

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 27

Willis Cunningham

Index No.

29434/2017E

-against-

Hon. JULIA I. RODRIGUEZ

CVS Pharmacy, Inc. et al.

Justice Supreme Court

E#003

The following papers numbered 1 to \_\_\_\_\_ were read on this motion (Seq. No. 3)  
for SJD noticed on July 29, 2020.

|  |        |
|--|--------|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | No(s). |
| Answering Affidavit and Exhibits   | No(s). |
| Replying Affidavit and Exhibits  | No(s). |

As further set forth in Decision and Order annexed hereto, motion by Defendant CVS for summary judgment pursuant to CPLR 3212 is **granted**, and therefore it is

ORDERED that the complaint and all cross-claims are dismissed as to Defendant CVS ALBANY, LLC s/h/a CVS PHARMACY, INC.

The Clerk is directed to enter Judgment.

Motion is Respectfully Referred to Justice:

Dated:

Dated:

12/4/2020

Hon.

2/10/20

JULIA I. RODRIGUEZ, J.S.C.

1. CHECK ONE..... ☒ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
- ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT



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

-----X Index No. 29434/2017E

Willis Cunningham,  
Plaintiff,

-against-

## DECISION &amp; ORDER

CVS Pharmacy, Inc. and Kathryn Hangarter,  
Defendants.Present:  
Hon. Julia I. Rodriguez  
Supreme Court Justice-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in review of defendants respective motions for summary judgment, dismissing the complaint.

| <u>Papers Submitted</u>                            | <u>Numbered</u> |
|--|-----------------|
| CVS Notice of Motion, Affirmation & Exhibits       | 1               |
| Pl. Affirmation in Opposition & Exhibits           | 2               |
| Co-Def. Affirmation in Partial Opposition          | 3               |
| Reply Affirmation                                  | 4               |
| Hangarter Notice of Motion, Affirmation & Exhibits | 5               |
| Pl. Affirmation in Opposition & Exhibits           | 6               |
| Reply Affirmation                                  | 7               |

In the instant action, plaintiff alleges he was injured on January 8, 2015, at approximately 8:00 a.m., when he slipped and fell on "black ice" in front of a CVS Pharmacy store located at 118-10 Queens Boulevard, Forest Hills, Queens, New York.

Defendant CVS Pharmacy, Inc. ("CVS") now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint and cross-claims of defendant Kathryn Hangarter on the grounds that: (1) there was a storm ~~was~~ in progress and (2) CVS did not contract with Hangarter or owe a duty to plaintiff.

Defendant Kathryn Hangarter moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross-claims asserted by CVS on the grounds that: (1) there was a storm in progress, (2) NYC Administrative Code Section 16-123(A) gives property owners and managers four hours to clean up after a storm ceases, (3) Hangarter had no actual or constructive notice of, and did not cause or create, the alleged dangerous condition and (4) Hangarter is an out-of-possession landlord with no obligation to maintain or repair the premises.

In support of summary judgment, CVS submitted, *inter alia*, the deposition testimony of plaintiff, Christian Zhagnay, and Kathryn Hangarter, the report of Forensic Weather Consultants, LLC, certified climatological records of the National Centers For Environmental Information,

and a lease/groundlease agreement between Kew Point Associates, L.P. and CVS for the subject premises.

At his deposition, plaintiff testified as follows: He is employed by the New York Transit Authority and, at the time of the accident, he was assigned to place signs in the windows of shuttle busses located at Union Turnpike/Queens Boulevard in Queens, NY. When plaintiff arrived at Union Turnpike/Queens Boulevard it was cold but not snowing or raining. As plaintiff was walking from the subway station to the shuttle buses on parked on Queens Boulevard, at about 8:00 a.m., he slipped and fell on black ice on the sidewalk of Queens Boulevard adjacent to a CVS Pharmacy store. There was no salt on the sidewalk where he fell. The sidewalk seemed wet from rainwater but not slippery. Plaintiff did not know when it last rained. He thought it had snowed a week before but there was no snow on the sidewalk or in the area around where he fell. Plaintiff did not see the ice that he slipped on before his accident. He “assumed that the sidewalk was wet just like the rest of the sidewalk was.” After he fell, plaintiff saw a “sheet of ice” leading up to the front entrances of the CVS, a nail salon, and a bakery. The ice was “clear” and “transparent;” it seemed as if the sidewalk was just wet. The ice was thin, clear, not dirty and not chipped. He could not have seen the ice if he had been standing directly above it. After the accident, plaintiff’s co-worker took photographs of the area where plaintiff fell using plaintiff’s cell phone. When presented with the photographs at his deposition, plaintiff initialed one of the photographs to show where he fell.

At his deposition, Christian Zhagnay testified as follows: On the date of plaintiff’s accident, he was the Shift Supervisor at the subject CVS Pharmacy store. Zhagnay was responsible for cleaning the sidewalk in front of the store in the morning of garbage and snow. On the day of the accident, Zhagnay arrived at the store at 6:55 a.m. and at 7:00 a.m. opened the store. He was the first employee to arrive at the store that day. He thought it was snowing at that time but he didn’t “really recall.” Within ten to fifteen minutes of opening the store, he went to the back of the store and got two shovels and salt. He then walked to the front of the store with the shovels and salt, put them behind the register, and helped a customer for 8 to 10 minutes. He then went outside and observed about an inch of snow on the sidewalk. He



shoveled the snow from the sidewalk areas around the store, beginning near the store's entrance. After he shoveled, he put salt down on the sidewalk, beginning with the sidewalk area near the store's entrance. The shoveling and salting process took about 30 minutes. About 40 minutes after he returned inside the store, a man that he believes was an MTA bus driver told him that he had fallen outside "in the back of the store." Zhagnay asked the man if he wanted to make a report and the man said "no." Zhagnay was unaware of anyone claiming that they fell on the sidewalk in front of the store that morning.

