

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

JULIO ALICEA,

Plaintiff,

-against-

THE CITY OF NEW YORK MANHATTAN BRONX
SURFACE TRANSIT OPERATING AUTHORITY
(MABSTOA) AND THE NEW YORK CITY TRANSIT
AUTHORITY,

Defendants.

NOTICE OF MOTION

03TT006941

Index No. 20625-2003

HON. ALEXANDER HUNTER

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COUNSELORS:

Upon the affirmation of RALPH JANZEN, dated April 30, 2008, and upon the exhibits annexed thereto, and upon all the pleadings and proceedings heretofore had herein, the City of New York will move this Court in front of Hon. Alexander Hunter, Part 23 of the Supreme Court of the State of New York, County of the Bronx, located at 851 Grand Concourse, Bronx, New York, on May 26, 2009, at 9:30 in the forenoon of that day or as soon thereafter as counsel can be heard, _____ for an Order

- (1) entering judgment in favor of the City of New York as a matter of law as plaintiff failed to establish a prima facie case; and alternatively
- (2) setting aside the verdict and ordering a new trial; and
- (3) staying the entry of judgment until this Court has decided this motion; and
- (4) granting such other and further relief as the Court deems just and proper.

PLEASE TAKE NOTICE that answering papers are to be served upon the undersigned at least seven (7) days prior to the return date of this motion pursuant to CPLR § 2214(b).

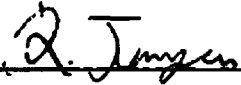
The above-entitled action is for personal injury.

Dated: Bronx, New York
April 30, 2009

Yours, etc.,

MICHAEL A. CARDOZO, ESQ.
CORPORATION COUNSEL

By: Ralph Janzen
Senior Counsel
198 East 161st Street
Bronx, NY 10451



TO:

Law Offices of William A. Gallina, Esq.
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1180 Morris Park Avenue
Bronx, NY 10461
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130 LIVINGSTON STREET -11TH FL
BROOKLYN, N.Y. 11201-5106

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

----- X

JULIO ALICEA,

Plaintiff,

AFFIRMATION IN SUPPORT

-against-

THE CITY OF NEW YORK MANHATTAN BRONX
SURFACE TRANSIT OPERATING AUTHORITY
(MABSTOA) AND THE NEW YORK CITY TRANSIT
AUTHORITY,

Defendants.

----- X

Ralph Janzen, an attorney duly admitted to practice in the State of New York and an Assistant Corporation Counsel of the City of New York, affirms the truth of the following under the penalties of perjury pursuant to Rule 2106 CPLR, upon information and belief, based on the records of the Office of the Corporation Counsel.

1. This affirmation is submitted on behalf of the City of New York in support of its motion for an order (1) entering judgment in favor of the City of New York as a matter of law as plaintiff failed to establish a prima facie case; and alternatively(2) setting aside the verdict and ordering a new trial; and (3) staying the entry of judgment until this Court has decided this motion; and (4) granting such other and further relief as the Court deems just and proper.

2. Although this motion is addressed to the specific points mentioned herein, the City does not waive any exceptions or points of error not mentioned herein that were raised at the trial and hereby incorporate same by reference.

3. This is an action for personal injuries allegedly sustained by plaintiff at on March 7, 2003, when plaintiff exited a bus and slipped on snow in the roadway. Plaintiff alleges that the City was negligent in failing to clear the roadway and that the Transit Authority failed to provide plaintiff a safe place to exit the bus. The jury reached a verdict on April 1, 2009; the jury found the City 75% responsible and the Transit Authority 25% responsible, awarding approximately \$180,000 past pain and suffering, \$780,000 future pain and suffering, and \$90,000 in medical expenses.

4. On April 1, 2009, the Court indicated that it would provide the parties with a schedule for written post-trial motions. On April 29, 2009, Assistant Corporation Counsel Steven Foyer contacted the Court to follow-up on the scheduling of the post-trial motion and the Court orally indicated that the motion needed to be served by May 1, 2009. Thereafter, Assistant Corporation Counsel Steven Foyer was unavailable to write the motion on April 30, 2009 and May 1, 2009 due to a family emergency. Moreover, the court reporter indicated that the trial transcript was unavailable and she could not state when the transcript would be completed. Accordingly, I have written the post-trial motion based upon records maintained by the Law Department pursuant to the Court's schedule.

TRIAL TESTIMONY

5. Meteorologist James Bria testified that preceding the accident, it rained and temperatures reached the 50s. On March 6, 2003 (the day before the accident), there was no snow or ice on the ground at midnight – at approximately 5:00 a.m., it began precipitating. It precipitated approximately four inches on March 6, 2003, from approximately 5:00 a.m. to 6:00 p.m. It rained, then a mixture of rain and sleet fell, then a mixture of freezing rain and sleet fell, and finally it began snowing. Approximately four inches of snow and ice covered the ground by 9:00 a.m. on March 7, 2003.

6. Department of Sanitation Supervisor Joseph Iocovello testified that when it began snowing on March 6, 2003, the Department of Sanitation began plowing and salting New York City streets. The accident location was plowed four times and salted five times before the accident (at 9:00 a.m. on March 7, 2003).

7. Plaintiff testified that he left work at approximately 8:00 a.m. on March 7, 2003, and took the BX 36 bus to East 174 Street. At trial plaintiff claimed that it was not snowing when he left work, but he was impeached with deposition testimony: plaintiff had previously testified that it was snowing. The bus pulled into the bus stop at East 174 Street at an angle, and the rear of the bus was a distance from the curb. Plaintiff exited the back of the bus, stepped onto the street, and slipped on snow. Plaintiff testified that everything was covered by fresh snow that morning. Plaintiff also claimed that there was ice under the snow. Plaintiff fractured his ankle and had surgery to have hardware inserted. He then had two additional surgeries to have the hardware removed. Plaintiff claimed that he now has problems placing weight on his leg and walks with a limp.

8. Plaintiff also called orthopedic surgeon Stuart Remer as a witness. Doctor Remer described the ankle fracture and subsequent surgeries. Doctor Remer further testified that based upon an examination in 2009, the ankle had arthritis, loss of range in motion, swelling, and tenderness. The doctor also stated that plaintiff had problems ambulating and might need ankle fusion or replacement.

POINT I

THIS COURT SHOULD GRANT THE CITY OF NEW YORK JUDGMENT AS A MATTER OF LAW.

9. As discussed below, this Court should dismiss the complaint against the City of New York since plaintiff failed to establish a prima facie case.

A. A Reasonable Amount Of Time Had Not Elapsed From The End Of The Snow Storm To Hold The City Liable.

10. It is well settled that a municipality is not liable for injuries sustained by a plaintiff involved in an accident on the roadway unless the condition was both dangerous and unusual, and the municipality had a reasonable amount of time after cessation of the storm to remedy it. Valentine v. City of New York, 86 A.D.2d 381 (1st Dep't 1982) aff'd 57 N.Y.2d 932 (1983); Hamil v. City of New York, 78 A.D.2d 792 (1st Dep't 1980), aff'd 52 N.Y.2d 1045 (1981). Additionally, plaintiff must show more than the presence of snow or ice at the time of accident, but must show that the City had notice of a dangerous condition. Simmons v. Metropolitan Life Insurance Company, 84 N.Y.2d 972 (1994); Grillo v. New York City Transit Authority, 214 A.D.2d 648 (2d Dep't 1995), app. den. 87 N.Y.2d 801 (1995); McGuire v. City of New York, 24 A.D.2d 496 (2d Dep't 1965), aff'd 18 N.Y.2d 880 (1966); see also Gaeta v. City of New York, 213 A.D.2d 509 (2d Dep't 1995) (applying Simmons rule to the City of New York).

11. In the leading case on the issue, the Appellate Division, First Department held that:

[t]he rule is well established that a municipality is not liable in negligence for injuries sustained by a pedestrian who slips and falls on an icy sidewalk unless a reasonable time has elapsed between the storm giving rise to the icy condition and occurrence of the accident.

