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| Henenlotter v Union Free Sch. Dist. No. 23 |
| 2020 NY Slip Op 34935(U) |
| July 23, 2020 |
| Supreme Court, Nassau County |
| Docket Number: Index No. 605701/18 |
| Judge: James P. McCormack |
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SUPREME COURT- STATE OF NEW YORK

PRESENT: Honorable James P. McCormack
Justice

x

DAVID HENENLOTTER and NANCY
HENENLOTTER,

TRIAL/IAS PART 18
NASSAU COUNTY

Plaintiff(s)

-against-

Index No.: 605701/18

Motion Seq. 001
Motion Submitted: 6/24/2020

UNION FREE SCHOOL DISTRICT NO. 23,
and MASSAPEQUA SCHOOL DISTRICT,

Defendant(s)

x

The following papers read on these motions:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition/Supporting Exhibits.....X
- Reply Affirmation.....X

Union Free School District No. 23 and Massapequa School District, move this court for an order pursuant to CPLR § 3212, for summary judgement dismissing the complaint against them. Plaintiffs, David Henenlotter (Henenlotter) and Nancy Henenlotter oppose the motion.

This is a slip-and-fall action to recover for personal injuries sustained by Henenlotter who allegedly slipped and fell on accumulated ice at 200 2nd Avenue, Massapequa Park, New York (hereinafter referred to as “the premises” or “the building”)

which houses the Nassau County Police Academy. Pursuant to General Municipal Law § 50-e, Henenlotter filed a Notice of Claim dated May 12, 2017 and served the Defendants on June 9, 2017. A 50-h hearing was held with both Plaintiffs on December 7, 2017. Henenlotter commenced the instant action by filing a Summons and Verified Complaint dated April 30, 2018. Issue was joined by service of an answer by the Defendants dated May 23, 2018. The case certified ready for trial on January 13, 2020 and a note of issue was filed on December 9, 2019.

According to the complaint and deposition transcripts annexed to the moving papers, on March 15, 2017 at approximately 5:55 AM, Henenlotter, a Nassau County detective, arrived at the premises and parked his vehicle in the parking lot of the building. After exiting his vehicle, he took a few steps onto the walkway, and slipped and fell while walking to the entrance of the building. As a result of the fall, he allegedly suffered injuries to his left knee and lumbar spine.

Henenlotter claims that his fall was due ice on the walkway leading to the entrance of the premises. Henelotter claims there had been no precipitation since 7pm the evening before. Defendants now move for summary judgement, arguing that they are not liable for Henelotter's alleged injuries based on the storm in progress rule and lack of notice.

In a motion for summary judgement, the moving party bears the initial burden of establishing a *prima facie* showing that he or she is entitled to summary judgement as a matter of law (*Harmitt v Riverstone Assoc.*, 123 AD3d 1089, 1091 [2d Dept 2014]). The moving party must present sufficient evidence to demonstrate the absence of a material

issue of fact (*Meyers v Big Six Towers, Inc.*, 85 AD3d 877, 877 [2d Dept 2011]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the moving party makes this showing, the burden shifts to the plaintiff produce admissible evidence to establish the existence of material issues of fact which requires a trial of the action (*Meyers*, 85 AD3d at 878-879; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). If the nonmoving party is unable to provide sufficient evidence, “the defendant’s motion for summary judgement dismissing the complaint should be granted” (*Meyers*, 85 AD3d at 879).

In determining a motion for summary judgement, the court must view the evidence “in the light most favorable to the nonmovant” (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]). The primary purpose of the court on such motion is “not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*Schumacher v Pucciarelli*, 161 AD3d 1205, 1205 [2d Dept 2018], quoting *Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005]). As such, summary motion should only be granted when no triable issues of fact exist (*see Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015]).

“A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk” (*Giulini v Union Free School Dist. No. 1*, 70 AD3d 632, 632-633 [2d

Dept 2010]; *see also Basso v Miller*, 40 NY2d 233, 239 [1976]). In order to hold a landowner liable for a third party's injuries, there must be sufficient evidence indicating "the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Morrison v Apostolic Faith Mission of Portland*, 111 AD3d 684, 685 [2d Dept 2013]).

