Holander v Downtown Condominium by Philippe Starck
2024 NY Slip Op 32688(U)
July 31, 2024
Supreme Court, New York County
Docket Number: Index No. 156036/2020
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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EVON HOLANDER,

Plaintiff,

- v -

DOWNTOWN CONDOMINIUM BY PHILIPPE STARCK, also known as DOWNTOWN BY PHILIPPE STARCK, also known as DOWNTOWN BY STARCK, 15 BROAD STREET, LLC, also known as 15 BROAD STREET, and FIRSTSERVICE RESIDENTIAL NEW YORK, INC.,

Defendants.

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INDEX NO. 156036/2020

MOTION DATE 07/12/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for personal injuries arising from a slip-and-fall accident on the 7th-floor outdoor deck of a building located at 15 Broad Street in Manhattan (the building), the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is granted only to the extent that summary judgment is awarded to the defendants 15 Broad Street, LLC, also known as 15 Broad Street (hereinafter 15 Broad), and FirstService Residential New York, Inc. (FirstService), dismissing the complaint insofar as asserted against them. The motion is otherwise denied, as the defendant Downtown Condominium by Philippe Starck, also known as Downtown by Philippe Starck, also known as Downtown by Starck (hereinafter Downtown), failed to establish its prima facie entitlement to judgment as a matter of law. Specifically, Downtown's submissions failed to establish that it lacked constructive notice of the icy condition upon which the plaintiff allegedly slipped and fell, and revealed the existence of triable issues of fact as to whether the plaintiff fell during or immediately after a storm in progress.

On January 30, 2019, between 3:30 p.m. and 4:00 p.m., the plaintiff allegedly slipped and fell on an icy patch on the wooden surface of the outdoor 7th-floor deck of the building, which is a condominium apartment complex owned by Downtown. At the time of the plaintiff's accident, FirstService was the property manager for the building. 15 Broad had been the sponsor of the condominium, but, as of the accident date, it did not own, and was not actively involved in the management of, the subject building.

Specifically, the plaintiff alleged that, after exiting a party/conference room located inside of the 7th floor of the building, and onto an uncovered, exterior wooden deck, she walked approximately six feet, when she slipped and fell approximately three to four feet from a five-to-six-foot tall rectangular basin serving as a decorative water fountain that had been installed approximately in the center of the deck. The plaintiff asserted at her deposition that the decorative fountain was operating at the time of her accident, and photographs depicted a tall, inverted J-shaped spigot emptying into a rectangular basin. According to the plaintiff's deposition testimony, at the time of her accident, it was freezing outside, and was likely the coldest day of the year, with temperatures probably in the 20s or 30s Fahrenheit, but it was neither raining nor snowing and had not rained or snowed near the building on that date. She further asserted that there was no snow blowing around the deck. The plaintiff further testified that it had not rained or snowed on the day prior to the accident, but that she attempted to be careful as she walked around her neighborhood on that date because the sidewalks remained slippery. She asserted that she "fell on black ice, so that's something you don't see," and repeated that she had looked at the wooden deck floor, and saw no snow or water. She further stated, however, that there was "black ice you can't see." As she explained it, "I took one step with my right foot and it just---there was black ice and it just my foot slipped out from under me and I screamed so loud and I passed out." The plaintiff testified that, at the moment when her foot began to slip, she had been facing the party-room door from which she had just exited.

In further describing the black ice on which she slipped, the plaintiff testified at her deposition that "black ice is something you don't see" and is "invisible," and that, hence, she "did not see it" before she slipped. She asserted that the flooring of the deck was not "wet," and that there was no garbage or debris on the deck. The plaintiff further testified that she did not know how long the patch of black ice on which she slipped had been present on the deck prior to her accident, that she had not made complaints about the condition prior to her accident, and that she did not know whether anyone else had made any such complaints. In addition, she did not remember the last time prior to her accident that she had been on the 7th-floor deck. The plaintiff did, however, testify at her deposition that, when the weather was inclement, the building management had always locked the doors through which the tenants and guests gained access to the outdoor deck from the 7th-floor party/conference room, and that the doors were not locked at the time she exited that room and walked onto the deck.

The plaintiff further testified at her deposition that, during the time that she was recovering from the injuries that she had sustained in the January 30, 2019 accident, she fell two additional times over the following months, due both to the initial injuries and difficulties in managing the crutches that she was employing.

