| **McLaughlin v Levinton** |
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| 2023 NY Slip Op 31501(U) |
| April 24, 2023 |
| Supreme Court, Kings County |
| Docket Number: Index No. 515850/2020 |
| Judge: Carl J. Landicino |
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of April, 2023.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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ANGELINE MCLAUGHLIN,

*Plaintiff,*

-against-

MICHAEL LEVINTON,

*Defendant.*

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Index No. 515850/2020

DECISION AND ORDER

Motion Sequence #3

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| | Papers Numbered (NYSCEF) |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed ........................ | 59-78, |
| Opposing Affidavits (Affirmations)........................ | 84-87, |
| Reply Affidavits (Affirmations) ........................ | 88. |
| Memorandum of Law ........................ | |

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After a review of the papers and oral argument, the Court finds as follows:

Defendant, Michael Levinton (the "Defendant") moves for summary judgment, pursuant to CPLR 3212, to dismiss the complaint. Plaintiff, Angeline McLaughlin (the "Plaintiff") alleges that on March 23, 2018, she suffered injuries as a result of a slip and fall on ice present at the "area where the driveway meets the sidewalk abutting the [Defendant's] residence at 2902 Avenue R, Brooklyn, New York."

Defendant, in support of his motion, contends that he did not create the condition alleged by Plaintiff and had no actual or constructive notice of it. Plaintiff contends that there are triable issues of fact as to whether the Defendant had a reasonable time to remedy the alleged condition

and failed to do so, and whether the Defendant negligently created the dangerous condition by his improper removal of snow and/or ice in the subject area.

In support of his motion, the Defendant proffers, *inter alia*, the Plaintiff's deposition, dated June 19, 2020, in relation to Plaintiff's prior action, Plaintiff's deposition in relation to this action, photographs, Defendant's deposition, and weather records.

The Plaintiff testified at her deposition on June 19, 2020 in the matter of *Angeline McLaughlin v. Enrico A. Dan, Inc. and Madison Estates Inc.* (Sup. Ct. Kings Cnty., Index No. 517135/2018). She confirmed that her accident occurred on March 23, 2018, between 7:00 and 8:00 a.m. (Page 23). She states that she was walking on Avenue R between Nostrand and 25th Street in Brooklyn prior to the accident. (Page 24). She testified that the accident occurred "in front of a driveway." (Page 26). As to the weather conditions at the time, the Plaintiff stated, "…the day before it was a snowstorm. So that day the ice was left over from the snow." "I don't remember if it was still snowing that morning but it was ice on the sidewalk." "It was clear ice." (Page 29). She answered "no" to questions as to whether there was sand and whether she saw anyone shoveling. (Page 30). She also stated that the area where she fell "wasn't shoveled at all." (Page 32). She stated that the ice patch was "about five inch." (Page 38). The Plaintiff identified a photograph and initialed the area where she fell. (Page 50). She also stated that there was no salt in the area. (Page 51).

Plaintiff sat for deposition in this action on October 15, 2021. The Plaintiff testified that the accident occurred on March 23, 2018 on Avenue R between Nostrand and 25th Street in Brooklyn. (Page 27). As to how the accident happened, the Plaintiff stated, "I was walking towards, I was looking straight ahead, when I – I stepped in ice and fell on my back." (Page 34). She stated that she did not see the ice before she fell and "[w]hen I fell and I look back – I looked over and

saw the ice." (Page 35). "I stepped on it first with my right foot, and then my left foot – then my left – after I stepped on it, my right foot first stepped on it, and then my left foot." (Page 36). She stated that it was not snowing at the time of the accident. (Page 48). She stated that she thought that it stopped snowing the night before at "about 12 o'clock", and the area where the accident happened had not been shoveled. (Page 49).

Defendant, Michael Levinton, sat for deposition on November 10, 2021. The Defendant testified that he had resided at 2902 Avenue R, Brooklyn, NY (the "Property") for 30 years, and still resided there. He stated that he was the owner of the Property on the day of the accident. (Pages 14-15). He stated that he had two vehicles in March of 2018 and that typically one of the two would be parked on the driveway. (Pages 21-22). He stated that he would remove the snow from the driveway after a snowfall, and no one else. (Pages 23-24). The Defendant described his usual procedure for snow removal to include a shovel and snowblower. (Pages 28-29). He confirmed that typically if there was an overnight snow he would go to work and address the condition and removal when he returned home. (Page 31). He stated that he had no recollection of snow removal on the day of the accident. (Page 32). He stated that he generally returns home from work at "5:30, 6:00." (Page 32). He also stated that he had the practice of placing calcium chloride in the area after shoveling. (Page 37).

