Tanenbaum v Bedford Mews Condominium
2017 NY Slip Op 30981(U)
May 10, 2017
Supreme Court, New York County
Docket Number: 155139/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12
--x
SIDNEY TANENBAUM,

Plaintiff,

-against-

BEDFORD MEWS CONDOMINIUM and KATONAH MANAGEMENT GROUP, INC.,

Defendants.
--x
BEDFORD MEWS CONDOMINIUM and KATONAH MANAGEMENT GROUP, INC.,

Third-party plaintiffs,

-against-

ARBORSCAPE, INC.,

Third-party defendant.
--x

Index No. 155139/14

Mot. seq. nos. 004, 005, 006

DECISION AND ORDER

BARBARA JAFFE, J.

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This action arises from a slip and fall in a Westchester County parking lot within an apartment complex owned and managed by defendants. By notice of motion, third-party defendant Arborscape, Inc., moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and third-party action. Plaintiff opposes, and defendants oppose and cross-move pursuant to CPLR 3212 for an order summarily dismissing the main action, for an order granting

them summary judgment in the third-party action and dismissing Arborscape's cross claims and counterclaims, and pursuant to CPLR 3126 for an order striking and precluding the affidavit, photographs, and testimony of a nonparty witness produced by plaintiff. Plaintiff and Arborscape oppose the cross motion. (Mot. seq. 006).

By notice of motion, Arborscape moves for an order vacating plaintiff's statement of readiness and striking the note of issue. Plaintiff opposes, and defendants oppose and cross move for an order vacating plaintiff's note of issue and statement of readiness, compelling Arborscape to provide all outstanding discovery or, alternatively, striking its answer or precluding it from producing any evidence in support of its defense at trial, extending time to file summary judgment motions, and denying Arborscape's motion to the extent it moves to compel discovery from defendants. Plaintiff and Arborscape oppose the cross motion. (Mot. seq. 005).

By notice of motion, plaintiff moves pursuant to CPLR 3403(a)(4) for an order granting him a special preference for trial. Arborscape opposes on the ground that a preference should not be granted until discovery is complete. (Mot. seq. 004).

The motions are consolidated for disposition.

I. PERTINENT FACTS

On or about October 25, 2012, defendant Bedford Mews Condominium (Bedford) entered into a contract with Arborscape commencing on December 1, 2012 and terminating on November 30, 2014, whereby the latter agreed to provide, among other services, snow removal from "all sidewalks, walkways, steps, decks, roads (curb to curb), and front of mailboxes." As pertinent here, the parties agreed that:

B. Snow must be removed by 7 a.m. during weekdays and 8 a.m. during weekends or

> holidays after 1 inch of accumulation. Continue removing snow until snowfall stops. Pavement shall be cleared from curb to curb.
> C. If accumulation is less than 1 inch, and as needed, apply salt and sand mixture to ensure road safety. . . .
> D. Ice must be handled to assure the safety of residents and their guests. Return visits may be required to ensure the safety of roadways and walkways.

(NYSCEF 138). Arborscape also agreed to "save and hold [Bedford] harmless from and against all liability, damage, loss, claims, demands, and actions of any nature whatsoever, for any reason whatsoever, which arise out of or are connected with, or are claimed to arise out of or be connected with, any of the work done by [Arborscape]," and to purchase liability insurance naming Bedford as additional insured thereunder. (*Id.*).

On the morning of January 11, 2014, plaintiff slipped and fell on ice in the parking lot. He commenced this action on or about May 23, 2014. (NYSCEF 1). On or about March 26, 2015, defendants commenced the third-party action, advancing claims for common-law and contractual indemnification, contribution, and breach of contract based on Arborscape's failure to defend and indemnify defendants and to procure insurance. (NYSCEF 133).

At his deposition, plaintiff testified that he had been at the apartment complex at issue continuously for at least two weeks before his accident, had used the parking lot every day before his accident while at the complex, and that few days before the accident, he had seen people shoveling but not salting the walkway leading to the parking lot, and had seen no ice on the walkway or parking lot, nor had he made any complaints about snow or ice on the walkway or parking lot. He also acknowledged that he had neither observed, nor did he know whether others had observed, any ice in the parking lot in the several weeks preceding his accident. On January 10, 2014, he had used the parking lot all day and noticed no ice on it, and had neither fallen nor

slipped. (NYSCEF 136).