In support of their motion, the defendants submitted the pleadings, the plaintiff's bill of particulars, the parties' deposition transcripts, including the deposition transcript of Downtown's resident manager Angel Carregal, an attorney's affirmation, a statement of allegedly undisputed material facts, photographs of the accident site, the affidavits of Carregal and Downtown's board of directors' president Robb Tretter, the affidavit of FirstService's president Dan Wurtzel, the affidavits of meteorological experts Howard Althschule and Kyle Gravlin, and certified meteorological records of the National Center for Environmental Information (NCEI) and National Weather Service (NWS), both of which are divisions of the National Oceanic and Atmospheric Administration (NOAA).

At his deposition, Carregal testified that one of his duties was to maintain records of tenant complaints concerning the operation of the building, and to make all necessary repairs. In this regard, he maintained work orders for tasks that needed to be undertaken in any particular apartment in the building. He averred that, when there was a snow event that needed to be addressed, the building's handyman and porter would usually respond to the condition by clearing the snow. With respect to the remediation of ice conditions, Carregal asserted that the procedure depended on the area. He stated that, "if we are working outside in the sidewalk or in the street area, we tend to use ice picks to remove it and after we removal we will put ice melt on the outside," and that he sometimes joined the handyman and porter in clearing the ice when necessary. Carregal, however, conceded that he did not maintain written records concerning ice removal from the street or the deck, although he tracked the weather to be prepared for any precipitation event that needed to be addressed. Carregal testified that neither he nor his staff pre-treated the deck area prior to an anticipated snow event, but instead responded "as it happened." He noted that the deck did not have an overhead covering, so that the floor of the deck would get wet if it rained, and was subject to snow accumulation when it snowed.

Carregal further testified that

> "[t]he deck gets checked twice a day. Once by the 8 o'clock porter that comes in and then it gets checked at 3:30 when the other porter comes in. I rely on them to tell me if there is a condition on that deck,"

including the presence of ice conditions, the condition of the deck furniture, and the integrity of the wooden floor planking. He asserted that the only records that he kept consisted of the "set schedule" that the handyman and porters were assigned, which he described as a "check-point schedule that they use to know what their duties are." He further averred that he did not keep written records as to whether those members of his maintenance staff actually adhered to the schedule and performed their assigned inspections on any given day. Carregal testified that he had trained his staff to report back to him immediately if there were any building maintenance or safety issues that needed to be addressed, but that he did not necessarily document all such

reports, reserving that procedure for issues such as a "major leak" or other condition "that . . . needed to be documented." He averred that he might send a worker to the deck at some time other than 8:00 a.m. or 3:30 p.m., if "the fireplace wasn't working, could be that there are leaves in the pool, it could be there that there is [sic] kids playing in the deck, could be that there are kids playing on the deck rough, and we need somebody to make sure they don't get hurt." Carregal further stated that he would generally rely on oral reporting by his staff as to whether their inspections of the deck at 8:00 a.m. or 3:30 p.m. disclosed a need for remedial action. As Carregal explained it,

> "[i]f it is an ice removal, they will remove the ice, if it is snow, they will shovel the area that I just explained to you before from the entrance to the deck to the back exit of the building. That is normal routine that they would do under a normal ice and snow condition. They make sure that pathway is clear and can be gotten to."

He asserted hypothetically that, if he knew that it had snowed at 12 midnight, he "might" send out a maintenance worker to clear snow and scrape off ice from the deck at that time, rather than waiting for the worker's regular 8:00 a.m. inspection shift.

Carregal additionally testified that, if he knew that a person fell on ice, he documented it in an incident report, and "would pull out the review of the . . . video that I have of the deck and see how it happened and why it happened," but that, in the plaintiff's case, no one ever told him that anybody fell. He stated that, at the time of his deposition, he did not believe that Downtown retained any video recording of the plaintiff's incident, which had occurred three years earlier, since the videos are recorded over on a 30-day cycle, and he only learned of the date of the plaintiff's accident one year prior to his deposition.

