

**Anglade v 458 E. Parkway LLC**

2023 NY Slip Op 32272(U)

June 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 509825/2021

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

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 15<sup>th</sup> day of June, 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

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PIERRE H. ANGLADE,

Index No.: 509825/2021

*Plaintiff,*

DECISION AND ORDER

-against-

Motion Sequence #2

458 EASTERN PARKWAY LLC and D. METSI REALTY INC.,

*Defendants.*

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed ..... 24-38,  
Opposing Affidavits (Affirmations)..... 42-43, 45-47,  
Reply Affidavits (Affirmations) ..... 50,  
Affidavit of Service ..... 48.

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

The instant action results from an alleged slip and fall incident that occurred on February 18, 2021. On that day, the Plaintiff Pierre H. Anglade (hereinafter the "Plaintiff") was allegedly injured outside of the premises located at 458 Eastern Parkway, Brooklyn, New York (hereinafter "the Premises"). The Plaintiff contends that the incident occurred when he slipped and fell on the outdoor walkway of an apartment building managed by D. Metsi Realty Inc. ("Defendant Metsi"). The Premises is purportedly owned by Defendant 458 Eastern Parkway LLC ("Defendant Eastern Parkway") (or collectively referred to as the "Defendants").

The Defendants now move (motion sequence #2) for an order pursuant to CPLR §3212 granting summary judgment and dismissal of the complaint. The Defendants argue that the instant matter should be dismissed because the Defendants did not create the condition or have actual or constructive notice of the alleged defect due to the purported ongoing storm at the time of the incident. In support of their application, the Defendants rely on the deposition of the Plaintiff, the deposition of Edward Burns, an affidavit and report of forensic weather consultants, and certified weather records.

In opposition, the Plaintiff argues that the Defendants have not met their *prima facie* burden. The Plaintiff argues that the Defendants, even assuming a storm in progress, failed to provide sufficient evidence regarding whether they created or exacerbated the alleged hazardous condition. Additionally, the Plaintiff contends that his expert report reflects that 1) Defendants negligently created the condition by failing to reapply salt to the walkway, and 2) Defendants' snow management practices failed to follow generally accepted practices in the industry.

“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 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853; see also *Akseizer v. Kramer*, 265 A.D.2d 356 [2d Dept 1999]. Moreover, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate 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 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

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]. Moreover, as the Court of Appeals made clear in *Andre v. Pomeroy* “when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.” *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]; *see also McElwain v. Olashansky*, 220 A.D.2d 394, 395, 6 631 N.Y.S.2d 886, 886 [2d Dept 1995].

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 [2<sup>nd</sup> Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2<sup>nd</sup> 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 [2<sup>nd</sup> Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2<sup>nd</sup> Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2<sup>nd</sup> Dept, 2008].

Plaintiff sat for deposition on October 12, 2021. (NYSCEF Doc. No. 30). When asked where he was going at the time of the alleged accident, Plaintiff stated that he was going to see

Rosemary Francis at 458 Eastern Parkway. (Page 29). When asked if he knew that the walkway was icy at the time of the accident, Plaintiff stated, “[y]es.” (Page 55). When asked whether he took any steps prior to his fall, the Plaintiff stated, “[y]es that’s one stop in the front of the building where I was standing. So the crutches under my right arm, when I put my left foot down, this is the time I slip.” (Page 68).

Edward Burns sat for deposition on November 3, 2021. (NYSCEF Doc. No. 32). Mr. Burns stated he was an employee of D. Metsi. (Page 8). Mr. Burns stated that he was the superintendent of 458 Eastern Parkway, he resided there since 2003, and was responsible for keeping the building clean. (Pages 10-11). Additionally, Mr. Burns stated that he was responsible for clearing snow and ice from the walkway leading to the entrance of 458 Eastern Parkway. (Page 21). When asked what preparation was made for snowstorms predicted for the following day, Mr. Burns stated, “I throw salt, I throw salt on the front of the building.” (Page 37). When asked whether there was a particular time that Mr. Burns would place the salt the day or evening before, he stated, “[i]f it’s going to be snow in the night, I put it there, I put it in the evening.” (Page 40). When asked if he had ever received complaints from tenants concerning ice or snow on the walkway, Mr. Burns responded, “[n]one, none of the tenants ever complain.” (Page 45). Mr. Burns stated that on the morning of the alleged accident, (7:00/7:30 a.m.), he shoveled and threw salt on the walkway. “When it melt I shovel, I just take the shovel and shovel the thing when the salt melt.” (Pages 52-54). He stated that he threw salt on the walkway again because it was anticipated to snow in the evening. However, he could not recall when he did so on that day. However, he confirmed that it did not snow that night. (Pages 58-59). Upon returning to the Premises he saw an ambulance and stated that “[t]he ice rain was falling” at that time. (Page 66). He also identified a photograph of

the area where the Plaintiff slipped and fell. (NYSCEF Doc. 31). He acknowledged the piled snow on the side of the walkway. (Pages 70-73, 76).

Defendants rely upon the affidavits of Howard Altschule and Kyle Gravlin of Forensic Weather Consultants in support of their motion. The report indicates that a winter storm which caused snow, sleet, freezing rain, and freezing drizzle to fall, with occasional lulls, was present on the date of the alleged accident from 6:40 a.m. to 11:59 p.m. Additionally, the report indicates that between 5:30 p.m. and 6:30 p.m. on the same date, light freezing rain was falling and the temperature was 27-28 degrees Fahrenheit.

