 51107[U], *1 [Sup Ct, Queens County 2012] [the same where precipitation consisted of "light rain, mixed with sleet or freezing rain" at the time of the accident]; *Draesel v New York City Tr. Auth.,* 2012 NY Slip Op 32164[U], *2, 2012 WL 3614379, 2012 NY Misc LEXIS 3969, *2 [Sup Ct, NY County 2012] [the same result where the accident happened at 9:30 p.m., 0.07 inches of precipitation fell during the hour ending at 9 p.m., 0.08 inches fell during the hour ending at 10 p.m., and on that day, temperatures ranged from 17 to 31 degrees]).

In *Powell* (290 AD2d at 346), there were "trace amounts of precipitation during the two-hour-and-20-minute period of subfreezing temperatures prior to the accident." Two inches of snow fell overnight. By 6 a.m., the precipitation had abated to less than 0.01 inches of rain. The accident happened at 9:15 a.m. "If only trace amounts fell during the two to three hours prior to plaintiff's accident . . .", the question whether it was reasonable for defendant to have removed the snow was a factual one (*id.*; *see also Vosper v Fives 160th, LLC*, 110 AD3d 544, 544 [1st Dept 2013]).

In this case, temperatures were not falling. At midnight on January 19, the temperature was 36 degrees, rising to 37 degrees at the time of the accident. Icy precipitation, sleet, heavy rain, or subfreezing temperatures are not recorded. The Court cannot state as a matter of law that NYCTA acted reasonably in not having removed the snow by the time that plaintiff fell because a storm was in progress.

NYCTA argues that it lacked notice of any dangerous conditions. It does not produce any evidence about actual or constructive notice by persons who would know about such things. The City attaches the deposition transcripts of two individuals. NYCTA's witness is Mohammed Ali, a supervisor in charge of cleaning operations at NYCTA. He testified

that his team cleaned snow off staircases, platforms, entrances, and exits at the subway stations. He was asked if "your cleaners [are] responsible for the areas before the steps, meaning the platform area outside the station before the steps?" (tr at 27). He said "The front of the steps, yeah" (*id.*). From 2012 through 2014, he said, he was assigned to three stations, not the station where plaintiff fell. Before that, he "was all over, every night they give me different stations." Ali did not remember where he was assigned in 2011 or if he was assigned to the station where plaintiff fell. He also said that he was never assigned there for snow duty.

The City produced Jose Torres, a supervisor at the Department of Sanitation. Torres said that his team became responsible for the intersection at Dyckman Street and Broadway in 2012. Torres said that his duty was to clean the streets, crosswalks, bus stops, and hydrants, and that he had no responsibility for sidewalks and curbs. He said that the Department of Sanitation was not responsible for cleaning snow and ice from the stairwell leading into or out of subway stations. He was not sure who was responsible for that.

To demonstrate a lack of constructive notice, a property owner has an obligation to produce "evidence of its maintenance activities on the day

of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust,* 86 AD3d 419, 421 [1st Dept 2011]). In this case, neither witness was able to testify about the area where the accident happened on the day that it happened, or even about a practice that would have applied to that area. Assuming for purposes of argument that plaintiff fell on property under NYCTA's control, summary judgment is denied.

Turning to the City's motion, the City says that it has no liability for accidents on subway property, because it relinquished all control of subway stations to NYCTA as part of a lease agreement when the NYCTA was organized in 1953. As an out-of-possession landlord, the City is not liable for negligence on NYCTA-controlled property solely by reason of being the landlord (*see Alladice v City of New York,* 111 AD3d 477, 478 [1st Dept 2013]; *Arteaga v City of New York,* 101 AD3d 454, 454 [1st Dept 2012]; *Williams v New York City Tr. Auth.*, 90 AD3d 522, 522 [1st Dept 2011]; *Wozniak*, 2012 NY Slip Op 51108[U], *2). Nowhere does plaintiff allege that the City actually did anything at the accident site that would render it liable. If plaintiff fell on property controlled by NYCTA, the City

would be entitled to judgment. However, given the triable factual question of the location of the accident, summary judgment cannot be granted.

II. Assuming that plaintiff fell on public property, that is, the sidewalk adjacent to but not part of the subway station

Under the common law, "liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not on the owner of the abutting land" (*James v Blackmon*, 58 AD3d 808, 808 [2d Dept 2009]; *see Rios v Acosta,* 8 AD3d 183, 184 [1st Dept 2004]; *Miller v City of New York,* 38 Misc 3d 1223[A], 2013 NY Slip Op 50237[U], *1-2 [Sup Ct, NY County 2013]). Unless a statute or ordinance clearly imposes liability upon an abutting landowner, only a municipality may be held liable for the negligent failure to remove snow and ice from a public sidewalk (*Roark v Hunting*, 24 NY2d 470, 475 [1969]). Under section 7-210 of the Administrative Code of City of New York, effective in 2003, maintenance and repair of public sidewalks and any liability for a failure to perform those functions, was shifted, with certain exceptions, from the City to the owners whose property abuts the sidewalk (*James,* 105 AD3d at 4). It cannot be determined from the papers before the Court whether there is an abutting private owner who would be responsible under Administrative

Code section 7-210.