As a proponent of the summary judgment motion in a slip-and fall-case, the Defendants have the initial burden of establishing that they neither created the dangerous ice and snow conditions that caused Henenlotter's alleged fall, nor had actual or constructive notice of the ice and snow conditions for a sufficient length of time to remedy it (*see Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-975 [2d Dept 2012]). The moving Defendants may satisfy this burden by presenting evidence of an ongoing storm at the time Henenlotter allegedly slipped and fell (*see Dylan v CEJ Properties, LLC*, 148 AD3d 1115, 1116 [2d Dept 2017]). If, however, Henenlotter's alleged accident occurred thereafter, the moving Defendants must demonstrate that they lacked a reasonably sufficient amount of time following the inclement weather to improve the resulting conditions (*Burgess v Mem. Sloan Kettering*, 237 AD2d 148, 148 [1st Dept 1997]).

Defendants argue they took appropriate measures to remedy snow and ice conditions at the premises the day before the accident by applying rock salt. They argue that under the storm-in-progress rule, they were not required to have the premises maintained until a reasonable time after the storm ended, and assuming it was not

snowing at the time of the accident, it would be unreasonable to remedy the conditions between the time the snowfall ceased and the moment of the accident. Defendants also argue that they are entitled to summary judgement because there was no actual or constructive notice of any particular ice condition on the walkway. They argue that it would be unreasonable to assume that a general awareness constitutes sufficient notice of any particular ice hazard.

In seeking summary judgement, the Defendants rely upon, *inter alia*, the following: 1) the pleadings, 2) the bill of particulars, 3) the transcripts of Henenlotter's deposition and 50-h hearing, 4) the deposition transcript of Joseph Archipolo (Archipolo), the acting head custodian of the premises, and 5) the sworn affidavit of Timothy O'Donnell (O'Donnell), Director of Facilities, an employee of the Defendants'.

The storm-in-progress rule that holds "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 . . ." (*Dylan*, 148 AD3d at 1116). Accordingly, during an ongoing storm, defendants are not liable for slip-and-fall injuries allegedly caused by "accumulated snow, rain, ice, sleet, or hail . . ." (*Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [1st Dept 2005], *affd*, 6 NY3d 734 [2005]). In this regard, Archipolo testified at his deposition that when he arrived for work on March 15, 2017 at 6:00 AM, approximately 5 minutes after the time of the accident, it was sleeting and raining at the premises.

Based upon the evidence submitted, including the witness testimony, the court finds that Defendants established entitlement to summary judgement as a matter of law pursuant to the storm in progress rule (*see Martin v Pasternack, Popish & Reiff, P.C.*, 259 AD2d 526, 527 [2d Dept 1999]). The burden shifts to Plaintiffs to raise a material issue of fact requiring a trial of the action (*see Meyers*, 85 AD3d at 878-879). To do so, Henenlotter must demonstrate, by the submission of objective proof, that there is a triable issue of fact as to whether there was a storm in progress during the time and at the location of his alleged fall (*see DeStefano v City of New York*, 41 AD3d 528, 529 [2d Dept 2007]; *see also Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]).

In order to defeat a summary judgement motion, a plaintiff may submit deposition testimony and/or certified weather records to demonstrate that a storm was not in progress at the time of the accident (*Pipero v New York City Tr. Auth.*, 69 AD3d 493, 494 [1st Dept 2010]). A nonmovant cannot successfully rebut a *prima facie* showing by relying on “[t]he plaintiff’s contentions and the opinions of [his or] her experts . . . based on speculation and conjecture” (*Butler v R.C. Diocese of Rockville Ctr.*, 123 AD3d 868, 869 [2d Dept 2014]). “Speculative claims [are] insufficient to create a genuine issue of fact” (*id.* at 868).

In opposition to the motion, Henenlotter relies upon, *inter alia*, the following: 1) his own deposition and 50-H transcripts, 2) the deposition transcript of Archipolo, 3) the sworn affidavit of meteorological expert Alicia C. Wasula, PHD, CCM (Wasula), and 4)

certified meteorological records from the U.S. Department of Commerce, National Centers for Environmental Information.

