At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, Binghamton, New York on the 9th day of February, 2018.

PRESENT: HON. MOLLY REYNOLDS FITZGERALD
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

SHANTAE CHRISTIE,

Plaintiff,

vs.

ROBERT J. ANDREJKO, as Administrator of the Estate of Sylvia A. Andrejko and CITY OF BINGHAMTON,

Defendants.

DECISION AND ORDER

Index No.: 2015-0303
RJI No.: 2016-0028-C

Background

On February 7, 2014, plaintiff, Shantae Christie, left her home at 42 Holland Avenue, Binghamton at approximately 11:00 a.m. to walk to work at Boscov's Department Store. At approximately 9:00 p.m., Ms. Christie left work and walked home. Ms. Christie was injured when she slipped and fell on the sidewalk in front of 12 Holland Street, Binghamton, New York. Plaintiff commenced this action against Sylvia A. Andrejko[1], the owner of the property, and the City of Binghamton on February 5, 2015. The complaint alleges that plaintiff's fall was caused by the snow and ice on the sidewalk, charging both

[1] Shortly after the action was commenced, Defendant Sylvia A. Andrejko died. Ms. Andrejko's brother was named administrator and "Robert Andrejko, as Administrator of the Estate of Sylvia A. Andrejko," was duly substituted in place.

defendants with negligence.

In late 2016, prior to filing the note of issue, both defendants moved for summary judgment. The Court granted defendant, City of Binghamton's motion, but denied (without prejudice) defendant Andrejko's motion as premature. Plaintiff filed the trial note of issue on January 5, 2018 and this motion followed shortly thereafter.

In support of his motion, defendant attached an attorney affirmation, copies of the pleadings, the deposition transcripts of Robert Andrejko, Tara Almy, Christopher Almy and Rebecca Stollman. Further, defendant incorporated by reference, plaintiff's deposition. In opposition, plaintiff has submitted an attorney affirmation and relies on the depositions submitted by defendant.

Legal Analysis

Defendant argues that it cannot be liable based on two undisputed facts: plaintiff fell on the sidewalk abutting Sylvia Andrejko's property; and the City of Binghamton has the Binghamton Housing and Property Maintenance Code §265-13(I)(4), which provides:

> The accumulation of snow and ice on sidewalks must be removed within 24 hours after said accumulation ceases. In the event of noncompliance, the Code Enforcement Director may direct the Department of Public Works to clean said sidewalks, and a bill shall be presented to the owner as per Subsection I(3).

What is noticeable by its absence, is any language imposing liability on the homeowner for failure to remove the snow and ice. 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, *Smalley v Bemben,* 12 NY3d 751, 752 (2009); *Owens v Miesch,* 118 AD3d 1259, 1260 (2014). The only

municipality involved in the case at bar, the City of Binghamton, was granted summary judgment more than a year ago[2].

Defendant further argues that there is no proof that defendant Andrejko negligently removed the snow and ice or exacerbated the sidewalk situation in any way. Defendant's counsel refers to the deposition of Robert Andrejko who resides in Florida during the winter and had no direct knowledge of his sister's sidewalk on February 7, 2014, as well as those of Tara Almy, Christopher Almy and Rebecca Stollman, tenants of Ms. Andrejko who, along with two unnamed neighbors, occasionally shoveled Ms. Andrejko's property. None of these individuals had any specific recollection of the day in question. Ms. Sylvia Andrejko, the homeowner, died in April 2015 and cannot aver to when or how she removed the snow and ice. Given the existence of the statute, as well as these affidavits, defendant has carried his initial burden under the motion and so plaintiff must now raise a triable issue.

As for the allegations of negligence, plaintiff in her verified bill of particulars sworn to on October 27, 2015, contends:

(1) defendant permitted the sidewalk to become and remain in an icy, snowy dangerous condition;

(2) failing to properly and adequately sand and/or salt the sidewalk; and

(3) causing or permitting snow piled on the sides of the sidewalk to melt onto the sidewalk and re-freeze.

Plaintiff in her deposition testified "there was a lot of snow and ice on the ground"

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[2] Defendant City of Binghamton's motion was granted February 1, 2017.

(p19); "there was snow on the sides and patches of ice in the middle" (p23); "it looked like someone tried to shovel but never threw salt down" (p44).

Plaintiff's theory is that the defendant failed to remove *all* of the snow and ice from the sidewalk. The failure to remove all snow and ice does not constitute negligence, *Gentile v Rotterdam Sq.*, 226 AD2d 973, 974 (1996); *Cardinale v Watervliet Hous. Auth.*, 302 AD2d 666, 667 (2003).

As to plaintiff's allegation that defendant did not adequately sand or salt, defendant's failure to completely cover the sidewalk with salt, even if true, does not establish defendant's liability since the failure to get all the snow and ice off the walk is not negligence, *Zima v North Colonie Cent. School Dist.*, 225 AD2d 993, 994 (1996). Furthermore, implying that defendant's salting activities were incomplete or insufficient would not establish that defendant's methods actually *increased* the natural hazards of the ice (id. at 994).

To recover, it must be shown that the hazard was increased by what was done in the process of removing the snow and ice. There is no evidence in the record that defendant's actions increased the hazard, *Herrick v Grand Union Co.*, 1 AD2d 911 (1956).

As to plaintiff's allegation that defendant allowed snow piled on the sides of the sidewalk to melt and re-freeze, in response to the first set of summary judgment motions, plaintiff filed an affidavit by Alicia C. Wasula, an American Meteorological Society Certified Consulting Meteorologist, who averred that the temperature between February 5-7 remained well below freezing. She further opined "that as a result of the air temperature remaining below freezing, there was no opportunity for melting of snow on undisturbed, untreated surfaces between the snowstorm on February 5 and February 7, the date of the

incident". Plaintiff's own expert defeated the allegation that snow piled on the sides of the sidewalk melted and re-froze on the sidewalk.

Plaintiff must establish that defendant had actual or constructive notice of the icy and snowy condition prior to plaintiff's fall. As to actual notice, plaintiff in her deposition stated she "never complained" (p20). Additionally, in response to the previous motions, Terry J. Kellogg, the Commissioner of Public Works for the City of Binghamton averred that there was no record of any written complaints as to the condition of the sidewalks along Holland Street prior to February 7, 2014.

In her bill of particulars, the plaintiff states the defendant's agents, servants or employees were aware of the conditions. However, the defendant's tenants, who may loosely be considered the defendant's agents or servants since they occasionally shoveled the sidewalk, all testified that defendant cleared the sidewalk, was very attentive, meticulous, the sidewalk was well maintained and she made the sidewalk safe. There was no notice via these individuals.

Plaintiff's bill of particulars further states that there was notice since the deceased defendant created the condition and the conditions existed for a period of two days. The court has determined that there is no evidence that defendant created or exacerbated the condition.

Additionally, it is not enough to show that defendant was generally aware of the existence of a potentially dangerous condition. To prevail, plaintiff present competent evidence that defendant knew or should have known of the specific condition, *Lyons v Cold Brook Cr. Realty Corp.*, 268 AD2d 659, 660 (2000); *Mosquera v Orin,* 48 AD3d 935,936 (2008); *Stewart v Canton-Potsdam Hosp. Found., Inc.*, 79 AD3d 1406, 1407 (2010). In

Chapman v Pounds, 268 AD2d 769, 770 (2000), the Appellate Division held that even where the defendant had salted or shoveled to remove snow and had a general awareness that snow and ice might accumulate on the steps on occasion, this was insufficient to constitute notice of a specific hazardous condition.

Lastly, the Court takes notice that plaintiff testified that the conditions did not exist solely as to defendant's sidewalk, instead she testified that, "it was pretty much patchy all the whole way down the block (p 69). Plaintiff has not provided competent evidence that defendant knew or should have known of a specific condition.

The defendant's motion for summary judgment is granted. This constitutes the Decision and Order of the Court.

Dated: May 16, 2018

HON. MOLLY REYNOLDS FITZGERALD
SUPREME COURT JUSTICE

cc: Victoria Leib Lightcap, Esq.
Mark D. Goris, Esq.
Judith E. Osburn, Broome County Chief Court Clerk