

|                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Flores v Rosario</b>                                                                                                                                                                                                        |
| 2023 NY Slip Op 35287(U)                                                                                                                                                                                                       |
| November 20, 2023                                                                                                                                                                                                              |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 702513/20                                                                                                                                                                                             |
| Judge: Allan B. Weiss                                                                                                                                                                                                          |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

## Short Form Order

## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable ALLAN B. WEISS IAS PART 2  
Justice

MARY ANNE GRADY FLORES,

Index No. 702513/20

Plaintiff,

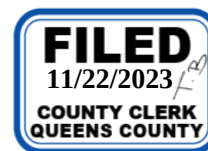
Motion Date: 10/4/23

-against-

Motion Seq. Nos. 2, 3, 4

MARINO ROSARIO, et al.,

Defendants.



The following numbered papers read on the motion by the defendants Marina Rosario, Alata Rosario, and Ariel Rosario (collectively the Rosario defendants) for summary judgment pursuant to CLR 3212 dismissing the complaint and all cross-claims insofar as asserted against them (Seq. No. 2); the separate motion by the defendants Weixia Huang and Linly Dai (together the Dai defendants) for the same relief (Seq. No. 3); and the separate motion by the defendants Zhongqiu Li, Yong Mao Li, and Yuye Xu (collectively the Li defendants) for the same relief (Seq. No. 4).

Papers  
Numbered

|                                                  |            |
|--------------------------------------------------|------------|
| Seq. No. 2                                       |            |
| Notice of Motion - Affidavits - Exhibits.....    | EF 54-81   |
| Answering Affidavits – Exhibits (Plaintiff)..... | EF 149-156 |
| Reply Affidavit - Exhibits.....                  | EF 187-188 |
| Answering Affidavit – Exhibits (Li).....         | EF 176-178 |
| Reply Affidavit - Exhibits.....                  | EF 184-186 |

## Seq. No. 3

|                                                  |            |
|--------------------------------------------------|------------|
| Notice of Motion - Affidavits - Exhibits.....    | EF 110-131 |
| Answering Affidavits – Exhibits (Plaintiff)..... | EF 157-164 |
| Answering Affidavits – Exhibits (Li).....        | EF 181-183 |
| Reply Affidavit.....                             | EF 189     |

## Seq. No. 4

|                                                  |            |
|--------------------------------------------------|------------|
| Notice of Motion - Affidavits - Exhibits.....    | EF 132-148 |
| Answering Affidavits – Exhibits (Plaintiff)..... | EF 165-172 |
| Answering Affidavits – Exhibits (Rosario).....   | EF 179-180 |

Upon the foregoing papers it is ordered that the motions are considered together for the purpose of a single decision and order and are determined as follows:

On February 13, 2017, the plaintiff was walking on the public sidewalk on 123rd Street in College Point, New York when she allegedly slipped and fell on ice on the sidewalk in front the garage of 123-01 23rd Avenue, College Point, New York (the 123-01 premises). Neighboring the garage of the 123-01 premises on 123rd Street is 2239 123rd Street, College Point, New York (the 2239 premises). The 2239 premises has two drainpipes that lead to 123rd Street. Between the garage of the 123-01 premises and the 2239 premises on 123rd Street is a drainpipe belonging to 123-03 23rd Street, College Point, New York (the 123-03 premises) that also leads to 123rd Street. The plaintiff alleges that the icy condition upon which she fell was on the sidewalk abutting the garage of the 123-01 premises and adjacent to the abovementioned three drainpipes.

In February 2020, the plaintiff commenced this action against the Rosario defendants as the owners of the 2239 premises, the Dai defendants as the owners of the 123-01 premises, and the Li defendants as the owners of the 123-03 premises to recover damages for personal injuries allegedly sustained in the February 2017 accident. The plaintiff asserts causes of action alleging negligence, public nuisance, and absolute nuisance. The Rosario defendants now move for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them (Seq. No. 2), the Dai defendants move separately for the same relief (Seq. No. 3), and the Li defendants move separately for the same relief (Seq. No. 4).

First, the court will address the Dai defendants' motion for summary judgment (Seq. No. 3). The plaintiff alleges that she slipped and fell on ice on the sidewalk abutting the garage of the 123-01 premises owned by the Dai defendants. In her bill

of particulars with respect to the Dai defendants, the plaintiff contends, among other things, that they were negligent in failing to remove and/or negligently removing snow and ice from the sidewalk/driveway and failing to keep the sidewalk in a reasonably safe condition. The Dai defendants contend, among other things, that they did not create or have actual or constructive notice of the dangerous condition and that they did not violate any applicable statutes or code provisions.

“Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street is placed on the municipality, and not on the owner or lessee of abutting property, unless the landowner or lessee has either affirmatively created the dangerous condition, voluntarily but negligently made repairs, caused the condition to occur through a special use, or violated a statute or ordinance expressly imposing liability on the landowner or lessee for a failure to maintain the abutting street” (*Gibbs v Husain*, 184 AD3d 809, 810 [2d Dept 2020]). “In 2003, the New York City Council enacted section 7-210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalk conditions from the City to abutting property owners” (*Stubenhaus v City of New York*, 170 AD3d 1064, 1065 [2d Dept 2019]). “However, this liability-shifting provision does 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’ ” (*id.*, quoting Administrative Code § 7-210 [b]). However, even in the absence of a statute or ordinance, a property owner may be held liable for the hazardous condition on the sidewalk if they affirmatively created the dangerous condition, undertook snow and ice removal efforts that made the condition more hazardous, or caused the defect to occur because of a special use (*see Thompson v Nassau County*, 200 AD3d 823, 825 [2d Dept 2021]; *John v City of New York*, 77 AD3d at 793).

In support of their motion, the Dai defendants submit, among other things, the deposition testimony of Linly Dai (Dai). She testified that, at the time of the plaintiff’s accident, she and her mother, the defendant Weixia Huang, owned the 123-01 premises. She testified that the 123-01 premises constitutes a one-family residence that, at the time of the plaintiff’s accident, was owner-occupied and was used exclusively for residential purposes. As such, the Dai defendants demonstrate that they are exempt from liability imposed pursuant to Administrative Code § 7-210 for negligent failure to remove ice and snow from the sidewalk (*see Davila v Parada*, 217 AD3d 652, 652-653 [2d Dept 2023]; *Stubenhaus v City of New York*, 170 AD3d

1064, 1065 [2d Dept 2019]; *John v City of New York*, 77 AD3d 792, 793 [2d Dept 2010]).

However, the Dai defendants fail to make a prima facie showing that there were no efforts to clear the sidewalk prior to the plaintiff's accident or that any snow and ice removal efforts undertaken by them or persons on their behalf did not exacerbate the hazardous condition which allegedly caused the plaintiff to fall (*see Sheikh v Chinatomy*, 205 AD3d 835, 836 [2d Dept 2022]; *Hsia v Valle*, 147 AD3d 933, 934 [2d Dept 2017]; *Forlenza v Miglio*, 130 AD3d 567, 568 [2d Dept 2015]). They also fail to make a prima facie showing that they did not make a special use of the subject area of the sidewalk as a driveway (*see Gibbs v Husain*, 184 AD3d at 810). In support of their motion, the Dai defendants submit the deposition testimony of Yongmao Li (Li), owner of the 123-03 premises. Li testified, among other things, that the Dai defendants used the garage of the 123-01 premises to store construction materials, however, that they "have a truck or van...driving by the garage entrance and get the materials in and out." Since the Dai defendants fail to satisfy their prima facie burden, the court need not consider the sufficiency of the papers submitted in opposition to their motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). As such, the Dai defendants' motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them is denied.

Next, the court turns to the Rosario defendants' motion for summary judgment to dismiss the complaint and all cross-claims insofar as asserted against them (Seq. No. 2), and the Li defendants' separate motion for the same relief (Seq. No. 4). The Rosario defendants owned the 2239 premises at the time of the plaintiff's accident, which neighbors the garage of the 123-01 premises. The 2239 premises has two drainpipes leading to the sidewalk on 123rd street (drainpipes one and two). The Li defendants own the 123-01 premises which had one drainpipe leading to the sidewalk on 123rd Street (drainpipe three) at the time of the plaintiff's accident. Drainpipe three is located between drainpipe two and the garage of the 123-01 premises. The plaintiff alleges that the ice on the sidewalk on which she fell was adjacent to the drainpipes and that said icy condition was caused by, among other things, the negligence of the Rosario defendants and the Li defendants in installing drainpipes that diverted water from their respective premises onto the sidewalk and allowing water drainage from their respective drainpipes to pool and freeze on the sidewalk.

The Rosario defendants argue, among other things, that they bear no liability insofar as the icy condition upon which the plaintiff slipped and fell was caused by the discharge from drainpipe three and not drainpipes one and two. They also argue that they did not have a duty to maintain the sidewalk upon which the plaintiff slipped and fell. The Li defendants also argue, among other things, that they did not have a duty to maintain the sidewalk upon which the plaintiff slipped and fell.

“If water from abutting private property is permitted to flow by artificial means onto a public street where it freezes, the private landowner may be held liable for creating a dangerous icy condition on the adjacent public property” (*Griffin v 19-20 Indus. City Assoc., LLC*, 37 AD3d 412, 412-413 [2d Dept 2007]). “Such liability may arise where the private property is negligently designed so as to conduct water onto a public street or where the landowner has actual or constructive notice of a defect on his or her premises causing a water discharge and icy condition onto public property” (*id.* at 413 [internal citations omitted]).

Here, both the Rosario defendants and the Li defendants fail to eliminate issues of fact, including but not limited to, whether they created the icy condition upon which the plaintiff fell by their defectively designing and constructing drainpipes one, two, and three so as to have said drainpipes conduct water on the sidewalk. In support of their respective motions, the Rosario defendants and the Li defendants both submit, among other things, the deposition testimony of Marino Rosario (Rosario), owner of the 2239 premises, Li, owner of the 123-03 premises, and Thomas Hurtubise (Hurtubise), a friend of the plaintiff’s.

Rosario testified that drainpipes one and two drained water from the roof of the 2239 premises onto the sidewalk of 123rd Street. Li testified that drainpipe three drained water from the garage of the 123-03 premises onto the sidewalk of 123rd Street. Hurtubise testified that his address is 22-28 123rd Street, College Point, New York, that the plaintiff is a family friend, and that the plaintiff was staying at his address prior to her accident. Hurtubise further stated that, on morning of the accident, the plaintiff left his house to move her car. A few minutes after leaving, the plaintiff called him and asked him to come to her saying that she fell and needed help. He further contends that when he reached the plaintiff, he saw ice in the area. Specifically, he states that “[t]he ice was across part of the sidewalk...what looked

like was a drain pipe was dripping water that had frozen, and so that line of water that was frozen was going towards the drain pipe, towards the sidewalk and the curb...there was ice buildup because of that drainage.” He further testified that the ice was in front of the garage of the 123-01 premises.

The Rosario defendants also submit the expert affidavit of Robert T. Fuchs (Fuchs) a forensic engineer, dated October 31, 2022. Fuchs’ affidavit is based upon, among other things, an inspection he conducted on August 9, 2022. Fuchs opines, within a reasonable degree of engineering and safety certainty, among other things, that “[t]he pattern of ice that reportedly existed on the sidewalk at the time of the accident was caused by the discharge of moisture from the downspout that had served the garage roof at 123-03 23rd Avenue.” However, the Li defendants submit the expert affidavit of David E. Behnken (Behnken), a professional engineer licensed in New York, dated June 14, 2023. Behnken’s affidavit is also based upon, in part, an inspection conducted on August 9, 2022. Behnken opines, within a reasonable degree of engineering certainty, among other things, that “[t]o the extent that ice formed from pipes along the public sidewalk, one cannot conclude from which pipe the water originated.” Based upon the respective deposition testimony of Rosario, Li, and Hurtubise, as well as Fuchs’ and Behnken’s respective expert affidavits, the Rosario defendants and the Li defendants fail to eliminate triable issues of fact, including but not limited to, whether their alleged negligence in designing drainpipes one, two, and three so as to cause water to flow onto the sidewalk of 123rd Street created the icy condition upon which the plaintiff fell (*see Malik v Style Mgt. Co. Inc.*, 168 AD3d 536, 536 [1st Dept 2019]; *Griffin v 19-20 Indus. City Assoc. LLC*, 37 AD3d at 412-413; *Patterson v New York City Tr. Auth.*, 5 AD3d 454, 455-456 [2d Dept 2004]).

Accordingly, the Rosario defendants’ motion for summary judgment (Seq. No. 2) is denied, the Dai defendants’ motion for summary judgment (Seq. No. 3) is denied, and the Li defendants’ motion for summary judgment (Seq. No. 4) is denied.

Dated: November 20 2023

  
\_\_\_\_\_  
J.S.C.