Carregal asserted that only Downtown's employees serve on his maintenance staff, and not FirstService's employees, and that Downtown's employees were responsible for the day-to-day maintenance of the building, including maintenance of the 7th-floor deck and the clearing of ice and snow. He asserted that Hector Vargas was on duty on the date of the plaintiff's accident as a porter, and had been scheduled to inspect the deck on that date, and that Vargas also

"cleans, vacuums, picks up garbage, maintains the common areas of" floors 7 through 14. According to Carregal, he allegedly had spoken with Vargas, and then contacted "the rest of the people, the concierges, I spoke to the handymen, I spoke to just about everybody"---including building workers named Isaac, Frankie, Willy, Phil, Andy, Louis, and Donovan---"and no one had an idea that this [accident] occurred at all."

Carregal also testified that,

> "[w]e might have treated the ice deck with salt melt possibly if there was a severe ice storm, but I don't recall there ever being one, but is it something that I try not to use. We try to just use basically manpower to remove the ice."

In his affidavit, Carregal asserted that Downtown's staff performed no snow or ice removal on the 7th-floor deck on January 30, 2019, and specifically performed no such tasks on the area circled on a photograph of the deck, which depicted a portion of the deck several feet from the fountain, located between several planters and benches.

In his affidavit, board president Tretter asserted that, as of the date of the plaintiff's accident, the sponsor 15 Broad had no ownership interest in the common areas of the condominium, did not own, occupy, maintain, or control the 7th-floor deck, was not responsible for any maintenance of, or repairs to, the deck, and had not entered into any contracts concerning the deck.

In their joint affidavit, Altschule and Gravlin asserted that they had reviewed certified NOAA records concerning temperature, precipitation, wind speed, and wind direction on the date of the accident for several NOAA observation sites located near the building. They then explained their methodology in reviewing those records, and came to a conclusion as to the temperature and extent of precipitation at the accident location on January 29, 2010 and January 30, 2019, as well as the likelihood that precipitation had frozen, melted, and/or refrozen during that interval. They concluded that, on January 29, 2019, or one day before the accident, the minimum air temperature at the accident location was 28 degrees Fahrenheit, that the maximum temperature was 43 degrees Fahrenheit, that a total of 0.15" inches in liquid

precipitation had fallen, that there was a trace of snow or sleet, meaning less than 0.01" in equivalent liquid precipitation had fallen as snow or sleet, and that there was no snow or ice on the ground. They further concluded that, on January 30, 2019, the date of the accident, the minimum air temperature was 9 degrees Fahrenheit, the maximum air temperature was 35 degrees Fahrenheit, there was only a trace of liquid precipitation, 0.2" in equivalent liquid precipitation had fallen as snow or sleet, and there was no snow or ice on the ground. They noted that NOAA had issued a wind advisory on January 29, 2019, a special weather statement on January 30, 2019 concerning an incoming Arctic cold front during the afternoon, followed by snow squalls of short duration, and a further wind advisory on January 30, 2019.

Altschule and Gravlin further asserted that their review of the NOAA records reflected that, at 2:55 p.m. on January 30, 2019, NWS issued a warning for Manhattan, through 4:00 p.m., for a "HAZARD...Whiteout conditions. Zero visibility in snow and blowing snow. Wind gusts to 50 mph." They also stated that, on that same day, relevant Doppler radar images and surface observations indicated that "mostly continuous light to occasionally moderate and heavy snow with some gusty winds and blowing snow as the result of a passing snow squall occurred at the incident location from approximately 3:15 p.m. through 4:56 p.m." These experts further asserted that approximately 0.2 inches of new snow accumulated on January 30, 2019 and, at 3:30 p.m. on that date, the approximate time when the plaintiff alleged that she had fallen,

> "moderate snow was falling, snow was actively accumulating, and strong winds caused areas of blowing and drifting snow as a result of the winter storm that was in progress. The air temperature was approximately 30 degrees Fahrenheit, and a 'Trace' of new snow was present on exposed, untreated, and undisturbed surfaces,"

while a "Snow Squall Warning" was in effect for the incident location. They explained that a Doppler radar image that had been processed at 3:25 p.m. on that date, or approximately five minutes prior to the time of the acccident, along with nearby surface observations, indicated that moderate snow was falling at the incident location, while a subsequent image that had been

processed at 3:32 p.m., along with nearby surface observations, also indicated that moderate snow was falling at the incident location at that time.

