SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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CHRISTINE BOUKNIGHT,

Plaintiff,

-against-

THE RETAIL PROPERTY TRUST,

Defendant.

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IAS Part 12
Index No. 614803/2018
Mot. Seq. Nos. 003-004

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following papers, in addition to any legal memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Defendant's Notice of Motion, Affirmation & Exhibits.....1
Plaintiff's Cross-Motion, Affirmation in Opposition & Exhibits.....2
Defendant's Reply Affirmation & Exhibits.....3
Defendant's Affirmation in Opposition to Cross-Motion.....4

This is an action for personal injuries following plaintiff Christine Bouknight's slip and fall on ice on March 13, 2018 when exiting the Roosevelt Field Mall. The Retail Property Trust is the owner of the premises. Bouknight contends that defendant created the dangerous icy condition or at least had constructive notice of it. Defendant now moves and Bouknight cross-moves for summary judgment pursuant to CPLR 3212.

BACKGROUND

It is undisputed that on March 13 snowfall began at approximately 2:00 a.m. and ended in the afternoon, accumulating a total of approximately 5 inches. Bouknight testified at her deposition that she parked her car on the upper level of a parking deck[1] and entered the mall near the dining district at approximately 4:00-5:00 p.m. Bouknight did not observe ice

[1] The upper level of the parking deck is uncovered and exposed to the elements.

on the ground at the time she arrived. Bouknight did observe piles of snow collected around poles in the parking area amongst the parking spaces.

Bouknight exited the mall from the dining district at approximately 9:45 p.m. She slipped and fell on the ramp/walkway leading from the dining district to the parking deck. Bouknight testified that there was no precipitation when she left the mall and she did not observe any ice on the ground prior to her fall. After she slipped and fell, Bouknight noticed "black ice" underneath her.

Defendant's general manager, Chris Brivio, testified at a deposition as to the general snow and ice removal procedures at the time of this incident. Brivio testified that snow removal services were performed by 365 Maintenance LLC (non-party) on the date of the incident. Based on defendant's snow incident report, 365 Maintenance arrived at the property at approximately 7:00 a.m. and left at 2:00 p.m. after plowing and salting the parking deck areas. The report indicated conditions as "wet," which Brivio testified signifies "heavy wet snowflakes." After Boughknight's fall, an incident report was generated by an employee of defendant wherein the employee states that he/she did observe a "thin layer of ice" at the site of the incident.

Brivio testified that defendant's janitorial staff typically would apply salt and remove snow with shovels if they notice patches that "need attention." Brivio had no independent knowledge of whether such snow removal efforts or salting were performed by a defendant employee after 2:00 p.m. on March 13 and no records or logs are maintained for those actions.

LEGAL ANALYSIS

On a motion for summary judgment the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that it is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Where the movant fails to meet its initial burden the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065 (1979); *Werner v. Nelkin*, 206 A.D.2d 422 (2d Dept. 1994).

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a *prima facie* case that it neither created the hazardous or defective condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. *Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522 (2d Dept. 2008). To constitute such notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. *See Nelson v. Cunningham Associates, L.P.*, 77 A.D.3d 638 (2d Dept. 2008). To meet its initial burden, a defendant seeking to establish that it did not have constructive notice of a hazardous condition must present evidence of when the area was last inspected in relation to a plaintiff's fall. *Jeremias v. Lake Forest Estates*, 147 A.D.3d 742 (2d Dept. 2017). Further, a defendant who elects to engage in snow removal activities must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by a storm. *See Gwinn v. Christina's Polish Restaurant, Inc.*, 117 A.D.3d 789 (2d Dept. 2014).

Here, genuine issues of fact exist as to whether defendant had constructive notice of the icy condition.

In moving for summary judgment, defendant contends that it cannot be held liable for Boughknight's slip and fall since there was not a reasonably sufficient amount of time to remedy the dangerous condition after the temperature fluctuation that caused the development of "black ice." In support of this position, defendant proffers the affidavit of Steven Roberts, a certified consulting meteorologist. Roberts asserts that between 3:00 p.m. to 4:00 p.m. and at 9:40 p.m. (the time of the incident), the temperature was above freezing. Roberts goes on to opine that the period of time between 7:00 p.m. and 9:40 p.m. the weather conditions were favorable for "evaporative cooling" of any standing water which would

result in the formation of black ice. Roberts further speculates that leftover moisture/water on "untreated surfaces from precipitation that occurred prior to 3:20 p.m." on the date of the incident was "likely the source of water for the formation of ice...." But Roberts does not account for the weather conditions between 4:00 p.m. and 7:00 p.m. or explain why evaporative cooling would likely begin at 7:00 p.m. and not earlier. What is undisputed is that snowfall ended over six hours prior to Boughknight's accident, and the temperature was above freezing at that time. Considering the gaps in Robert's affidavit, an issue of fact remains as to whether there was a sufficient period of time for defendant to take action in preventing or remediating the icy conditions that caused Boughknight to fall.

Further, defendant does not proffer any evidence as to when the subject ramp was last cleared of snow or inspected. The court is unable to discern from the record whether 365 Maintenance's snow removal services were extended to the subject ramp or were limited to the parking decks. Moreover, an employee of defendant observed a thin sheet of ice after responding to Boughknight's fall. As such, an issue of fact exists as to whether defendant would have been aware of this dangerous condition through a reasonable inspection. *See Ahmetaj v. Mountainview Condominium*, 171 A.D.3d 683 (2d Dept. 2019).

In the same vein, Boughknight failed meet her *prima facie* burden in establishing that the icy condition that caused her fall was created by defendant. Boughknight contends that defendant was negligent in piling the snow into mounds and leaving the ground wet at or near freezing temperatures without taking further remedial measures. But it is unclear from the record where the snow piles created by defendant were in relation to the location of Bouknight's fall and where the salt was applied. Therefore, an issue of fact exists as to whether the snow piles were far enough removed from the ramp so as to prevent a dangerous condition when the snow melted. *See Morris v. Home Depot USA*, 152 A.D.3d 669 (2d Dept. 2017); *see also Viera v. Rymdzionek*, 112 A.D.3d 915 (2d Dept. 2013).

Based on the foregoing, defendant's motion and plaintiff's cross motion are denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: August 12, 2020
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED
Aug 13 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE