SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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TOMO NIKAC,

Plaintiff,

DECISION AND ORDER (Motion # 1)

-against-

Index No.: 032164/2018

NORTHGATE GARDENS LLC and INVICTUS MANAGEMENT LLC,

Defendants.
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Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 7, were considered in connection with Defendants Northgate Gardens LLC and Invictus Management LLC's (hereinafter "Defendants") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in their favor, dismissing the action, along with such other and further relief as this Court shall deem proper:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF MARK KRAMER/EXHIBITS A-I	1-3
AFFIRMATION IN OPPOSITION/AFFIDAVIT OF BART RODI, P.E.	4-5
AFFIRMATION OF REPLY/AFFIDAVIT OF SANDY RANCANELLI/ EXHIBITS A-B	6-7

Upon the foregoing papers, the Court now rules as follows:

This action for serious personal injuries arises out of an alleged slip and fall which occurred on January 17, 2018, at approximately 9:30 a.m., at Plaintiff's apartment complex located at 9 Cresthill Drive, Nyack, New York. Plaintiff commenced an action with the filing of the Summons and Complaint on April 18, 2018. Issue was joined as to Defendants with the service of an Answer on May 22, 2018. Discovery proceeded and a Note of Issue was filed on April 29, 2019, and the instant summary judgment motion is timely brought.

Plaintiff alleges when he woke up on the morning of January 17, 2018, at approximately, 7 a.m., he realized that it had snowed overnight. When he left his apartment at 7:30 to 7:45 a.m., in order to drive to Bardonia, New York, for an appointment with his ophthalmologist, he noted that the sidewalk, grass, his car and the parking lot were covered in about one to five inches of snow. He claims that it was not snowing during the approximate 40 minutes he was at his doctor's office. When he returned to his apartment complex a little after 9 a.m., he testified that no new snow had fallen that morning. As he exited his car, and stepped from the parking lot surface onto the sidewalk, he observed that the sidewalk had been shoveled, and that there were patches of snow that the shoveling had missed. He also testified that there was no salt pellets or ice melt or sand on the sidewalk in the vicinity. Plaintiff testified that after walking about four or five feet on the sidewalk, his "feet went under" and he recalls both feet slipping forward. He fell to the right and ultimately came into contact with the sidewalk. He further testified that he did not look at the sidewalk surface in the specific area where his feet slipped but believed he was caused to slip because it "felt like ice" and felt "very slippery." Plaintiff also noted that where he fell, the sidewalk was slanted.

Defendant produced Kyle Tucker, the vice president of Defendant Invictus Management, the apartment complex's management company. Mr. Tucker had no idea what snow removal procedures were in effect on the day of the fall. He testified it was custom to shovel every one and a half hours for a larger storm beginning around 5 a.m. He did not have any snow removal records. Also produced for an examination before trial was Johnathon Olivieri, superintendent of the property on the day plaintiff fell. Although Mr. Olivieri initially testified that he did not remember what the sidewalk looked like on the day of Plaintiff's accident or whether the management participated in snow removal operations, he later testified that he inspected the sidewalk at 9 a.m. and it was fine but does not recall whether there was ice melt or salt applied in the area where plaintiff fell. Jonathon Ruiz, the assistant porter, testified that he could not recall what the sidewalk looked like on the day plaintiff fell or

whether he shoveled any snow that day.

Defendants move for summary judgment on the ground that they had no duty to clear snow and ice from the sidewalk at the time of the accident because there was a "storm in progress." In support of this contention, they submit the expert affidavit of Mark Kramer, as well as certified meteorological records[1]. Mr. Kramer avers that on January 17, 2018, snow commenced at least two and a half hours prior to plaintiff's slip and fall which occurred at approximately 9:30 a.m. and continued to fall for several hours until the early afternoon, by which approximately two inches of snow fell on ground surfaces. As such, Defendants' contend that their duty to clear snow and ice at the time of the occurrence was suspended because a storm was occurring. Additionally, defendants argue that Plaintiff is unable to testify as to the cause of his fall because he did not look and see any ice before he fell or look at the sidewalk condition after he fell. They further contend that Plaintiff cannot prove that Defendants actually shoveled the walkway. Lastly, Defendants argue that any claim that a "slanted" walkway contributed to the accident must be rejected because it is at best a "trivial defect."

In opposition thereto, Plaintiff contends that there is a triable issue of fact as to whether a storm was in progress based upon Plaintiff's testimony that it had not snowed for some two and a half hours before his fall. Additionally, Plaintiff argues that there are triable issues of fact as to whether Defendants created or exacerbated the hazardous condition by virtue of the fact that the sidewalk had been shoveled that morning, that there were patches where snow remained and that there was no salt or sand present on the walkway. Plaintiff also submits the affidavit of Bart Rodi, P.E., a liability expert, who opines that by shoveling the

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[1]Defendants originally failed to annex the climatological records that are referenced in their expert report to the moving papers. However, on reply, defense counsel submits an affidavit from Sandy Racanelli, a legal secretary, who avers that she inadvertently forgot to include the records with the expert affidavit, although she had been instructed by the attorney to do so, as well as the records themselves. The Court accepts defendants' explanation of why the records were not initially included and finds that there is no basis upon which to reject the expert affidavit.

sidewalk without salting, defendant's made the sidewalk more dangerous, causing Plaintiff to fall.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

Turning first to Defendants' argument that Plaintiff's action must be dismissed because the Plaintiff cannot identify the cause of his accident without relying upon impermissible speculation, the Court finds no merit to this contention. A plaintiff with no recollection of an accident or who cannot testify exactly as to how an accident occurred, can establish negligence wholly through circumstantial evidence. Timmins v. Benjamin, 77 A.D.3d 1254, 1256, 910 N.Y.S.2d 584 (3d Dept. 2010); Patrikis v. Arniotis, 129 A.D.3d 928, 12 N.Y.S.3d 174 (2d Dept. 2015). A case of negligence based wholly on circumstantial evidence may be established if the plaintiffs "show facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." Seelinger v. Town of Middletown, 79 A.D.3d 1227, 1229, 913 N.Y.S.2d 376 (3d Dept. 2010).

