**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**



**PRESENT: HON. TIMOTHY J. DUFFICY PART 35**
**Justice**

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**MARINA ASITASHVILI,**

**Plaintiff,**

**-against-**

**TROULAKIS FAMILY TRUST, EMMANUEL F. TROULAKIS, as Co-Trustee of the TROULAKIS FAMILY TRUST, dated February 14, 2016, STELLA TROULAKIS, as Co-Trustee of the TROULAKIS FAMILY TRUST, dated February 14, 2016, EMMANUEL F. TROULAKIS, EMMANUEL F. TROULAKIS, M.D.,**

**Defendants.**

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**Index No.: 701553/19**
**Mot. Date: 10/12/21**
**Mot. Seq. 2**

The following papers were read on this motion by defendants for an order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing the plaintiff's Complaint as against them.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Affidavits-Exhibits ..... | EF 22-29 |
| Answering Affidavits-Exhibits..... | EF 30-33 |
| Replying Affidavits ..... | EF 34 |

Upon the foregoing papers, it is ordered that the motion by defendants is denied.

Plaintiff Marina Asitashvili claims that, on December 10, 2017, at approximately 8:15 a.m., she was allegedly injured after she slipped and fell on snow and ice on the steps of defendants' premises, located at 30-18 37th Street, Astoria, New York. Plaintiff maintains that as a result of the negligence of the defendants, she sustained serious personal injuries. It is undisputed that the premises are owned by defendant Troulalcis Trust.

Defendants move for an order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing the plaintiff's Complaint as against them.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v Montrose Knitwear Corp*., 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

For the defendants to be liable, the plaintiff must prove that the defendants either created or had actual or constructive notice of a dangerous condition (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit a defendant to discover and remedy it (s*ee id.*).

Defendants established that there are no triable issues of fact. Defendants established their *prima facie* entitlement to summary judgment by showing that they neither created an unsafe condition nor had actual or constructive notice thereof (*see Rajgopaul, et. al. v Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). In support of the motion, defendants presented, *inter alia*, the examination before trial transcript of plaintiff herself, wherein she testified, *inter alia,* that: there was about two inches of snow on the ground the morning of the fall; there were no footptints in the snow and no one had walked in the area prior to her fall; and, certified weather reports and the affidavit of Certified

Consulting Meteorologist, Steven Roberts, CCM, who averred that: "[o]n December 9, 2017, approximately 4.6 inches of snow fell between the hours of 8:20 a.m. and 10:45 p.m. at the above location. Prior to December 9, 2017, there was no snow or ice events between December 4, 2017 and December 8, 2017. At the start of the day on December 9, 2017, there was no snow or ice cover present. At 8:00 a.m. on December 10, 2017, approximately 4.3 inches of snow and ice cover was present. This snow and ice cover was the result of the snowfall event that occurred on December 9, 2017." Defendants also submit the examination before trial transcript testimony of defendant Emmanuel F. Troulakis, M.D., who had a medical office in said building, who testified that no complaints were ever made to him about snow removal and, on Sunday, he did not have staff in his office.

Under the "storm in progress" rule, "a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or 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" (*Dowden v. Long Island Rail Road*, 305 AD2d 631 [2d Dept 2003]). On a motion for summary judgment, the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case *(see Valentine v City of New York*, 57 NY2d 932, 933-934 [1982]; *Sie v Maimonides Medical Center,* 106 AD3d 900 [2d Dept. 2013]; *Lanos v Cronheim*, 77 AD3d 631 [2d Dept. 2010]). A lull in the storm does not impose a duty to remove the accumulation of snow or ice before the storm ceases in its entirety (*see* Mazzella v City of New York, 72 AD3d 755 [2d Dept. 2010]; *DeStefano v City of New York*, 41 AD3d 528 [2d Dept. 2007]). But "if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied" (Mazzella v City of New York, supra at 756 [*internal quotation marks omitted*]; see *Dancy v New York City Hous. Auth.*, 23 AD3d 512 [2d Dept. 2005]).

Plaintiff presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. In opposition, plaintiff submitted, *inter alia*, her own examination before trial transcript testimony wherein she testified, *inter alia* that: she slipped on snow

and ice on the steps of defendants' premises, at 8:15 a.m., on the morning of December 10, 2017. Plaintiff also relies on defendants' climatological data which indicates that there is no accumulation of snow for more than nine to ten hours prior to plaintiff's accident.

There are triable issues of fact in connection with, *inter alia*, whether a defective condition existed, whether the defendants had constructive notice of a defective condition, whether a reasonably sufficient period of time had passed from the cessation of the storm to allow for the taking of protective measures, and whether the defendants acted reasonably under the circumstances (*See Gonzalez v. American Oil Co.*, 42 AD3d 253 [1st Dept 2007]. On these issues, a trial is needed and the case may not be disposed of summarily as there remains issues of fact in dispute.

Accordingly, it is

**ORDERED** that the motion by defendants is denied.

The foregoing constitutes the decision and order of the Court.

**Dated: November 15, 2021**

FILED
11/18/2021
COUNTY CLERK
QUEENS COUNTY

**TIMOTHY J. DUFFICY, J.S.C.**