Valentine, 86 A.D.2d at 383. In determining whether the City's actions were reasonable, the Court explicitly held that "[r]esponsibility for ice conditions arises, at the most, only after the lapse of a reasonable time for taking protective measures, and never while a storm is still in progress." Id. at 384 (quoting Valentine v. State of New York, 197 Misc. 972, 975 aff'd, 277 App. Div. 1069). Furthermore, the Valentine Court acknowledged that the City is responsible for snow and ice removal over 6,401 miles of streets, and 11,420 miles of sidewalk, Valentine 86 A.D.2d at 382, and

may reasonably prioritize its snow removal efforts, deferring sidewalks until after higher priorities have been accomplished.

[T]here is a necessary rationing of the working force and certain priorities... ahead of sidewalks come the roadways, which must be cleared as immediately as possible for the emergency traffic of police, fire apparatus and ambulances and for essential traffic ... ahead of sidewalks is the removal of snow from various terminals in the city and market areas where food and fuel are delivered.

Id. at 386-387.

12. In Valentine, a storm (that ended around midnight of December 17, 1973) deposited 2 to 3 inches of snow, sleet, and freezing rain on the streets and sidewalks of Manhattan. Id. at 382. The Court emphasized the special difficulties presented when precipitation fall as ice and freezing rain, and does not accumulate as snow:

Although often producing a much smaller amount of accumulation than the snow storms involved in the case city, *supra*, a severe ice storm such as the one here, by coating the ground with a layer of ice, can create the same hazardous, icy condition of a much heavier snowfall, and pose problems of street and sidewalk clearance just as serious.... Ice is even more difficult to remove than snow.

The Court reversed a finding of negligence against the City, concluding that:

the interval of some 30 hours between the storm's cessation and the plaintiff's fall was insufficient, as a matter of law, to charge the city with the duty of clearing the sidewalk where plaintiff fell. (emphasis supplied).

Id. at 384. The Court further noted that it knew of no reported case where the City of New York had been found liable for an accident occurring less than 30 hours after the cessation of snowfall. Id. at 388.

13. Here, plaintiff fell approximately 15 hours after the precipitation ended.

A municipality need not take any action at all to remove ice caused by a freezing rain but may, instead, await a thaw. This frozen surface it is **practically impossible to remove** until a thaw comes which remedies the evil. **The municipality is not negligent for awaiting that result..** The emergency is one which is common to every street in the village or city, and which the [municipality] is **powerless to combat**.

Valentine, supra (emphasis added).

14. After snowstorms, courts have consistently allowed the City an extended length of time to clear snow and ice. Valentine, supra; see also Weisfeld v. City of New York, 282 App Div 739 (City not liable for accidents occurring 120 hours after a snowstorm); Rapoport v. City of New York, 281 App Div 33 (90 hours after a snowstorm); Thompson v. Rose, 283 App Div 735 (84 hours after a snowstorm); Ganek v. City of New York, 286 App Div 1036 (80 hours after a snowstorm); Eckert v. City of New York, 211 App Div 474 (61 hours after a snowstorm); Yonki v. City of New York, 276 App Div 407 (60 hours after a snowstorm).

15. In addition, the Court of Appeals has dismissed cases against the City where plaintiffs fell five days (see Kirsch v. City of New York, 289 NY 684) and eight days (see Reutlinger v. City of New York, 281 NY 592) after a storm that dropped 18 inches of snow.

16. In the case at bar, the City cannot be held liable. The weather records established that the accident happened approximately 15 hours after the precipitation ended – plaintiff further testified that it was still snowing at 8:00 a.m. As a matter of law, there was an insufficient amount of time for the City to remove all snow and ice from its roadways.

B. The City Acted Reasonably As A Matter of Law.

17. The Department of Sanitation plowed and salted the accident location four times and salted five times before the accident. As a matter of law, the City acted reasonably in response to the snow storm, and the complaint should be dismissed. (at 9:00 a.m. on March 7, 2003).