Moreover, a plaintiff is not required to rule out all plausible variables and factors that could have caused or contributed to the accident, but need only prove that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other causes. Timmins, 77 A.D.3d at 1256. The law does not require that plaintiff's proof positively exclude every other possible cause of the accident but defendant's negligence." Hernandez v. Alstom Transp. Inc., 130 A.D.3d 681, 13 N.Y.S.3d 232 (2d Dept. 2015). Rather, the proof must render other causes sufficiently remote such that the jury can base its verdict on logical inferences drawn from the evidence, not merely on speculation. Timmins, 77 A.D.3d at 1256. In the instant matter, there exists sufficient circumstantial evidence that a jury could conclude that Plaintiff was caused to slip and fall due to the presence of ice and/or snow on the sidewalk.

"[O]wners of real property onto which members of the public are invited have a nondelegable duty to provide the public with reasonably safe premises and safe means of ingress and egress. Smith v. Harir Realty Associates, Inc., 109 A.D.3d 897, 971 N.Y.S.2d 451 (2d Dept. 2013). "A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice thereof." Id. A defendant moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, prima facie, that it neither created the snow and ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of the condition. Talamas v. Metropolitan Transp. Authority, 120 A.D.3d 1333, 1334, 993 N.Y.S.2d 102 (2d Dept. 2014).

Under the so-called "storm in progress rule", a property owner will not be held responsible for accident 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. Bradshaw v. PEL 300 Associates, 152 A.D.3d 635, 636, 59 N.Y.S.3d 90 (2d Dept. 2017). "However, once a

property owner elects to engage in snow removal activities, the owner must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm. Wei Wen Xie v. Ye Jiang Yong, 111 A.D.3d 617, 618, 974 N.Y.S.2d 113 (2d Dept. 2013).

In the instant matter, Defendants have established that there was a storm in progress at the time of Plaintiff's fall by virtue of the affidavit of their meteorological expert and the certified weather reports which demonstrate that it began to snow several hours before Plaintiff's accident and continued to snow until several hours later. Moreover, even accepting Plaintiff's testimony that it was not snowing at the time he returned to the parking lot of his condominium, case law holds that a lull or break in a storm around the time of a plaintiff's accident does not establish that defendant had a reasonable time after the cessation of the storm to correct hazardous snow or ice-related conditions. Baia v. Allright Parking Buffalo, Inc., 27 A.D.3d 1153, 811 N.Y.S.843 (4th Dept. 2006); Krutz v. Betz Funeral Home Inc., 236 A.d.2d 704, 653 N.Y.S.2d 212 (3d Dept. 1997). Plaintiff did not submit an affidavit from a meteorological expert to support Plaintiff's contention that it had not snowed for at least two and a half hours prior to his fall.

However, the Court finds that Defendants failed to meet their prima facie burden with respect to whether they created or exacerbated a dangerous condition by virtue of their snow removal efforts. Where a defendant fails to establish as a matter of law that it did not, in fact, undertake efforts to clear the sidewalk and that its snow removal activities did not create or exacerbate the icy condition which allegedly caused plaintiff to fall, a summary judgment motion must be denied regardless of the sufficiency of the opposition papers. Robles v. City of New York, 56 A.D.3d 647, 868 N.Y.S.2d 114 (2d Dept. 2008); Cotter v. Brooklhaven Memorial Hospital, 97 A.D.3d 524, 947 N.Y.S.2d 608 (2d Dept. 2012); Petrocelli v. Marrelli Development Corp., 31 A.D.3d 623 (2d Dept. 2006).

In Prenderville v. International Service Systems, Inc., 10 A.D.3d 334, 781

N.Y.S.2d 110, 113 (2d Dept. 2004), the court held that given defendants' silence with respect to the actual snow removal operations at issue, their alleged prima facie showing was patently insufficient. In a case similar to the matter at bar, Arroyo v. Clarke, 148 A.D.3d 479, 49 N.Y.S.3d 660 (1st Dept. 2017), the Court denied summary judgment motion on the ground that there were triable issues of fact regarding the "failure to place sand or salt on the stairs created or exacerbated a dangerous condition" after the prior storm." In the instant matter, Defendants have failed to make the required showing that on the morning of the accident no employees undertook efforts to remove the snow or that if they did, they applied salt or sand to the subject sidewalk, or otherwise removed the snow in a non-negligent manner.

Accordingly, it is hereby

ORDERED that Defendants' Notice of Motion for summary judgment and dismissal of the Complaint is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear for a conference in the Trial Readiness Part on **WEDNESDAY, DECEMBER 4, 2019, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
September 25, 2019

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

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