Defendant contends that he owed no duty to the Plaintiff and did not create the condition alleged. Defendant argues that he is exempt from liability pursuant to NYC Administrative Code §7-210(b) in that his property is a one, two or three family residential real property that is owner-occupied and used exclusively for residential purposes. He also contends that his special use of the driveway did not create the alleged defect. Defendant also argues that he did not have actual or constructive notice of the alleged condition. Defendant relies on *Dwulit v. Walters*, 19 AD3d 535,

800 N.Y.S.2d 413, 2005 N.Y. Slip Op. 05247 [2d Dept 2005], wherein the Court found that the defendants made their *prima facie* showing that they were entitled to summary judgment. The defendants established that they lacked actual or constructive notice of the alleged icy condition on the basis that the defendant shoveled and salted the driveway prior to the accident. Also, Defendant relies on the case of *Simmons v. Metropolitan Life Ins. Co.*, 84 N.Y.2d 972, 646 N.E.2d 798, 622 N.Y.S.2d 496 [1994]. In this case, the Court held that the plaintiff failed to meet his *prima facie* burden as to his negligence claim. The Court reached its conclusion by reasoning that the defendant was not notified of the condition, and no evidence was presented as to the creation of the condition or whether the defendant had sufficient time to remedy it.

The Defendant points to weather records he argues reflect that although there was a snow fall of approximately 8.5 inches of snow on March 22, 2018, the records are "void of any evidence that an ice condition existed for a sufficient length of time prior to Plaintiff's fall." Defendant cites *Gam v. Pomona Professional Condominium*, 291 AD2d 372, 737 N.Y.S.2d 113, 2002 N.Y. Slip Op. 01077 [2d Dept 2002] on the grounds that, absent relevant evidence, any finding concerning when and how an ice patch is formed can only be based on speculation. Additionally, the Defendant relies on *Gallo v. Health Port, Inc.*, 62 AD3d 943, 881 N.Y.S.2d 108, 2009 N.Y. Slip Op. 04191 [2d Dept 2009]. In this instance, the Court found that attributing a general awareness of a hazardous condition to the defendant is insufficient to charge it with constructive notice of the alleged condition.

Plaintiff in opposition challenges the Defendant's use of inadmissible weather reports. The Court agrees. The reports are not certified and are therefore inadmissible. Plaintiff contends that it clearly snowed approximately 24 hours prior to the accident, it was not snowing at the time of the accident, and Defendant accordingly had sufficient time to address the alleged condition. Plaintiff

further states that any reference to the Sidewalk Law is inapplicable here as the area alleged included the driveway and sidewalk, and the Sidewalk Law does not shield the Defendant from liability when he has created the condition. Moreover, Plaintiff raises the fact that Defendant had no recollection of the snowfall and the dates surrounding the accident, therefore his routine is speculative. Plaintiff relies on *Scholz v. Kolan Holdings*, 305 AD2d 489, 758 N.Y.S.2d 827 (Mem), 2003 N.Y. Slip Op. 14127 [2d Dept 2003], wherein the Court properly dismissed the defendants' summary judgment motion because questions of fact remained as to whether the defendants had constructive notice of the alleged icy condition and whether removal of the condition was performed in a timely and nonnegligent manner. *See* also *Knee v. Trump Vil. Constr. Corp.*, 15 AD3d 545, 791 N.Y.S.2d 576, 2005 N.Y. Slip Op. 01323 [2d Dept 2005]. Additionally, Plaintiff cites *Wilson v. Rancanelli Constr.*, 295 AD2d 423, 743 N.Y.S.2d 560, 2002 N.Y. Slip Op. 04805 [2d Dept 2002]. In this instance, the defendant's summary judgment motion was denied upon presented evidence that the area where the plaintiff allegedly fell was plowed prior to her accident, thereby creating an issue of fact as to whether the defendant had an opportunity to address the condition and whether its removal of the ice patch was performed negligently.

The Plaintiff also provides the affidavit of Mark Kramer, Consulting Forensic Meteorologist. In sum and substance, Mr. Kramer upon review of certified meteorological records annexed to his affidavit, found that no additional snowfall occurred between sunrise on March 22, 2018 and March 23, 2018, at approximately 8:30 a.m.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment

must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Generally, in a slip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.,* 75 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008].

Turning to the merits of the Defendant's motion, the Court finds that the Defendant fails to meet his *prima facie* burden and is not entitled to summary judgment. Putting aside the special use theory raised by Plaintiff, Defendant had no obligation under the Sidewalk Law to remove snow.

NYC Administrative Code §7-210 provides:

> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, 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. This subdivision shall not apply to one-, two- or three-family residential real property

that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

-*See Michalska v. Coney Is. Site 1824 Houses, Inc.*, 155 AD3d 1024, 66 N.Y.S.3d 314, 2017 N.Y. Slip Op. 08365 [2d Dept 2017].

However, where a homeowner does cause and create a condition, or after its own activity a condition is created (i.e. melting snow creating an ice patch) and the owner has reasonable notice of it, the owner may sustain tort liability. *See Forlenza v. Miglio*, 130 AD3d 567, 13 N.Y.S.3d 183, 2015 N.Y. Slip Op. 05639 [2d Dept 2015]. According to the Defendant's deposition, he could not recall as to when he removed snow or ice before the Plaintiff's accident. Further, Defendant failed to recall whether it had snowed on the day of the accident and prior to that day. The Defendant's inability to recall prevents him from asserting that he did not create, exacerbate, or even have notice of the condition at all. Despite having an admitted procedure of removing the snow by shoveling, using a snow blower, and putting down calcium chloride as "more of an ice preventer", the Defendant stated that, generally, he would not address the snow and ice until returning home from work as early as 5:30 p.m. the day after it would snow in the evening[1]. By his own testimony, Defendant would have engaged in post-snowfall removal activity, raising a causation question. However, his lack of recall prevents him to address the question of whether, even assuming this activity, he did not create the condition alleged. As such, the Defendant has failed to establish whether he caused or exacerbated the condition or had sufficient time to discover and remedy the alleged ice condition he may have caused as a consequence of his activity. In addition, Defendant's reliance on weather reports from the date of the accident fail to support his *prima facie* burden because they are uncertified and consequently inadmissible. The Defendant has failed to make a

[1] Insofar as Defendant has not made his *prima facie* showing, the Court need not address the Plaintiff's opposition. However, Plaintiff's expert found that there was no snowfall between the time Defendant states he usually addresses the snow and when the Plaintiff allegedly fell.

*prima facie* showing. As such, the Court needs not address the opposing papers. "When the defendant fails to establish entitlement to judgment as a matter of law, the sufficiency of the plaintiff's opposition papers need not be considered (*see Junco v. Ranzi*, 288 AD2d 440, 733 N.Y.S.2d 897 (Mem), 2001 N.Y. Slip Op. 09530 [2d Dept 2001]." *Gamberg v. Romeo*, 289 AD2d 525, 736 N.Y.S.2d 64, 2001 N.Y. Slip Op. 10974 [2d Dept 2001].

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant's motion (motion sequence #3) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

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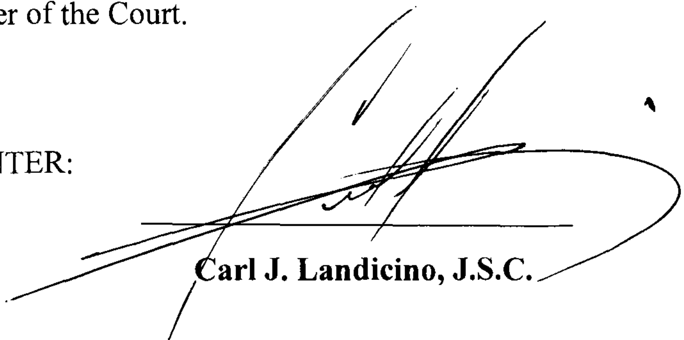

**Carl J. Landicino, J.S.C.**

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