Altschule and Gravlin asserted that the air temperature was above freezing from midnight though approximately 1:26 a.m. on January 30, 2019, dropped below freezing from approximately 1:26 a.m. through 1:11 p.m., rose above freezing from approximately 1:11 p.m. through 3:07 p.m., precipitously dropped below freezing at approximately 3:07 p.m., and remained below freezing through midnight on January 31, 2019. They stated that there was no ice present prior to the onset of the winter storm event that began at 3:15 p.m. on January 30, 2019, and that, as some of the snow fell, it initially melted and quickly froze to ice, as temperatures continued to drop below freezing, while existing wet surfaces quickly turned to ice with the onset of snow, and the moderate snow that was falling accumulated on top of it. They opined that the combination of active ice formation and active snow accumulation caused a slippery condition to occur. They further opined that the presence of black ice on the surface of the deck, as the plaintiff described it, was consistent with the weather conditions that were occurring immediately before and at the time of her accident.

The defendants argued that summary judgment should be awarded to 15 Broad because it had no ownership interest or maintenance responsibilities with respect to the 7th-floor deck as of the date of the accident. They further argued that summary judgment should be awarded to FirstService because it only served as the managing agent of the building, and had no contractual obligation to clear ice from the deck, inasmuch as Downtown directly employed all maintenance workers at the building, including resident manager Carregal. In addition, the defendant contended that summary judgment should be awarded to Downtown because it did not create the icy condition, had no actual or constructive notice thereof, and was immunized from liability by virtue of the storm-in-progress rule.

In opposition to the defendants' motion, the plaintiff relied on the pleadings, the bill of particulars, and the deposition transcripts that had been submitted by the defendants. She also

submitted a counter statement of material facts, an attorney's affirmation, her CPLR 3101(d) expert witness disclosure statement, an unsworn report written by meteorologist Steven Roberts that was accompanied by graphs, tables, and charts, and printouts of relevant NOAA data, and the affidavits of eyewitnesses Nadine Januzzi and Kalu Ugwuomo. She contended that Downtown failed to establish, prima facie, that it lacked constructive notice of the icy condition, and that, based on her own deposition testimony, and the affidavits of eyewitnesses, there were triable issues of fact as to whether it was raining or snowing at any time on the date of her accident, immediately before she walked out onto the deck, or at any time immediately prior to her accident and, thus, whether the storm-in-progress rule was applicable.

In her affidavit, Januzzi asserted that she was present on the deck at the time when the plaintiff slipped and fell. Januzzi stated that, prior to walking out onto the deck, she noted that it was not snowing at any time at the building and that, "[w]hen we walked out on to the deck it was not snowing at any time at the location." She additionally explained that, "[w]hile we were outside on the deck it was not snowing at any time at the location. At any time prior to and up to and including when Evon Holander slipped and fell there was no snow either on the deck/ground or falling from the sky at the location." Moreover, Januzzi asserted that "the deck *appeared to be slippery* from ice formed from water and not due to any snow accumulation" (emphasis added), that the temperature was below freezing at the time she walked onto the deck, and that she herself also was slipping on the ice that was present. Januzzi also did not observe the presence of any salt or de-icing substances on the deck.

In his affidavit, Ugwuomo confirmed the plaintiff's deposition testimony to the effect that, when the weather outside was inclement, maintenance workers locked the doors leading from the 7th-floor party/conference room onto the deck, and that they were not locked in the minutes leading up to the plaintiff's accident. Ugwuomo asserted that, prior to the accident, he had been working in the interior 7th-floor party/conference room. He stated that, immediately after hearing the plaintiff screaming as a consequence of her fall, he went outside and onto the deck

through the unlocked doors, and helped her up. Ugwuomo averred that it was not snowing at any time while he was working in the party/conference room, at any time while he was walking to the doors to exit the party/conference room, or at any time while he remained on the deck to help the plaintiff get up from the deck and return her to her apartment in the building. He confirmed Januzzi's statement that it was below freezing during the time that he was on the deck, and that he saw no salt or de-icing materials stored on the deck.

Based on his review of official meteorological records, Roberts, in his unsworn report, concluded that,

> "on January 30, 2019 at 5:30 PM EST (date and time of the incident), a trace (less than 0.5 inch) to 0.5 inch of snow and ice cover was present on untreated, undisturbed, and exposed outdoor surfaces at 15 Broad Street, New York, NY 10005 (site of the incident). This snow and ice was the result of an event that occurred between approximately 3:15 PM and 5:05 PM EST on January 30, 2019. In addition, at 5:30 PM EST, the sky was partly to mostly cloudy, no precipitation was occurring, and the temperature was near 18-23 F."

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie

showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn*., 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

Liability for failing to maintain premises in a safe condition must be based on occupancy, ownership, control, special use, statutory obligation, or contractual obligation (*see Jackson v Board of Educ. of City of N.Y*., 30 AD3d 57, 60 [1st Dept 2006]). 15 Broad established, prima facie, that it did not occupy, own, control, or have a special use over the building, and that it had no statutory or contractual obligation to maintain the deck in a safe condition. In opposition to that showing, the plaintiff failed to raise a triable issue of fact. Hence, summary judgment must be awarded to 15 Broad dismissing the complaint insofar as asserted against it. FirstService, as the managing agent retained by Downtown, established, prima facie, that it was not a party to a contract with the plaintiff, that it had not even assumed a contractual obligation to Downtown to clear ice or snow from the deck, and that it owed no statutory obligation to the plaintiff (*see Espinal v Melville Snow Contrs.,* 98 NY2d 136, 138 [2002]; *Baek v Red Cap Servs., Ltd..* 129 AD3d 752, 754 [2d Dept 2015]; *Scott v 11 W. 19th Assoc., LLC*, 125 AD3d 749, 751 [2d Dept 2015]; *Johnson v City of New York*, 102 AD3d 746, 749 [2d Dept 2013]). Rather, that duty was imposed only upon Downtown's employees. In opposition to the defendants' showing in this regard, the plaintiff failed to raise a triable issue of fact as to whether any of the

exceptions recognized by the Court of Appeals in *Espinal* was applicable to this action. Consequently, summary judgment must be awarded to FirstService dismissing the complaint insofar as asserted against it.

Downtown, as the owner of the building, and employer of the resident manager and maintenance staff of the building, did, however, owe a duty to the plaintiff to maintain the deck in a reasonably safe condition. To prevail in this action, the plaintiff ultimately must establish that Downtown not only owed her a duty to provide and maintain a reasonably safe outdoor deck, but that it breached that duty by allowing a dangerous condition to remain thereon despite creating the condition or having actual or constructive notice of the condition for a period of time sufficient for it to remedy the condition (*see Betances v 185- 189 Audubon Realty, LLC*, 139 AD3d 404 [1st Dept 2016]). Thus, a private landowner moving for summary judgment in a slip-and-fall action has the initial burden of showing that it did not create the alleged hazardous condition and lacked actual or constructive notice of its existence (*see Velocci v Stop & Shop*, 188 AD3d 486, 489 [1st Dept 2020]).

Downtown established, prima facie, that it did not create the icy condition by launching a force or instrument of harm. Specifically, it established that its employees did not engage in the negligent clearing or de-icing the deck's surface, inasmuch as none of its employees attempted to clear or de-ice the deck (*cf. Jimenez v Cummings*, 226 AD2d 112, 113 [1st Dept 1996] [plaintiff raised triable issue of fact as to whether snow removal was negligently performed]). Although the parties' submissions included a photograph that depicted the outdoor fountain on the deck, with water surrounding its basin, the plaintiff has submitted no proof, expert or otherwise, that Downtown created the icy condition by permitting the fountain to spray water onto a rapidly freezing wooden floor surface. Downtown further established, prima face, that it did not receive actual notice of the allegedly icy patch on the deck, as it demonstrated that no worker, tenant, or guest had complained about it, either orally or in writing. In opposition to Downtown's showings in this regard, the plaintiff failed to raise a triable issue of fact.

Constructive notice of a dangerous condition, however, may be established with proof that the condition was visible and apparent for a sufficient period of time so that the defendant had an opportunity to correct it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010]) or with proof that the defendant had actual notice of a recurring condition (*see Chianese v Meier*, 98 NY2d 270, 278 [2002]*; Roman v Met-Paca II Assocs., L.P.* , 85 AD3d 509, 510 [1st Dept 2011]). The plaintiff made no allegation here that Downtown had actual notice of a recurring icy condition on the deck near the fountain.

"[A]ll of the circumstances regarding a defendant's maintenance efforts must be scrutinized in ascertaining whether the defendant exercised reasonable care in remedying a dangerous condition" (*Pomahac v TrizecHahn 1065 Ave. of the Ams., LLC*, 65 AD3d 462, 465-466 [1st Dept 2009]; *see Rijos v Riverbay Corp*., 105 AD3d 423, 423 [1st Dept 2013]). On a motion for summary judgment, a defendant seeking summary judgment on the ground that it did not have constructive notice of a dangerous condition cannot establish its prima facie entitlement to judgment as a matter of law merely by showing that the plaintiff will be unable to prove the existence of constructive notice, that is, it may not simply point to potential gaps in the plaintiff's proof; rather, it has the burden of establishing the absence of constructive notice (*see Fitzgerald v Marriot Intl., Inc*., 2016 NY Slip Op 30881[U]; 2016 NY Misc LEXIS 1814 [Sup Ct, N.Y. County, May 13, 2016]). Thus, such a movant may satisfy its burden in this regard only by showing that it recently inspected the area in question, or repeatedly inspected the area for a sufficient period of time leading up to the accident (*see Maynard-Keeler v New York City Housing Auth.*, 161 AD3d 470, 470-471 [1st Dept 2018]; *Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 432 [1st Dept 2015]; *Mike v 91 Payson Owners Corp.*, 114 AD3d 420, 420 [1st Dept 2014]). In other words, it has to offer "specific evidence as to [its] activities on the day of the accident, including evidence indicating the last time the [area] was inspected or maintained

before plaintiff fell" (*Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 [1st Dept 2008]). Consequently, a defendant's submission of evidence showing only that it had established a fixed maintenance and inspection schedule is insufficient to demonstrate its prima facie entitlement to judgment as a matter of law where, as here, it submits no evidence of when the area of accident actually was last inspected prior to accident (*see Dylan P. v Webster Place Assoc., L.P.*, 132 AD3d 537, 538 [1st Dept 2015], *affd* 27 NY3d 1055 [2016]; *see also Vargas v Cadwalader Wickersham & Taft, LLP*, 147 AD3d 551, 552 [1st Dept 2017]).

"Personal injury actions involving black ice are particularly challenging for plaintiffs. If the slippery condition is not readily visible and apparent, then, by definition, actual or constructive notice of it to the property owner is unlikely and perhaps impossible, depending on the circumstances of the case" (*Steffens v Sachem Cent. Sch. Dist*., 190 AD3d 1003, 1004 [2d Dept 2021]). Nonetheless, the "unique issues" posed by a "black ice" case "do not change the burden of proof which a property owner must meet in order to establish prima facie entitlement to summary judgment" (*id*. at 1004). Thus, it is irrelevant to Downtown's burden in this respect that the plaintiff testified that she did not and could not observe the black ice on which she fell; Downtown still had the obligation to establish when it actually last inspected the deck prior to the accident. In any event, Januzzi, in her affidavit, asserted that the deck "appeared to be slippery from ice" and, thus, even had Downtown met its initial burden, this statement would have raised a triable issue of fact as to whether the dangerous condition was, in fact, visible and apparent.

"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" (*Yassa v Awad*, 117 AD3d 1037, 1037-1038 [2d Dept 2014]). Where a slip-and-fall accident occurs during a storm, or immediately thereafter, any issue concerning whether a defendant made reasonable efforts to prevent or remedy a slippery condition prior to the accident is "beside the point" since

it had no duty to correct the condition "until a reasonable time after the storm ended" (*Rosario v Prana Nine Props*., 143 AD3d 409, 409 [1st Dept 2016]; *see Keum Choi v Olympia & York Water St. Co*., 278 AD2d 106, 107 [1st Dept 2000]).

Although Downtown submitted evidence, in the form of expert affidavits, that there had been a storm in progress at the moment when the plaintiff slipped and fell, they also submitted the transcript of the plaintiff's own deposition testimony, in which she insisted that it had not rained or snowed at the building either on the day before the accident or on the date of the accident, including during the time when she was walking on the deck. Where a party's submission itself reveals the existence of a triable issue of fact, that party has failed to establish its prima facie entitlement to judgment as a matter of law (*see Reading v Fabiano,* 137 AD3d 1686, 1687 [4th Dept 2016]; *Kimber Mfg., Inc. v Hanzus*, 56 AD3d 615, 617 [2d Dept 2008]). Hence, Downtown has failed to establish, prima facie, that the storm-in-progress rule should be applicable to the plaintiff's claims. Moreover, Januzzi attested in her affidavit that it had not rained or snowed during the relevant period of time, thus confirming the plaintiff's testimony.