C. Plaintiff Cannot Prove The Existence Of A Dangerous And Unusual Condition That Was In Anyway Extraordinary To Those Conditions Commonly Associated With Winter Weather In New York

18. In addition to proving that the period of time elapsed from the cessation of the storm was unreasonable, plaintiff must also prove that the City of New York was on notice of the particular condition that was both dangerous and unusual.

19. In Simmons v. Metropolitan Life Insurance Company, the Court of Appeals specifically declined to find that the occurrence of a snowstorm is, in and of itself, notice of dangerous snow or ice conditions. 84 N.Y.2d 972 (1994). Moreover, plaintiff cannot prevail because the City did not receive notice of the alleged dangerous condition complained of by plaintiff in the instant action, given that over 6,401 miles of streets and 11,420 miles of sidewalks falls under the jurisdiction of the City of New York. In Simmons v. Metropolitan Life Insurance Co., 84 N.Y.2d 972 (1994), the Court of Appeals affirmed the First Department's dismissal holding that although it snowed nine days before the date of the accident, there was no proof that defendant had actual or constructive notice of the icy condition because there was no evidence introduced linking the icy condition to the particular snowstorm. See Grillo v. New York City Transit Authority, 214 A.D.2d 648 (2d Dep't 1995).

20. As a matter of law, the notice must be for the particular patch of snow or ice that caused the fall. Grillo, 214 A.D.2d 648. The Grillo Court found that evidence of snowfall nine days prior to an accident was insufficient to establish notice for a patch of snow or ice on a public sidewalk which had caused plaintiff to fall. The Court held that a plaintiff must present particularized evidence to

satisfy the notice requirement; *the mere occurrence of a snowstorm prior to the accident date is not enough*. A plaintiff in this type of case must establish when the patch of ice was created and prove notice on the part of the defendant. Plaintiff cannot present any evidence that the City had actual or constructive notice of the condition that caused plaintiff to fall, and the complaint must therefore be dismissed. See Abaya v. City of New York, 683 N.Y.S.2d 263 (1st Dep't 1999); Robles v. City of New York, 679 N.Y.S.2d 340 (2d Dep't 1998); Epstein v. City of New York, 250 A.D.2d 547 (1st Dep't 1998). Urena v. New York City Tr. Auth., 248 A.D.2d 377 (2d Dep't 1998); Fuks v. New York City Tr. Auth., 243 A.D.2d 678 (2d Dep't 1997); Gonzalez v. City of New York, 168 A.D.2d 541 (2d Dep't 1990); Silver v. Brodsky, 112 A.D.2d 213 (2d Dep't 1985).

21. Any claim that defendant City may have had actual or constructive notice of this particular ice patch would only be conjecture and insufficient to defeat a motion for dismissal. In Robles, supra; the Court dismissed a similar case, holding that:

The plaintiff's allegation that the respondents had constructive notice of the ice patch upon which he allegedly fell or that there was a reasonably ample amount of time to remedy the situation is based upon speculation. Accordingly, the court properly granted summary judgment to the respondents.

Id.; see also Simmons, supra; Tashbook v. Kaplan, 250 A.D.2d 756 (2d Dep't 1998); Bertman v. Bd. of Mgrs. Of Omni Ct. Condominium I, 233 A.D.2d 283 (2d Dep't 1996); Grillo, supra.; Bernstein v. City of New York, 69 N.Y.2d 1020 (1987); Spett v. Monroe Bldg. & Mfg. Corp., 19 N.Y.2d 203 (1967). "The plaintiff's claim that she slipped on an old patch of ice is based on pure speculation." Porcari v. S.E.M. Mgmt. Corp., 184 A.D.2d 556 (2d Dep't 1992). Here, plaintiff has presented insufficient evidence proving that the City had notice of this particular condition, and the complaint should be dismissed.

