SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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ELIZABETH COONEY,

Plaintiff,

- v -

CHRISTOPHER & SEVENTH REALTY LLC,THE DUPLEX

Defendant.

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INDEX NO. 153757/2022

MOTION DATE 07/05/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

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

On February 5, 2022, at approximately 5:30 p.m., plaintiff Elizabeth Cooney alleges she slipped and fell while exiting The Duplex at 61 Christopher Street, New York, NY 10014. Her injuries include a right fibular fracture, distal end fracture of the right fibula, and lateral malleolus fracture of the right ankle, which required surgical intervention. (NYSCEF doc. no. 22, plaintiff's bill of particulars.) She claims the fall resulted from two purported hazards: (1) ice on the metal threshold step; and (2) the absence of a "panic bar" on the exit door, which prevented her from stabilizing herself. (*Id*.) In this motion sequence, defendants Chirstopher & Seventh Realty LLC and The Duplex (hereinafter, collectively, "defendants") move for summary judgment pursuant to CPLR 3212. In sum and substance, they argue that they had no actual or constructive notice of an icy condition on its premises, that they maintained adequate snow/ice removal protocols, which were implemented prior to plaintiff's fall, and the lack of a panic bar near the doorway did not violate applicable codes or cause the fall (NYSCEF doc. no. 29, def. memo of law.) Plaintiff opposes the motion in its entirety. For the following reasons, the motion is denied.

Under CPLR § 3212(b), summary judgment is warranted if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law directing judgment in favor of any party." The movant must first demonstrate the absence of material factual disputes; the burden then shifts to the non-movant to raise triable issues of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 [1980].) For slip-and-fall claims, the moving defendant must show it neither created the hazardous condition nor had actual or constructive notice of it. (*Rodriguez v. 7057 E. 179th St. Hous. Dev. Fund Corp.*, 79 A.D.3d 518, 519 [1st Dept. 2010].) Once it has made this prima facie showing, the burden shifts to the plaintiff to raise a triable issue of fact. (*Id*.) A defendant fails to meet its burden if there is evidence of inconsistent maintenance testimony, gaps in inspection records, or expert disputes regarding hazard formation.

In support of its motion, defendants rely on the deposition testimony of The Duplex's owner, Anthony Decicco, and the affidavits of various employees, each of whom testify to defendants' maintenance protocols when clearing snow and ice from the entrance and abutting sidewalk. Decicco testified that, when it snows, that porters like Jesus Luna generally conduct pre- or post-shift inspections and handle any necessary salting/shoveling daily from 4 a.m. to 3 p.m., when shifts begin and end (*see* NYSCEF doc. no. 25, Deciccos dep transcript); Luna corroborated this testimony, averring that he would treat the step with rock salt and shovel the sidewalk once the snowing had stopped. (NYSCEF doc. no. 26 at ¶ 5-7, Luna affidavit). Taylor Rey J'Vera, a bartender employed by The Duplex, stated that she would arrive for her shift at approximately 4 p.m., using the same entrance as plaintiff; she further avers that, on this particular day—or any other day for that matter—she did not notice any snow or ice accumulation as she would have informed whichever porter was on duty at that time. (NYSCEF doc. no. 27 at ¶¶ 5-10, J'Vera affidavit.) As to the entrance/exit's structural soundness, engineer Michael Cronin conducted a site inspection and opined that the step was "sound, well-maintained, and in good condition. No structural defects or hazardous conditions were observed." (NYSCEF doc. no. 28 at ¶8.) Nor did he observe that access to the building violated any applicable New York City administrative codes. (*Id*. at ¶10.)[1] Accordingly, defendants contend that they did not create the alleged defective conditions nor, given their maintenance procedures and J'Vera's specific observations, have actual or constructive knowledge of snow or ice accumulation. (*See Labiner v Jerome Florist, Inc.*, 189 AD3d 624, 625 [1st Dept 2020] [where the defendant's president established that he oversaw the maintenance of the building exterior, was working on the date of incident, inspected the premises 3 ½ hours before, and received no prior complaints, defendant established entitlement to summary judgment].)

While this argument may be persuasive,[2] plaintiff has sufficiently demonstrated triable issues of fact that preclude summary judgment. Plaintiff attaches a weather report for February 2022 (authenticated by the National Centers for Environmental Information and their data administrator), which shows that, on February 3, two days before her fall, it snowed approximately two inches, and on February 4, it rained approximately .72 inches with an average temperature of approximately 42 degrees Fahrenheit. (NYSCEF doc. no. 37, Feb 2022 weather report.) The report then shows temperatures falling to sub-freezing 23 degrees on February 5, with a low of 19 degrees and high of 27 degrees. (*Id*.) In addition, plaintiff testified that the general conditions throughout the city and on this particular street were wet and icy from the rain the previous day and that she observed chunks of ice in the entrance step's grooves. (NYSCEF doc. no. 23 at 73, plaintiff dep. transcript.) Lastly, in opposition to the motion, she notes that, between Luna and J'Vera's averments, there is an approximately 2½ hour gap where defendants have not shown an inspection took place, undermining defendants' showing that it did have constructive notice of the alleged dangerous condition.

[1] Summary judgment may be appropriate in a snow or ice case where the defendant demonstrates, through climatological data and expert opinion, that the weather conditions would preclude the existence of snow or ice at the time of the accident. (*Rodriguez v Woods*, 121 AD3d 474, 475 [1st Dept 2014].) Here, defendant's expert did not opine that the weather conditions alleged by plaintiff were precluded by climatological data. Thus, this ground for summary judgment is not in issue.

[2] In opposition, plaintiff does not argue that defendants' employees' testimony failed to meet its prima facie burden, only that a 2½ hour gap, discussed *infra*, created issues of material fact.

In *Massey v Newburgh W. Realty, Inc.* (84 AD3d 564, 567 [1st Dept 2011]), the plaintiff relied on two forms of evidence, her own testimony—that she observed ice on the ground and identified the location of the ice in photographs of the scene—and meteorological data which showed freezing temperatures leading up to her accident. In her view, this evidence created issues of fact as to whether defendants had constructive knowledge of the alleged dangerous icy conditions that led to her fall. The First Department concurred, finding the evidence "concerning the nature of the ice and the climatic conditions" to be sufficient to deny summary judgment. (*Id*.) Here, the same principle applies.

In attempting to distinguish *Massey* with the present factual circumstances, defendants argue that the First Department's holding was, at least partially, based on the fact that the defendant "failed to submit evidence that any store employees regularly inspected the sidewalk" and, thus, unlike here, had not shown that it lack constructive notice. (*Id*.) Yet, while the defendant in *Massey* indeed failed to establish its prima facie burden separate and apart from whether issues of fact were raised in opposition, this argument ignores the aforementioned 2½ hour gap between when defendants' employees last inspected the sidewalk/entrance way and when plaintiff's accident occurred. By arguing that a defendant "does not need to establish that an area was cleaned or monitored up to the moment of an alleged accident," and doing so without citing supporting caselaw, defendants have failed to establish that *this* specific gap of time is, as a matter of law, insignificant for purposes of determining whether they acted in a reasonable manner to ensure the safety of those entering the premises and had no constructive notice. (*See Coelho v S&A Neocronon, Inc.*, 178 AD3d 662, 664 [2d Dept 2019] [finding testimony that plaintiff-employee did not see snow or ice on the sidewalk when he arrived more than three hours prior to his accident was not sufficient to demonstrate that "defendants could not reasonably have been expected to notice and remedy the condition"].) [3] And while the Court recognizes that *Spinoccia v Fairfield Bellmore Ave., LLC* (95 AD3d 993 [2d Dept 2012]) arguably supports defendants' position—that without "any findings as to when the ice patch developed," whether there was adequate time to discover and remedy the dangerous condition could only be "speculative"—numerous other First Department cases suggest that plaintiff's testimony and the weather report are sufficient to establish triable issues of fact. [4] (*See Rodriquez v Woods* (121 AD3d 474, 475-476 [1st Dept 2014]), *Jones v New York City Hous. Auth.* (157 AD3d 426, 426 [1st Dept 2018]*), Ralat v New York City Hous. Auth.* (84 84 AD3d 564 [1st Dept 199]), and *Tubens v New York City Hous. Auth.* (248 AD2d 291, 292 [1st Dept 1998].) (*See, compare and contrast: Kovel v Glenwood Management, (*160 NYS3d 208 [1st Dept 2021*](reversed trial court and granted defendant property owner's summary judgment motion where plaintiff testified that she tripped and fell on a "stone tree well guard" – not snow [emphasis added] - while a snowstorm was underway at the time of plaintiff's fall and snow "partially covered the tree guard that was low to the ground and difficult to see.")*

As for the missing panic bar, defendants are not entitled to summary judgment. While they attach the affidavit of engineer Michael Cronin, his averments consist entirely of impermissible legal conclusions as to the non-applicability of certain New York City Building Codes to a

[3] Defendants do not address *Coelho* in their reply papers.
[4] In *Spinoccia*, the Second Department does not address the proof defendant adduced to demonstrate it did not have constructive knowledge of the ice patch, specifically whether it conducted inspections of subjecting parking garage and at what intervals.

structure built in 1915—conclusions for which defendants' counsel does not offer support in their moving papers.[5] (*See Tamrazyan v 379 Ocean Parkway, LLC*, 232 AD3d 736, 737 [2d Dept 2024].) As such, in testifying that she attempted to stabilize herself during the fall on a handrail, plaintiff has established issues of fact as to whether the missing panic bar was a proximate or substantial cause of her accident. (*See Ocasio v. Board of Education of City of New York*, 35 A.D.3d 825 [2d Dept. 2006]; *Hoberg v Shree Granesh*, 85 AD3d 965 [2d Dept 2011.)

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment pursuant to CPLR 3212 is denied in its entirety; and it is further

ORDRED that counsel for plaintiff shall serve a copy of this order, along with notice of entry, within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.

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10/20/2025
DATE

DAKOTA D. RAMSEUR, J.S.C.

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

[5] For instance, while defendants' expert opines that the access step does not need to comply within any applicable NYC Building Code provision due to the age of the building (*see* NYSCEF doc. no. 41 at ¶19-20), they have not attached property records that would tend to show this.