On January 11, 2014, between 7:30 and 7:45 am, plaintiff exited the complex and walked toward the parking lot on the walkway. He saw no ice on the walkway or anything that would affect his ability to walk, but saw snow on each side of the walkway and a nearby container of salt. When plaintiff stepped from the walkway onto the parking lot, he immediately slipped and fell. When he looked down to see what had caused his fall, he saw ice, which he described as "solid" or "glistening" ice, with the pavement visible underneath. Plaintiff did not see the ice before his fall, and it "came as a complete surprise." Immediately after his fall, two women "tried to help [him], but couldn't because they were slipping and sliding on the ice." (NYSCEF 136).

Although plaintiff took no photographs of the parking lot after his fall, a friend of his, one Jeffrey Bergman, did. Bergman did not live at the apartment complex, and plaintiff believed that he had taken his photographs a day or two after his fall. Plaintiff had not told Bergman precisely where he had fallen. (NYSCEF 136).

In a subsequent affidavit, plaintiff contends that when he fell, it had "recently" snowed, and that he noticed "a little" leftover snow on each side of the walkway to the parking lot and a container of salt. He asserts that he fell on transparent ice, that there was ice under him and "all over the vicinity," and that the pavement was visible beneath the ice. (NYSCEF 124, Exh. C).

On or about August 16, 2016, Arborscape served nonparty Bergman with a subpoena demanding that he appear for deposition on September 27, 2016. He did not appear, but by affidavit dated October 10, 2016, Bergman states that the subpoena was apparently served at his parents' address where he no longer resides, that he never received it, and that he is willing to be

deposed. According to Bergman, he was at the complex on the day of plaintiff's accident, was at the scene after the accident, and observed that it was not snowing at the time, that the area was icy, and that the ice was transparent, "rendering the icy area invisible to pedestrians." While there was container of salt nearby, none was on the ground, nor was the area cleared of ice and snow. Bergman states that he took photographs of the area which accurately reflect the conditions on the accident date. The photographs annexed to his affidavit reflect what appears to be a corner of a parking lot, but no indication of the location of the walkway where plaintiff had allegedly walked. Rather, the photographs are focused on a location several feet into the parking lot, and on a large patch of snow and ice next to a salt container. (NYSCEF 124, Exh. E).

At a deposition, Stephen Brussels, who was defendant Katonah Management Group Inc.'s principal and Bedford's managing agent, testified that defendants had contracted with Arborscape for landscape and snow removal work at the apartment complex. Brussels knew of no prior slips and falls on ice on the property before plaintiff's fall, nor did he have any personal knowledge of what snow removal services Arborscape provided at the complex or whether it complied with its contract, but that it was contractually required to come to the complex whenever it snowed and return to the complex if there was more freezing or ice. (NYSCEF 137).

Arborscape partner Nicholas McLaren testified at a deposition that he was personally responsible for salting or deicing the complex's parking lot, and that in 2014, he had appeared at the complex for every snowfall or deicing event, and worked as a truck driver and manager/ supervisor. He knew of no prior accidents relating to Arborscape's snow removal services at the complex. (NYSCEF 139).

McLaren described his ordinary duties at the complex related to snow removal. If at least

a half-inch of snow had fallen or was predicted via information he received from a weather service to which Arborscape subscribed, or if warranted by the view from his home a half-mile from the complex, he would go to the complex, remove the snow, disperse sand or salt, and return the following morning at 5:30 am to inspect. McLaren would also return the day after a snowfall to finish removing whatever snow could not have been initially removed, such as when a parked automobile covered up snow or ice, and when the weather was freezing, or when temperatures would rise, resulting in melted snow and ice, which would then re-freeze at night, after which McLaren would inspect for ice. According to him, if it is raining, only sand can be put down to provide traction in case of icy conditions. While sand does not melt ice, salt and calcium do, but salt is washed away by rain. Thus, during a rainstorm, the only solution for ice is applying sand. He also inspected the parking lot whenever he was there. (*Id.*).

Thus, if Arborscape had recently plowed the complex and the temperature had risen above freezing during the day and then at night it dropped below freezing, Arborscape would return to check the complex for icing conditions, looking at locations where snow had piled up or might have melted or for areas of ice in general. If there was re-icing in the parking lot, McLaren would apply de-icing material to it, such as a mixture of sand and salt, or one or the other. He would not return thereafter to ensure that the ice was gone. While the contract provides that return visits by Arborscape may be required to ensure the safety of roadways and walkways, McLaren would only return to check for ice if there had been an accumulation of snow or rainfall on a particular day. (*Id.*).

A winter storm log kept by Arborscape for Bedford reflects that a snowstorm had commenced at 7:30 pm on January 2, 2014, when the temperature was 36 degrees, and ended at 1

pm on January 3, when the temperature was 30 degrees. During the storm, Arborscape plowed and treated the roads and walks, and on January 4, cleared parking spots. On January 5, freezing rain capable of developing into ice fell, and between 4 and 8 pm, after the rain ended, McLaren constantly applied a sand/salt mix to all walks, stairs, and roadways, including parking lots. He next returned to the complex and filled out a log for a visit on January 18. (*Id.*).

From the absence of logs for January 6 to January 18, 2014, McLaren inferred that there was no storm or precipitation during that period. While he may have gone to the complex during that time to check for ice, he would not have documented it unless ice or another condition was present. Between January 9 and 11, there were no visits to the complex, and between January 5 and 18, no snow plows were deployed there. (*Id.*).

In a subsequent affidavit, McLaren states, as pertinent here, that his review of weather records maintained by Arborscape reflects that between January 5 and 18, there were no snow or ice events in the area that would have required Arborscape's services. (NYSCEF 97).

II. SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment dismissing a cause of action, the defendant "bears the initial burden of coming forward with evidence that, absent contrary evidence creating an issue of fact, establishes as a matter of law that plaintiff cannot sustain this cause of action." (*Correa v Saifuddin*, 95 AD3d 407, 408 [1st Dept 2012]). If the defendant meets this burden, the plaintiff must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

To prevail on a motion for summary judgment in a slip-and-fall case, the defendant must

establish, *prima facie*, that it neither created the condition that caused the plaintiff's fall, nor did it have actual or constructive notice of that condition. (*Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-975 [2d Dept 2012], *lv dismissed* 20 NY3d 965; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011]). A defendant has constructive notice of a dangerous condition where it is "visible and apparent and . . . exist[s] for a sufficient length of time before the accident to permit the defendant to discover and remedy it." (*Arcabascio v We're Assoc., Inc.*, 125 AD3d 904, 904 [2d Dept 2015]).

III. ARBORSCAPE'S MOTION

A. Dismissal of main action

1. Contentions

Arborscape denies that it or defendants had actual or constructive notice of the icy condition which allegedly caused plaintiff's fall, relying on plaintiff's testimony that he observed no ice in the parking lot in the weeks preceding his fall, that no one had alerted him of any ice, that he had never lodged any complaints about the icy condition, and that he was present and active all day in the parking lot the day before the accident without incident. (NYSCEF 86).

In opposition to Arborscape's motion, plaintiff contends that the icy condition arose from a snowstorm that occurred six days before his accident, and that even if the ice was "black" or transparent, it could be found to have been sufficiently visible so as to provide Arborscape with constructive notice of it, as it was present for a sufficient amount of time. He also maintains that defendants and Arborscape had actual knowledge of the ice on which he fell, that they failed to meet their *prima facie* burden of showing when the area was last inspected, that Arborscape's notice of the condition constitutes notice to defendants, and that Arborscape launched an instrument of harm and/or created or exacerbated the hazard. Moreover, he asserts, a jury could

reasonably find that defendants' failure to summon Arborscape to the complex more often and Arborscape's failure to salt the complex more often is sufficient to hold them liable for failing to correct the icy condition. He characterizes Arborscape's snow removal efforts as "lackadaisical." (NYSCEF 123).