In opposition to the Defendants' motion, Plaintiff relies on an expert report provided by Allin/Rose Consulting, Inc. Mr. Allin is supported by extensive credentials and long-term experience in the industry of snow removal. Mr. Allin opined that the Defendants' treatment of the ice on the day of the accident and the failure to adhere to generally accepted practices within the industry, caused the condition that resulted in the Plaintiff's injury. *Inter alia*, Mr. Allin states, "[s]pecifically, defendants created the dangerous condition by salting the snow – and ice-covered sidewalk/front exterior walkway, which lowered the freezing point of water and created water that then refroze, but then defendants failed to reapply sodium chloride which they were obliged to do once they began addressing the icing situation." (Page 34).

Turning to the merits of the instant motion, the Court finds that there is an issue of fact regarding whether the Defendants "created the allegedly dangerous condition" ... or "...had actual or constructive notice of it." *Hudlin v. Epicurean Deli*, 46 A.D.3d 752, 847 N.Y.S.2d 479 [2<sup>nd</sup> Dept, 2007]. The deposition testimony of Edward Burns indicates that he did not know, with any specificity or detail, when the walkway was last salted prior to Plaintiff's fall and whether he shoveled it at all on the date of the alleged accident. He does not indicate whether an existing ice

condition was present due to his snow removal. He stated that he observed an icy condition on the morning of February 18, 2021. (Page 63). Reference was made to his general practices. Moreover, the Defendants presented no documentary evidence such as log-books or sign in sheets relating to Mr. Burns' activities. "[R]eference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question." *Quinones v. Starret City, Inc.*, 163 A.D.3d 1020, 1021–22, 81 N.Y.S.3d 184, 185–86 [2d Dept 2018], quoting *Rong Wen Wu v. Arniotes*, 149 AD3d 786, 787, 50 N.Y.S.3d 563, 564 [2d 2017]. See also *Muhammad v. St. Rose of Limas R.C. Church*, 163 AD3d 693, 81 N.Y.S.3d 131, 2018 N.Y. Slip Op. 05181 [2d Dept 2018].

"Under the so-called '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" (*Marchese v. Skenderi*, 51 A.D.3d 642, 642, 856 N.Y.S.2d 680; see *Solazzo v. New York City Tr. Auth.*, 6 N.Y.3d 734, 810 N.Y.S.2d 121, 843 N.E.2d 748." *Dylan v. CEJ Properties, LLC*, 148 AD3d 1115, 1116, 50 N.Y.S.3d 483, 484, 2017 N.Y. Slip Op. 02403 [2d Dept 2017]. "However, if a storm is ongoing, and a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm (see *Kantor v. Leisure Glen Homeowners Assn., Inc.*, 95 A.D.3d 1177, 944 N.Y.S.2d 640; *Petrocelli v. Marrelli Dev. Corp.*, 31 A.D.3d 623, 817 N.Y.S.2d 913." *Dylan v. CEJ Properties, LLC*, 148 AD3d 1115, 1116-1117 [2d Dept 2017]. "The motion court improperly focused on whether defendant had a duty to clear the sidewalk while the storm was in progress. While it is undisputed that defendant had no obligation to clear the public sidewalk, once defendant gratuitously undertook to do so, it could be held liable for creating or

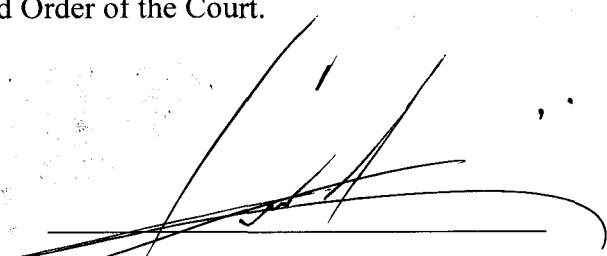
exacerbating a dangerous condition (*Suntken v 226 W. 75th St.*, 258 AD2d 314, 315).” *Rugova v. 2199 Holland Ave. Apt. Corp.*, 272 AD2d 261, 262-63, 708 N.Y.S.2d 390, 2000 N.Y. Slip Op. 05366 [1st Dept 2000]. See also *Cody v. DiLorenzo*, 304 AD2d 705, 757 N.Y.S.2d 789 (Mem), 2003 N.Y. Slip Op. 13259 [2d Dept 2003], and *Licari v. Brookside Meadows, LLC*, 214 AD3d 780, 186 N.Y.S.3d 55, 2023 N.Y. Slip Op. 01284 [2d Dept 2023]. The expert report proffered by Plaintiff raises an issue of fact as to whether the Defendants created or exacerbated the icy condition of the walkway. The experts opined that failing to salt the walkway consistently caused the surface to refreeze. Although Defendants contend that they were not held to such a standard on the grounds of the “storm in progress” rule, that contention alone does not absolve them of their duty to maintain a safe walkway once they began to address the condition. The issue of whether they created or exacerbated the condition at the time of Plaintiff’s alleged fall is a question of fact. Accordingly, the Defendants’ motion is denied.

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

Defendants’ motion (motion sequence #2) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



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

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