Medrano-Pereyra v 3462 Third Ave. Owner Realty LLC
2022 NY Slip Op 34973(U)
September 30, 2022
Supreme Court, Bronx County
Docket Number: Index No. 26565/2018E
Judge: Alison Y. Tuitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 5

---X

MARIA MEDRANO-PEREYRA,

Index №. 26565/2018E

-against-

Hon. ALISON Y. TUITT,
Justice Supreme Court

3462 THIRD AVENUE OWNER REALTY LLC,
3467 READY, SET, LEARN LLC, and
PILLAR PROPERTY MANAGEMENT LLC,

---X

The following papers were read on this motion (NYSCEF **Seq. No. 5)**, for **Summary Judgment,** submitted **December 6, 2021**,

Notice of Motion–Aff & Exhibits-**by Δs 3462 Third Ave/Pillar**	NYSCEF Doc No(s). 129-151
Answering Affirmation & Exhibits – Opp by π	NYSCEF Doc No(s). 168,170-175,180, 182-83
Replying Affirmation & Exhibits-- by Δs	NYSCEF Doc No(s). 178-79, 181, 184

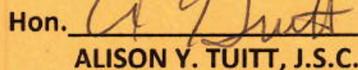
----AND----

The following papers were read on this motion (NYSCEF **Seq. No. 6)**, for **Summary Judgment,** submitted **December 2, 2021**,

Notice of Motion–Aff & Exhibits- **by Δ 3467 Ready**	NYSCEF Doc No(s). 152-167
Answering Affirmation & Exhibits – by π	NYSCEF Doc No(s). 169, 176, 177

UPON the foregoing papers, the Motion by Defendants, 3462 THIRD AVE, and PILLAR (Seq #5), and the Motion by Defendant 3467 READY (Seq #6), for summary judgment, and related relief, are both decided in the annexed memorandum decision and order.

Dated: 9/30 **2022**

Hon. 
ALISON Y. TUITT, J.S.C.

1. CHECK ONE................................ ✓ CASE STILL ACTIVE
2. MOTION BY Δs **(SEQ #5)** IS .... ✓ DENIED
3. MOTION BY Δ 3467 Ready **(SEQ #6)** IS ✓ GRANTED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
--X
MARIA MEDRANO-PEREYRA,
Plaintiff,
-against-
Index No.: 26565/2018E
3462 THIRD AVENUE OWNER REALTY LLC,
3467 READY, SET, LEARN LLC, and
PILLAR PROPERTY MANAGEMENT LLC,
Defendants.
--X
HON. ALISON Y. TUITT:

These two motions are decided herein:

Motion by Defendants, 3462 THIRD AVENUE OWNER REALTY LLC, and PILLAR PROPERTY MANAGEMENT LLC, for summary judgment in their favor, dismissing Plaintiff's Complaint and any cross claims as against them, and for related relief; and

Motion Defendant, 3467 READY, SET, LEARN LLC, for summary judgment, in its favor, dismissing Plaintiff's Complaint and any cross claims as against it, and for related relief.

This is an action to recover damages for alleged personal injuries sustained by Plaintiff MARIA MEDRANO-PEREYRA, in an accident which occurred on or about December 9, 2017, at about 3:30 p.m. It is alleged that the Plaintiff slipped on ice, located on the sidewalk of premises known as 3480 Third Avenue, Bronx, NY, which were owned, and managed, by Defendants, 3462 THIRD AVENUE OWNER REALTY LLC, and PILLAR PROPERTY MANAGEMENT LLC.

The Defendant, 3467 READY, SET, LEARN LLC, operated a day care center across the street from the subject premises.

The submissions, on these Motions, include: the pleadings; the deposition transcripts of the Plaintiff dated May 21, 2019; Defendants 3462 THIRD AVE and PILLAR, by superintendent Jaime Gomez, dated July 24, 2019; Defendant 3467 READY, SET, LEARN LLC, by Marlene Beeston dated September 19, 2019; Non-Party Witness, Dany Veras, dated January 27, 2020; and the Affidavit by Plaintiff's expert meteorologist, James Bria, dated October 21, 2021, and his CompuWeather weather analysis report dated June 8, 2018; Affidavit of Plaintiff's snow removal expert, Daniel Zdanoff, dated October 18, 2021; photographs of the premises; Certified Climatology records from the National Oceanic and Atmospheric Administration ("NOAA"); and the "Property Management Agreement" and Management Plan between 3462 THIRD AVE and PILLAR.