Plaintiff submits uncertified weather records from the National Climatic Data Center at Westchester County Airport and from Danbury Municipal Airport. (*Id.*).

In reply, Arborscape contends that it has shown that there was no actual notice of the ice, that it did not create the icy condition, and that the ice was not present for a sufficient length of time to be remedied. It asserts that plaintiff's allegation that the ice was formed by varying temperatures is unsupported as the weather records on which he relies are uncertified and inadmissible, nor do they reveal anything about the location in question. While Bergman observed ice after the accident, that observation, Arborscape claims, does not prove the duration of the icy condition. Moreover, it notes that plaintiff summarily concludes, without any analysis or pertinent authority, that it was defendants' agent, and that the rote recitation of case law without any explanation as to how it applies to the facts here fails to support plaintiff's arguments. (NYSCEF 146).

2. Analysis

An owner or occupant of premises has a duty to remove an accumulation of snow or ice inside or outside the premises which may be dangerous, or to take other measures to ensure the safety of the premises, when it has actual or constructive notice of the existence of the condition and a reasonable opportunity to act. (*See eg Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]; *Helms v Regal Cinemas, Inc.*, 49 AD3d 1287, 1288 [4th Dept 2008]; *Blackwood v New York City Tr. Auth.*, 36 AD3d 522, 523 [1st Dept 2007]; *Solazzo v New York*

City Tr. Auth., 21 AD3d 735, 735-36 [1st Dept 2005], *affd* 6 NY3d 734; *Hussein v New York City Tr. Auth.*, 266 AD2d 146, 146-47 [1st Dept 1999]; *Zonitch v Plaza at Latham LLC*, 255 AD2d 808, 808-809 [3d Dept 1998]; 86 NY Jur 2d, Premises Liability § 341; 355 [2016]; 15 NY Prac, New York Law of Torts § 12:11 [2015]).

Here, there is no evidence that Arborscape had actual notice of the icy condition, as it denies having received any complaints about the icy condition and McLaren saw no ice before plaintiff's fall. Although McLaren concedes not having inspected the parking lot for ice between January 6 and 17, he testified that there was no weather event during that period that would have prompted or required him to inspect the lot, and that nothing in Arborscape's contract required daily inspections for ice.

Moreover, plaintiff's testimony supports Arborscape's position that it had no constructive notice of the icy condition, as he saw no ice before his fall, describing it as transparent. Bergman likewise stated that the ice he saw was transparent, making it invisible. Not only did plaintiff see no ice the day before his accident, but he continuously crossed the parking lot without incident the day before his accident, and offers no evidence as to the duration of the alleged icy condition. Nor does Bergman address the duration of the condition.

Arborscape thus establishes that it had no actual or constructive notice of the condition, nor did it create it, having salted and sanded the complex after the storm on January 5 and as no other precipitation occurred between January 5 and 11 which would have required its treatment. (*See eg, Hall v Staples Office Superstore E., Inc.*, 135 AD3d 706 [2d Dept 2016] [as plaintiff testified that she saw no ice in area where she fell before fall and that she safely traversed same area only minutes before accident, her contention that defendant had notice of black ice or that ice formed as result of improper snow removal conclusory and speculative]; *Kiileen v Our Lady*

of Mercy Med. Ctr., 35 AD3d 205 [1st Dept 2006] [no evidence of defendant's notice of ice condition absent complaints and plaintiff did not notice black ice before he fell]; *Murphy v 136 N. Blvd. Assocs.*, 304 AD2d 650 [2d Dept 2003] [plaintiff slipped on black ice which she did not see before fall and thus failed to show that condition visible and apparent for sufficient length of time; also no evidence how long ice on ground before fall or whether defendant received prior complaints]; *see also Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541 [1st Dept 2015] [plaintiff's testimony did not support allegation that ice on which he slipped was old or preexisting, as he did not recall seeing ice on sidewalk when he walked there night before accident]).

