SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

JOHANA RIVERA,

Plaintiffs,

-against-

HIGHGATE HOTELS LP, ROCKPOINT GROUP, and RP/HH MILFORD PLAZA GROUND TENANT, LP,

Defendants.

Index No.: 500334/2016

DECISION/ORDER

Hon. Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants, pursuant to CPLR sec. 3212.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	
Other: ..... (memo).....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendants, Highgate Hotels, LP ("Highgate Hotels"), Rockpoint Group ("Rockpoint") and RP/HH Milford Plaza Ground Tenant, LP ("Milford Plaza Ground Tenant") have moved (seq. 6), pursuant to CPLR § 3212, for an Order awarding summary judgment and a dismissal of plaintiff's complaint upon the grounds that based upon the "storm in progress rule", their duty to remedy any dangerous condition was suspended until a reasonable time after the storm had ended; Rockpoint did not control or maintain the subject premises, and as a result did not owe a duty to the plaintiff; and as to defendant Highgate Hotels, plaintiff's action is barred by the Workers Compensation Law statute since the plaintiff was employed by Highgate Hotels at the time of the alleged incident and was receiving Worker's Compensation benefits.

Counsel for the plaintiff has opposed the motion for summary judgment by defendants Milford Plaza Ground Tenant and Rockpoint upon the grounds that the movants have not demonstrated that the action is barred as a matter of law based upon the "storm in progress" rule. Further, the plaintiff maintains that this Court in a Decision/Order dated January 11, 2020, denied the request by defendant Milford Plaza Ground Tenant to amend their answer and as a result Milford Plaza Ground Tenant cannot deny ownership of the subject premises and any duty that they may have had to the plaintiff.

Background:

The within action was commenced on behalf of the plaintiff by the filing of a summons and complaint with the Clerk of this Court, on or about January 6, 2016. Issue was joined by the service of a verified answer on behalf of the defendants on or about April 21, 2016.

The plaintiff alleges that she sustained serious injuries as a result of the defendants' carelessness, recklessness and/or negligence: in failing to remove liquid and ice from the employees' entranceway to the premises known as 700 Eighth Avenue, New York, N.Y. ("subject premises"); in failing to warn passerby's and/or pedestrians of the dangerous condition that existed on the subject premises; and in failing to take necessary precautions to prevent the occurrence of the accident.

A deposition was conducted of the plaintiff on November 8, 2016. Defendant Highgate Hotels, appeared by their witness, Richard Gomez ("Mr. Gomez"), on December 17, 2009[1] and defendants Rockpoint and Milford Plaza Ground Tenant appeared by their witness, Ron Hoyl, on March 26, 2020.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about February 26, 2018. On or about July 23, 2018, the defendants moved for summary judgment (Motion Seq. 3). On the return date of the motion, this Court issued an order dated May 9, 2019, in which defendants' Motion to dismiss the plaintiff's complaint, pursuant to CPLR §3212, was withdrawn without prejudice with leave to renew upon completion of

[1] Richard Gomez was employed by Highgate Hotels since 2011 and served as the director of engineering (maintaining the electrical, plumbing and mechanical systems of the hotel building).

discovery. In addition, the Note of Issue was vacated due to the fact that discovery had not as yet been conducted.

Thereafter, the defendants on or about May 21, 2019, moved for an Order, pursuant to CPLR §3025(b), for leave of Court to serve an amended answer to plaintiff's complaint. In seeking this relief, the defendants sought to amend their answer to paragraph "24" of the complaint[2], the essence of which was that defendant Milford Plaza Ground Tenant sought to deny each and every allegation contained in said paragraph (24) and in doing so would rectify a prior error in which they mistakenly admitted ownership of the subject premises. The plaintiff opposed the relief sought in the motion arguing that they would be prejudiced if said relief were granted since the statute of limitations had expired and they would be unable to assert claims against the party who would now be designated as the actual owner of the premises. This Court in a Decision/Order dated January 11, 2020, denied the relief sought in defendants' motion, and determined that permitting an amendment of defendant (Milford Plaza Ground Tenant's) answer to deny ownership would be inappropriate where there has been an unjustified delay by the moving party (nearly three years after joinder of issue before moving to amend the answer) which would result in significant prejudice to the non-moving party (the plaintiff).

