Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RICHARD G. LATIN**
Justice

IA PART 40

----------X

JOANNA LECHOWICZ and WOJCJECH LECHOWICZ,

Plaintiffs,

-against-

MEADOW COURT CONDOMINIUM and BOARD OF MANAGERS OF MEADOW COURT CONDOMINIUM, et al.,

Defendants.

----------X

Index No.: 703171/17
Motion Date: 8/1/19
Motion Cal. No.: 16
Motion Seq. No.: 2

The following numbered papers read on this motion by defendants for summary judgment.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 7
Affirmation in Opposition-Affidavits-Exhibits.....	8 - 9
Replying.....	10 - 12

Upon the foregoing cited papers, it is ordered that the motion by defendants for summary judgment pursuant to CPLR 3212, is determined as follows:

Plaintiff, Joanna Lechowicz (Plaintiff-Wife), commenced the instant action to recover for injuries she allegedly sustained, on March 10, 2014 at approximately 6:25 a.m., when she slipped and fell on snow and/or ice on the sidewalk abutting 130 Pondfield Road, Bronxville, NY, at or near the property line of 12 Meadow Avenue, Bronxville, NY. Plaintiff, Wojcjech Lechowicz (Plaintiff-Husband; collectively: Plaintiffs), seeks damages for the alleged loss of consortium arising from Plaintiff-Wife's accident and injuries.

Defendants now seek summary judgment dismissing the complaint on the ground that, inter alia, the "storm in progress" rule applies.

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (*see Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable

issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v. Felder*, 33 AD3d 645, 645-46 [2d Dept 2006]). Thus, where the movant fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers (*see Voss v. Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

A defendant property owner moving for summary judgment in an action predicated upon the presence of snow and/or ice has the initial burden of establishing prima facie that it neither created the snowy or icy condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of such condition (*see Elizee v. Village of Amityville*, 172 AD3d 1004, 1004 [2d Dept 2019]; *Ryan v. Beacon Hill Estates Cooperative, Inc.*, 170 AD3d 1215, 1215 [2d Dept 2019]; *Blair v. Loduca*, 164 AD3d 637, 638-39 [2d Dept 2018]). This burden may be satisfied by offering evidence that there was a storm in progress at the time of the subject accident (*id.*). If the defendant meets this initial burden, then the burden shifts to the plaintiff to raise a triable issue of fact as to whether the injured plaintiff's fall was caused by something other than precipitation from the storm in progress (*id.*).

"Under the so-called 'storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*Allen v. New York City Transit Authority*, 172 AD3d 1285, 1286 [2d Dept 2019], quoting *Marchese v. Skenderi*, 51 AD3d 642, 642 [2d Dept 2008] [internal quotation marks omitted]; *Amato v. Brookhaven Professional Park Limited Partnership*, 162 AD3d 620, 620 [2d Dept 2018]; *Brandimarte v. Liat Holding Corp.*, 158 AD3d 664, 665 [2d Dept 2018]; *De Chica v. Saldana*, 153 AD3d 782, 782 [2d Dept 2017]; *Bradshaw v. PEL 300 Associates*, 152 AD3d 635, 636 [2d Dept 2017]; *DeMonte v. Chestnut Oaks at Chappaque*, 134 AD3d 662, 664 [2d Dept 2015]).

In support of this motion, Defendants submit, inter alia, the transcript of Plaintiff-Wife's examination before trial (EBT), the transcript of Defendants' witness Harrin K. Platzner's EBT, and the affidavit of Howard Altschule, a Certified Consulting Meteorologist, coupled with the climatological records and data he relied on.

Plaintiff-Wife testified, in relevant part, that at the time of the accident, it was not raining or snowing, and there was no precipitation falling. Plaintiff-Wife also testified that at the time of the accident, there was snow piled next to the sidewalk towards the premises on her right-side. Plaintiff-Wife testified that she did not see the ice prior to her accident. Nevertheless, she averred that after the accident she observed a clear puddle-like ice patch that extended from the curb on her left-side all the way to the snow pile on her right-side. She further described the patch of ice to be wider towards her right-side and narrowed as it went towards her left-side (the curb). Plaintiff-Wife also testified that there was no salt or sand over the ice patch, and that it felt wet to the touch.

Harrin K. Platzner, an employee of defendant Platzner International Group, LTD. (Platzner LTD), testified that at the time of the accident Platnzer LTD was, and is currently, the managing agent for defendant Meadow Court Condominium (Defendant-MCC). Mr. Platzner averred that as the managing agent, Platzner LTD mostly provided supervisory services. Mr. Platzner explained that Platzner LTD is an agent of defendant the Board of Managers of Meadow Court Condominium (Defendant-Board), and executes the instructions provided by Defendant-Board. Mr. Platzner testified that Defendant-MCC was responsible for the removal of ice and snow from the sidewalk. Mr. Platzner averred that he would inspect the premises during the winter, however, he would not make a note of an icy or snowy condition, as he or someone else would resolve the issue immediately. Nonetheless, he testified that the removal of ice and/or snow from the sidewalk would ultimately be the responsibility of Defendant-MCC's employee, Robinson Lugo, the full-time superintendent resident on the premises. Mr. Platzner also testified that, in effect, that no one could have observed ice where the accident occurred, as he has never seen ice in that spot. He further testified that "we *almost* [emphasize added] always place [the snow] to the left side," therefore, there were no piles of snow to Plaintiff-Wife's right-side. Notably, Mr. Platzner had no personal knowledge of when the sidewalk was last inspected or what it looked like within a reasonable time prior, during or after the subject accident.

Defendants' meteorologist opined that no precipitation fell on March 8th and 9th of 2014, and that air temperatures were above freezing from approximately 7:05 a.m. on March 8, 2014 through and after the time of the accident on March 10, 2014. Nevertheless, Mr. Altschule's affidavit reveals that there was half-an-inch of residual ice and/or snow on both March 8th and 9th of 2014. Regardless, Mr. Altschule concluded that a snow storm was in progress when the subject accident occurred, and that the storm produced a light coating of slippery wet snow.

The Court notes that Defendants presented evidence that there was a storm in progress when Plaintiff-Wife slipped and fell (*id.*). Nonetheless, the Court finds that Defendants failed to meet their prima facie burden demonstrating that they neither created nor had actual or constructive notice of the icy condition that allegedly caused Plaintiff to fall (*see Elizee*, 172 AD3d at 1005; *Isabel v. New York City Housing Authority*, 171 AD3d 714, 714-15 [2d Dept 2019]; *Ryan*, 170 AD3d at 1216; *Rodriguez v. New York City Housing Authority*, 169 AD3d 947, 948 [2d Dept 2019]; *Blair*, 164 AD3d at 639; *Pankratov v. 2935 OP, LLC*, 160 AD3d 757, 758-59 [2d Dept 2018]; *Gervasi v. Blagojevic*, 158 AD3d 613, 614 [2d Dept 2018]; *Burniston v. Ranric Enterprises Corp.*, 134 AD3d 973, 974 [2d Dept 2015]; *Gyokchyan v. City of New York*, 106 AD3d 780, 782 [2d Dept 2013]).

Moreover, Defendants' own submissions, especially Plaintiff-Wife's EBT and their expert's affidavit, raised a triable issue of fact as to whether Plaintiff-Wife slipped and fell on old snow and/or ice that was a product of a prior storm, as opposed to precipitation from the storm in progress, and as to whether Defendants had constructive notice of the preexisting condition (*id.*).

The Court further notes Defendants' argument that they did not have a duty to remove the subject ice at the time of the accident pursuant to The Village of Bronxville Code, Article III § 260-12 4(C) (Code), and that such Code does not impose tort liability upon Defendants, is also insufficient to establish their prima facie burden. Defendants rely on *Palka v. Village of Ossining*, a slip-and-fall action related to ice and/or snow on the sidewalk, which involved a similar village code; however, the instant action is distinguishable from said case (120 AD3d 641 [2d Dept 2014]). In *Palka*, the plaintiffs did not allege that the defendants created the icy condition, but rather alleged that they were negligent in failing to remove snow and ice from the sidewalk (*id.* at 642). Here, in contrast, Plaintiffs alleged that Defendants created the icy condition, and that Defendants undertook snow and ice removal efforts which made the naturally occurring conditions more hazardous (*id.*). While Defendants established that section 260-12 of the Village of Bronxville Code did not impose tort liability upon them for a failure to remove snow and ice from the sidewalk, they failed to demonstrate that they did not create the icy condition through their snow and ice removal efforts (*id.*).

While the Court finds that summary judgment must be denied regardless of the sufficiency of the opposing papers, it nevertheless finds that Plaintiffs raised a triable issue of fact (*see Voss*, 22 NY3d at 734).

In opposition, Plaintiffs submit, inter alia, the EBT transcript of nonparty witness, Sargent Watson Morgan, coupled with his relevant business records, and the affidavit of George Wright, a Certified Consulting Meteorologist, coupled with the climatological records and data he relied on.

Sargent Morgan testified, inter alia, that upon arriving to the scene of the accident, he observed a large patch of clear hard ice, which he believed caused Plaintiff-Wife's fall. Sargent Morgan further testified that the patch of ice was the width of the sidewalk, however, it narrowed as it went towards the curb. As part of his business records, he drew the patch of ice and Plaintiff-Wife on a diagram. Sargent Morgan also testified that there was no sign of sand or salt on the ice patch. Such testimony demonstrates that the patch of ice, which allegedly caused Plaintiff-Wife to slip and fall, was visible at the time of the accident and not black ice as Defendants contend. Moreover, several times throughout the EBT, Sargent Morgan was asked about the weather at the time of the subject accident, and he consistently testified that the weather was clear and that there had been no snow or precipitation that night before or at the time of the accident. Sargent Morgan also produced his daily activity log for the date of the accident, which references the weather conditions as being clear.

Like Defendants' meteorologist, Plaintiffs' expert, Mr. Wright, opined that no precipitation fell on March 8th and 9th of 2014. However, Plaintiffs' expert opined that the temperature fluctuated above and below freezing from March 1, 2014 through and after the time of the accident on March 10, 2014. Mr. Wright opined that the prolonged period of melting and refreezing that occurred during March 1-9, 2014, produced a

buildup of thick ice on the subject sidewalk where Plaintiff-Wife slipped and fell. Mr. Wright notes that on March 10, 2014, between approximately 4:30 a.m. and 5:45 a.m., there was merely a trace of snowfall, i.e., less than one-tenth of an inch, which produced white crystallized snowflakes, but did not produce ice. Furthermore, Mr. Wright opined that Plaintiff-Wife slipped and fell on ice that formed prior to the accident and was present on the subject sidewalk for more than 21 hours before her accident. Finally, Mr. Wright explained that the patch of ice could have felt wet, because a portion of the ice had melted.

The Court finds that Plaintiffs raised a triable issue of fact as the whether the accident was caused by the snow and/or ice that existed prior to the storm, as opposed to the precipitation from the storm in progress, and whether Defendants had constructive notice of the alleged preexisting condition (*see Elizee*, 172 AD3d at 1005; *Isabel*, 171 AD3d at 714-15; *Ryan*, 170 AD3d at 1216; *Rodriguez*, 169 AD3d at 948; *Blair*, 164 AD3d at 639; *Pankratov*, 160 AD3d at 758-59; *Gervasi*, 158 AD3d at 614; *Burniston*, 134 AD3d at 974; *Gyokchyan*, 106 AD3d at 782).

Therefore, the Court finds that Defendants failed to establish, prima facie, its entitlement to judgment as a matter of law.

Accordingly, Defendants' motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: October 2, 2019

RICHARD G. LATIN, J.S.C.

FILED
OCT 18 2019
COUNTY CLERK
QUEENS COUNTY