Plaintiff cites no record evidence to support his claim that Arborscape had actual or constructive notice of the condition, or that created it through improper snow removal. His opposing arguments consist of quotes from other cases without any indication as to how they apply to the facts at issue here, nor does he compare or analogize the cases or facts to the facts at issue here, and the uncertified weather records he offers are inadmissible (*see Morabito v 11 Park Place LLC*, 107 AD3d 472 [1st Dept 2013] [unaffirmed report from weather reporting company, absent certified weather records or admissible climatological records, inadmissible]; *see also Hanifan v COR Dev. Co., LLC*, 114 AD3d 1569 [4th Dept 2016] [plaintiff's allegations insufficient to raise triable issue as she relied on inadmissible printouts from weather data website and defendant's general snow removal practices]), and even if they were admissible, he offers no expert affidavit to explain them. For all of these reasons, plaintiff fails to raise a triable issue as to Arborscape's liability.

Moreover, and in any event, Arborscape, as a third-party contractor, owes plaintiff no duty of care. A contractual obligation to perform snow removal services creates no duty of care to a third-party such as a pedestrian, unless the contractor, in performing its duties, launches a

force or instrument of harm, or where the pedestrian detrimentally relies on the contractor's continued performance of its contractual obligations, or where the contractor has entirely displaced another party's duty to maintain the premises safely. (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]). Thus, in *Espinal*, where the snow removal contract required the contractor to plow only after snow accumulation had ended and if it exceeded three inches, the contractor did not entirely displace the landowner's duty to maintain the premises, and the contractor "was under no obligation to monitor the weather to see if melting and refreezing would create an icy condition." (*Id.* at 141). Moreover, the plaintiff did not allege that he had detrimentally relied on the contractor's continued performance of its contractual obligations. And, even if the snow which the contractor had plowed later melted and refroze, "[b]y merely plowing the snow, [the contractor] cannot be said to have created or exacerbated a dangerous condition." (*Id.* at 141-142). The contractor therefore could not held liable for the pedestrian's injuries. (*Id.*).

Here, plaintiff raises no triable issue as to whether Arborscape created or exacerbated the icy condition, or whether it completely assumed defendants' duty to maintain the premises safely, given Arborscape's contractual duty to remove snow only at specific times and after one inch of accumulation. Nor does plaintiff allege that he detrimentally relied on Arborscape's snow-removal services. (*See DeCanio v Principal Bldg. Svces. Inc.*, 115 AD3d 579 [1st Dept 2014] [complaint dismissed against snow removal contractor as contract with defendant property manager did not trigger duty of care; acts of plowing and salting parking lot neither created nor exacerbated dangerous condition; contract required that it plow after two inches of snow fall or if manager asked; plaintiff did not allege in pleadings that she detrimentally relied on contractor's snow removal services]). Arborscape is thus not liable for plaintiff's alleged injuries.

B. Dismissal of third-party action

As Arborscape establishes that plaintiff's accident neither arose from nor was it connected with any work performed by Arborscape for defendants, there is no basis for finding it liable for contractual indemnification. For the same reason, and as the accident occurred a half-hour before Arborscape was contractually required to perform snow removal services and as the snow which fell on January 10 had an accumulation of less than one inch, defendants' breach of contract claim against Arborscape fails.

In any event, as Arborscape establishes its entitlement to dismissal of the complaint, it also establishes a basis for dismissal of the third-party complaint. (*See eg, Prigent v Friedman*, 264 AD2d 568 [1st Dept 1999] [as claim dismissed against defendant in main action, third party claim for indemnification academic and should have been dismissed]; *see also Roberson v Wyckoff Heights Med Ctr.*, 123 AD3d 791 [2d Dept 2014] [as complaint should have been dismissed, whether court properly granted third-party defendant's motion to dismiss third-party complaint academic]).

IV. DEFENDANTS' CROSS MOTION

A. Dismissal of main action

1. Contentions

Defendants deny any duty to remedy the alleged icy condition in issue as there was a storm in progress at the time of plaintiff's accident. They rely on the affidavit of Thomas E. Downs, a certified meteorologist, who explains that he reviewed weather records obtained from Westchester County Airport and Danbury Municipal Airport, which he characterizes as being the "closest hourly weather stations to and most representative of the location of plaintiff's accident," and submits certified copies of the records, along with records from four other weather

stations. Based thereon, Downs states that approximately five inches of snow fell in the vicinity of the complex between January 3 and 4, 2014, freezing rain and regular rain fell between January 5 and 6, and above-freezing temperatures were recorded from late January 5 until late January 6, followed by sustained freezing temperatures until January 9. (NYSCEF 128, 145).

On January 10, snow began falling in the early morning, and the temperature rose during the day until it reached above freezing by 2 pm, when the snow turned to rain. By then, less than an inch of snow had accumulated. From the evening of January 10 into and throughout January 11, rain intermittently fell until at least 11 pm on January 11. The records also show that by 12 am on January 11, the temperature was 34 degrees, and that it rose steadily until it was in the 40s by approximately 5 am. Based on these records, Downs opines that it was raining when plaintiff fell, the temperature was approximately 52 degrees, and that there was "no snow or ice . . . present on undisturbed ground surfaces." (NYSCEF 145).

Defendants also argue that plaintiff's fall may have been caused by rain, snow, or his own negligence, relying on his admission that he observed no ice before he fell, and absent other evidence that he fell on ice. (NYSCEF 128).

In opposition, plaintiff submits the affidavit of George Wright, dated November 28, 2016, a certified meteorologist, who states that the relevant certified weather records indicate approximately seven inches of snow falling between January 2 and 3, 2014, with rain beginning on January 5, and rain and mild temperatures on January 6 with sharp colder air moving in and dropping the temperature below freezing by midnight on January 6, resulting in a "flash freeze." Wright thus opines that the piled snow which plaintiff observed on January 11 had previously partially melted on January 6 and flowed into the parking lot, forming the ice on which he fell. (NYSCEF 157). Plaintiff argues that based on the weather records and Wright's opinion, the ice

on which he slipped was formed by the snow that fell between January 2 and 3, which melted and froze during a flash freeze on January 6, and due to the freezing or below freezing temperatures between January 6 and January 11, persisted to the time of plaintiff's fall. (NYSCEF 149).

Wright also contends that as the temperature did not rise above freezing between January 7 and 9, 2014, and absent any new precipitation, the snow continued to melt, and that if a site inspection had been performed during that two-day period, the ice on which plaintiff slipped would have been easily observed, and would not have formed if the piled snow had been removed and the walking surface salted. On January 10, snow fell during the morning and ended at noon, with a total accumulation of approximately one inch. From noon to 10 pm on January 10, there was no measurable precipitation. The weather records submitted by Wright show that on January 10, the temperature rose above freezing by approximately 3 pm, continued rising steadily, and did not fall below freezing again until after plaintiff's accident. He thus concludes that at the time of plaintiff's accident, rain was falling and the temperature was 50 degrees, that the ice on which plaintiff fell resulted from the January 6 flash freeze, and that the temperatures remained cold enough from January 6 to 10 to allow the ice to remain. (NYSCEF 157). Plaintiff thus argues that defendants had constructive notice of the icy condition, and that they are vicariously liable for Arborscape's negligent snow removal efforts. He reiterates his arguments against Arborscape. (NYSCEF 149).

Plaintiff denies that the ongoing storm defense is applicable, as once the January 3 storm stopped, there was no additional accumulation of snow, and from January 6, when there was a flash freeze, to January 9, there was no precipitation. Plaintiff does not address defendants' expert's or his own expert's contention that there was precipitation from January 10 through the

night of January 11 and that the temperature was well above freezing by the time he fell. (NYSCEF 149).

In reply, defendants note that plaintiff testified that he was unaware of the cause of his fall, thus permitting the possibility of other causes and precluding his claim of negligence. They reiterate that they are relieved of any duty during an ongoing storm, and that plaintiff's own expert observed that it was raining on the morning of the accident. (NYSCEF 162).

