At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of March, 2022.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

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RICHARD GAVIN,

Index No. 520876/19

Plaintiff,

- against -

316 BERGEN STREET LLC,

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	27-65, 67-72
Opposing Affidavits (Affirmations)	77-80
Reply Affidavits (Affirmations)	82

Upon the foregoing papers in this personal injury action plaintiff Richard Gavin moves for an order, pursuant to CPLR 3212, granting summary judgment on the issue of liability against defendant 316 Bergen Street LLC and, pursuant to CPLR 3126, imposing sanctions against the defendant for spoliation of evidence for its failure to preserve the full surveillance video footage relating to the alleged

slip and fall (Seq 1). The defendant cross-moves, pursuant to CPLR 3212, for an order granting it summary judgment, dismissing the complaint (Seq 2).

Background

On March 2, 2019, at approximately 8:30 a.m., the plaintiff slipped and fell on an alleged snowy and icy condition, near the premises known as 316-319 Bergen Street, Brooklyn, NY (premises). The incident occurred as he was walking on the sidewalk on 3rd Avenue, adjacent to the premises; towards the intersection of 3rd Avenue and Bergen Street. At the time of the incident, the defendant contracted with non-party First Service Residential to manage the premises, including maintaining the public sidewalk abutting the premises. Non-party First Service Residential retained individuals from non-party Crown Energy Services, also known as Able Engineering Services, to perform necessary work relating to maintaining the premises, including removal of snow from the sidewalk abutting the premises.

The snow began falling the day before the plaintiff's accident (March 1, 2019) at approximately 4:00 AM. It continued to fall through the early morning hours of March 2, 2019, but it was not snowing at the time of the plaintiff's accident. In total, between two and four inches of snow accumulated during the two-day span. Just prior to the incident, the plaintiff observed Mr. Tony Spates shoveling and removing snow from the sidewalk on 3rd Avenue. After the accident, Spates observed plaintiff on the ground and assisted him to his feet. Shortly thereafter,

Spates reported the incident to the defendant's superintendent, Mr. Steven Martinez. Mr. Martinez in turn reported the incident to Mr. Andrew DiSchino (DiSchino), the defendant's property manager. That same day, DiSchino reviewed surveillance footage and preserved portions capturing the accident. On March 12, 2019, plaintiff's attorney delivered a letter seeking preservation of all surveillance video relating to the incident.

Subsequently, on September 23, 2019, the plaintiff commenced the instant personal injury action, alleging the defendant was negligent in the maintenance of the sidewalk by causing and creating the hazardous condition of black ice to form, resulting in plaintiff's accident. Defendant served an answer, asserting general denials to the substantive allegations and various affirmative defenses.

The Parties' Positions

Summary Judgment

Plaintiff seeks summary judgment on the issue of liability, asserting that the defendant breached its duty by failing to maintain the sidewalk abutting the premises in a reasonably safe condition and by causing and creating the hazardous condition, to wit, black ice. Supporting this position, the plaintiff proffers his deposition transcripts, and those of Spates and DiSchino. Plaintiff also presents multiple photographs of the accident location, in addition to surveillance video footage of the accident. Plaintiff argues that the defendant had a nondelegable duty to maintain public sidewalks abutting the premises and that defendant

breached this duty when Spates failed to apply salt or other substances on the sidewalk after removing snow, resulting in black ice.

Plaintiff recounts that while walking on 3rd Avenue, he observed Spates shoveling snow about 20-feet ahead of him. He attests that there was no salt laid on the sidewalk area where he slipped. Plaintiff also argues that Spates' testimony should not be considered as he gives various accounts and inconsistent statements regarding whether he shoveled the subject area or whether he applied salt to the sidewalk.

In opposition to plaintiff's motion, and in support of the cross motion, defendant asserts that plaintiff failed to establish that he slipped on a section of sidewalk defendant was responsible for maintaining, as both DiSchino and Spates testified that the accident took place in front of the neighboring premises. DiSchino testified that a neighboring deli is located in close proximity to the incident location; likewise, Spates testified that the incident occurred on the borderline of the two properties. Both men maintain that this neighboring property was responsible for maintaining the sidewalk where the accident took place in a reasonable and safe condition.

Further, the defendant argues that the proximate cause of the plaintiff's accident was his choice to deviate from a safe path, by purposefully walking on a snow-and-ice covered portion of the sidewalk. Defendant argues that where a plaintiff purposefully chooses to traverse over a snow and ice-covered area, where

there also exists a safe and reasonable alternative, the plaintiff cannot recover damages resulting from any injuries. Defendant relies upon the deposition testimonies and the surveillance video, which purport to show that Spates cleared a path, free of snow and ice, but despite this, plaintiff chose to walk over a section of the sidewalk visibly covered in snow and ice.