The court notes that Downtown's experts explained that a fast-moving snow squall likely was responsible for any frozen precipitation that accumulated near the building on January 30, 2019, and their explanations suggest that much of this localized snow came in small, localized microbursts. Hence, they did not, and could not, dispositively establish that it actually snowed directly over the building on that date, or that any snow accumulated on the deck of the building. Rather, their conclusions required the interpolation of various measurements taken at the Downtown Manhattan/Wall Street Heliport, which is .4 miles away from the building, and several observation points located even farther away, including the Central Park Observatory in Manhattan, three locations in Queens, including Jackson Heights, Middle Village, and JFK International Airport in Jamaica, one Brooklyn location, one Staten Island location, and several locations in New Jersey, including in Newark Liberty International Airport, Jersey City, Hoboken, Harrison, Kearney, and Mount Holly, as well as a report from Upton, New York, located in

eastern Suffolk County. Downtown's experts employed data from additional Community Collaborative Rain, Hail, and Snow Network locations in the five boroughs of New York City, as well as Bergen, Essex, Hudson, and Union Counties in New Jersey, along with astronomical data from Manhattan for January 29, 2019, and January 30, 2019, United States Surface Analysis Images from the Weather Prediction Center, the Storm Events Database from the NCEI for New York County, and Geostationary Operational Environmental Satellite 16 (GOES-16) satellite imagery for January 30, 2019. Consequently, although a jury might very well credit their anticipated testimony that there was a storm in progress at the time of the plaintiff's accident, which would preclude her from recovery against Downtown, their submissions did not dispositively establish, as a matter of law, that there was indeed a storm.

The court notes that, although the plaintiff's own expert, Roberts, essentially agreed with Downtown's experts that precipitation was falling at or near the building at the time of the plaintiff's accident---an opinion that could defeat the plaintiff's claim---the report submitted by Roberts was unsworn and, hence, may not be considered as evidence in connection with the instant motion, whether in opposition to the defendants' motion, or in support the conclusions of the defendants' experts (*see Glueck v Starbucks Corp.,* 173 AD3d 450, 451 [1st Dept 2019]; *Ulm I Holding Corp. v Antell,* 155 AD3d 585, 586 [1st Dept 2017]).

Finally, although Ugwuomo's affidavit was sworn to and executed in Texas, it was not accompanied by the certificate of conformity required by CPLR 2309. A certificate of conformity is a written instrument, pursuant to which a person qualified by the laws of the state in which an affidavit or affirmation is executed and notarized, or by the laws of New York, certifies that the out-of-state affidavit or affirmation has indeed been drafted, executed, and notarized in conformity with the laws of that state. The absence of the certificate of conformity, however, does not require the court to disregard or reject that affidavit, as the failure to include a certificate of conformity is a mere irregularity that may be cured by the submission of the proper certificate nunc pro tunc (*see Khurdayan v Kassir*, 223 AD3d 590, 591 [1st Dept 2024]; *Parra v*

Cardenas, 183 AD3d 462, 463 [1st Dept 2020]; *Bank of New York v Singh*, 139 AD3d 486, 487 [1st Dept 2016]; *DaSilva v KS Realty, L.P.,* 138 AD3d 619, 620 [1st Dept 2016]; *Diggs v Karen Manor Assoc., LLC*, 117 AD3d 401, 402-403 [1st Dept 2014]; *Matapos Tech., Ltd. v Compania Andina de Comercio Ltda.*, 68 AD3d 672, 673 [1st Dept 2009]).

In light of the foregoing, it is,

ORDERED that the defendants' motion for summary judgment dismissing the complaint is granted to the extent that that summary judgment is awarded to the defendants 15 Broad Street, LLC, also known as 15 Broad Street, and FirstService Residential New York, Inc., dismissing the complaint insofar as asserted against them, and the motion is otherwise denied; and it is further,

ORDERED that the action is severed against the defendants 15 Broad Street, LLC, also known as 15 Broad Street, and FirstService Residential New York, Inc.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants 15 Broad Street, LLC, also known as 15 Broad Street, and FirstService Residential New York, Inc.; and it is further,

ORDERED that the remaining parties shall appear for an initial pretrial settlement conference before the court, in Room 304 of 71 Thomas Street, New York, New York 10013, on August 28, 2024, at 10:00 a.m.., at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

7/31/2024
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	[X]	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**