SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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MARIA SANCHEZ,

Plaintiff,

-against-

Index
No.:161660/2013

CHELSEA/VILLAGE ASSOCIATES, LLC, and LA PAIN QUOTIDIEN, THE ORIGINAL HOMESTEAD RESTAURANT INC. and 56 NINTH AVENUE LLC,

Defendants.

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DEBRA A. JAMES, J.:

Defendants Chelsea/Village Associates, LLC, and PQ Meatpacking, District Inc., d/b/a Le Pain Quotidien i/s/h/a La Pain Quotidien (Le Pain), move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff Maria Sanchez's complaint and all cross claims against them.[1]

Defendants Original Homestead Restaurant Inc. d/b/a Old Homestead Steakhouse (Old Homestead) and 56 Ninth Avenue LLC (56 Ninth), cross-move, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint and all cross claims against them.

CONCLUSION

The motion and cross motions of the defendants shall be denied.

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[1] Defendant PQ Meatpacking, District Inc. is not named in the caption of this case but is named as a moving defendant in the notice of motion.

FACTUAL ALLEGATIONS

Plaintiff alleges that on November 24, 2013, she suffered personal injuries when she slipped and fell on ice on the sidewalk in front of 52 Ninth Avenue, New York, New York. Plaintiff was deposed and testified that on the date of her accident, she was walking to St. Bernard's Church on 14th Street. Plaintiff left her house at 8:00 a.m. and was walking slowly because there was ice precipitation. Plaintiff maintains that it started snowing about ten minutes prior to her accident and that it continued to snow until she slipped and fell.

Plaintiff testified that while there was ice on the ground near where her accident occurred, there was no ice on the ground on the prior blocks. Plaintiff first saw the ice on the sidewalk near where she fell when she was about five feet away. She proceeded to avoid walking on the ice by entering into the street and then walked back onto the sidewalk. When plaintiff returned onto the sidewalk, she took three steps and then proceeded to slip and fall on ice. After she fell, plaintiff experienced pain in her left arm and wrist.

Prior to stepping on the sidewalk, plaintiff testified that she saw a worker either setting up, or fixing a table at the subject sidewalk. Plaintiff maintains that the worker witnessed her accident and assisted her after the fall. Plaintiff was helped to a chair and an ambulance was called. When the

ambulance arrived, plaintiff told those who arrived that she had slipped in front of the store with the "LE" signage. She testified that she did not know how long the ice was on the sidewalk and she did not remember seeing anyone from the other store in the area of her accident.

Albert Sanders (Sanders) testified that he worked for Chelsea/Village Associates as the superintendent of 48 Ninth Avenue from January 1990 until the summer of 2015. He maintains that Chelsea/Village owned the property located at 48 and 52 Ninth Avenue and that the premises at 52 Ninth Avenue was a commercial space. Sanders did not remember what he did on the date of plaintiff's accident, but states that his daily routine included checking the sidewalks which were about four feet from the building's doorway. He testified that the commercial spaces were responsible for removing snow or ice on the sidewalk in front of their locations and that he had conversations with the manager from Le Pain, the commercial resident at the premises, regarding placing salt on the sidewalk before it snowed. Sanders maintains that directly to the north of Le Pain was Old Homestead, a restaurant. Sanders testified that at night, Old Homestead would put garbage out, and that in the morning, workers from Old Homestead would use bleach and hose down the sidewalk where the garbage previously sat. Sanders maintains that when it was cold out, a gloss of ice would appear from the use of the

water. He testified that due to the existence of the ice, he had discussions with Old Homestead's porter that salt was needed to be utilized in the area. Sanders avers that he would also speak to a worker named "Louie," the manager of Old Homestead, about the water freezing from the hose. However, he did not recall when he had this conversation. Sanders testified that sometimes the water from the hose would flow in front of Le Pain. He would report the water to Louie, who would then tell the porter to utilize salt. Sanders believes that he spoke with the manager from Le Pain about plaintiff's accident as he was not aware when it happened. He believes that they discussed that the water was sprayed as usual, that it froze, and that plaintiff fell. However, Sanders did not specifically know whether the sidewalk was sprayed by Old Homestead's porter on the morning of plaintiff's accident.

On the motion, movant Chelsea Village Associates also submits an affidavit of Sanders, in which he states that prior to the date of plaintiff's accident, he noticed employees of Old Homestead washing the sidewalk with a hose and bleach, and that he had told the porter for Old Homestead and Louie several times about the water freezing on the sidewalk. Sanders affirms that when Old Homestead failed to address the issue, he would salt the sidewalk. Sanders did not observe any snow or ice condition on the sidewalk in front of the premises on the day of plaintiff's

accident.

Michael Banasiak (Banasiak) testified that he is the general manager of Le Pain. Banasiak maintains that there were three porters responsible for cleaning up inside and outside of the restaurant, that porters would arrive at about 8:00 a.m., and that he did not recall which porter was working on the date of plaintiff's accident. Banasiak testified that upon arriving at work each day, he would look at the sidewalk and fix any conditions. He would also have to walk to a kiosk located outside the restaurant about two to three times between 8:00 a.m. and 9:00 a.m. Banasiak testified that, on the morning of plaintiff's accident, he did not recall seeing ice or anything else on the sidewalk in front of Le Pain. He maintains that himself and a worker were responsible for cleaning up the sidewalk and clearing ice in front of Le Pain.

Prior to the date of plaintiff's accident, Banasiak observed multiple people from Old Homestead at about 8:00 a.m. or 9:00 a.m. cleaning the sidewalk with a hose in front of the restaurant. He remembers water staying on the sidewalk after the hose was used, but he did not recall if water in the hose flowed in front of the building in which Le Pain was located. Banasiak did not observe the water from the hose freezing after it was sprayed and did not have any discussion with anyone about Old Homestead spraying the sidewalk. From the time at which he

arrived at Le Pain until plaintiff's accident, Banasiak did not see anyone removing ice or snow, or sweeping the sidewalk.

On the date of plaintiff's accident, Banasiak was told that people were falling in front of the restaurant. He went outside and talked with plaintiff who was sitting on a chair. While he was outside, Banasiak noticed people falling and took photographs of the subject location. He maintains that the area about five or six feet away from where plaintiff was located appeared to be wet, but that it was actually ice in front of Old Homestead and in front of 52 9th Avenue. Banasiak maintains that there was no ice in front of Le Pain.

Banasiak told a porter from Old Homestead that plaintiff slipped and fallen on the ice, but he was not sure how much of the conversation the porter understood as he did not appear to understand English. Banasiak maintains that another man came out of Old Homestead, placed a sign in the area, and told Banasiak that they had no salt. Banasiak did not recall it raining or snowing on the day of plaintiff's accident and noticed that there was no ice or snow on the previous day. He did not see or hear anyone was spraying water on the morning of the accident.

In an affidavit, Banasiak states that on the morning of plaintiff's accident, he arrived at the restaurant at 6:45 a.m., checked the sidewalks in front of the premises, and did not observe any snow or ice on the sidewalk. After being notified of

plaintiff's accident, Banasiak noticed that people were slipping in an area north of Le Pain in front of Old Homestead. He maintains that there was no ice in front of Le Pain, but that there may have been ice in front of the residential part of the building. Banasiak states that the ice was the result of the sidewalk being washed by employees of Old Homestead and that he had previously observed the employees of Old Homestead clean the sidewalk by spraying water with a hose. After he placed salt on the sidewalk, Banasiak notified Old Homestead employees about the condition and provided them with salt. Banasiak did not receive any complaints from anyone regarding snow or ice on the sidewalk adjacent to Le Pain.

Luis Acosta (Acosta) was deposed and testified that he is the general manager of Old Homestead. Acosta maintains that porters named Mario Morales (Morales) and Umberto Medina were responsible for cleaning the front of the restaurant. Acosta testified that the porters would work from 7:00 a.m. to 10:30 p.m. and that their responsibilities included cleaning the sidewalk in front of Old Homestead. Acosta maintains that the porters would sometimes use water and soap when cleaning the sidewalk and that after the sidewalks were cleaned, they would use a brush to remove the water. Acosta did not know how often the porters would use the hose, but testified that the porters were instructed not to use the hose if it was below freezing.