At her deposition, Kathryn Hangarter testified that she owned the subject property together with Kew Point Associates but did not know the extent of her ownership interest at the time of plaintiff's accident. Since June of 2015, she owns 12.5% of the property. She knows that CVS rents space at the location from Kew Point Associates but had no other information and no involvement with the lease. She is not involved with the management or operation of the property.

A Forensic Weather Investigation of the Weather and Ground Conditions for the period January 16-18, 2015 at 118-10 Queens Boulevard in Forest Hills, Queens, New York was certified by Consulting Meteorologists Dillon Turner and John Lombardo, and Certified Consulting Meteorologist Howard Altschule. To determine the weather conditions at the subject location at and around the time of plaintiff's accident, the meteorologists reviewed official weather records and climatological data including certified records of the National Centers for Environmental Information. After reviewing the official weather records and climatological data, as well as plaintiff's bill of particulars, plaintiff's deposition transcript, and the deposition transcript of Zhagnay, the meteorologists made the following conclusions:

1. No snow or ice was present on exposed, untreated, and undisturbed surfaces prior to the onset of a winter storm that affected the subject location on January 18, 2015. There was no precipitation at the subject location between January 13, 2015 to 6:00 a.m. on January 18, 2015.
2. A winter storm caused freezing rain, freezing drizzle, and rain to fall, with some occasional lulls, from approximately 6:10 a.m. through 9:44 p.m. on January 18, 2015 at and around the subject location.

3. At 6:44 a.m. on January 18, 2015, the National Weather Service in Upton, New York issued a "Special Weather Statement" which stated, "*Spotty freezing rain early this morning.*"

4. At 8:00 a.m. on January 18, light freezing rain was falling, ice was actively accumulating as a result of the winter storm that was still in progress, the air temperature was 34 degrees Fahrenheit, and the ground temperature was still below freezing. A coating of new ice/glaze less than 1/10th of an inch thick was present on unexposed untreated and undisturbed surfaces as a result of the ongoing freezing rain.

5. At 8:43 a.m. on January 18, 2015, the National Weather Service in Upton, New York issued a short fuse "Freezing Rain Advisory" that was in effect through 11 a.m. that day.

6. The Storm Events Database contained an entry for Northern Queens County, New York as a result of the winter storm that occurred on January 18, 2015. Within this entry, it stated, "*Freezing rain led to widespread motor vehicle accidents, including a 25-car pileup on the Cross Island Parkway in Queens, and numerous falls and injuries.*"

7. Freezing rain was falling and new ice was actively accumulating before, during, and beyond the time of the accident.

8. Because each drop of rain or drizzle freezes on contact with exposed, below freezing surfaces, the sidewalk where this accident occurred was extremely dangerous, slippery and icy even with trace amounts of freezing rain or freezing drizzle.

\* \* \* \* \*

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1<sup>st</sup> Dept. 1989).



Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

A landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while a storm is in progress, and does not commence until a reasonable time after the storm has ended. *Weinberger v. 52 Duane Assoc., LLC*, 102 A.D.3d 618, 959 N.Y.S.2d 154 (1<sup>st</sup> Dept. 2013). Here, the certified climatological data submitted by CVS and the report of plaintiff's meteorologists, which is consistent with plaintiff's own testimony and photos taken within 20 minutes of the accident are sufficient to establish, *prima facie*, that a storm was in progress at the time of plaintiff's accident. In opposition, plaintiff failed to raise a triable issue of fact. Notably, plaintiff did not submit any evidence, i.e., climatological data, expert reports, etc., to contradict the conclusions of ~~plaintiff's~~<sup>defendants'</sup> meteorologists. Contrary to plaintiff's contention, the fact that Zhagnay testified that he shoveled an inch of snow on the morning of the accident, when the weather reports and plaintiff's own photographs show that no snow was present, is likely attributable to a mistaken recollection as to what Zhagnay did on the day of plaintiff's accident, which occurred five years before the day Zhagnay testified.

Inasmuch as the storm in progress doctrine is applicable in this case, and precludes any liability on the part of either CVS or Kathryn Hangarter, the Court need not reach the parties' remaining arguments.

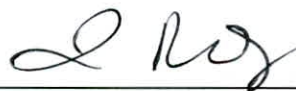
Based upon the foregoing, the motion for summary judgment brought by Defendant CVS Pharmacy Inc. is **granted**, and it is ORDERED that plaintiff's complaint and all cross-claims asserted against this defendant are dismissed. The motion for summary judgment brought by Defendant Kathryn Hangarter is **granted**, and it is ORDERED that plaintiff's complaint and all cross-claims asserted against this defendant are dismissed.

The Clerk is directed to enter judgment.

Dated: Bronx, New York

~~November~~, 2020

Dec. 4,



Hon. Julia I. Rodriguez, J.S.C.