The Note of Issue was filed on August 5, 2021.

Applicable Law/Analysis:

It is well established that a landowner must maintain his property in a reasonably safe condition "in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk". (*Basso v Miller*, 40 NY2d 233, 241 [1976]).

A defendant may be found liable if it had created a dangerous condition, or had either actual or constructive notice of the condition. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to

discover and remedy it" (*Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]).

NYC Administrative Code § 7-210 "Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition" provides that a property owner shall remove snow and ice form the sidewalk:

> "a. **It shall be the duty of the owner of real property abutting any sidewalk, ... to maintain such sidewalk in a reasonably safe condition.**
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. **Failure to maintain such sidewalk in a reasonably safe condition shall include**, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and **the negligent failure to remove snow, ice, dirt or other material from the sidewalk**". [emphasis added]

Further, NYC Administrative Code § 16-123(a) "Removal of snow, ice and dirt from sidewalks; property owners' duties", provides that the snow and ice shall be removed within four hours after the snow ceases to fall, as follows: **"Every owner, lessee, tenant, occupant, or other person, having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall,** within four hours after the snow ceases to fall, or after the deposit of any dirt or other material upon such sidewalk, **remove the snow or ice**, dirt, or other material from the sidewalk and gutter"-- with the time between 9 p.m., and 7 a.m., not being included in the said four-hour period. [emphasis added]

Where a "plaintiff suffered injuries after falling on ice that had accumulated due to defendants' negligent maintenance of the abutting sidewalk" the Court of Appeals held that "defendant owners are subject to the nondelegable duty imposed by section 7-210, which exposes them to potential liability for injuries allegedly caused by their failure to properly remove snow and ice from the sidewalks abutting their property" [emphasis added] (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 171 [2019]).

--Motion by Defendants, 3462 THIRD AVE, and PILLAR

Defendants, 3462 THIRD AVE, and PILLAR, seek to make a *prima facie* showing of their entitlement to summary judgment in their favor dismissing this action, as against them, upon the ground that there was a "storm in progress" at the time of the accident.

On behalf of Defendants, the building's superintendent, Mr. Gomez, testified, in relevant part, that he is employed by PILLAR, and his supervisor, Jennifer Prieto, works for PILLAR. His job duties included "snow removal from the sidewalk ... [and the] treatment of ice". In addition, there were two other employees of PILLAR who were responsible for snow removal, namely Domingo Reyes and Carlos Rodriguez.

Mr. Gomez did not have specific recollection as to whether he performed snow removal on the date of the accident, December 9, 2017. There were no records kept about what snow removal work had been performed.

However, Mr. Gomez' custom and practice was to shovel most of the sidewalk free of snow; and, then, to treat it with salt (calcium chloride). He

customarily "would start cleaning while the snow was still falling", rather than wait unit the end of the snowfall. However, he did not recall ever "just making a path down the sidewalk for a person to walk in", and "leaving the rest of the sidewalk covered by snow". (Defendants' deposition, by Gomez).

There is no dispute that there was an ongoing "storm in progress" at the time of the accident. This is evidenced, for example, by the certified weather records, and by the Affidavits of Plaintiff's experts.

Pursuant to the so-called "storm in progress" defense: "A landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while a storm is in progress, and does not commence until a reasonable time after the storm has ended" (*Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]).

However, "Upon a defendant's showing that the ["storm in progress"] doctrine applies, the plaintiff may defeat summary judgment by raising a triable **issue of fact as to whether the landowner had undertaken snow removal activities that created or exacerbated a hazardous condition** (see Pipero v New York City Tr. Auth., 69 AD3d 493, 894 NYS2d 39 [1st Dept 2010])." [emphasis added] (*Baumann v Dawn Liqs., Inc.*, 148 AD3d 535, 537 [1st Dept 2017]).

In opposition to said Defendants' Motion, Plaintiff raised issues of fact as to whether said Defendants created or exacerbated the hazardous condition through its snow removal activities, within the meaning of the applicable law.

