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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HAROLD BEELER J.S.C. PART 21

Index Number : 109120/2007
STELLMAN, MICHAEL
VS.
TRANSIT AUTHORITY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

is denied as per attached decision and order.

FILED
MAY - 1 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/24/09

HAROLD BEELER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

MICHAEL STELLMAN,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK, and METROPOLITAN TRANSIT AUTHORITY,

Defendants

----------X

Index No. 109120/20067
SEQUENCE MS002
DECISION & ORDER

HAROLD B. BEELER, J.S.C.:

Defendants New York City Transit Authority, Metropolitan Authority, and City of New York (collectively, "defendants") move for summary judgment dismissing plaintiff Michael Stellman's ("plaintiff" or "Stellman") complaint. Plaintiff opposes the motion. For reasons discussed herein, defendants' motion is denied.

On Feb. 15, 2007 at approximately 7:15 A.M., plaintiff was walking down the "S-2" stairway of the No. 1 subway station at West 86th Street. He held the rail as he descended because there was a layer of ice on the stairs. When he momentarily let go of the handrail to avoid contact with some unpleasant bird deposits, he slipped on the ice, causing his alleged injuries. Plaintiff brought suit against defendants, claiming that defendants negligently failed to remove the ice.

The day prior to plaintiff's accident, snow and freezing rain had begun to fall at around 2 A.M., ending at 4 P.M., approximately fifteen hours before the accident. The storm produced approximately 2 inches of precipitation. National Climatic Data Center's weather reports for the time period indicated that the average temperature on February 14 was 23 degrees, and that at no

time between Feb. 14 and plaintiff's accident did the temperature rise above 30 degrees.

A Transit Authority worker testified at a deposition, as to the snow removal process. This worker was assigned to clean various stations within the city, and he has occasionally been assigned to the stairway in question. Although his signature reveals that he was assigned to this stairway at 7 A.M. on the day of the accident, he has no specific recollection of providing service in that area. He testified that there was a regular person assigned to the 86th Street Station to remove snow and ice from the steps, and that the station was equipped with a shovel, pick, salt, and sand for snow and ice removal. The station also employed a 24 hour clerk. At least six Transit Authority employees signed the 86th Street Station Time Control log, acknowledging their presence at the station at different times between Feb. 14, 1:00 P.M., and Feb. 15, 6:30 A.M.

Discussion

Defendants argue that plaintiff's complaint should be dismissed because the defendants did not have actual or constructive notice of a dangerous condition, and because the condition did not exist for a reasonable enough time to remedy the dangerous condition.

"The proponent of a summary 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 N.Y.2d 851, 853, 476 N.E.2d 642, 643, 487 N.Y.S.2d 316 (1985). In a slip and fall case, where the defendant has not created the hazardous condition, the initial burden is on the moving defendant to establish the absence of actual or constructive notice. *See South v. K-Mart Corp.*, 24 A.d.3d, 807 N.Y.S.2d 133 (2d Dept 2005). Once defendant has made out a prima facie case, the burden then falls upon the non-

movant to establish a material issue of fact with respect to notice. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595, 596 (1980).

Constructive notice is found where the defect is visible and apparent, and the condition has been there for so long that the defendant is presumed to have seen it, or to have been negligent in failing to see it. *Gordon v. Am. Museum of Natural History*, 67 N.Y.2d 836, 492 N.E.2d 774, 501 N.Y.S.2d 646 (1986).

The Court has doubts as to whether defendants have met their burden of establishing the absence of actual or constructive notice. Defendants submitted the testimony of only one transit employee, and he had no specific recollection of cleaning the area on the day of the accident. *See Polgar v. Syracuse Univ.*, 225 A.D. 780, 680 N.Y.S.2d 132 (3d Dept 1998) (affirming denial of summary judgment, where defendant's employee who was assigned to maintain the subject area had no specific recollection of working on that area); *Maholland v. Schindler Elevator Corp.*, 2009 WL 212541 (Sup. Ct. N.Y. Cty. 2009) (finding that defendant did not establish a prima facie case showing the absence of notice, where testifying maintenance employees could not recall making repairs). Moreover, his testimony suggests that there was a transit employee manning the station at all times.

Nevertheless, even assuming defendants have established a prima facie case, plaintiff has in response raised material issues of fact as to whether defendants had actual or constructive notice of the dangerous condition. The snow and freezing rain began on the previous day, and stopped approximately fifteen hours before the accident. The temperature did not rise above thirty degrees during that time period, making it highly unlikely that plaintiff slipped on newly formed ice. A jury could thus reasonably conclude that the ice on the stairs froze the previous day,

creating a dangerous condition more than fifteen hours prior to the accident. *Compare Torri v. Big V of Kingston, Inc.*, 147 A.D.2d 743, 744, 537 N.Y.S.2d 629 (3d Dept 1990) (finding insufficient evidence of constructive notice, where "partially frozen" condition of spilled orange juice at supermarket indicated that the substance had not been there for very long). Other courts have denied summary judgment where precipitation has ceased prior to the accident, a significant amount of time elapsed between cessation and the accident, and the temperature was consistently below freezing. *Rivas v. N.Y.C. Housing Auth.*, 261 A.D.2d 148, 689 N.Y.S.2d 483, 484 (1st Dept 1999) (finding material issues of fact where the last accumulated snowfall took place five to six days before the accident, and the temperatures were consistently freezing for three days prior); *Brown v. Haylor, Freyer & Coon, Inc.*, 2009 WL 614483, * 2 (3d Dept 2009) (holding that plaintiff raised material issues of fact where last snowfall ceased at least 16 hours before plaintiff's fall, and the temperature did not rise above freezing for at least three days prior to the accident). *Compare Laster v. Port Auth. of N.Y. and N.J.*, 251 A.D.2d 204, 205, 676 N.Y.S.2d 539, 540 (1st Dept 1998) (finding no basis to impute constructive notice, where plaintiff testified that it was snowing during and just prior to the accident). In addition to the transit employee, whose signature is on the time log, there was a 24 hour clerk at the station, and six employees were present at the subject area at different times in a 24 hour period. A jury could reasonably conclude that the presence of these employees established actual or constructive notice of the dangerous condition, for a reasonable time prior to the accident. A jury may also reasonably conclude that these employees had an opportunity to observe and rectify the condition.

Defendant relies on *Valentine v. City of New York*, to support its position that it did not have sufficient time to remedy the condition. 86 A.D.2d 381, 449 N.Y.S.2d 991 (1st Dept 1982),

affirmed 57 N.Y.2d 932, 443 N.E.2d 488 (1982). The Court agrees with plaintiff that his situation is distinguishable from the instant case.

Valentine did not rely on a theory of notice in granting summary judgment. Rather, the court held that a reasonable amount of time had not elapsed, between cessation of the storm and plaintiff's accident, so as to rectify the condition. *Id.* at 381-82. The case arose out of the December 16, 1973 ice storm, one of the city's worst in fifty years. *Id.* at 382. The storm continued until midnight December 17, and afterwards the entire city was covered with ice "like a skating pond." *Id.* Approximately 30 1/4 hours following the end of the storm, plaintiff slipped and fell on an icy sidewalk in front of a residential building. *Id.* The Court held that, where the City was charged with making the entire city's streets safe after one of its worst snow storms, and the temperature was below freezing for the relevant time period, that it was unreasonable and unrealistic to find it liable for failing to clear the ice and snow from the sidewalk. *Id.* at 382-83. *See also Espinell v. Dickson*, 57 A.D.3d 252, 869 N.Y.S.2d 42 (1st Dept 2008).

In the instant case, approximately fifteen hours elapsed between the last snowfall and plaintiff's fall, which is less time than the thirty hours in *Valentine*. However, the First Department more recently reiterated that *Valentine* did not set a fixed legal standard for absolving a municipality of liability following a snowstorm. *Crichton v. Pitney, Hardin, Kipp & Szuch*, 225 A.D.2d 155, 679 N.Y.S.2d 392, 393-94 (1st Dept 1998). Rather, "reasonableness will usually require a factual evaluation of the several factors impacting on the City's actual ability, given physical and climatic conditions, and its capital and labor resources, to have cleared the location of ice and snow." *Id.* at 155-56, 679 N.Y.S.2d at 393-94. *See also Murdock v. City of New York*, 272 A.D.2d 249, 250, 708 N.Y.S.2d 89 (1st Dept 2000).

This Court cannot say as a matter of law that defendants did not have a reasonable amount of time to correct the allegedly dangerous condition that caused plaintiff's injuries. The accident occurred after only two inches of precipitation had accumulated, rather than after one of the City's worst snow and ice storms. Moreover, defendants' responsibility extends to a finite number of subway stations, rather than to the entire City's streets and sidewalks. Unlike the residential sidewalk where the *Valentine* plaintiff fell, the location of plaintiff's fall is a commonly used area exclusively under defendants' control. *See Kozak v. Broadway Joe's*, 296 A.D.2d 683, 745 N.Y.S.2d 139 (3d Dept 2002) (noting that defendant assumed all control and responsibility for maintenance of the area). Moreover, unlike the circumstances in *Valentine*, the subway station was manned at all times, and equipment for snow and ice removal were located on the premises. Given these factors, there is a triable issue of fact as to whether defendants had a reasonable amount of time to clean any ice and snow from the subway stairs.

Accordingly, defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 24, 2009

ENTER:

Harold B. Beeler, JSC

HAROLD BEELER
J.S.C.