Facts:

In the underlying matter, the plaintiff who had been employed as a housekeeper at the ROW Hotel since 2012 seeks to recover for personal injuries allegedly sustained when she slipped and fell while walking on the sidewalk near the employee entrance to the hotel located on West 45th Street between Seventh and Eighth Avenue at approximately 8:15 A.M. on January 18, 2015 (see plaintiff's EBT p. 29-38).[3]

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[2] Paragraph 24 of the complaint states "that at all of the times hereinafter mentioned, and upon information and belief, the defendant, Milford Plaza Ground Tenant, owned the premises known as 700 8th Avenue, New York, N.Y., in the County of New York, City and State of New York.

[3] The Employee Accident/Illness Report provides that the incident occurred at 8:00 A.M. and was reported at 8:10 P.M. The report further states that the plaintiff slipped and fell on black ice which was on the sidewalk at the employee entrance (see Incident report annexed as Exhibit "C" to plaintiff's Opposition to Motion (NYSCEF Doc. No. 127)).

The premises at the time of the incident was allegedly owned by non-party 700 Milford Holdings LLC. Milford Plaza had leased the land from 700 Milford Holdings LLC. and then leased the rights to the hotel to RP/HH Milford Plaza Lessee, LP. Pursuant to a Hotel Management Agreement, defendant Highgate Hotels agreed to operate and manage the subject premises. It was Highgate Hotels, as the operator and manager, who hired the plaintiff and paid her wages (see plaintiff's EBT p. 22). The employment information was confirmed by Sam Grabush, the Senior Vice-President of Operations of Highgate Hotels, who in an affidavit submitted to the court states that his company hired the plaintiff on August 24, 2012, they create her daily schedule, and her work is assigned, supervised, instructed, monitored and directed by Highgate Hotels on a daily basis (see affidavit of Mr. Grabush annexed as Exhibit "F" to Defendant's Motion to Dismiss (NYSCEF Doc. No. 108)). It is further alleged that Highgate Hotels Housekeeping Department was also responsible for snow/ice removal at the time of the incident.

Mr. Gomez testified that the entrance at West 45th Street was the only means of ingress and egress for the employees of the hotel (see Mr. Gomez EBT p. 22). The plaintiff testified that at the time of the incident it was raining and she was wearing short ankle boots (see plaintiff's EBT 45-47). The plaintiff stated that she slipped on ice in the entry way of the door for employees and that the area where she fell had not been salted (see plaintiff's EBT p.50-51, 53-54). The plaintiff further testified that a fellow employee, Nancy Echanique, who also worked in housekeeping, had fallen in the same area less than one-half hour earlier that same morning.[4]

Mr. Gomez stated that he received notification immediately following the incident, went to the site and inspected the area accompanied by the assistant chief engineer, Richard Reher ("Mr. Reher"). Mr. Gomez testified that he does not believe there was any precipitation falling at the time of his inspection, and while the sidewalk[5] was wet, there was no ice. Mr. Gomez stated he observed ice on the sidewalk nearby but not within the property

[4] An incident report was filed on behalf of Ms. Echanique, which provides that Ms. Echanique stated that "she had a slip and fall in front of the employee entrance due to allegedly black ice on the sidewalk". That incident which allegedly took place at 7:58 A.M. was reported at 8:05 A.M. (see Incident Report annexed as Exhibit "C" to plaintiff's opposition to Motion) (NYSCEF Doc. No. 127)).
[5] The sidewalk near the employee entrance is all concrete (see Mr. Gomez EBT p. 56-57).

line of the hotel (see Mr. Gomez EBT p. 63-67). He also stated that there is a façade on the third floor of the premises which could cause water to drip onto the sidewalk in the area immediately in front of the employee entrance when it is raining, but there was no unusual water accumulation or pooling of water that morning (see Mr. Gomez EBT p. 58-61).

Mr. Gomez testified that based upon information he received from Mr. Reher, the area in which the plaintiff fell appeared to be in front of the abutting property (the Golden Theater on West 45th Street) which is approximately one or two flags past the hotel's property line. Mr. Gomez observed black ice at that site (see Mr. Gomez EBT p. 73, 84). However, when later questioned during his deposition if Mr. Reher[6] was referring to the plaintiff or Ms. Echanique when he was shown the area in front of the theater where the fall occurred, Mr. Gomez was not sure (see Mr. Gomez EBT p. 84-85).

