SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

----------x

MARK I. MEERTENS,

Plaintiff,

-against-

MARCIA BYAM, THE CITY OF NEW YORK, and FOOT SOLDIERS,

Defendants.

----------x

Index # 524500/2021

ORDER
Motion Seq. # 3

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on March 25, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1& 2 [Exh. A-J]
Affirmation/Affidavit in Opposition	3 [Exh. 1-8]
Reply Affirmations	4 [Exh. A]

Plaintiff commenced this action due to an alleged slip and fall on snow and ice at 1408 Bedford Avenue, Brooklyn, New York on February 20, 2021, at approximately 9:15 a.m. The defendant, The City of New York, has been stipulated out of the case. Defendant, Marcia Byam (hereinafter "Byam"), is the property owner of the subject premises, and defendant, Foot Soldiers, was a snow removal contractor hired by Byam.

Defendants move pursuant to CPLR § 3212 for an order granting summary judgment dismissing plaintiff's complaint. Plaintiff opposes defendants' motion on the grounds that it was filed a month late; defendants have failed to meet their prima facie burden in that they failed to allege when the area in question was last cleaned or inspected; there are issues of facts as to whether snow and ice remaining on a ground surface a minimum of 13 hours after precipitation has ended, as well as icy conditions that existed for several days, constitutes constructive notice of a dangerous condition; there are issues of fact as to whether defendants created a dangerous condition by shoveling and piling snow in a manner that they knew or should have known created a dangerous condition due to, inter alia, freezing and refreezing over several days; and defendant, Byam, is vicariously liable for the actions of defendant, Foot Soldiers, due to their non-delegable duty as owner.

After careful review of the moving papers, and opposition thereto, the court finds as follows:

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See, Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." *See also, Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The papers submitted in the context of the summary judgment motion are viewed in the light most favorable to the party opposing the motion. *See, Marine Midland Bank, N.A. v. Dino v. Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2nd Dept., 1990). If the *prima facie* showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. *See, CPLR 3212[b]; Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986].*

Snow removal contractor, Foot Soldiers

In support of their motion for summary judgment, defendants submitted a copy of the snow removal contact between Byam and Foot Soldiers, which explicitly states that Foot Soldiers was not responsible for remediating melting/refreezing of snow and that the owner maintained the responsibility for monitoring and inspecting the property.

As a general rule, a contract for the removal of snow and ice does not give rise to a duty on the part of the snow removal contractor to exercise reasonable care to prevent foreseeable harm to a plaintiff unless: (1) in failing to exercise reasonable care in the performance of its duties, the snow removal contractor launched a force or instrument of harm (2) the plaintiff detrimentally relied upon the continued performance of the snow removal contractor's duties, or (3) the snow removal contract has entirely displaced the property owner's duty to maintain the premises safely. See, *Espinal v Melville Snow Contrs.*, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002).

Here, the snow removal contractor, Foot Soldiers, sustained its burden of demonstrating its entitlement to summary judgment dismissing the complaint insofar asserted against it. Foot Soldier's contract to perform snow removal services at the subject premises was not an exclusive and comprehensive agreement which entirely displaced the property owner's duty to maintain the premises safely. See, *Roach v AVR Realty Co., LLC*, 41 A.D.3d 821, 839 N.Y.S.2d 173 (2nd Dept., 2007). Moreover, there is no evidence that the injured plaintiff detrimentally relied upon Foot Soldiers performance of its contractual duties. See, *DeMartino v Home Depot U.S.A., Inc.*, 37 A.D.3d 758, 831 N.Y.S.2d 236 (2nd Dept., 2007). Finally, there is no evidence that Foot Soldiers launched a force or instrument of harm and thus created or exacerbated a hazardous condition. By merely plowing/shoveling the snow in accordance with the contract and leaving some residual snow or ice on the sidewalk, Foot Soldiers cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm. See, *Foster v Herbert Slepoy Corp.*, 76 A.D.3d 210, 905 N.Y.S.2d 226 (2nd Dept., 2010). A claim that a contractor exacerbated an existing

condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them. See, *Rudloff v Woodland Pond Condominium Assn.*, 109 A.D.3d 810, 971 N.Y.S.2d 170 (2nd Dept., 2013). Therefore, even if Foot Soldiers failed to apply an appropriate ice melting agent, the plaintiff has offered nothing more than speculation of its expert meteorologist that the failure to perform that duty rendered the property less safe than it was before Foot Soldiers started its work. See, *Church v Callanan Indus.*, 99 N.Y.2d 104, 782 N.E.2d 50, 752 N.Y.S.2d 254 (2002). In opposition to Foot Soldiers prima facie showing, the plaintiff failed to raise a triable issue of fact by speculating that the icy condition was created by snow removal activities that were undertaken by Foot Soldiers the day before the incident occurred.

Property Owner, Byam

The defendants bear the initial burden of making a prima facie showing that it neither created nor possessed actual or constructive notice of the alleged hazardous condition. *See*, *Spano v. Apogee Retail N.Y, LLC*, 164 A.D.3d 1495, 84 N.Y.S.3d 203 (2nd Dept., 2018). To constitute constructive notice, a condition must be visible and apparent for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it. *See*, *Gordon v. American Museum of National History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986). To establish the lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time of the accident. See, *Morlan v Atlantic Westerly Co.*, 214 A.D.3d 787, 186 N.Y.S.3d 57 (2nd Dept., 2023). Reference 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. See, *Rong Wen Wu v Arniotes*, 149 A.D.3d 786, 50 N.Y.S.3d 563 (2nd Dept., 2017).

In the case at bar, the defendants allege that the plaintiff cannot meet his burden as to constructive notice because according to his deposition testimony, he did not see the ice until after he fell, and as such has no ability to establish when the ice formed. In addition, defendants submitted an affidavit of Byam in which she states that she was never made aware of any dangerous condition on the sidewalk in front of her building prior to the incident. In opposition, plaintiff provides his 50-H examination and deposition testimony in which he states that there had been snow the night before which was still accumulated on the sidewalk and that the sidewalk had not been shoveled; he slipped on an ice patch that was 4-5 feet in diameter and it was all around him when he landed; the area appeared as if someone had previously cleared a path and piled the snow on the street side of the sidewalk; he had previously seen water and ice coming from the piled snow in the days prior to the accident; and the particular pile that caused the icy condition where plaintiff fell had been there for weeks, snow had been falling all month and people never really clean up the sidewalk, it's just piled up there. The plaintiff also provided an affidavit from his expert meteorologist that established through weather records that the storm producing said snow ended at approximately 8 p.m. on February 19, 2021, approximately 13 hours prior to the incident. Lastly, the plaintiff offered the deposition testimony of Byam where she acknowledged that she never inspected the property in the year 2021.

The court finds that the defendant-owner, Byam, has failed to satisfy her initial prima facie burden as to the lack of constructive notice by not offering some evidence as to when the area in question was last cleaned or inspected relative to the time of the accident. See, *Morlan v Atlantic Westerly Co.*, 214 A.D.3d 787, 186 N.Y.S.3d 57 (2nd Dept., 2023). Furthermore, in view of the plaintiff's testimony, Byam failed to sustain her burden of demonstrating the absence of all triable issues of facts as to whether she had constructive notice of the allegedly dangerous condition. See, *Stewart v Sherwil Holding Corp.*, 94 A.D.3d 977, 942 N.Y.S.2d 174 (2nd Dept., 2012).

Accordingly, defendants' motion for summary judgment dismissing the complaint against defendant, Foot Soldiers, is hereby granted. The defendants' motion for summary judgment dismissing the complaint against defendant, Byam, is hereby denied.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
August 23, 2024

HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
2024 AUG 30 A 10:17