The court finds Henenlotter raises a triable issue of fact as to whether a storm was in progress at the time of the accident. First, Henenlotter testified that at the time of his fall, it was neither snowing nor could he recall precipitation, such as rain. He also testified that it last snowed the previous night, however he could not recollect when it had stopped snowing. Second, Henenlotter submits the sworn affidavit and reports of expert meteorologist Wasula. Meteorological reports were taken at both John F. Kennedy International Airport (Kennedy Airport) and Farmingdale Republic Airport (Republic Airport). After multiple weeks of dry conditions, 2.5 inches of snow was reported on March 11, 2017, followed by several dry days until “a major winter storm brought widespread accumulating snow to the region on March 14, 2017.” As a result, the last measurable precipitation prior to the time of the accident was reported on March 14, 2017, where snow ended at Kennedy Airport at 6:39 PM and precipitation (mix of rain which then changed to snow) ended at Republic Airport at 7:04 PM. It was further reported that on March 14, 2017, air temperature fell below freezing after 8:00 PM and 4:29 PM at Kennedy Airport and Republic Airport, respectively, and remained so through the time of the accident. The National Weather Service issued a Special Weather Statement to warn of icy conditions overnight, with temperatures below freezing. These hazard statements were issued on March 14, 2017 at 5:16 PM and 8:31 PM, and on March 15, 2017 at 12:31 AM and 4:41 AM.

In summary, Wasula opined that the weather near the premises at the time of the accident was as follows: mostly clear sky, temperature between 20- and 23-degrees Fahrenheit, no precipitation, and the last measurable precipitation had ended at 7:00 PM on March 14, 2017. In her expert opinion, Wasula concluded, “the ice upon which the plaintiff slipped would have originated as a result of the winter storm which impacted the region during the day on March 14, 2017.” She went on to note that “[a]ny wet areas, uncleared snow and slush from the storm would have frozen after 4:00 PM on March 14, 2017 . . . ”.

Based upon the report of Wasula and other admissible evidence, the court finds that there is an issue of fact as to whether there was a storm in progress at the time of accident. Further, Henenlotter raises a triable issue on the basis of Wasula’s conclusion that the conditions resulting from the March 14 storm and freezing temperatures that followed produced the ice upon which he allegedly fell. The reports provided by Henenlotter’s expert show generally dry conditions prior to the March 14 storm, with temperatures remaining below freezing thereafter. As such, Wasula’s expert opinion that these conditions were suitable to create the ice in question are neither speculative nor unsupported (*see Rodriguez v Woods*, 121 AD3d 474, 475-476 [1st Dept 2014]). Further, the moving Defendants failed to offer any meteorological records or an expert opinion. “Without an expert to interpret the meteorological record in a way that would disprove this theory, the [Defendants] failed to establish a right to judgement as a matter of law” (*id.* at 476).

Moreover, in reliance on the storm-in-progress rule, an adequate period of time following the end of a storm is one that permits the person maintaining the property a reasonable opportunity to remove snow or ice that accumulated as a result of the recent storm or following initial snow removal efforts, if any were exercised during the storm (*see Wei Wen Xie v Ye Jiang Yong*, 111 AD3d 617, 619 [2d Dept 2013]). The question of whether a sufficient period of time had passed between the cessation of a storm and the time of the accident to allow for snow removal is a matter of law and may be decided by the court (*see Lanos v Cronheim*, 77 AD3d 631, 632 [2d Dept 2010], citing *Valentine v City of New York*, 57 NY2d 932, 933 [1982]). Where the property owner chooses to remove snow during the storm, he or she may be held liable if they fail to do so with reasonable care and “creat[e] or exacerbate[e] a natural hazard created by the storm” (*Dylan*, 148 AD3d at 1116). Under such circumstances, the defendant must establish that the actions taken neither created nor exacerbated an alleged hazardous condition created by the storm (*see DeMonte v Chestnut Oaks at Chappaqua*, 134 AD3d 662, 664 [2d Dept 2015]).

Herein, Defendants argue that based on Henenlotter’s 50-h transcript, where he testified that it last snowed on the evening of March 14, 2017, the period between the end of the storm alleged by Henenlotter and the time of the accident was insufficient to remedy any icy or snowy conditions resulting from the previous night’s storm. The Defendants also argue that there is no evidence to suggest that snow removal procedures performed during the storm, if any, created hazardous conditions or exacerbated the

naturally hazardous conditions created by the storm. They offer the sworn affidavit of O'Donnell to show that appropriate measures to remedy the ice and snow conditions at the premises were taken. O'Donnell testified that Archipolo reported to work on March 14, 2017 for "the removal of snow and ice from the subject [] property . . ." and "kept in the regular course of business." O'Donnell also testified that John Keane (Keane), an employee of the Defendants who worked the evening shift, had not reported to work on this date and therefore, Archipolo, the only staff member on the premises, would have performed procedures such as "the shoveling and blowing of snow off of the exterior walkways and egresses of the subject property and the application of rock salt...".