Mr. Gomez further testified that he was unaware of a prior trip and fall by an employee, staff member of the hotel or a vendor on a snow or ice condition in the vicinity of the employee entrance prior to January 18, 2015 (see Mr. Gomez EBT p. 38- 39). Mr. Gomez further stated that he was unaware of any lawsuits that may have been brought by a passerby who utilized the sidewalk on West 45th Street near the employee entrance and had claimed a snow and ice condition (see Mr. Gomez EBT p. 40).

Parties' Contentions:

Here, the Court is presented with the issue as to whether a question of fact exists with respect to the alleged negligence of Highgate Hotels, Rockpoint, and Milford Plaza Ground Tenant in maintaining the premises, which resulted in plaintiff slipping and falling on ice and/or freezing rain at the employee entrance to the subject premises.

In support of defendants' motion, counsel offers the affirmation of Brett Zweiback, a meteorologist and the president of Spot-on Weather, LLC, who submits an analysis of weather records that reflect that on the date the accident, the weather was inclement as freezing rain had been falling for approximately ninety minutes prior to the incident.

[6] It appears that Mr. Reher was also referred to as Mr. Ruck during Mr. Gomez' deposition.

Counsel asserts that not only is this action barred due to the "storm in progress" rule, but as to defendant Highgate Hotels, the storm in progress doctrine should not even be considered because plaintiff was a "special employee" of Highgate Hotels at the time of the alleged accident and workers' compensation is the exclusive remedy. Defendants further claim that Rockpoint is not liable for any alleged negligence because it did not control the premises or have any responsibility for its maintenance.

Plaintiff, by her attorneys, opposes the defendants' motion for summary judgment, arguing that the action is not barred by the "storm in progress" rule, and even if there was a storm in progress, defendants elected to act and did so negligently. Plaintiff also asserts that Rockpoint should be held liable because it has an association with the ownership of the subject premises.

Discussion:

To sustain a cause of action sounding in negligence, a plaintiff must establish that the defendant owed that plaintiff a duty, which was breached, thereby causing the plaintiff harm. Sanchez v State, 99 NY2d 247 [2002]. Here, once the existence of a duty has been established, the defendants have the burden of establishing *prima facie* that they neither created the snow and ice condition which allegedly caused the plaintiff to slip and fall, nor that they had actual or constructive notice of the condition. Smith v Christ's First Presbyterian Church of Hempstead, 93 AD3d 839, 941 NYS2d 211 [2d Dept. 2012]. This burden may be met by presenting evidence that there was a storm in progress when the injured plaintiff allegedly slipped and fell. Smith v Christ's First Presbyterian Church of Hempstead, 93 AD3d at 839. Under the "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. Fisher v Katsen, 124 AD3d 714, 715 [2d Dept. 2015]; Rabinowitz v Marcovecchio, 119 AD3d 762, 989 NYS2d 305; *see* Solazzo v New York City Tr. Auth., 6 NY3d 734, 810 NYS2d 121 [2005]. An owner of real property may be liable for a hazardous snow or ice condition created on its property as a result of a storm only upon a showing that it had actual or

constructive notice of the hazardous condition, and that a sufficient period of time had elapsed since the cessation of the storm. McKeown v Stanan Management Corp., 274 AD2d 460, 710 NYS2d 633 [2d Dept. 2000]; *see also* Pepito v City of New York, 262 AD2d 619, 692 NYS2d 691 [2d Dept. 1999].

This Court finds that the defendants have presented sufficient evidence to meet this burden, including plaintiff's deposition testimony which included a statement that it was raining at the time of the incident, and certified meteorological records demonstrating there was inclement weather at the time of the occurrence. Meteorologist Brett Zweiback confirms the storm started 1 to 1.5 hours prior to the alleged accident and ended 2.5 hours after. Defendants' counsel argues that the defendants had no duty to clear the sidewalk of ice while the freezing rainstorm was in progress on the morning of January 18, 2015, and the action is barred by the "storm in progress doctrine". Fisher v Katsen, 124 AD3d 714, 715 [2d Dept. 2015]; *see* Talamas v Metropolitan Transp. Auth., 120 AD3d 1333, 1334-1335, 993 NYS2d 102. Defendants assert that the movants duty to take reasonable measures to remedy any dangerous condition which may have been caused by the storm was suspended while the storm was in progress and that duty did not commence until a reasonable time after the termination of the storm. Here, the defendant has established its prima facie entitlement to a judgment as a matter of law by producing evidence that the accident occurred while a storm was either in progress or had just stopped. Smilowitz v GCA Service Group, Inc., 101 AD3d 1101 [2d Dept. 2012]; *see* Coyne v Talleyrand Partners, L.P., 22 AD3d 627, 802 NYS2d 513.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011].