Plaintiff testified, in relevant part, that, on the morning of December 9, 2017, she was aware that it was snowing. At about 3:30 p.m., she stepped out of

the building, and began walking on the sidewalk in front of it. It was snowing lightly, and she saw snow on the ground. She observed a "path" -- a "shoveled trail" -- that had been cleared of snow, through the middle of the sidewalk. The path was a line, wide enough for one person to pass. There was snow to the left, and to right, of this path. However, she did not see any sand or salt on the sidewalk. Plaintiff's left foot "slip[ped] on ice ... on the sidewalk", causing her to fall to the ground. After she fell, she was sitting on the ice; and it was then that she observed the ice, and that she felt the ice, too. However, she had not seen this clear ice prior to her fall, since there had been a thin layer of snow on top of it. (*See* Plaintiff's deposition).

Plaintiff's expert, Mr. James Bria, a Certified Consulting Meteorologist (C.C.M.), determined the weather conditions, during the period in question, by reviewing records generally accepted by the professional meteorological community, including data maintained by the National Oceanic and Atmospheric Administration, as is more fully set forth in his report.

His opinion was rendered within a reasonable degree of meteorological certainty, based on his knowledge, experience, and education, in the field of meteorology, and his review of the meteorological data listed in his report. In pertinent part, Mr. Bria's conclusions include the following:

> "a. On December 9, 2017 at 3:30 P.M. (date and time of the accident), approximately 3.0 - 3.2 inches of snow and ice cover was present on untreated, undisturbed and exposed outdoor surfaces at 3480 3rd Avenue, Bronx, New York. This was the result of an ongoing event that had been occurring since around 8:15 - 8:20 A.M. that day. In addition, at 3:30 P.M.,

the sky was cloudy, snow was falling and the temperature was near 32 degrees [Fahrenheit].
b. The temperatures from December 1 - 8, 2017 were continuously above freezing with a peak of 63 degrees on December 5, 2017.
c. As a result of air temperatures, ground temperature was above freezing prior to the start of the snow on December 9, 2017.
d. The snow began approximately at 8:15 - 8:20 A.M., on December 9, 2017. The air temperature at that time was above freezing and didn't fall below freezing until about 11:00 A.M., on December 9, 2017.
e. After the onset of precipitation that morning the snow would have initially melted on these above freezing ground surfaces creating a wet surface.
f. As the temperature fell below freezing starting at about 11:00 A.M., the wet surfaces would have developed into a layer of ice on December 9, 2017.
g. This ice would then have been covered by the falling snow.
h. As a result, the exposed surfaces would have required both shoveling and to be treated with ice melt in order to completely remove the snow and ice accumulation". [emphasis added]

(Affidavit by Plaintiff's expert meteorologist, James Bria, dated October 21, 2021, and his CompuWeather report).

Further, Plaintiff presents the report of her expert in the field of ice and snow removal operations, and salting and de-icing operations, Mr. Daniel B. Zdanoff. In formulating his opinion, Mr. Zdanoff reviewed the report of meteorologist, Mr. Bria, and the deposition transcripts. He inspected the premises; he measured the sidewalk in front of the subject premises, and informs that it is about 10 feet wide, and 100 feet long. Based upon the foregoing, including Plaintiff's testimony that merely a narrow path was cleared, and no salt was applied, he opines as follows:

"By only clearing a single path on the sidewalk which was covered by accumulated snow, a snow wall of about 4" would have been created on either side of the path.

Sidewalks are pitched toward the curb line so as to allow the proper drainage of snow melt and water run off to the curb. Therefore, the approximate 4" of accumulated snow on both sides of the path would have created a snow dam that would have prevented water drainage so any melting snow would puddle and freeze and create an ice condition on the cleared area when the temperature dropped to or below freezing. This would especially occur when temperatures were above freezing for several hours when the snowfall began as during the day of the accident, and under the conditions where no salt or sand or other anti-freezing material had been placed on the sidewalk in the cleared path, as testified to by the Plaintiff, and then prior to the time of the accident the temperature dropped to below and at freezing...

Since the snow began at about 8:15 A.M., on December 9, 2017 and the air temperature didn't fall below freezing until about 11:00 A.M., that day after the onset of the snowfall, the snow would have initially melted on these above freezing sidewalk. The wet surface would then have developed into an icy condition when the temperature fell below freezing and would then have been covered by the snowfall. Therefore, **when Defendants shoveled the snow prior to Plaintiff's accident, and did not remove and/or treat the sidewalk with de-icing materials, the untreated icy condition under the removed snow would have been exposed making the condition more slippery, dangerous and treacherous than it would have been if the snow had been left in place...**

By making a path on the sidewalk surrounded on both sides by walls of snow, failing to treat the sidewalk with de-icing materials and in doing this all during a continuing a snow fall which then permitted a thin layer of snow to cover and hide the remaining ice condition the Defendants created a more slippery, dangerous, treacherous and hazardous condition than would have existed if they had not performed any snow removal at all". [emphasis added]

(Affidavit of Plaintiff's snow removal expert, Daniel Zdanoff, dated October 18, 2021).