22. As pointed out in the above-cited cases, the Courts have consistently dismissed claims where plaintiffs have failed to present particularized evidence of actual or constructive notice of an ice patch. In Otero v. City of New York, 248 A.D.2d 689 (2d Dep't 1998), the Second Department held that:

Although there was some evidence introduced that an icy patch may have been present for some 48 hours prior to the accident, there was no proof that the City had actual notice that it existed. Nor was there sufficient proof that the City possessed constructive notice of the ice condition. The fact that the Sanitation Department may have conducted road inspections and performed spot-salting in the sanitation district which encompassed the accident site does not establish that the City had any constructive notice of this particular ice condition.

Id. Similarly, the First Department has held plaintiffs to just as high a standard in proving notice of an icy condition:

"We reject plaintiff's characterization of the meteorological evidence as showing only 'trace amounts' of snow that could not have caused him to fall, and it is pure speculation for [plaintiff] to argue that he fell on 'old' snow negligently removed, rather than on a fresh accumulation (see Simmons v Metropolitan Life Ins. Co., 84 N.Y.2d 972)."

Abaya, supra. [emphasis added]; see also Epstein, supra.; Soboleva v. Gojcaj, 238 A.D.2d 170 (1st Dep't 1997); Davis v. City of New York, 679 N.Y.S.2d 423 (2d Dep't 1998). Courts have found claims of "old snow" that conflict with weather reports "incredible as a matter of law." Cruz v. The Port Authority of New York and New Jersey, 243 A.D.2d 251 (1st Dep't 1997), citing Loughlin v. City of New York, 186 A.D.2d 176 (2d Dep't 1992). This type of claim cannot rest upon pure speculation. Gonzalez v. City of New York, 168 A.D.2d 541 (2d Dep't 1990); Porcari, supra.; Laster v. Port Authority of New York and New Jersey, 676 N.Y.S.2d 539, lv. denied, 92 N.Y.2d

812 (1st Dep't 1998). In the case at bar, based upon the weather reports submitted, plaintiff cannot show that the City had actual or constructive notice of the alleged condition, and the complaint and any and all cross-claims should be dismissed on that basis.

23. Furthermore, plaintiff must also show that the condition was both dangerous and unusual. Hamil v. City of New York, 78 A.D.2d at 792. This has been the law in this state for over eighty years, and was explained by the Court of Appeals in the case of Williams v. City of New York: "In order to render a municipality liable in this class of cases the interference with travel must be, Dangerous, Unusual or exceptional: that is to say different in character from conditions ordinarily and generally brought about by the winter weather prevalent in the given locality."

214 N.Y. 259, 263-264 (1915). The Court explained this strict requirement by pointing out that winter weather is a hazard New Yorkers are accustomed to, and equipped to handle.

The danger arising from the slipperiness of ice or snow ... is one which is familiar to everybody residing in our climate and which everyone is exposed to who has occasion to traverse the streets of cities and villages in the winter season.

Id. at 264. Following this rule, Courts have declined to impose liability where the condition was merely that which was "naturally to be expected during the winter season in our climate." Gaffney v. City of New York, 218 N.Y. 228 (1916). This rule continues to be followed to the present day. See Valentine v. City of New York, 86 A.D.2d at 381; Hamill v. City of New York, 78 A.D.2d at 792; McGuire v. City of New York, 24 A.D.2d at 496.

24. Based on the foregoing, plaintiff cannot prove the existence of a dangerous and unusual condition that was in anyway extraordinary to those conditions commonly associated with winter weather in New York.

D. Plaintiff Cannot Defeat Dismissal By Alleging That He Slipped On Old Ice.

25. First, the weather records and testimony establish that there was no old snow or ice on the ground on March 7, 2003. Furthermore, plaintiff would have to step on the new snow and freezing rain just to reach any alleged old ice. An allegation that old ice, as opposed to freshly fallen snow, or freshly created ice caused the accident is speculative and is not permitted by the Second Department. See, e.g., Bernstein v. City of New York, 69 NY2d 1020, 1022 (1987) (holding it would be speculative to conclude that an ice patch resulted from a previous snowfall and not the latest snowfall); Nazario v. Chavez, 306 AD2d 391, 391-92 (2d Dep't 2003) (allegation that plaintiff slipped on preexisting ice and not fresh snow was speculative and could not create an issue of fact warranting denial of summary judgment); Smith v. 1327 Jefferson Realty, Inc., 300 AD2d 466, 467 (2d Dep't 2002) (where plaintiff slipped on an icy snow-covered sidewalk, an allegation that the accident resulted from a prior snowfall was purely speculative and could not defeat summary judgment); Pelliccio v. TCW Realty Fund VIA Holding Co., 291 AD2d 388, 388 (2d Dep't 2002) ("The injured plaintiff's assertions that she must have slipped on old ice because snow and ice removal was undertaken by the defendants the day before her fall is mere speculation and insufficient to raise an issue of fact as to the defendants' liability."); Jones v. Housing Auth., 298 A.D.2d 500, 500 (2d Dep't 2002) ("The plaintiff's contention that she injured herself when she slipped on ice from a prior storm is based upon pure speculation and thus is insufficient to raise a triable issue of fact."); Chapman v. City of New York, 268 AD2d 498, 498 (2d Dep't 2000) ("The injured plaintiff's assertion that the hazardous condition was a result of "old" snow and ice is nothing more than mere conjecture and speculation.").

POINT II

**ALTERNATIVELY, THIS COURT SHOULD
GRANT A NEW TRIAL.**

(1)

The Verdict is Against the Weight of the Evidence

26. **Alternatively, for the reasons discussed in Point I above, this court should grant a new trial as the verdict is against the weight of the evidence and as discussed below, the award deviates materially from what is reasonable compensation.**

27. **Additionally, the apportionment of liability is against the weight of evidence; at trial plaintiff testified that he did not hold onto anything while exiting the bus even though plaintiff saw that he was stepping onto snow. Furthermore, given that the City plowed and salted the area numerous times, the 75% apportionment is unreasonable as a matter of law.**

28. **Finally, the City requests a new trial since the damages award is excessive.**

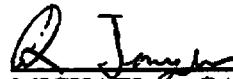
CONCLUSION

In sum, it is respectfully requested that this Court (1) enter judgment in favor of the City of New York as a matter of law as plaintiff failed to establish a prima facie case; and alternatively (2) set aside the verdict and order a new trial; and (3) stay the entry of judgment until this Court has decided this motion; and (4) grant such other and further relief as the Court deems just and proper.

WHEREFORE, it is respectfully requested that this Court grant the motion of the City of New York and order such other and further relief as to this Court seems just and proper.

Dated: Bronx, New York
 April 30, 2009

Respectfully submitted,



MICHAEL A. CARDOZO, ESQ.
CORPORATION COUNSEL
by Ralph Janzen
Senior Counsel
New York City Law Department
198 East 161 Street
Bronx, NY 10451

SUPREME COURT OF THE STATE OF NEW YORK
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----- X

REPLY AFFIRMATION

INDEX No. 20625-2003

HON. ALEXANDER HUNTER

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Steven Foyer, an attorney duly admitted to practice in the State of New York and an Assistant Corporation Counsel of the City of New York, affirms the truth of the following under the penalties of perjury pursuant to Rule 2106 CPLR, upon information and belief, based on the records of the Office of the Corporation Counsel and having tried the above matter before this Court.

1. This affirmation is submitted on behalf of the City of New York in further support of its motion for an order (1) entering judgment in favor of the City of New York as a matter of law as plaintiff failed to establish a prima facie case; and alternatively (2) setting aside the verdict and ordering a new trial; and (3) staying the entry of judgment until this Court has decided this motion; and (4) granting such other and further relief as the Court deems just and proper and in response to plaintiff's cross motion. This affirmation is also submitted in opposition to plaintiff's cross-motion to set aside the jury's award for past pain and suffering.

2. In a nutshell, the City of New York's motion was based on four legal arguments: (1) the "Valentine" argument that the City did not have a reasonable amount of time to respond to the conditions since; according to the meteorologist the storm had ended the evening before the accident and according to the plaintiff it was still snowing lightly on the morning of the accident; (2) the City

acted reasonably as a matter of law; (3) the conditions where plaintiff fell were not unusual and dangerous compared to the existing conditions elsewhere in the Bronx at the time of the accident and (4) the "old ice" argument is insufficient to resurrect plaintiff's claims. The four arguments are basically unassailable. The arguments asserted by plaintiff in his cross motion arguments regarding these four grounds for dismissal should be given short shrift.