In opposing the defendants' motion, plaintiff's counsel has pointed to several issues of fact, such as whether the plaintiff was entitled to rely upon the party or parties responsible for the building to maintain the employee entrance in a safe condition, and whether the defendants acted reasonably under the circumstances in maintaining that entrance. Plaintiff cites the testimony of Mr. Gomez, who states that the employee entrance was the only means

of ingress and egress for workers. (See Mr. Gomez EBT, annexed to Plaintiff's Opposition as Exhibit D, p. 22). Plaintiff's counsel argues that the issue is not whether there was a storm in progress, but whether there is a "duty to maintain a safe entranceway for workers expected to be using that entranceway at that time of day." (See Plaintiff's Affirmation in Opposition, para. 18). Plaintiff's counsel opines that reasonable measures the defendants could have taken under the circumstances to treat the surface would include salting or sanding the entranceway, placing a mat in the entranceway, and placing a warning sign, none of which require clearing the entire sidewalk.

In addition, plaintiff's counsel argues that, even if the "storm in progress" rule is applicable here, it will not shield a responsible party where that party elects to act while a storm is in progress, as such acts must be conducted carefully, and liability will attach where an injury results from a failure to do so. Aronov v St. Vincent's Housing Development Fund Co., 145 AD3d 648, NYS3d 59 [2d Dept. 2016]; Harmitt v Riverstone Associates, 123 AD3d 1089, 1 NYS3d 225 [2d Dept. 2014]. Plaintiff's counsel cites the testimony given in the depositions of plaintiff and Mr. Gomez, wherein reference is made to a customary procedure for a worker or workers to clear and put down salt at the entranceway whenever it snowed. (See Plaintiff's EBT, annexed to Defendant's Motion for Summary Judgment as Exhibit "C", p. 54; and EBT of Richard Gomez, annexed to Defendant's Motion for Summary Judgment as Exhibit "D", p. 28-29). However, Mr. Gomez merely states that preparations are made with respect to equipment and supplies (i.e., ensuring the snow blower is full of gasoline and that the salt machine is working properly, with an adequate supply of salt) if a storm is forecast, which plaintiff's counsel perplexingly characterizes as an "election to act." Plaintiff's counsel claims the defendants cannot evade responsibility for their negligent failure to follow their customary procedures, which allegedly contributed to plaintiff's injuries. Plaintiff's counsel argues that defendants were aware of the ice on the ground at the employee entrance due to the Incident Report filed by a co-worker earlier that day, who had slipped and fallen in the same spot. (See Incident Report, annexed to Plaintiff's Opposition as "Exhibit C"). Plaintiff 's counsel asserts that the Incident Report does not indicate that any corrective measures were taken between the time the co-worker fell in the employee entrance (7:58 am) and the time the plaintiff fell in the same location (8:10 am). Plaintiff's counsel

maintains that there should have been someone available to put down salt, sand, or a mat in the entranceway. Plaintiff's counsel claims that the defendants owe the plaintiff a heightened duty because the plaintiff was an employee who had to use the specific employee entrance, rather than a casual passerby or visitor to the premises, although this assertion is not supported by caselaw. Plaintiff's counsel also states that there is an issue as to whether there was advance notice of inclement weather.