The court finds an issue of fact exists as to whether Defendants' had a reasonable opportunity after the snowfall ended to remedy the ice and snow conditions which allegedly caused Henenlotter's injury. Once there is a period of inactivity after a storm has ended, "it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable" (*Powell v MLG Hillside Assoc., L.P.*, 290 AD2d 345, 346 [1st Dept 2002]). According to the deposition testimony of Archipolo, under normal circumstances, Keane worked the night shift from 3:30 PM to 12:00 AM and would salt each individual egress in anticipation of an overnight freeze. However, per O'Donnell's affidavit, Keane did not report to work on March 14, 2017, therefore Archipolo, who's shift ended at 4:00 PM, was the only employee on duty at the premises prior to the accident. Thus material issues of fact exist as to whether appropriate measures to remedy

the snow and ice conditions at the premises were taken in a timely manner (*see Powell*, 290 AD2d at 345-346).

In addition, the moving Defendants argue that they neither created the alleged ice conditions nor had notice of it. They argue that a general awareness of snow or precipitation on the premises is insufficient to constitute notice. The Defendants also claim a lack of evidence as to how long the ice conditions existed prior to Henenlotter's alleged fall.

A landowner is liable for an accident involving ice and snow if he or she created the conditions that caused the accident or had constructive notice that the dangerous conditions existed (*see Velasquez v Pro Park, Inc.*, 173 AD3d 1246, 1247 [2d Dept 2019]). "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent and has existed for a sufficient length of time . . . to discover and remedy it" (*id.*).

With regard to constructive notice, the moving Defendants' only showing of snow and ice removal prior to the accident was O'Donnell's sworn affidavit. O'Donnell testified that based on his records, Archipolo adhered to regular procedures on the day prior to the accident and "procedures performed by [Archipolo] *would have* included the shoveling and blowing of snow off of the exterior walkways and egresses of the subject property and the application of rock salt . . ." (emphasis added). "References to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question" (*Garcia-*

Monsalve v Wellington Leasing, L.P., 123 AD3d 1085, 1086 [2d Dept 2014]). In his deposition, Archipolo also testified with regard to general practices, and not the specific actions he took on March 14, 2017 (see *Medina v La Fiura Dev. Corp.*, 69 AD3d 686, 686 [2d Dept 2010]). He further asserted that no ledger, registry, or book is kept documenting the days and times on which snow removal or application of rock salt is performed (see *Santiago v New York City Health and Hosps. Corp.*, 66 AD3d 435, 435 [1st Dept 2009]; see also *Harrison v New York City Tr. Auth.*, 113 AD3d 472, 476 [1st Dept 2014]). As such, the moving Defendants failed to provide sufficient evidence that no icy conditions existed at the time of usual inspection in order to establish that they lacked a reasonably sufficient period of time to remedy the allegedly dangerous conditions prior to the accident (see *Velasquez*, 173AD3d at 1247).

Even if Defendants had established, *prima facie*, that they did not have constructive notice of the icy conditions on the premises, the meteorological reports and Wasula's sworn affidavit submitted by Henenlotter would raise a triable issue of fact as to the origin of the ice patch and the length of time it was at the premises prior to the accident (see *Santiago*, 66 AD3d at 435-436). Meteorological data provided by Wasula indicated hazard statements issued by the National Weather Service, warning of icy conditions created at least 24 hours prior to the accident.

Under the circumstances of this case, on the issue of constructive notice, the moving Defendants failed to establish entitlement to summary judgment as a matter of

law, regardless of the sufficiency of the opposition's papers (*Winegrad*, 64 NY2d at 853).

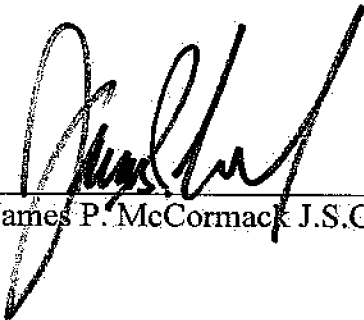
Accordingly, it is hereby

ORDERED, that the moving Defendants' motion for summary judgement pursuant to CPLR § 3212 is DENIED in its entirety.

The court has considered the remaining contentions of the parties and finds them to be without merit.

This constitutes the decision and order of this court.

Dated: Mineola, New York
July 23, 2020.



Hon. James P. McCormack J.S.C.

ENTERED

Jul 27 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE