STATE OF NEW YORK
SUPREME COURT
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MARGARET WALSH
SUPREME COURT JUSTICE

MARNE L. ONDERDONK
LAW CLERK

LAURA D'AGNESE
SECRETARY TO JUDGE

July 20, 2020

Thomas J. Johnson, Esq.
Bailey, Johnson & Peck, P.C.
Pine West Plaza 5 , Suite 507
Albany, New York 12205

LD 7/20/20

Re: ***Charles Duffy v. Rondout Properties Management, LLC, et al.***
Index No. 4139-18

Dear Mr. Johnson:

Enclosed please find the original *Decision/Order/Judgment* signed by Judge Walsh on July 17, 2020. Please file the original with the County Clerk and serve with notice of entry on all attorneys or parties pursuant to CPLR §2220. Thank you.

Very truly yours,

Laura D'Agnese

Laura D'Agnese
Secretary to Hon. Margaret Walsh
Supreme Court Justice

/ld
Enclosure

cc: w/enc.
Howard E. Shafran, Esq.
Shafran & Rock, PLLC
730 Broadway
Kingston, New York 12401

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

CHARLES DUFFY,

Plaintiff, **DECISION/ORDER/JUDGMENT**

Index No. 4139-18

-against-

RONDOUT PROPERTIES MANAGEMENT, LLC, THE BIRCHES AT ESOPUS, LLC, AND BIRCHEZ ASSOCIATES, LLC,

Defendants.

(Supreme Court, Ulster County, Trial Term)

(Hon. Margaret Walsh, Supreme Court Justice, Presiding)

APPEARANCES:

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Walsh, J.:

The Court held a non-jury trial on March 5 and 6, 2020 in Ulster County Supreme Court concerning whether the Defendants should be held liable for personal injuries allegedly sustained by the Plaintiff in a claimed slip and fall on property for which they are responsible. The Court makes the following findings of fact and conclusions of law based upon the credible evidence adduced at trial.

The Plaintiff, Mr. Duffy, who was 78 years old at the time of trial, resided at The Birches at Esopus from February 2012 until December 2017 and was a resident there at the time of the incident. The Birches at Esopus is an affordable senior housing complex owned by the Defendants, The Birches at Esopus, LLC, and Birchez Associates, LLC (collectively, "The Birches"). The Defendant Rondout Properties Management, LLC manages the property ("Rondout") for the Birches. Rondout employed Michael and Leslie Tierney to take care of the property; at all relevant times herein, the couple resided on-premises.

On December 17, 2016, Mr. Duffy was leaving his residence at The Birches shortly after 10 p.m. to retrieve his car and move it to the parking lot near his residence. Earlier, he had moved his vehicle and parked it elsewhere in accordance with the Defendants' directive so that snow that had accumulated earlier in the day could be cleared from the parking lot. To get to his car, Mr. Duffy had to traverse a concrete sidewalk from the entrance of the building where he resided. Mr. Duffy observed that the surface of the sidewalk appeared to be wet; he could not tell if the sidewalk was covered in ice or was wet. Nothing distracted him from walking - he was not using a phone or carrying bags

or looking away from his path, for example. After about ten steps on the sidewalk, Mr. Duffy lost his footing and fell backwards, landing on his foot, back, and head. He could not get up because he had no traction on the ice, so he dragged himself to a handicapped signpost. He telephoned the Tierneys, who attended to him right away. They called an ambulance, but Mr. Duffy did not feel that he needed to go to the hospital, and he returned to his apartment. There was no precipitation falling at the time of Mr. Duffy's accident.

The next morning, however, Mr. Duffy was in pain and called an ambulance to take him to the hospital. He also wrote out a statement of the events of the night before, because in his work as a security guard at Marist College, he would write incident reports (Plaintiff's Ex. 11). In this statement, Mr. Duffy says that he "approached a spot on the sidewalk which appeared to be wet. Upon stepping on the 'wet spot,' I lost my footing due to the fact that it black ice (sic)... It should be noted that there was no salting on the sidewalk which would have prevented my fall." At trial Mr. Duffy said that the spot did not look like ice at the time he first observed it but used quotation marks around the words "wet spot" because he later realized that it was ice.

The first question to be resolved is whether the surface of the sidewalk on which Mr. Duffy fell was in an unsafe condition, that is, had black ice. At trial Mr. Duffy testified that the entire sidewalk was icy, not just that there was an icy spot or area on the sidewalk. The credible proof at trial established that earlier in the day 6.6 inches of snow had fallen, stopping at 12:46 p.m. (Tr 115). The snow was then cleared from the sidewalk by the Tierneys. The Tierneys had also applied calcium chloride, a form of ice melt, to all the

sidewalks at the complex, but they did not apply any further treatment after 4 p.m. or 4:30 p.m. The Tierneys also testified that they did not check the weather after they concluded for the day at approximately 4 p.m. or 4:30 p.m.

The Court credits Mr. Duffy's testimony that he slipped and fell on an icy area of the sidewalk. From Plaintiff's Exhibit 5 it is clear that no calcium chloride can be seen. The Court also credits the Defendants' expert in meteorology, Howard Altshule, who testified that a photo depicting the area shortly after Mr. Duffy's fall showed there to be ice on the walkway (Plaintiff's Exhibit 5). In viewing the photo of the area, Dr. Altshule testified,"[i]t looks like everything is covered with ice to me" and "it looks like a very icy area everywhere" (Tr. 127, 142). Dr. Altshule attributes his ability to discern whether the surface was ice rather than simply wet to his experience developed over decades of being a meteorologist (Tr. 139). The Court finds that that the area of the sidewalk where Mr. Duffy fell had black ice and was a hazard.

The Court finds, in addition to the snow, that there were further periods of precipitation after 4:30 p.m. occurring on December 17, 2016. Dr. Altshule testified that intermittent periods of freezing rain occurred after the snowfall, and this freezing rain created black ice on the walkway in front of Mr. Duffy's home. Dr. Altschule testified that Dopplar records show on and off precipitation in the area of The Birches the afternoon and evening prior to Mr. Duffy's fall. "[P]eriods of light freezing rain and drizzle occurred from 5:47 until approximately 8:14 p.m. And then there was a little bit of a lull with more periods of light freezing rain or freezing drizzle occurring from approximately 9:13 p.m. through midnight" (Tr. 127). The temperature had been below freezing from

December 15 until 7:20 at night on December 17. From 7:20 p.m. the temperature rose to 33-34 degrees until midnight.

"[B]y definition freezing rain is. . . rain that falls as a liquid and lands onto a below freezing surface, and turns to a glaze, and that's what this looks like to me," Dr. Altschule testified (Tr. 142). Referring to the photo of the sidewalk, he stated, "[a] little less than a tenth of an inch, just under a tenth of an inch of ice or glaze from freezing rain had covered those surfaces - exposed surfaces" (Tr. 128). Dr. Altschule testified that two National Weather Service advisories were issued the evening of Mr. Duffy's fall for the geographic area that included the Birches. The first advisory issued at 7:10 p.m. stated: "Impacts: Freezing rain can lead to slippery travel conditions and reduced visibilities. Treacherous travel conditions possible on untreated surfaces Saturday afternoon and evening due to freezing rain" (Tr. 132). The second advisory issued at 9:24 p.m. for the same geographic area gave the identical warning. Dr. Altschule testified that the freezing precipitation was not steady or consistent but occurred in periods or waves during the relevant timeframe (Tr. 124).

Based upon the meteorological evidence and Dr. Altschule's testimony, the Court finds that, in the days immediately preceding and on December 17, 2016, the subject sidewalk had been exposed to temperatures below freezing. The Court further finds that the preponderance of credible evidence establishes that, on December 17, 2016, precipitation fell in the form of freezing rain or drizzle from approximately 5:47 p.m. to 8:14 p.m. upon the subject sidewalk and then again after 9:13 p.m., causing black ice to be formed in the area of the sidewalk at issue. The Court finds that the meteorological

proof including the National Weather Service advisories establish that a storm in the form of freezing rain or drizzle was ongoing from 5:47 p.m. on December 17, 2016 through midnight in the vicinity of The Birches, with a lull in the freezing precipitation occurring from approximately 8:15 p.m. to 9:13 p.m.

Conclusions of Law

A defendant is liable for personal injuries in a slip and fall accident where the defendant either (a) created a dangerous condition or (b) had actual or constructive knowledge of a dangerous condition (*Torosian v. Bigsbee Vil. Homeowners Assn.*, 46 AD3d 1314, 1315 [3d Dept. 2007]).

There was no testimonial or written evidence demonstrating that anyone had complained to the Defendants verbally or in writing of the particular icy hazard on or icy condition of the subject sidewalk prior to Mr. Duffy's fall. Thus, the Defendants lacked actual notice of the icy condition of the subject sidewalk and cannot be liable to him on this basis.

While it is suggested that the caretakers negligently permitted the melting of a snowbank onto the sidewalk, thereby creating the unsafe condition of black ice, there is insufficient record evidence that this is the case. There is insufficient evidence that the Tierneys improperly shoveled snow onto the outer cement edges of the sidewalk; the photographic evidence does not show snow present on these edges. Any conclusion that melting snow pooled or collected onto the sidewalk and froze as the result of the Tierney's snow removal procedures is entirely speculative (*see Harvey v. Laz Parking Ltd.*,

LLC, 128 AD3d 1203, 1205 [3d Dept. 2015][case citations omitted]; *Hanifan v. COR Dev. Co., LLC*, 144 AD3d 1569 [4th Dept. 2016]).

The Court turns to the issue of constructive notice. A defendant will be said to have constructive knowledge of an icy condition where "in the exercise of reasonable care [the defendant] should have known [it] existed" (*Marcellus v. Nathan Littauer Hosp. Ass'n*, 145 AD2d 680, 681 [3d Dept. 1988]). Constructive knowledge requires proof by a preponderance of credible evidence "that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendants to discover it and take corrective action, and a general awareness that snow or ice might accumulate is insufficient" (*id.* at 1315 [internal quotation marks and citation omitted];" (*Calvitti v. 40 Garden, LLC*, 155 A.D.3d 1400 [2017]; *Tate v. Golub Props., Inc.*, 103 AD3d 1080, 1081 [3d Dept. 2013]; *Pierson v. North Colonie Cent. School Dist.*, 74 AD3d 1652, 1654 [3d Dept. 2010]; *Lewis v. Bama Hotel Corp.*, 297 AD2d 422, 423 [3d Dept. 2002]).

Here, the particular icy condition was in existence for only approximately an hour from the time precipitation ended at around 8:15 p.m. until approximately 9:13 p.m. when freezing precipitation resumed. In this respect, an icy patch or condition existing for about an hour does not provide sufficient time for a property owner to discover and remedy it (*Lewis v. Bama Hotel Corp.*, 297 AD2d at 423; *see also Williams v. State of New York*, 140 AD3d 1376 [3d Dept. 2016]; *Boucher v. Watervliet Shores Assoc.*, 24 AD3d 855 [3d Dept. 2005]; *Espinell v. Dickson*, 57 AD3d 252, 253 [1st Dept. 2008]). The Defendants here lacked sufficient time to be imputed with knowledge of the particular icy condition that caused Mr. Duffy to slip and fall. Further, the weather advisories issued that evening at most

would confer only a general awareness that ice could be present, as opposed to awareness of the particular area of the sidewalk where Mr. Duffy slipped and fell.

Additionally, a defendant cannot be liable for personal injuries due to an accident as the result of hazardous conditions caused by an ongoing storm (*Pacelli v. Pinsley*, 267 AD2d 706, 707 [3d Dept. 1999]). "A landowner has no duty to remedy a dangerous condition resulting from a storm while the storm is in progress and has a reasonable amount of time after the storm as ended to take corrective action" (*Harvey v. Laz Parking Ltd, LLC*, 128 AD3d 1203, 1204 [3d Dept. 2015][case citations omitted]). Stated another way, "[u]nder the 'storm in progress rule,' a landowner generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter" (*Ryan v. Taconic Realty Assocs.*, 122 AD3d 708, 709 [2d Dept. 2014][case citations omitted]; *Wheeler v. Grande'Vie Senior Living Center*, 31 AD3d 992, 992 [3d Dept. 2006]). Where meteorological records established that it was snowing at the time of a plaintiff's accident, the "storm in progress" doctrine affords a complete defense to the personal injury action (*id.*; see also *Griguts v. Alpin Haus Ski Shop, Inc.*, 150 AD3d 1438 [3d Dept. 2017]).

Moreover, "'[a] lull in the storm does not impose a duty to remove the accumulation of snow or ice before the storm ceases in its entirety'" (*Scarlato v. Town of Islip*, 135 AD3d 738, 738 [2d Dept. 2016], quoting *Rabinowitz v. Marcovecchio*, 119 AD3d 762, 762 [2014]).

The Court finds that the credible proof establishes that a storm was in progress at the time Mr. Duffy slipped and fell. Two weather service advisories were issued

concerning freezing rain in the geographic location of The Birches on the evening of December 17, 2016. Dr. Altschule credibly testified that, based on meteorological records including Dopplar radar, freezing rain and drizzle occurred at or in the immediate vicinity of The Birches, with the first period of freezing precipitation occurring from 5:45 p.m. to about 8:14 p.m., and again from approximately 9:13 p.m. to midnight on December 17, 2016. As Dr. Altschule explained, the freezing precipitation occurred in waves, which explains why none of the witnesses observed precipitation at about the time of Mr. Duffy's fall or shortly thereafter. Further, a lull in precipitation between 8:15 p.m. to 9:13 p.m. did not impose a duty upon the Defendants to remedy an icy condition, although here the Tierneys applied calcium chloride to the sidewalk after Mr. Duffy fell as an extra precaution. Rather, the obligation to alleviate the hazardous condition was suspended until the passage of a reasonable time after the storm concluded, which here was midnight. In short, the Defendants proved their defense to this action in that there was a storm in progress at the time of the slip and fall, thereby precluding a finding of liability.

Finally, the Court is unaware of any legal precedence holding the owner or caretaker of a senior apartment complex to a higher duty of care. In the absence of same, the Court declines to impose a greater obligation upon the Defendants to alleviate icy hazards within an abbreviated period of time or while a storm is in progress.

Those remaining arguments not specifically addressed herein were rendered moot, were found to be unpersuasive or were otherwise unsupported by the proof adduced at trial.

For the reasons set forth herein, it is therefore

ADJUDGED and ORDERED, that the complaint filed by Plaintiff Charles Duffy is denied and dismissed; and it is further

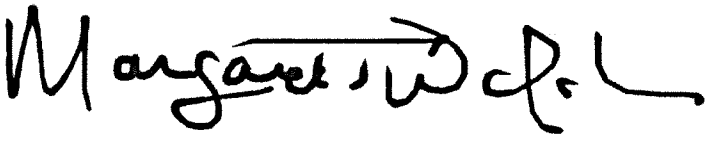
ADJUDGED and ORDERED, that the *Motion for a Directed Verdict* by the Plaintiff is denied in its entirety; and it is further

ADJUDGED and ORDERED, that no costs or counsel fees are awarded to either party.

This constitutes the *Decision/Order/Judgment* of the court. Pursuant to the *Administrative Order of the Chief Administrative Judge of the Courts* AO/86/20 (dated April 20, 2020), the signed digital copy of this *Decision/Order/Judgment* shall be accepted for filing purposes when presented for filing via electronic delivery to the Ulster County Clerk's Office. All original papers are being retained by the Court for delivery to and filing with the Ulster County Clerk's Office. The electronic signing of the *Decision/Order/Judgment* and delivery of original motion papers to the Ulster County Clerk's Office shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry and notice of entry of the digital *Decision/Order/Judgment*.

So Ordered.

Dated: July 17, 2020
Albany, New York.



Margaret Walsh
Supreme Court Justice

ENTER:

Papers considered:

(1) *Trial Transcript dated March 5 and 6, 2020;*

(2) *Trial Transcript of Dr. Perkins (Videotaped on* February 21, 2020);

(3) *Trial Exhibits* 1, 2-4, 5, 6-8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21; A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q

(4) Plaintiff's Proposed Findings of Fact and Conclusions of Law, by Howard E. Shafran, Esq., Shafran & Rock, PLLC, dated May 15, 2020;

(5) Plaintiff's Motion for a Directed Verdict, by Howard E. Shafran, Esq., Shafran & Rock, PLLC, dated May 15, 2020;

(6) Defendants' Post-Trial Submission by Thomas J. Johnson, Esq., Bailey, Johnson & Peck, P.C., dated May 18, 2020;

(7) Defendants' Response to Court's June 11, 2020 Question, by Thomas J. Johnson, Esq., Bailey, Johnson & Peck, P.C., dated June 15, 2020.