In addition to reviewing the documents submitted in support and in opposition to the motion, the Court has also reviewed the EBTs of all the parties, in which there is conflicting testimony adduced from the parties and witnesses as to the weather condition at the time of this incident. While the plaintiff testified that it was raining when she fell, Mr. Gomez stated that when he went to inspect the premises right after the incident occurred, he did not believe there was any precipitation falling. These statements also conflict with the the meteorologist, who stated that there was sleet in the area that commenced prior to the incident and continued thereafter. A further issue of fact is raised by Mr. Gomez' testimony, in which he stated that he believes, after inspecting the accident site with the assistant chief engineer, Mr. Reher, that Ms. Echanique and the plaintiff may not have fallen in the entranceway but rather a short distance away in front of the adjoining property. The Incident Reports of both plaintiff and Ms. Echanique include a statement that they slipped on black ice on the sidewalk, and Mr. Gomez was unable to clarify whether Mr. Reher was referring to the plaintiff or Ms. Echanique, or both, when discussing the location of the incident. In light of the conflicting accounts as to what may have transpired, there appears to be a triable issue of fact as to whether the storm in progress doctrine is applicable here, and whether the defendants have any liability for the incident in which the plaintiff was allegedly injured.

With respect to defendant Rockpoint, the defendants argue that Rockpoint did not owe plaintiff a duty, as it did not own, control, maintain, occupy, repair or inspect the subject premises. It is well settled that liability for a dangerous condition on a property is predicated upon ownership, occupancy, control, or special use of the property. Reeves v Welcome Parking LLC, 175 AD3d 633, 634 [2d Dept. 2019]; *see* Bartlett v City of New York, 169 AD3d 629, 630 [2d Dept. 2019]; Donatien v Long Is. Coll. Hosp., 153 AD3d 600, 600-601 [2d Dept. 2017]. Plaintiff's counsel asserts that, since there are a series of inter-related

companies involved in the ownership and management of the hotel, there is no proof as to whether the various companies operate as separate corporate entities or are a series of "shells" set up in an attempt to evade responsibility for the premises. As it is unclear to what extent Rockpoint is involved in the control and management of the subject premises, the motion to dismiss plaintiff's claims against Rockpoint is denied.

With respect to the issue regarding workers' compensation, defendants have presented sufficient evidence to establish that the plaintiff was an employee of Highgate Hotels at the time of the alleged accident, including plaintiff's W-2 from 2014-2016 (which names her employer as Highgate Hotels), the Hotel Management Agreement (pursuant to which Highgate Hotels operates and manages the premises), and the affidavit of Sam Grabush, Senior Vice President of Operations of Highgate Hotels (which includes statements that Highgate Hotels hired plaintiff, she reported daily to a Highgate Hotels supervisor, and Highgate hotels issued checks to plaintiff for her employment wages). Defendants argue that plaintiff cannot sue her employer for negligence if she has applied for and obtained worker's compensation benefits. DiSpigna v Lutheran Medical Center Parking, 170 AD2d 645, 567 NYS2d 69 [2d Dept. 1991]; Mera v Adelphi Mfg. Co., Inc., 160 AD2d 781, 553 NYS2d 826 [2d Dept. 1990]. Defendant Highgate Hotels asserts that workers' compensation is "an exclusive remedy as a matter of substantive law" and the obligation of alleging and proving non-coverage falls on plaintiff. Murray v City of New York, 43 NY2d 400, 407, 401 NYS2d 773 [1977]. Defendant Highgate Hotel maintains that plaintiff is barred from bringing the personal injury action because workers' compensation was her exclusive remedy.

Plaintiff's counsel does not offer any opposition to defendant Highgate Hotels' motion to dismiss based on Worker's Compensation Law. However, plaintiff's receipt of Worker's Compensation Benefits is only a bar to the cause of action as against her employer, Highgate Hotels, and not as to the other defendants. As such, plaintiff's causes of action for negligence against Highgate Hotels are dismissed.

Conclusion:

While the defendants have met their burden for establishing a prima facie case for summary judgment, the plaintiff, in opposition, has met her burden to offer admissible evidence raising a question of fact as to whether the defendants breached their duty to clear the black ice allegedly present on the sidewalk in the vicinity of the employee entrance to the subject premises. Accordingly, the motion by the defendants for summary judgment and a dismissal of plaintiffs' complaint, pursuant to CPLR §3212, is granted only to the extent of dismissing the cause of action of negligence as against Highgate Hotels. In all other respects the motion is denied.

In accordance with the above, the caption is amended to read as follows:

JOHANA RIVERA,

Index No.: 500334/2016

Plaintiffs,

-against-

ROCKPOINT GROUP, and RP/HH MILFORD PLAZA GROUND TENANT, LP,

Defendants.

This shall constitute the decision and order of this Court.

Dated: April 13, 2021
Brooklyn, NY

ENTER

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM