To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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VICTOR MANUEL SANCHINELLI PALMA and SANDRA SANCHINELLI,

Plaintiffs,

-against-

FATSIS HOLDINGS, LLC, KONSTANTINOS FATSIS, FATSIS & ASSOCIATES, PLLC and HIGHLAND FALLS REALTY, LTD.,

Defendants.

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DECISION AND ORDER

INDEX NO.: EF009355-2017
Motion Date: 12/2/19
Sequence Nos. 1 - 2

SCIORTINO, J.

The following papers numbered 1 to 20 were considered in connection with the summary judgment application (Sequence #1) of defendant Fatsis Holdings, LLC (Holdings); and the summary judgment application (Sequence #2) of defendants Konstantinos Fatsis (Fatsis), Fatsis & Associates, PLLC (Law Firm) and Highland Falls Realty, Ltd. (Realty):

PAPERS	NUMBERED
Notice of Motion (Seq. #1)/Affirmation (Piracci)/Exhibits A-J	1 - 12
Affirmation in Opposition (Seq. #1) (Dreyer)/Exhibits A-B	13 - 15
Notice of Motion (Seq. #2)/Affirmation (Sidney)	16 - 17
Affirmation in Opposition (Seq. #2) (Dreyer)/Exhibits A-B	18 - 20

Background and Procedural History

This action arises out of a slip and fall accident on ice, alleged to have occurred on March 16, 2017, on the municipal sidewalk in front of 245 Main Street, Highland Falls, New York. The building abutting the sidewalk is owned and managed by defendant Holdings, whose principal member is Soula Fatsis. The premises is occupied by the Law Firm and the Realty Company, both

of which are solely owned by defendant Fatsis, the son of Soula Fatsis.

This matter was commenced by the electronic filing of a Summons and Complaint on November 15, 2017. An Amended Verified Complaint was filed on June 25, 2018. (Exhibit A[1]) Holdings filed its Answer on December 21, 2017 and an Amended Verified Answer on June 26, 2018. (Exhibit B) The Answer of Fatsis, Law Firm and Realty was filed on August 20, 2018. (Exhibit C) Plaintiff provided a Verified Bill of Particulars and an Amended Verified Bill of Particulars. (Exhibit D) A Note of Issue was filed on June 10, 2019. (Exhibit E)

Depositions

Plaintiff (Exhibit F)

On March 16, 2017, at about 7:15 p.m., plaintiff fell in front of 245 Main Street, Highland Falls. Plaintiff fell in the middle of the municipal sidewalk in front of a door to the building. The first floor of the building on Main Street has three doors opening onto the municipal sidewalk which runs parallel to the building front. Plaintiff identified the door where he fell in a photograph (Exhibit G) as the one with a black mat in front of it ("the main door").

It had last snowed three or four days before the accident. From the sidewalk, plaintiff saw little snow banks where the sidewalk meets the roadway. They did not extend onto the sidewalk. The area was well-lit and plaintiff could see very well. The sidewalk looked dry to him. Plaintiff neither saw nor felt any ice on the sidewalk before he fell, nor did he see any ice melt or salt on the ground. Plaintiff's left foot slipped and he fell, landing on his left side and the back of his head. After he fell, he touched what he believed was ice. He did not know the width, length or thickness of the ice.

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[1]Motion Sequence #2 incorporates and adopts the exhibits appended to Sequence #1. References to exhibits are to those in Sequence #1, unless otherwise provided.

Defendant Fatsis Holdings (Exhibit H)

Holdings is the sole owner of the premises at 245 Main Street, Highland Falls, and Soula Fatsis manages the building herself. Sometimes people are hired to do maintenance. Her son, Fatsis, arranges for snow and ice removal for her, both because she is his mother and she is the owner of the building. She has no personal involvement with snow and ice removal at the building.

Defendant Konstantinos Fatsis (Exhibit I)

Fatsis owns Fatsis and Associates, his law firm, and Highland Falls Realty, his real estate agency. Both businesses are housed at 245 Main Street. Fatsis usually does the snow and ice removal on the sidewalk himself. He keeps no written records regarding snow and ice removal. There has never been a snow and ice removal contract for the building.

Fatsis hired Tomas Rojas to remove snow for the storm that took place two to three days before the accident. The storm occurred over the course of a couple of days, so Rojas shoveled numerous times. Fatsis was at the building briefly on the morning of March 16th, and saw no snow or ice on the sidewalk. When he returned around 10:00 a.m., he saw no snow or ice on the sidewalk. Throughout the day, he took care of any slush with salt. Snow or slush is not generally pushed up by the plows onto the sidewalk near the main door.

Around 5:00 that day, Fatsis was told that there was slush at the northeast corner of the building, past the third door and brick wall on Main Street, where the building meets a bridge which goes over a brook. He exited his office and did not see any ice by the main door. He saw a slush mix extending from the third door, three quarters of the way down toward the bridge. Fatsis shoveled the slush back into the street and put down salt. He did the same thing in the same place at 6:00 p.m. He

left the office at approximately 6:30 p.m.,using the main door. He did not see any icy condition outside the main door when he left.

The municipal sidewalk outside the office door is approximately seven to eight feet wide. When Fatsis left the building on March 16th, there was a snow bank between the sidewalk and the roadway, less than a foot high, on the roadway itself, perhaps extending a little onto the curb.

Non-party William Hurtado (Exhibit J)

Hurtado is a co-worker of plaintiff's, and his wife is plaintiff's cousin. He is also a friend of Fatsis and his family. He never worked for Fatsis. On the day of the accident, at about 5:00, Hurtado, passing by, saw a slushy condition outside Fatsis' building, at the end of the third door. He told Fatsis about it and Fatsis removed the slush with a chopper and salt. Fatsis pushed the slush into the street. Fatsis also threw salt on the sidewalk. Hurtado saw no icy condition in front of the main door or the second door. When Hurtado left the area, he did not see any snow on the sidewalk. Later, he returned to the building after hearing that someone who had fallen. He saw plaintiff lying on the sidewalk between the bridge railing and the brick wall near the third door. There was snow on Main Street on the day of the accident. There was a snowbank in front of Fatsis Law Office.

Motions for Summary Judgment

By Notice of Motion (Sequence #1) electronically filed on August 8, 2019, Fatsis Holdings moves for summary judgment dismissing the Complaint. The remaining defendants, Fatsis, Fatsis & Associates and Highland Falls Realty, electronically filed their motion (Sequence #2) on November 11, 2019. The motions, and the opposing papers, are nearly identical.

Both motions assert that plaintiff's claim that Holdings breached a duty to maintain the public sidewalk outside its building is unsupported by the law. The Village of Highland Falls Municipal

Code directs that "the owner, lessee, tenant, occupant....of any building ...abutting upon the public sidewalks....,shall keep such public sidewalk adjacent to the building abutting thereon free and clear of snow and ice...." Failure to comply with that provision is punishable by a monetary fine. No mention is made in the Code of third-party liability. Unless the property owner or tenant made the sidewalk more hazardous through negligent snow removal efforts, there is no liability. The failure to remove all snow and ice from the sidewalk does not constitute negligence. In this matter, there is no evidence of any action taken or not taken by any of the defendants that exacerbated a snow and ice condition. Rather, the evidence shows due and diligent efforts to keep the area well-lit, clean and clear. Forty-five minutes before the accident, Fatsis was in the area and saw no ice or snow in the area where plaintiff fell. The slush he did see during the day was promptly addressed. In fact, plaintiff, Fatsis and Hurtado both testified that there was no snow on the sidewalk by the door where plaintiff fell. Plaintiff's claim that ice was caused by dripping from the second floor porch or a snow bank melt and refreeze is nothing but speculation, insufficient to defeat summary judgment.

In opposition, plaintiff acknowledges that the Municipal Code does not generally provide for tort liability of abutting property owners. Rather, plaintiff argues the exception to the rule: actions taken by defendant Fatsis, on behalf of Holdings, resulted in the formation of ice on the sidewalk, causing plaintiff's fall. He argues that defendants' papers fail to eliminate triable issues of fact on the claim that defendants' actions exacerbated the snow and ice condition. Specifically, he states that: "[b]y removing the snow and ice from the sidewalk and making it appear to be safe for use by pedestrians, while failing to conduct periodic inspections for potentially dangerous conditions, the defendants failed to fully discharge its (sic) common law duty to the plaintiff."

Plaintiff further argues that defendants owed a non-delegable duty to plaintiff to maintain the

premises in a reasonably safe condition; and to inspect the property to discover and address potentially dangerous conditions. The fact that Fatsis was twice apprised of the slushy condition evidences his awareness of his responsibility "as agent of the property owner." Had Fatsis conducted a purposeful inspection of the sidewalk prior to leaving for the night, "he might have discovered the puddle or coating of water" which would later freeze and form the patch of ice upon which plaintiff slipped.

Plaintiff appends to his opposing papers the affidavit of Howard Altschule (Exhibit A), a forensic meteorologist, who conducted a meteorological analysis of the weather conditions at the site of plaintiff's fall on March 16, 2017. The affidavit recites that Altschule reviewed "numerous official weather records and prepared a written report dated September 19, 2019 for the incident location." He affirms that the contents of his report are true. However, although the affidavits submitted in opposition to both motions reference his report and his curriculum vita as attachments, neither are attached to either set of opposition.

Plaintiff asserts that even if defendants have made out *prima facie* cases, he has raised issues of fact with regard to defendants' negligent performance of snow and ice removal, and periodic inspection.

Defendants submitted no replies.

The Court has fully considered the submissions of the parties.

Discussion

For the reasons which follow, the summary judgment applications are granted.

An owner is under no duty to remove snow and ice that naturally accumulates upon the municipal sidewalk in front of his or her premises. (*Lakhan v. Singh*, 269 AD2d 427 [2d Dept 2000])

Absent a statute or ordinance which clearly imposes premises 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. (*Tepeu v. Nabrizny*, 129 AD3d 935 [2d Dept 2015]) Although the Village of Highland Falls Municipal Code placed a duty on the abutting landowner to keep the sidewalk free from snow and ice, it did not expressly make the landowner liable in tort for failure to perform that duty. (*See, Rodriguez v. County of Westchester*, 138 AD3d 713, 716 [2d Dept 2016])

Plaintiff argues the exception to that rule: the owner of the abutting property will be held liable when he or she, or someone on his or her behalf, undertook snow and ice removal which made the natural conditions more hazardous. (*Tepeu*, 129 AD3d at 936) In this matter, defendants Holdings and Fatsis have shown that they undertook snow removal procedures in the days before the plaintiff's fall, during which heavy snow fell, as well as during the day of the accident. Fatsis testified that he walked in and out of his office, the door in front of which plaintiff claims to have fallen, early in the morning, upon his return from court, and at least twice more to address the slush issues at the end of the property. Although Fatsis personally undertook snow removal efforts at the far end of the property, near the brick wall where the property met the bridge, those steps were far from the sidewalk where plaintiff claims to have fallen. (*See, id.*)

The submissions of defendants Holdings and Fatsis sufficiently establish their *prima facie* entitlement to judgment, upon a showing that none of the efforts undertaken by Fatsis to address the conditions on the sidewalk exacerbated the naturally-occurring condition. The burden thus shifts to plaintiff to demonstrate triable issues of fact. (*Torosian v. Bigsbee Village Homeowners Ass'n*, 46 AD3d 1314 [3d Dept 2007]) Plaintiff has failed to do so.

Defendants assert that plaintiff's theory of liability is that defendants' negligent snow removal

efforts and negligent failure to inspect caused a melting/refreezing condition on the sidewalk. Where there is evidence of melting and refreezing, the Second Department has indeed found triable issues of fact. (*See, e.g., Braun v. Weissman*, 68 AD3d 797 [2d Dept 2009]; *Larenas v. Incorp. Village of Garden City*, 143 AD3d 777 [2d Dept 2016]) However, this plaintiff submits no proof, expert or otherwise, as to how the icy condition could have formed in the less than two hours between Fatsis' exit from the office when he saw no snow or ice, and the time of plaintiff's fall. There was no testimony that any snow banks or piles of snow were present on the sidewalk at or near the site. (*Compare, Viera v. Rymdzionek*, 112 AD3d 915 [2d Dept 2013]) In fact, plaintiff, Fatsis and Hurtado all testified that the accident site appeared clean and clear. Nor is plaintiff's argument that the condition was caused by snow thrown from the upstairs porch supported by evidence. Plaintiff's claim that a melting/refreezing condition was possible may have been supported by an expert's report, but the same was not submitted to the Court. In short, any claim that defendants caused or created the icy condition is based on nothing more than speculation, insufficient to defeat summary judgment. (*Zabbia v. Westwood, LLC*, 18 AD3d 542,544 [2d Dept 2005])

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact." (*Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dept 2011], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) Defendants Holdings and Fatsis having established their *prima facie* entitlement to judgment, and plaintiff having failed to offer evidentiary proof of a triable issue of fact, summary judgment is granted to them. (*Packes v. Bally Total Fitness Corp.*, 278 AD3d 212 [2d Dept 2000]; *Rao v. Hatanian*, 2 AD3d 616 [2d Dept 2003])

With respect to the remaining defendants, Fatsis & Associates and Highland Falls Realty,

plaintiff has made no attempt to establish that either entity owed a duty of care to him, or of any breach which might have been occasioned by those defendants. In the absence of such a showing, summary judgment is likewise granted to Fatsis & Associates and Highland Falls Realty. (*Rodriguez v. County of Westchester*, 138 AD3d 713, 716 [2d Dept 2016])

The applications afor summary judgment are granted. The complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 24, 2020
Goshen, New York

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HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*