Acosta testified that he did not tell the porters where to check the temperature. If there was snow or ice in front of Old Homestead, the porters were to clean it with a shovel and use white pellets.

Acosta did not recall seeing a thin layer of ice in front of Old Homestead. He did not know about plaintiff's accident until a couple of days later when he was told by someone that worked in the office at Old Homestead. He asked Umberto about the accident who told him that someone from Le Pain knew about plaintiff's accident. Acosta did not speak with Mario or anyone from Le Pain about the accident.

Morales, the Le Pain porter, was deposed and testified that he worked for Old Homestead, and that his job included working as a porter for two days a week. Morales testified that he would arrive at work at 7:00 a.m. Morales testified that depending on the weather conditions, he would utilize a hose and detergent every day to clean the sidewalks. Morales testified that he had received strict orders from Acosta not to use the hose when snow or ice were present. Morales would also not use the hose when it was cold, freezing, or raining. He maintains that at 7:00 a.m. on the date of plaintiff's accident there was sleet coming down, which continued to fall at the time of plaintiff's accident.

Morales maintains that upon arriving to work on the date of plaintiff's accident, he placed two orange "wet floor" signs

outside. He proceeded to spread a half a sack of a five or ten pound bag of salt between 8:00 a.m. and 9:00 a.m. Morales testified that he saw plaintiff walking five or six feet towards him and coming from 14th Street to 15th Street. He maintains that plaintiff was in the vicinity of a door near a Le Pain sign when she fell and landed on ice.

Morales saw employees from Le Pain approach plaintiff and noticed that there was ice on the entire sidewalk. He did not have any knowledge of any complaints that ice would form on the sidewalk in front of Le Pain after Old Homestead's employees would hose down the sidewalk. Morales maintains that he had told Luis about plaintiff's accident on the date on which it occurred and told Luis that she slipped and fell in front of the restaurant which was next door. He testified that although plaintiff indicated that she fell in front of the doorway by Le Pain, she was actually located more south, about two or three feet from the building line.

Plaintiff submits an expert affidavit from Joseph C. Cannizzo (Cannizzo), a licensed professional engineer, principal of Fortech, Ltd., and a former chief forensic engineer. Cannizzo states that weather reports from Central Park, New York, and Newark Airport, Newark, New Jersey, recorded no precipitation on the date of plaintiff's accident. The records reveal that a slight precipitation began at 10:15 a.m., after the incident had

occurred, and that the temperature at the time of plaintiff's accident was 28.4 degrees. He states that runoff water from the hose would have taken 45 minutes, at a minimum, to freeze. Cannizzo opines that Sanders should have insisted that the hosing process not be permitted at temperatures near freezing and that his failure to notice the ice at the location was due to the ice's transparent nature. Cannizzo further opines that both Chelsea and Le Pain were aware that the condition that caused the slippery sidewalk had been previously created and that they failed to take any action to stop Old Homestead from hosing the sidewalk with water, or insist that the hosing was performed with liquids to prevent freezing.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . . ." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006).

Chelsea and Le Pain argue that their motion for summary judgment must be granted on the basis of a "storm in progress" that created an ongoing hazard which would not provide Chelsea

and Le Pain with a reasonable amount of time after the cessation of the storm to clear any snow or ice from the sidewalk.

Chelsea and Le Pain also argue that they neither caused nor created the alleged dangerous condition, nor had actual or constructive notice of it. Chelsea and Le Pain contend that Acosta and Morales admitted that their practice in which they clean the sidewalk by spraying water with a hose. Le Pain's manager Banasiak testified that on the date of plaintiff's accident, he did not observe any icy conditions when he arrived at the restaurant or on two subsequent trips he made outside between 8:00 a.m. and 8:45 a.m. Chelsea and Le Pain cite Banasiak testimony that he did not receive any complaints on the date of plaintiff's accident and was not aware of any similar incidents involving a slip and fall due to snow or ice.

Chelsea and Le Pain argue that although water was sprayed on the sidewalk during other mornings, this does not create constructive notice that the specific patch of ice existed on the morning of plaintiff's accident. They also contend that a general awareness that water could turn into ice is insufficient to establish constructive notice of the subject condition which allegedly caused plaintiff to fall.

Old Homestead and 56 Ninth cross-move for summary judgment and likewise argue that they are free of negligence as there was a storm in progress at the time of plaintiff's accident. They

argue that plaintiff testified that it began snowing during her walk until her accident and that Morales corroborated that there was a storm in progress at the time of plaintiff's accident, observing that there was ice on the entire sidewalk.

Old Homestead and 56 Ninth also contend that plaintiff cannot demonstrate that defendants created and/or received notice of the alleged condition, as there is no evidence which would demonstrate that these defendants received any complaints regarding a snow or icy condition or that there were any accidents involving a snow or ice condition prior to and including the date of plaintiff's accident. These defendants argue that even if Old Homestead sprayed water on the sidewalk in the mornings, this does not demonstrate constructive notice of the specific patch of ice on which plaintiff fell. Defendants also argue that any evidence suggesting that Old Homestead's practice of hosing and cleaning the front of the sidewalk could have possibly created the subject condition is pure speculation and is insufficient to impose liability.

In opposition to both motions, plaintiff contends that defendants failed to prove that there was a storm in progress, or that the ice plaintiff tripped on was caused by such storm. Plaintiff states that the weather reports demonstrate that there was no precipitation on the day prior to plaintiff's accident, or the day of the accident, until several hours following the

accident. Plaintiff also counters that both witnesses produced by Chelsea and Le Pain admitted that they had actual knowledge of the recurring ice. Plaintiff argues that Sanders, Chelsea's superintendent, testified that Old Homestead's porter would wash down the sidewalk with a hose, that he would observe the water creating a thin gloss of ice, that he informed the porter and Louie about the water freezing numerous times prior to the date of plaintiff's accident, and that he observed water which was sprayed getting onto the property in front of 52 Ninth Avenue. Plaintiff points to Banasiak's testimony that he observed employees from Homestead cleaning the sidewalk with a hose in the mornings and that the water would sometimes remain on the sidewalk. Plaintiff argues that along with having actual notice of the water getting onto the sidewalk, Chelsea and Le Pain had constructive notice of the condition and had a duty to maintain the premises in a reasonably safe condition. Plaintiff contends that there is evidence which suggests that the water at the subject premises which had turned to ice was present for more than an hour prior to the accident. She argues that Morales testified that he would arrive at 7:00 a.m. and clean the sidewalk with a hose shortly after.

Based on a review of the record, this court finds that issues of fact exist which preclude the granting of summary judgment.

First, with respect to the storm in progress doctrine, the duty of a landowner or the tenant in possession to take measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress. The duty does not commence until a reasonable time after the storm has ended. See 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).

Plaintiff submits an uncertified weather history report for the subject date which states that there was no precipitation in the area at the time when plaintiff fell, the Appellate Division, First Department, has held that an un-affirmed weather report, without certified records will not be considered. See Morabito v 11 Park Place LLC, 107 AD3d 472, 472 (1st Dept 2013) ("[d]efendants additional submission of an un-affirmed report from a weather reporting company, not accompanied by any certified weather records or admissible climatological reports, cannot be considered"). Nevertheless, the testimony of eyewitnesses to the weather conditions around the time of plaintiff's accident raise an issue of fact as to whether there was a storm in progress at the time of plaintiff's accident.

To recap, Banasiak testified that on the morning of plaintiff's accident, he arrived at the restaurant at 6:45 a.m., checked the sidewalks in front of the premises, and did not observe any snow or ice on the sidewalk. Banasiak also stated

that he made two trips between the store and to an outside kiosk between 8:00 a.m. and 9:00 a.m., but did not observe any icy conditions. Sanders states that at about 7:30 a.m., on the date of plaintiff's accident, he did not observe any snow or ice on the sidewalk in front of the premises, and that if there was anything in front of the commercial space, he would have taken care of it or reported it to Le Pain's manager or employee.

On the other hand, Morales testified that at 7:00 a.m. on the date of plaintiff's accident, he observed sleet coming down and that when plaintiff's accident took place, there was ice on the entire sidewalk. Plaintiff testified that it started to snow about ten minutes prior to her accident and that it continued to snow for the entire time leading to the accident. Therefore, the various versions raise an issue of fact as to whether or not there was a storm in progress and if any precipitation from a storm contributed to plaintiff's accident.

Even if the snow in progress doctrine would apply, there exists a question of fact as to whether the defendants caused or created the condition, and/or should have notice of the condition caused when water was sprayed on the sidewalk at freezing temperatures.

"However, once a landowner elects to engage in snow removal activities, it is required to act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural

hazard created by the storm". Kantor v Leisure Glen Homeowners Assn, Inc, 95 AD3d 1177 (2d Dept 2012),citing Cahudhry v East Buffet & Rest, 24 AD3d 494, 494).

In this regard, Sanders testified that he had observed water freezing on the sidewalk on prior occasions and that he had told the porter for Old Homestead and Acosta several times about this condition on the sidewalk. Sanders testified that he had conversations with the manager from Le Pain regarding the need for placing salt on the sidewalk before it snowed and believes that they spoke about plaintiff's accident and discussed that the water was sprayed as usual, that it froze, and that plaintiff fell. Banasiak testified that he remembers water staying on the sidewalk after the hose was utilized, but did not recall if water in the hose came in front of the building in which Le Pain was located. The contrary testimony of Acosta and Morales that the porters were instructed not to use the hose if it was below freezing and that they would not use the hose when it was cold, freezing, or raining create issues of credibility. "On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." S. J. Capelin Assocs., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974); see also Psihogios v Stavropoulos, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of

fact).

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986). The Appellate Division, First Department, has held that "[p]laintiff must come forward with evidence establishing constructive notice of the particular condition that caused the fall . . . [p]laintiff's burden may be met by evidence of an ongoing and recurring dangerous condition in the area of the slip and fall, which routinely was left unaddressed by the landlord. Such evidence will be viewed in a light most favorable to the plaintiff." Megally v 440 W. 34th St. Co., 246 AD2d 346, 346 (1st Dept 1998) (citations omitted).

As the testimony of Sanders suggests that he observed the hose being utilized during days in which water was turning into ice and that he had to remind workers from both stores to use salt due to ice, and as there are issues as to precisely where plaintiff fell that implicate credibility, the question of the situs of the accident and Chelsea and Le Pain's notice must await trial.

With regard to the expert testimony of Cannizzo, Old Homestead and 56 Ninth contend that the affidavit of Cannizzo should be disregarded as it is speculative and provides opinions

and conclusions which are outside the scope of his expertise as a civil engineer. Such defendants contend that as the affidavit states that he reviewed the facts and circumstances of the "construction project", the affidavit lacks an understanding of the case, as it does not involve a construction project, but an alleged slip and fall.

While the affidavit mistakenly utilizes the phrase, "construction project," the affidavit lists all of Cannizzo's prior work, the materials and deposition transcripts from this case which he reviewed, and includes a conclusion as to what he believes was the cause of plaintiff's accident. In any event, such error would go to the weight and not the probity of the opinion. The expert report is sufficient to raise a question of fact as to how long the water was located on the sidewalk and whether any of the defendants should have noticed the condition. Cannizzo concludes that in order for there to be ice, water must have existed for at least 45 minutes prior to plaintiff's accident in order for it to freeze. Therefore, a question of fact remains as to how long the water was on the ground, or whether precipitation from a storm caused the condition.

ORDER

Accordingly, it is hereby

ORDERED that defendants Chelsea/Village Associates, LLC, and PQ Meatpacking, District Inc., d/b/a Le Pain Quotidien i/s/h/a La

Pain Quotidien's motion for summary judgment is denied; and it is further

ORDERED that defendants Original Homestead Restaurant Inc., d/b/a Old Homestead Steakhouse and 56 Ninth Avenue LLC's cross motion for summary judgment is denied.

This is the decision and order of the court.

Dated: December 22, 2017

ENTER:

DEBRA A. JAMES
J.S.C