3. First, Mr. Bria, the meteorologist, establishes a 3.5 inch snow storm within 15 hours of the accident. See trial testimony of Mr. Bria attached as exhibit A (trial pages 376 and 379). Plaintiff has it snowing lightly at the time of the accident (see exhibit A of the co-defendant's motion at pages 115 and 116). Valentine v City of New York, 86 A.D.2d 381 (1st Dep't 1982) affd. 57 N.Y. 2d 932 (1983) (certainly gives the City more than 15 hours to respond to a storm). Second, plaintiff implicitly concedes the City acted reasonably by stating in his motion papers "for secondary rout 10 (which encompassed the accident location), on March 5 and in the early hours of March 6, 2003, City was removing piles of snow and addressing icy conditions, as needed." Third, plaintiff's testimony establishes that the conditions during his commute to work, walk to the subway and ride on the bus in route to the accident location were the same as where he fell (see trial pages 85-88 and 94 -97). Thus, given the snow storm, there was nothing about the accident location to make it any more dangerous or unusual than other areas of the Bronx that morning. Fourth, is the "old ice" theory discussed below.

4. The essence of plaintiff's theory against the City at trial and in his cross-motion is that plaintiff fell on old ice which originated from a storm several weeks earlier on February 16-19, 2003. The record is completely devoid of any evidence to support that claim. This argument is insufficient to avoid dismissal in light of the testimony by meteorologist James Bria. Mr. Bria, the meteorologist called by the City, was the sole meteorologist to testify at trial. According to him, the storm started

at about 7:30 am on March 6, 2003, and continued to 6:00 pm (trial page 374). The accumulation was about three and a half inches (trial pages 379-380). Mr. Bria was unequivocal in his testimony that any snow or ice cover had washed away by the time plaintiff had his accident. Mr. Bria testified that on March 5 an additional storm occurred in the form of only a rainfall (trial page 374). Additionally, the temperature was in the 50's (trial page 374). Given the combination of rain and temperature, any snow or ice cover would have been washed away by the end of the day on March 5 (trial page 375). Plaintiff failed to call a meteorologist or present any evidence contradicting the fact that no snow or ice remained on the ground beginning two days before plaintiff's accident. Plaintiff tried to circumvent Mr. Bria's testimony by positing the theory that the City Department of Sanitation witness, Mr. Iocovello, contradicts Mr. Bria. Attached as exhibit B is Mr. Iocovello's trial testimony. The argument regarding a contradiction is nonsense and in fact Mr. Iocovello's testimony dovetails with the expert. Mr. Iocovello testified that a storm occurred in February of 2003. The Sanitation Department's response to the February storm ended on March 1 (trial page 325). On March 3, they had an icy condition that was "not major". The rain storm the meteorologist noted occurred two days later on March 5. The Sanitation Department next went out on March 6, 2003, in response to the storm that occurred that day (trial testimony page 325). Since "old snow" argument is unsupported by any evidence, it must fail.

5. Alternatively, the City moves for a new trial. Not only is the liability verdict against the weight of evidence, but the motion papers submitted co-defendant Transit Authority joins in the City's argument that the jury's award for the ankle injury was excessive. Mr. Philip Coleman's papers cite 16 cases of recent vintage in the First and Second Departments which are more than ample precedent for his argument that a total pain and suffering award, past and future, should amount to no more than \$425,000.00. It is not necessary to repeat those arguments. Accordingly, the

entire award damages award is excessive and plaintiff is not entitled to a new trial solely on past damages.

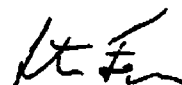
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WHEREFORE, it is respectfully requested that this Court grant the motion of the City of New York and order such other and further relief as to this Court seems just and proper.

Dated: Bronx, New York
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Respectfully submitted,



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