#567C

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF BRONX, PART: IAS-12

JOSE TAVERAS-RODRIGUEZ,
Plaintiff,

-against-

CHEN PING CHEN, XIA FEI XIA, IRIS MARTINEZ, CESAR MARTINEZ, and VERIZON NEW YORK INC.,
Defendants.

IRIS MARTINEZ and CESAR MARTINEZ,
Third Party Plaintiff,

-against-

VERIZON NEW YORK INC.,
Third Party Defendants.

Index No. 32725/2018E

Hon. KIM ADAIR WILSON
Justice Supreme Court

The following papers NYSCEF Doc No. (75 – 218), read on this SUMMARY JUDGMENT MOTION (mot. seq 5, 6, 7), noticed on 7/25/2022, 7/28/2022 and 9/23/2022 and duly submitted as NYSCEF Docs. No. 109, 119 and 152.

	NYSCEF Doc. No.
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	
Replying Affidavit and Exhibits	
Other: Stipulation	

Upon the foregoing papers,

This motion is decided in accordance with the annexed Decision and Order.

Motion is Respectfully Referred to Justice:
Dated: _____

Dated: July 15, 2024

Hon. _____
KIM ADAIR WILSON, J.S.C.

1. CHECK ONE.....
2. MOTION IS.....
3. CHECK IF APPROPRIATE.....

☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE

☒ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

☐ NEXT APPEARANCE DATE: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

----------X

JOSE TAVERAS-RODRIGUEZ,
Plaintiff,

-against-

CHEN PING CHEN, XIA FEI XIA, IRIS MARTINEZ, CESAR MARTINEZ, and VERIZON NEW YORK INC.,
Defendants.

----------X

IRIS MARTINEZ and CESAR MARTINEZ,
Third-Party Plaintiffs,

-against-

VERIZON NEW YORK INC.,
Third-Party Defendants.

----------X

DECISION AND ORDER
Index No. 32725/2018E
Motion Seqs. #: 5, 6, 7

HON. KIM ADAIR WILSON
J.S.C.

Kim Adair Wilson, J.:

"**NOTICE OF MOTION**" (NYSCEF Doc 109), dated and filed July 22 and 25, 2022, respectively, by Marjorie Jules, Esq., (Law Office of Brian Rayhill), counsel for defendants, Shu Ping Chen and Yue Fei Xia (collectively, "Chen & Xia"), seeking an Order "pursuant to CPLR 3212, granting summary judgment in favor of Defendants, SHU PING CHEN and YUE FEI XIA, and dismissing the Plaintiff's Complaint and any and all claims and cross-claims made against SHU PING CHEN and YUE FEI XIA;" and "**NOTICE OF MOTION**" (NYSCEF Doc 119), dated and filed July 26 and 28, 2022, by Correia, Conway & Stiefeld, counsel for defendants, Iris Martinez and Cesar Martinez (collectively, "the Martinezes"), seeking an Order "pursuant to CPLR §3212 granting Defendants, Iris Martinez and Cesar Martinez, summary judgment as to liability dismissing the complaint and all claims, cross and counter claims against Iris Martinez and Cesar Martinez where (a) movants did not manufacture or own the green fiberglass telephone cover located on the sidewalk area where plaintiff identified he fell; (b) movants were under no contractual obligation to conduct any inspection, maintenance or repairs to said telephone cover; (c) movants had no prior notice of any purported dangerous condition to said telephone cover; and (d) movants are not liable under the Storm-In-Progress Doctrine [;]" and "**NOTICE OF MOTION**" (NYSCEF Doc 152), dated and filed September 22 and 23, 2022, respectively, by Michael A. Mazzeo, Esq. (Lewis Brisbois Bisgaard & Smith LLP), counsel for Verizon New York Inc. ("Verizon") seeking an Order "pursuant to CPLR § 3212 granting Verizon summary judgment and dismissing Plaintiff JOSE TAVERAS RODRIGUEZ's Complaint and IRIS MARTINEZ AND CESAR MARTINEZ's Third-Party Complaint, and all other claims and cross claims against Verizon;" are consolidated for the purpose of disposition and decided as set forth below.