Section 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the public sidewalk (*Collado v Cruz,* 81 AD3d 542, 542 [1st Dept 2011]), but it does not impose strict liability for a dangerous condition. Under both common law and section 7-210, the owner must have created the dangerous condition on the sidewalk or have had notice of it (*Early v Hilton Hotels Corp.,* 73 AD3d 559, 561 [1st Dept 2010]; *Brownell v City of New York,* 277 AD2d 31, 31 [1st Dept 2000]). The City is moving on the basis that plaintiff fell on subway property, so the City does not address whether it had notice of or created the alleged danger.

As for NYCTA, it "cannot be held liable for injuries caused by the dangerous or defective condition of a City sidewalk because it does not own, maintain, operate or control the public streets and sidewalks . . ." (*Pantazis v City of New York*, 211 AD2d 427, 427 [1st Dept 1995]). Under common law, NYCTA had no duty of care with respect to where plaintiff in *Pantazis* fell, an area five feet from the subway (*id.*). In regard to those, such as NYCTA, who lease property abutting a public sidewalk, section 7-210 imposes no duty to maintain and repair the public sidewalk (*Schron*

v Jean's Fine Wine & Spirits, Inc., 114 AD3d 659, 661 [2d Dept 2014]; *Leary v Dallas BBQ*, 91 AD3d 519, 519 [1st Dept 2012]). Liability for the defective condition of an abutting sidewalk can be imposed upon a tenant/lessee only upon proof that the tenant created the defect or made special use of the sidewalk (*Collado,* 81 AD3d at 542). These issues are not addressed by NYCTA, because it is moving on the ground that plaintiff fell on part of the subway station, not on the public sidewalk.

NYCTA's reply to plaintiff's opposition raises Administrative Code of the City of New York § 16-123 (a), which requires the owner or lessee of real property abutting a sidewalk to clear snow or ice from the sidewalk within four hours after the end of a storm, excluding 9:00 p.m. to 7:00 a.m. The law applies to public, not private, sidewalks (*see Penn v 57-63 Wadsworth Terrace Holding, LLC,* 112 AD3d 426, 426 [1st Dept 2013]; *Vosper,* 110 AD3d at 544). NYCTA points out that plaintiff takes the position that the storm ended at 8:51 p.m. on the day before the accident, which means that the four-hour period did not elapse by the time that the accident happened. Allegedly, plaintiff fell at 7 a.m. Thus, NYCTA argues, it was not obligated to clean the sidewalk until about 11:00 a.m. on the day of the accident. This argument first appears in NYCTA's reply; therefore

plaintiff was not able to address it. The Court therefore declines to consider it.

III. The City's cross claim for indemnification against NYCTA

The City moves for an order granting contractual and/or common-law indemnification against NYCTA. Article VI, Section 6.17 of the lease between the City and NYCTA contains language requiring NYCTA to repair damage to sidewalks directly attributable to its elevated and subway operations and constructions. Assuming that plaintiff fell on the public sidewalk, this section cannot be the basis of indemnification. Plaintiff alleges that snow and ice caused the dangerous condition. Nothing is alleged about damage to sidewalks attributable to NYCTA's operations or constructions (*cf Vikhor v City of New York,* 43 AD3d 914, 916 [2d Dept 2007] [the allegation that NYCTA's equipment and machinery damaged the sidewalk raised the possibility that it might have to indemnify the City]).

Article VI, Section 6.8 of the lease requires NYCTA to indemnify the City for any damage resulting from any accident or occurrence arising out of or in connection with NYCTA's operations of the leased property. It is not clear where plaintiff fell or whether plaintiff fell on part of the subway station; neither is it clear that the accident was NYCTA's fault. The answer

to these factual questions will determine whether the City is entitled to indemnification under this section.

To be entitled to common-law indemnification, the City must show that NYCTA was negligent or that it exercised control over the activity that produced the injury, and that the City's liability for the injury is vicarious or statutory (*see Naughton v City of New York,* 94 AD3d 1, 10 [1st Dept 2012]; *Hart v Commack Hotel, LLC,* 85 AD3d 1117, 1118 [2d Dept 2011]). Because there are triable issues regarding defendants' liability, particularly where the accident took place, the motion for common-law indemnification is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion for summary judgment by defendant New York City Transit Authority (Motion Seq. No. 001) is denied; and it is further

ORDERED that the motion for summary judgment by defendant City of New York (Motion Seq. No. 002) is denied.

Dated: January 7, 2016
New York, New York

ENTER:

J.S.C.