Defendants had "a duty to inspect and safely maintain the premises, [including the] ... obligation to monitor the weather to see if melting and refreezing would create an icy condition" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141 [2002]).

Accordingly, even assuming that said Defendants had made a *prima facie* showing of entitlement to summary judgment in their favor, Plaintiff has raised issues of fact with respect thereto; "triable issues of fact preclude summary judgment for defendants" (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 171 [2019]).

------Defendant PILLAR:

In addition, Defendant PILLAR seeks summary judgment in its favor dismissing this action as against it, upon the ground that, as the managing agent of the premises, it did not owe a duty to the Plaintiff.

In this regard, the Court of Appeals has established as follows:

> "In sum, *Moch, Eaves Brooks* and *Palka* identify **three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons**: **(1)** where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launches a force or instrument of harm" (*Moch*, 247 NY at 168); **(2)** where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (see *Eaves Brooks*, 76 N.Y.2d at 226) and **(3)** where the contracting party has entirely displaced the other party's duty to maintain the premises safely (see *Palka*, 83 N.Y.2d at 589). These principles are firmly rooted in our case law, and

> have been generally recognized by other authorities (*see e.g.* Restatement [Second] of Torts § 324A)" [emphasis added]

(*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

In *Palka*, the Court of Appeals held that factors, taken together, which supported imposition of liability against a defendant, in favor of a plaintiff, were: "reasonably interconnected and anticipated relationships; particularity of assumed responsibility under the contract and evidence adduced at trial; displacement and substitution of a particular safety function designed to protect persons like this plaintiff; and a set of reasonable expectations of all the parties" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 589 [1994]).

In *Moch*, Judge Cardozo pronounced that, in determining whether the action was maintainable, the query was "whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good" (*H. R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]).

The pertinent facts, in the case at bar, include that the building's superintendent, Mr. Gomez, was employed by PILLAR. His supervisor was employed by PILLAR. Snow removal on the premises was part of the job duties of Mr. Gomez, as well as two other employees of PILLAR.

Moreover, the Property Management Agreement/ Management Plan between 3462 THIRD AVE, and PILLAR, provides that PILLAR, as the managing agent, was required to maintain the building, and grounds, in accordance with applicable laws. Significantly, this document shows that these entities share a

common principal, namely, Kiumarz Geula -- who signed the agreement on behalf of both parties.

Further, as aforesaid, Plaintiff alleges that PILLAR's employees' snow removal activities created and exacerbated a hazardous condition.

Accordingly, applying these principals to the facts herein, there remain issues of fact as to whether PILLAR displaced the owner's duty to maintain the premises safely, and whether it launched a force of harm, within the meaning of the applicable law. (*See Espinal v Melville Snow Contrs.*, 98 NY2d 136).

--Motion by Defendant 3467 READY, SET, LEARN LLC

Defendant, 3467 READY, SET, LEARN LLC, seeks summary judgment in its favor dismissing the Plaintiff's Complaint and any cross claims as against it, and related relief, upon the ground that it did not owe a duty to Plaintiff. It was not an owner, or lessee, of the subject premises. Rather, Defendant 3467 READY, SET, LEARN LLC, operated a day care center across the street from the premises. It was not responsible for snow removal, and it did not perform the same, on the subject premises.

There is no opposition to the motion of this Defendant, 3467 READY, SET, LEARN LLC.

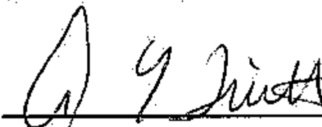
Conclusion:

Accordingly, the Motion by Defendants, 3462 THIRD AVENUE OWNER REALTY LLC, and PILLAR PROPERTY MANAGEMENT LLC, for summary judgment in their favor, dismissing the Plaintiff's Complaint and any cross claims as against them, and for related relief, is denied.

The Motion by Defendant 3467 READY, SET, LEARN LLC, for summary judgment in its favor, dismissing the Plaintiff's Compliant and any cross claims as against it, and for related relief, is granted, without opposition.

This constitutes the decision and order of this Court.

Dated: 9/30, 2022



HON. ALISON Y. TUITT, J.S.C.