The main action was commenced on November 7, 2018, by the filing of plaintiff's Verified Complaint, seeking monetary damages for personal injuries allegedly sustained on or about December 15, 2017, when plaintiff alleges that he was caused to slip on an ice-encased utility cover embedded in a sidewalk adjacent to the premises located at 2092 and 2094 Davidson Avenue, Bronx, New York, variously owned by Chen & Xia, and by the Martinezes, respectively. One January 4, 2019, the Martinezes filed their Verified Answer (NYSCEF Doc 4) asserting a general denial and three affirmative defenses, as well as two cross-claims against co-defendants Chen & Xia for indemnity and contribution. On January 17, 2019, defendants Chen & Xia filed their joint Verified Answer (NYSCEF Doc 5) denying all allegations, asserting six affirmative defenses, and asserting a cross-claim against the Martinezes for indemnity and contribution. Subsequently, on August 19, 2020, the Martinezes filed a Third-Party Complaint (NYSCEF Doc 47) impleading third-party defendant Verizon on two causes of action, for contribution and common law indemnification. Then, on August 28, 2020, plaintiff filed an Amended Verified Complaint (NYSCEF Doc 51), to allege negligence against Verizon as a new co-defendant in the main action. On September 30, 2020, Verizon filed its Answer in the main action (NYSCEF Doc 57), denying plaintiff's allegations, asserting thirty-nine affirmative defenses, and asserting cross-claims against all co-defendants for contribution and indemnity. Verizon also filed its Third-Party Answer (NYSCEF Doc 58) on September 30, 2020, denying the Martinezes' third-party allegations, raising thirty-nine affirmative defenses, and asserting two counterclaims against the Martinezes for contribution and indemnity. The Martinezes thereafter filed their Verified Amended Answer (NYSCEF Doc 61) denying all claims asserted against them and asserting thirteen complete defenses and also a single cross-claim for indemnity and contribution against all co-defendants. Similarly, on November 23, 2020, defendants Chen & Xia filed their Verified Answer to plaintiff's Amended Complaint (NYSCEF Doc 63), asserting four affirmative defenses and a cross-claim for indemnity and contribution. On November 30, 2020, Verizon filed two Answers (NYSCEF Doc 65 and 66) denying its co-defendants' respective cross-claims. Finally, plaintiff filed his Note of Issue demanding a trial by jury on May 27, 2022.

Contentions of the Parties

1. Chen & Xia's Summary Judgment Motion

Defendants Chen & Xia's motion seeks summary judgment dismissing plaintiff's Complaint and all claims and cross-claims asserted against those defendants. In support of their motion, Chen & Xia submit their annexed "AFFIRMATION IN SUPPORT" (NYSCEF Doc 110); plaintiff's deposition transcript and exhibit photographs (NYSCEF Docs 112 and 113); the respective Affidavits of defendant Xia and defendant Chen (NYSCEF Docs 114 and 116); a photograph purportedly depicting the weather at 11:54 a.m. on December 15, 2017 (NYSCEF Doc 115); a Reply Affirmation to plaintiff's opposition papers (NYSCEF Doc 204); and a Reply Affirmation to Verizon's opposition papers (NYSCEF Doc 218).

In opposition, plaintiff submits his "AFFIRMATION IN OPPOSITION" (NYSCEF Doc 168), dated and filed November 14, 2022, by Jonathan Damashek, counsel to the plaintiff (filed in simultaneous opposition to all three motions); Replies to the various opposition papers (NYSCEF Docs 197, 198, and 212) the Affidavits of plaintiff, nonparty witness Regina

Rodriguez, expert forensic meteorologist Mark L. Kramer, and expert professional engineer Scott Silberman, P.E., respectively (NYSCEF Docs 174, 175, 183, and 184); the deposition transcripts of Migdalia Sequinot, defendant Iris Martinez, and defendant Xia, respectively (NYSCEF Doc 176, 180, and 182); a Verizon contract for the replacement of the subject sidewalk plate (NYSCEF Doc 177); and photos of the subject sidewalk plate (NYSCEF Docs 178, 179, and 181).

Also in opposition, defendant Verizon submits its "AFFIRMATION IN OPPOSITION TO CHEN PING CHEN AND XIA FEI XIA DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 211), dated and filed February 16, 2023; and the deposition transcripts of defendant Xia and defendant Verizon's witness Migdalia Sequinot (NYSCEF Docs 214 and 215).

Movants, Chen & Xia, assert, in sum, that they owed no duty to plaintiff to clear the sidewalk of snow, nor did they cause or create the allegedly dangerous condition, and so cannot be held liable for plaintiff's injuries. Movants emphasize that New York City Administrative Code §16-123(a) requires non-residential property owners to remove snow and ice within four hours after snow ceases to fall but does not expressly impose liability for injuries caused by breaches of that obligation. Movants proffer defendant Xia's Affidavit (NYSCEF Doc 114) which indicates that she and her husband, defendant Chen, have owned the two-family residence located 2092 Davidson Avenue for ten years, and have used it exclusively for residential purposes, exempting them from liability under Administrative Code §7-210. She further stated that the sidewalk was clear of snow and ice on the morning of December 15, 2017, that she did not conduct any salting or shoveling of the sidewalk on that date, and that she took a photo of the sky on the way to work showing the absence of any precipitation (NYSCEF Doc 115). Further, movants assert, Verizon owns the utility cover that plaintiff slipped on, and plaintiff's deposition testimony (NYSCEF Doc 112) established that the weather was clear at the time that his accident occurred, at around 8:40 p.m. on December 15, 2017, and that the ice-covered utility cover did not appear to have been salted or shoveled.

In opposition, plaintiff argues that movants' negligent removal of the snow from previous storms caused or created the allegedly dangerous condition that proximately caused plaintiff's injuries, precluding summary judgment in their favor. Plaintiff submits the Affidavit of Mark L. Kramer, expert meteorologist (NYSCEF Doc 183), who reviewed, *inter alia*, certified Climatological Data records from the National Oceanic and Atmospheric Administration, opines that the sidewalk utility cover, which was located inside a one-inch depression in the sidewalk, permitted water from previous storms to pool inside and then refreeze prior to plaintiff's accident on December 15, 2017. Also submitted is the Affidavit of Scott M. Silberman, professional engineer, who reviewed the deposition testimonies and exhibits thereto, and who opined that the one-inch depression of the utility cover violated Administrative Code §19-147 and other rules governing sidewalk construction, as alleged in plaintiff's Supplemental Bill of Particulars (NYSCEF Doc 206), causing water to pool therein instead of properly draining from the sidewalk into the roadway. Plaintiff further contends that water accumulation on the cover was a recurring condition, as corroborated by the Affidavit of nonparty witness Regina Rodriguez (NYSCEF Doc 175), plaintiff's niece, who resides at 2056 Davidson Avenue, and who observed an inch of dark ice encasing the utility

cover immediately following the accident, as well as a mound of snow less than a foot from the and who attested that she had previously observed water pooling inside the depressed sidewalk cover.

In further opposition, defendant Verizon proffers the deposition transcript of Migdalia Sequinot (NYSCEF Doc 215), a senior engineer employed by Verizon, wherein she states that Verizon does not remove snow from in front of private homeowner's residences; and that Verizon had not received any requests for corrective action regarding the subject plate prior to the alleged incident. Verizon further contends that the deposition testimony of defendant Xia establishes that she shoveled and salted the area in question on the day prior to the accident, pushing the snow into a mound establishing an issue of fact as to whether those actions caused or created a dangerous condition a day later when plaintiff allegedly became injured. Finally, Verizon asserts, Local Climatological Data from the National Oceanic and Atmospheric Administration indicates that on December 15, 2017, a snowstorm commenced from 3:00 p.m. to 9:00 p.m. that accumulated an inch of snow in the area.

In their Reply to plaintiff's opposition papers (NYSCEF Doc 204), movants reiterate their contentions that they are exempt from liability for snow removal under Administrative Code §7-210; that they were under no obligation to maintain Verizon's utility cover; and that they did not make special use of the utility cover, because they lacked any control over it.

Movants' Reply Affirmation to Verizon's opposition (NYSCEF Doc 218), filed June 5, 2024, was untimely filed over a year after the motion's stipulated (NYSCEF Doc 210) submission date of February 23, 2023, due to counsel's admitted law office failure, and therefore will not be considered.

2. The Martinezes' Summary Judgment Motion

The Martinezes move for summary judgment on liability dismissing plaintiff's Complaint as against the movants. In support of their motion, movants submit their annexed "AFFIRMATION IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 121); Replies to plaintiff's and Verizon's opposition papers (NYSCEF Docs 195 and 196); the deposition transcripts of plaintiff (NYSCEF Docs 131 and 143), defendant Xia, defendant Iris Martinez, and Migdalia Sequinot, respectively (NYSCEF Docs 141, 144, and 145), and the unsworn report of forensic meteorologist Steven Roberts, dated February 1, 2018 (NYSCEF Doc 148).

In opposition, plaintiff submits the selfsame papers submitted on the previous motion, above.

In further opposition, defendant Verizon submits its "AFFIRMATION IN PARTIAL OPPOSITION TO MARTINEZ DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 192).

Movants contend that they did not manufacture or own the utility cover that plaintiff slipped on; that they had no obligation to maintain said cover; that movants had no notice as to the hazardous condition of the cover; and that movants have no liability under the Storm-In-Progress Doctrine. Movants argue that the deposition testimony of defendant Iris Martinez (NYSCEF Doc 180) establishes that she observed no snow or ice on sidewalk on the

morning of December 15, 2024, but that she salted the sidewalk in front of 2094 Davidson Avenue anyway; and that it was still snowing when she first encountered plaintiff sitting on the utility cover. Movants insist that the Storm-In-Progress doctrine exempts them from liability for a party injured due to slippery conditions that occur during, or immediately following, a snowstorm.

In contrast, plaintiff contends, *inter alia*, that because the movants' efforts to undertake snow removal measures efforts created a hazardous condition, they can be held liable for plaintiff's injuries. Plaintiff also argues that the movants' unsworn and uncertified meteorologist report should not be considered on their summary judgment motion.

Finally, defendant Verizon does not oppose the movants' invocation of the Storm-In-Progress Doctrine, but contends that the movants were obligated to inspect the utility cover for transient conditions. Verizon also highlights the testimony of Iris Martinez (NYSCEF Doc 180) that she never notified Verizon of any defect pertaining to the utility cover prior to plaintiff's accident.

In Reply (NYSCEF Doc 195), movants assert that plaintiff's contention that plaintiff was injured by the refrozen remnants of a prior storm, where a more recent or ongoing storm also caused accumulation at the same location, is conjecture and speculation, and is insufficient to raise a triable issue of fact; that the mere presence of ice on the utility cover cannot alone support an inference of negligence by the defendants, or that their snow removal efforts were unreasonable; and that it cannot reasonably expected for any private homeowner to privy to the meteorological expertise required to calculate the proper amount of salt to apply to a given area. In Reply to Verizon's opposition (NYSCEF Doc 196), movants contend that any icy or slippery conditions present on the date of the accident were caused by Verizon's failure to meet their exclusive obligation to properly maintain the utility cover, as indicated by the Department of Transportation Corrective Action Request (NYSCEF Doc 177).

3. Verizon's Summary Judgment Motion

Verizon moves for summary judgment dismissing plaintiff's Complaint, the Martinezes' Third-Party Complaint, all other claims and cross-claims asserted against Verizon. In support of their motion, movants submit their annexed "AFFIRMATION IN SUPPORT" (NYSCEF Doc 153); their Replies to the various opposition papers (NYSCEF Docs 197, 198, and 212); the deposition transcripts of plaintiff (NYSCEF Docs 157 and 160), defendant Xia, defendant Iris Martinez, and Migdalia Sequinot, respectively (NYSCEF Docs 158, 159, and 161); and the Local Climatological Data from the National Oceanic and Atmospheric Administration (NYSCEF Doc 163).

In opposition, plaintiff submits the selfsame papers submitted on the previous motion, above.

Also in opposition, the Martinezes submit their "AFFIRMATION IN OPPOSITION TO VERIZON'S MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 187), dated and filed November 18, 2022, respectively.

In yet further opposition, defendants Chen & Xia submit their "AFFIRMATION IN OPPOSITION TO VERIZON'S SUMMARY JUDGMENT MOTION" dated and filed January 5, 2023, respectively.

Movant Verizon contends, in sum, that the snow and ice to which plaintiff attributes causation of his injuries is a transient condition that Verizon has no obligation to remedy; that Verizon had no opportunity to remedy the accumulation of snow and ice due to the Storm-In-Progress; and that Verizon had received no prior notices of any defective conditions pertaining to the subject utility cover. Verizon insists that the abutting landowners were under obligation to inspect the sidewalk and utility cover for transient conditions. Verizon further asserts that plaintiff's testimony (NYSCEF Doc 157) indicates that the ice was what caused plaintiff's fall, not a defect in the utility cover itself. Verizon also reiterates contentions raised in their previously described papers, and which need not be restated here.

In opposition, Plaintiff contends, *inter alia*, that the sunken position of Verizon's utility cover, in purported violation of Administrative Code §19-147, permitted water to pool and freeze, and that but for the aforementioned defect, the ice that proximately caused plaintiff's injuries would not have formed. Separately, plaintiff argues that Verizon also made special use of that portion of the sidewalk, and therefore became liable to maintain and repair any defective sidewalk conditions occurring at that location.

In further opposition, the Martinezes contend that, although evidence of subsequent repairs to the utility cover may be inadmissible as proof of negligence, the Department of Transportation Corrective Action Request that describes the cover as "very slippery" (NYSCEF Doc 177) is admissible to establish the prior condition of the cover; and that Verizon had a statutory obligation to maintain and repair that cover.

Finally, defendants Chen & Xia contend, in opposition, that Chen & Xia had no obligation to maintain or repair the utility cover, and that they also did not make any special use of the cover. Moreover, defendants Chen & Xia maintain that they were under no legal obligation to maintain the sidewalk in front of their residence, and that any determination that Verizon is exempt from liability under the Storm-In-Progress doctrine would also apply to defendants Chen & Xia.

In its Replies (NYSCEF Docs 197, 198, and 212), Verizon contends that special use doctrine does not apply to the circumstances at bar because plaintiff specifically stated that he slipped and fell due to ice, and not due to a defect of the utility cover, and that plaintiff's allegations that Verizon violated 34 R.C.N.Y. §2–07 and Administrative Code §19-147, as alleged in plaintiff's Supplemental Bill of Particulars (NYSCEF Doc 206), are therefore without merit. Movants also insist that that 34 R.C.N.Y. §2–07 does not obligate the owner of sidewalk hardware to remedy transient conditions with twelve inches of a grate, and that the utility cover must be instead be construed as part of the sidewalk with respect to mandated snow removal under Administrative Code §7-210, irrespective of the absence of any special use by the abutting landowners.