In reply, the plaintiff argues that the defendant failed to demonstrate that Spates properly cleared a path free of obstructions and failed to establish that the incident occurred outside the defendant's area of control. To this end, the plaintiff again highlights various inconsistencies in both Spates and DiSchino's testimony as to whether the section of sidewalk where the incident occurred was under defendant's control. Plaintiff further argues that DiSchino's testimony should not be considered, as his knowledge was gained through Spates' statements and his review of surveillance video footage. Finally, plaintiff posits that the defendant's proximate cause argument is misplaced, as the cases cited by the defendant are distinguishable from the present action. According to plaintiff, in the cases cited by the defendants it is undisputed that there was a clear and safe alternative path. Despite this, those plaintiffs chose to cross a snow-covered area. Here, plaintiff asserts, there was no safe alternative, as both paths on the sidewalk presented dangers to him.

Spoliation

Plaintiff asserts that the defendant failed to preserve critical surveillance video evidence, despite being aware of the accident and receiving timely notice to preserve video evidence of the site and the accident. Plaintiff alleges that the defendant only captured and preserved 50-second of surveillance video footage, rather only capturing the slip-and-fall, and the immediate aftermath. Plaintiff claims extreme prejudice to his ability to demonstrate his prima facie case, as the video does not preserve any images of the snow removal efforts.

In opposition, the defendant asserts that sanctions are not appropriate, as it did not commit spoliation. The notice dated March 12, 2019 was not received until after March 14, 2019, due to a mistake in the address. Further, defendant asserts that the demands for preservation failed to specify the duration of the video to preserved and only demanded footage relating to the slip and fall be preserved and exchanged. Defendant maintains that the video evidence preserved satisfied its obligations as it captured the accident; it was not required to preserve surveillance video from prior to the accident.

In reply, plaintiff highlights that DiSchino testified to viewing the surveillance video on the day of the accident and that the defendant had a 90-day look back period to preserve the relevant surveillance video. Further DiSchino failed to specify when he received notice, only testifying that he received it sometime after March 14, 2019. Finally, plaintiff maintains that the demand to

preserve was sufficient to place defendant on notice to preserve video evidence of the snow and ice removal efforts undertaken prior to the accident.

Discussion

Summary Judgment

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez, 68 NY2d* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion (*see Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

If the initial prima facie showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial (*see* CPLR 3212 [b]; *see also Alvarez*, 68 NY2d at 324; *Zuckerman, 49 NY2d at* 562). Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman, 49 NY2d* at 562). "While negligence cases do not generally lend themselves to resolution by motion for summary judgment, such a motion should be granted where the facts

clearly point to the negligence of one party without any fault or culpable conduct by the other party" (*O'Malley v USA Waste of New York, Inc.*, 283 AD2d 409 [2d Dept 2001]).

"Section 7–210 of the Administrative Code of the City of New York imposes a nondelegable duty on a property owner, exclusive of one-, two-, and three-family owner-occupied homes, to maintain and repair the sidewalk abutting its property, and specifically imposes liability upon those property owners for injuries resulting from a violation of the code provision" (*Michalska v Coney Is. Site 1824 Houses, Inc.*, 155 AD3d 1024, 1025 [2d Dept 2017] [internal citations omitted]). "Section 7–210 of the Administrative Code of the City of New York . . . imposes tort liability . . . for the negligent failure to remove snow and ice from the sidewalk abutting their property" (*Martinez v Khaimov*, 74 AD3d 1031, 1032 [2d Dept 2010] [internal citations omitted]). The provision does not impose strict liability, rather liability will only be imputed where the injured party has demonstrated the material elements of negligence: (1) the existence of a duty on the defendant's part as to the plaintiff, (2) a breach of this duty, and (3) a resulting injury to the plaintiff (*see Nisimova v City of New York*, 145 AD3d 1023, 1023-1024 [2d Dept 2016] [internal citations omitted]).

"[O]nce a landowner elects to engage in snow removal activities, it is required to act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm" (*Kantor v Leisure Glen*

Homeowners Ass'n, Inc., 95 AD3d 1177 [2d Dept 2012]). Where a plaintiff alleges the defendant landowner caused or exacerbated icy conditions, to be entitled to summary judgment, the landowner must "demonstrate that their snow removal efforts, which were undertaken prior to the accident, did not create or exacerbate the icy condition which allegedly caused the plaintiff to slip and fall" (*Arashkovitch v City of New York*, 123 AD3d 853, 854 [2d Dept 2014]). Further, and critical to the examination, the removal of the snow and ice must result in a sidewalk that is in a reasonably safe condition (*see* Administrative Code of the City of New York § 7-210 [b]; *see generally Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793 [2016]).

Additionally, a defendant's negligence must be found to be the proximate cause of a plaintiff's injuries. "A defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury" (*Mazella v Beals*, 27 NY3d 694, 706 [2016] [internal quotation marks and citation omitted]). "Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences" (*Hain v Jamison*, 28 NY3d 524, 529 [2016]). The mere happening of an accident is not evidence of negligence (*see Scavelli v Town of Carmel*, 131 AD3d 688, 690 [2d Dept 2015]).

Here, numerous questions of fact exist precluding summary judgment in

favor of either party. The evidence fails to establish, as a matter of law, that the accident took place on a portion of the sidewalk which was under the defendant's control. Specifically, there is conflicting testimony as to whether the section of the sidewalk where the accident occurred was within the control of the defendant or a neighboring property owner. Further, the video and photographic evidence does not permit the court, as a matter of law, to conclude exactly where the accident took place.

A question of fact also exist as to whether the snow removal efforts performed by Spates were reasonable and whether the sidewalk was maintained in a reasonably safe condition as required by Administrative Code of City of NY § 7-210. Additionally, questions of fact exist as to whether plaintiff's purposefully traveling over this section of the sidewalk was the proximate cause of his injury.

Spoilation

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Tanner v Bethpage Union Free School Dist.*, 161 AD3d 1210, 1211 [2d Dept 2018] [internal quotation marks and citations omitted]). "New York courts have 'broad discretion to provide proportionate relief to the party deprived of the lost evidence,' including preclusion of proof favorable to the spoliator, adverse inference instructions, or, in extreme cases, striking responsive pleadings or dismissing the complaint" (*Hillman v Sinha*, 77 AD3d 887, 888 [2d

Dept 2010], quoting *Oretga v City of New York*, 9 NY3d 69, 81 [2007]).

> "'A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense'" (*Lilavois v JP Morgan Chase and Co.*, 151 AD3d 711, 712 [2d Dept 2017], quoting *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543,547 [2015]).

"A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence" (*Hirschberg v Winthrop-Univ. Hosp.*, 175 AD3d 556, 557 [2d Dept 2019] [internal quotation marks and citations omitted]). In instances where a defendant fails to preserve complete video surveillance footage of an alleged incident, but a plaintiff is not wholly deprived from establishing their prima facie case, the appropriate sanction is directing a negative inference at the time of trial (*see Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654, 655-656 [2d Dept. 2013]; *Giuliano v 666 Old Country Rd., LLC*, 100 AD3d 960, 962 [2d Dept 2012]; *Mendez v La Guacatala, Inc.*, 95 AD3d 1084, 1085-1086 [2d Dept 2012], *cf. Francis v Mount Vernon Bd. of Educ.*, 164 AD3d 873, 873-874 [2d Dept 2018]).

The plaintiff has demonstrated that the defendant committed spoilation of evidence when it failed to preserve sufficient video surveillance footage. The footage preserved only captures 50 seconds of video, accounting for only the accident in question, but not footage of the snow removal efforts around the

subject location. DiSchino testified that after receiving notice from plaintiff's counsel to preserve any footage "relating to the slip and fall," no efforts were taken to preserve additional footage of the snow removal efforts. As such, defendant was negligent in its preservation of potentially critical evidence. However, the plaintiff is not wholly deprived of his ability to establish his cause of action, as suitable evidence exist which can be presented to the trier of fact. Accordingly, the appropriate sanction is a negative inference charge, to be given at the time of trial.

Conclusion

Accordingly, it is hereby

ORDERED that the portion of the plaintiff's motion (Seq 1) which seeks summary judgment is denied; and it is further

ORDERED that the portion the plaintiff's motion which seeks sanctions against the defendant is granted, to the extent that a negative inference charge shall be given at the trial with respect to the unavailable videotape footage capturing the snow removal efforts; and it is further

ORDERED that the defendant is precluded from offering any testimony specifically relating to the unpreserved portions of the surveillance video footage; and it is further

ORDERED that defendant's cross motion for summary judgment (Seq 2) is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. WAVNY TOUSSAINT,
J. S. C.