2. Analysis

A landowner "will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter." (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020 [2016]; *Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]). As a lull or break in precipitation may not give the defendant enough time to remedy the hazard (*Ndiaye v NEP W. 119th St. LP*, 124 AD3d 427, 428 [1st Dept 2015]; *Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345-346 [1st Dept 2002]), there is no duty to remove an accumulation of snow until the storm ceases in its entirety (*Rabinowitz v Marcovecchio*, 119 AD3d 762, 762 [2d Dept 2014]; *DeStefano v City of New York*, 41 AD3d 528, 529 [2d Dept 2007]; *Ioele v Wal-Mart Stores, Inc.*, 290 AD2d 614, 616 [3d Dept 2002]; *Powell*, 290 AD2d at 345), when "the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation" (*Powell*, 290 AD2d at 345-346). Evidence of a storm in progress thus constitutes *prima facie* evidence of no duty, and is "especially persuasive when based upon the analysis of a licensed meteorologist." (*Powell*, 290 AD2d at 345).

If the defendant satisfies its initial burden of demonstrating that a storm was in progress at the time of the plaintiff's accident, the plaintiff must then establish that the dangerous condition

was not precipitated by the storm, but preexisted. (*Mosquera v Orin*, 48 AD3d 935, 935 [3d Dept 2008]; *see also Bagnoli v 3GR/228 LLC*, 147 AD3d 504, 504 [1st Dept 2017]; *Mike v 91 Payson Owners Corp.*, 114 AD3d 420, 420 [1st Dept 2014]).

Here, as both plaintiff's and defendants' experts agree that it was raining when plaintiff fell on January 11, and based on the certified weather records showing that it had been raining continuously since midday on January 10, defendants have established that there was a storm in progress at the time of plaintiff's accident. (CPLR 4528 ["any record of the observations of the weather, taken under the direction of the United States weather bureau, is *prima facie* evidence of the facts stated"]; *see Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541, 542 [1st Dept 2015] [weather records and meteorologist's affidavit sufficient to establish storm in progress]; *Weinberger*, 102 AD3d at 619 ["*prima facie* entitlement to summary judgment by submitting certified climatological data"]; *Boynton v Eaves*, 66 AD3d 1281, 1282 [3d Dept 2009] [affidavit of meteorologist sufficient to establish storm in progress]; *Simeon v City of New York*, 41 AD3d 344, 344 [1st Dept 2007] [defendant granted summary judgment as plaintiff slipped and fell during snowstorm; snowfall confirmed by climatological records]).

While it is plaintiff's expert's opinion that the ice on which plaintiff fell was caused by a flash freeze on January 6 which persisted to January 11, he also acknowledges that when plaintiff fell, the temperature was in the 50s. Having also conceded that the temperature had risen above freezing during the morning of January 11 and was at approximately 50 degrees by the time of the accident, and relying on records that show that between January 10 and 11, the temperature had risen above freezing, Wright contradicts himself and undermines his opinion. (*See eg, Daley v Janel Tower L.P.*, 89 AD3d 408 [1st Dept 2011] [defendant met burden through records showing snow fell more than one week prior to fall and during three-day period before fall,

temperatures were above freezing, which established that icy condition would not have formed under the circumstances]; *compare Harrison v New York City Tr. Auth.*, 113 AD3d 472 [1st Dept 2014] [evidence including climatological data, recurrent dripping conditions, and freezing temperatures on day before plaintiff's accident, supported conclusion that source of ice was earlier snowstorm]; *Dominguez v 2520 BQE Assocs., LLC*, 112 AD3d 550 [1st Dept 2013] [records showed it had snowed two days before plaintiff's fall and temperatures remained freezing until accident, from which it could be reasonably inferred that ice had been present for at least two days]).

Moreover, plaintiff, who had been at the complex for days before January 11 and used the parking lot extensively the day before his accident and every day before then during the several weeks he was at the complex, testified that he had observed no ice before his fall, had not seen anyone else fall on ice, and had heard of no other complaints about ice, and he offers no evidence of prior falls or complaints on the ice before his accident. (*See Levene*, 126 AD3d at 541 [plaintiff's testimony did not support theory that ice was old or preexisting as he did not remember unusual snow or ice conditions on sidewalk when he walked there night before accident]).

Additionally, plaintiff's and Bergman's description of the ice as invisible and transparent, and the absence of any dirt or debris on the ice, permits the inference that the ice was newly or recently formed, and had not existed for at least five days before the accident, especially in a heavily-trafficked location. (*Compare Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412 [1st Dept 2013] [triable issues raised as to defendant's constructive notice as there had been no precipitation since storm two days before accident and hazard described as patch of black ice on dirty or filthy sidewalk]; *Wright v Emigrant Sav. Bank*, 112 AD3d 401 [1st Dept 2013]

[description of ice as black grayish dirty snow that was circular and measured one-and-half foot wide provided some indication that condition had existed for some time, raising issue as to constructive notice]).

Wright also fails to account for Arborscape's evidence that all day on January 5, 2014, McLaren and other employees applied a mix of sand and salt to all areas of the complex, including the parking lot, thereby calling into question Wright's assertion that the snow which fell on January 5 could and would have melted and refroze on January 6. (*See e.g., Rand v Cornell Univ.*, 91 AD3d 49 [1st Dept 2012] [record did not support expert's claim that snow had accumulated on exposed and untreated, or not salted, ground and then melted and refroze; building custodian testified that area of fall had been salted and shoveled and cleared of snow week before accident, and thus expert's conclusion was speculative and failed to raise triable issue as to whether plaintiff slipped on "old" ice]).

Finally, Bergman's photographs are not probative, absent evidence that they depict the spot where plaintiff fell, and as they appear to reflect a location different from the one described by plaintiff. Moreover, his testimony that he was present at the complex on the date of plaintiff's accident and at the scene of the fall shortly thereafter is contradicted by plaintiff's testimony that Bergman was not at the complex on January 11 and took the photographs a day or two later.

For all of these reasons, plaintiff's expert's conclusion is insufficient to raise a triable issue as to whether the ice pre-existed the storm in progress at the time of the accident, and plaintiff offers no other evidence to rebut defendants' *prima facie* showing. (*See Reagan v Hartsdale Tenants Corp.*, 27 AD3d 716 [2d Dept 2006] [plaintiff's expert's theory that icy condition caused by snow melting and freezing from prior storms was impermissible speculation, given undisputed weather conditions on date of accident including storm in progress]). The fact

that there may have been snow remaining unplowed or not removed by defendants or Arborscape on the walkway to the parking lot does not, in and of itself, constitute proof of their negligence. (*See Hanifan v COR Dev. Co., LLC*, 144 AD3d 1569 [4th Dept 2016] [observing that it is well-settled that mere failure to remove all snow and ice from parking lot does not constitute negligence or creation of hazard]).

Upon searching the record (CPLR 3212[b]) and based on the findings made on Arborscape's motion, there is no evidence that defendants had actual notice of the icy condition or that they created it, and absent sufficient proof that the ice existed for a sufficient length of time for defendants to have observed it and remedied it, defendants had no constructive notice of the ice.

B. Third-party action and remainder of cross motion

Given the merits of Arborscape's motion to dismiss the complaint and third-party complaint against it and defendants' motion to dismiss, the remainder of defendants' cross motion is denied as moot.

V. REMAINING MOTIONS

Given these results, Arborscape's motion to vacate plaintiff's statement of readiness and strike the note of issue and plaintiff's motion for a special preference are denied as moot.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a special preference (sequence 004) is denied as moot; it is further

ORDERED, that third-party defendant Arborscape, Inc.'s motion to vacate plaintiff's statement of readiness and strike the note of issue, and defendants' cross-motion (sequence 005),

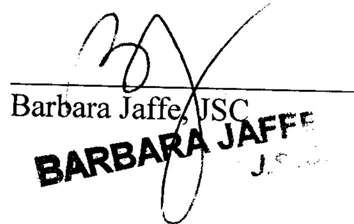
are denied as moot; it is further

ORDERED, that third-party defendant Arborscape, Inc.'s motion for an order dismissing the complaint and third-party action is granted, and the complaint and third-party complaint are dismissed as against it with costs and disbursements as taxed by the clerk upon submission of an appropriate bill of costs; it is further

ORDERED, that defendants Bedford Mews Condominium and Katonah Management Group, Inc.'s cross motion is granted solely to the extent of dismissing the complaint against it, and the complaint is dismissed as against defendants with costs and disbursements as taxed by the clerk upon submission of an appropriate bill of costs; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC

DATED: May 10, 2017
New York, New York