Applicable Law

At this outset, the Court notes that plaintiff requests leave to serve his "SUPPLEMENTAL VERIFIED BILL OF PARTICULARS" (NYSCEF Doc 206), pursuant to CPLR 3043(b). The Supplemental Bill of Particulars alleges that the defendants failed to follow and comply with Administrative Code §19-147. Defendants Chen & Xia and Verizon oppose plaintiff's request, contending that the Supplemental Bill of Particulars proposes a new theory of liability, and is therefore untimely. It is well-established that a plaintiff should be permitted to file a supplemental bill of particulars with respect to defendants' alleged violations of statutes, ordinances, rules, and/or regulations, since these amendments, which merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars, and which raise no new theory of liability. *Orros v. Yick Ming Yip Realty, Inc.*, 258 A.D.2d 387, 388 (1st Dept. 1999). Plaintiff's original Bill of Particulars alleges that the defendants failed to follow and comply with pertinent and applicable codes and statutes, and the Supplemental Bill clearly only elaborates on the original allegations. Therefore, plaintiff's request for leave to supplement his Bill of Particulars is **GRANTED**.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003); *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad*, *supra* at 853. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to rebut the movants claims and establish that triable issues of fact exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In a slip-and-fall case, a defendant property owner moving for summary judgment has the burden of showing prima facie that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence. *Rodriguez v. Kwik Realty, LLC*, 216 A.D.3d 477, 478 (1st Dept. 2023). Actual notice will be imputed where a defendant is determined to have created a dangerous or defective condition. See *Lewis v. Metro. Transp. Auth.*, 99 A.D.2d 246, 249 (1st Dept. 1984) aff'd, 64 N.Y.2d 670 (1984). Although under normal circumstances liability for the maintenance of adjoining sidewalks does not attach to the owners of "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" (*Coogan v. City of New York*, 73 A.D.3d 613, 614 [1st Dept. 2010]), once the owner undertakes snow removal efforts, he must do so in a reasonable manner and may be held liable for creating or exacerbating a dangerous condition. *See Salvanti v. Sunset Indus. Park Assocs.*, 27 A.D.3d 546, 813 N.Y.S.2d 110 (2d Dept. 2006). It is for a jury to decide whether defendant's snow removal methods created a more hazardous condition than would have obtained had the snow been left untouched. *Santiago v. New York City Hous. Auth.*, 274 A.D.2d 335, 712 N.Y.S.2d 93 (1st Dept. 2000); *Glick v. City of New York*, 139 A.D.2d 402, 403, 526 N.Y.S.2d 464 (1st Dept. 1988). Moreover, even if a storm was in progress at the time of the incident, where plaintiff raises issues of fact as to whether defendant gratuitously and negligently performed snow and ice removal operations that

created or exacerbated a dangerous condition, summary judgment is precluded. *See Pipero v. New York City Transit Auth.*, 69 A.D.3d 493 (1st Dept. 2010).

With respect to the subject utility cover, Administrative Code §19-147 provides, in relevant part, as follows:

> **New York City Administrative Code §19-147. Replacement Of Pavement And Maintenance Of Street Hardware**
>
> **d. Maintenance of street hardware. All utility maintenance hole (manhole) covers, castings, and other street hardware shall be maintained flush with the existing surrounding grade.**

Furthermore, 34 R.C.N.Y. §§2–07(b)(2) and (b)(3) require the following:

> **(2) The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating. Such owner must obtain a permit to maintain a steel plate that is covering such cover or grating or such street condition.**
>
> **(3) Street hardware shall be flush with the surrounding street surface. Street hardware which is greater than 1/2" above or below the street surface as measured by a six foot straight edge centered on the hardware shall be replaced or adjusted at the owner's expense.**

In the case of *Hurley v. Related Management Co.*, the Appellate Division, First Department, held that 34 R.C.N.Y. §2–07(b)(2) obligates utility company owners to inspect their grates for potentially slippery conditions, and imposed no duty upon abutting property owners to maintain such grates where they lack exclusive access to, or control, over them. *Hurley v. Related Mgmt. Co.*, 74 A.D.3d 648, 649 (1st Dept. 2010).

Analysis

We turn first to defendants Chen & Xia's motion for summary judgment. Upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that the movant has prima facie demonstrated entitlement to summary judgment dismissing plaintiff's causes of action against them is warranted here. Defendant Xia testified that she had last shoveled and salted the sidewalk on the day prior to the accident, and that she also inspected the sidewalk on the morning of the accident and observed no snow or ice, and therefore had no constructive notice of any dangerous conditions (See NYSCEF Doc 214 at pp.39, 50 - 51). However, on rebuttal plaintiff raised a triable issue of material fact via the Affidavit of plaintiff's expert witness, forensic meteorologist Mark L. Kramer (see NYSCEF Doc 198), as to whether defendant Xia's placement of the mounds of snow near the sunken utility cover, coupled with the lowered freezing point of the melt water caused by the previously strewn salt, created an allegedly dangerous condition that proximately caused plaintiff's injuries. Because that factual issue is not appropriate for determination on summary judgment (*see Pipero, supra* at 493) defendants Chen & Xia's motion for summary judgment must be **DENIED**.

Turning now to the Martinezes' motion for summary judgment, the Martinezes similarly demonstrated prima facie entitlement to summary judgment, showing that Iris

Martinez inspected the sidewalk on the morning of the December 15, 2017, found no snow, and placed salt on the ground in anticipation of later snowfall. She also stated that when she encountered plaintiff in front of her home just following the accident, she observed that snow was still falling (see NYSCEF Doc 144 at p.23), establishing the presumption that the Storm-In-Progress doctrine exempts the Martinezes from liability for plaintiff's injuries. Although the unsworn CompuWeather report (NYSCEF Doc 148) is inadmissible, the record holds ample evidence corroborating that snowfall occurred on December 15, 2017, between the hours of 3:00p.m. and 9:00p.m. (see NYSCEF Doc 183 at pp.32, 33). However, as above, the Affidavit of plaintiff's expert established an issue of fact as to whether Iris Martinez's salting created or contributed to the allegedly hazardous condition. Therefore, the Martinezes' motion for summary judgment is also **DENIED**.

We turn, finally, to defendant Verizon's motion for summary judgment. Verizon has failed to meet its burden on summary judgment, to establish that it was not responsible to remedy any slipperiness on its utility cover created by transient conditions. It has heretofore been established that 34 R.C.N.Y. §2–07(b)(2) imposes a duty on utility company owners to inspect their grates for potentially slippery conditions (*see Hurley*, *supra* at 649). Furthermore, the Affidavits of Mark L. Kramer (see NYSCEF Doc 198) and professional engineer Scott Silberman (NYSCEF Doc 184), proffered on plaintiff's rebuttal, also raised an issue of fact as to whether the one-inch depression of Verizon's utility cover with respect to the surrounding sidewalk, in purported violation of Administrative Code §19-147(d) and 34 R.C.N.Y. §2–07(b)(3), permitted the collection and refreezing of runoff from previously shoveled snow atop the utility cover, and was thus integral to the creation of the hazard that proximately caused plaintiff's injuries. In light of the foregoing, defendant Verizon's motion of summary judgment is also **DENIED**.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

Accordingly, all three motions are **DENIED in the entirety**. Further, it is hereby

ORDERED that plaintiff's "SUPPLEMENTAL VERIFIED BILL OF PARTICULARS" (NYSCEF Doc 206), filed January 7, 2023, is deemed filed as of ten (10) days from the date of entry of this Decision and Order and served upon the defendants; and it is further

ORDERED that the respective movants are directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and to file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated: July 15, 2024
Bronx, New York

Hon. Kim Adair Wilson, J.S.C.