SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ELLEN S. LITROFF and ISRAEL LITROFF, Index No.: 714635/2018

Plaintiffs, Motion Date: 10/22/2020

- against - Motion No.: 36

ABLE MOTOR CARS CORPORATION, Motion Seq.: 1

Defendant.

- x

The following electronically filed documents read on this motion by defendant for an Order pursuant to CPLR 3212, granting defendant summary judgment and dismissing plaintiff's complaint; and on this cross-motion by plaintiffs for an Order striking the answer of defendant, alternatively, precluding defendant from offering testimony or evidence at the time of trial, in the further alternative, for a negative inference charge and/or an Order resolving issues of notice and breach of duty to maintain in favor of plaintiff, in the further alternative, compelling production of post Note of issue discovery:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 29 - 37
Notice of Cross-Motion-Affirmation in Opposition & in Support of Cross-Motion-Exhibits	EF 39 - 51
Affirmation in Reply	EF 56 - 57
Affirmation in Reply	EF 58 - 59

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Ellen S. Litroff as a result of a slip and fall on February 18, 2018 at the shopping center known as the Baybridge Commons and located at 208-24 Cross Island Parkway, Queens County, New York.

Plaintiffs commenced this action by filing a summons and complaint on September 25, 2018. Defendant joined issue by service of an answer on November 13, 2018. Defendant now moves for summary judgment. Plaintiffs cross-move for discovery sanctions.

Plaintiff appeared for an examination before trial on April 17, 2019 and testified that the parking lot at Baybridge looked clear and dry even though it had snowed the day before. She could not give an approximation as to how much snow had fallen the day before. She could not remember if it was the type of snowfall that required shoveling or if there was snow on her car when she first walked out to it that morning. She frequented Baybridge quite often. On the morning of the incident, she parked her car, got out of her car, closed the door, took one or two steps, and fell as she stepped up onto the curb. Prior to the incident, she did not notice any snow or ice on the ground. While on the ground, she noticed that she was sitting on a sheet of ice. The ice was clear. Prior to the incident, she never made any complaints with respect to any defects at Baybridge. Prior to her fall, she never noticed any defects on the property. She is not aware of any other incidents occurring in the shopping center.

Michael Pescatore appeared for a deposition on behalf of defendant on July 9, 2019 and August 5, 2019. He testified that he is the CEO of defendant. He visited his properties located in Queens and Brooklyn several times per week. He would walk the property, look for any maintenance issues, and look for any repair needs. The maintenance issues would include making sure the supers cleaned the property correctly; making sure there was no garbage or litter; checking the signage; looking for safety issues; and looking for security issues. Back in 2018, he would go to Baybridge about two to three times per week. During those visits, he would perform inspections, tenant relations, and community relations. In February of 2018, he inspected snow removal efforts at the property. There is an internal gutter system in place that filters water down the building. There is also gutter pipping under the second-floor tile that leads into the sealed columns. Romel Gerald was the super that worked at Baybridge. Mr. Gerald started working at Baybridge in 2016. Mr. Gerald performed cleaning, maintenance, snow removal, tenant interaction, and public relations at the premises. Mr. Gerald was only responsible for performing snow removal on the paver sidewalk abutting the storefronts. Mr. Gerald's hours varied from 6:30 a.m. to 4:30 p.m., six days a week; typically Monday through Saturday. On the day Mr. Gerald was off, another super would be present. Mr. Gerald had an office at the building directly in the rear of Ridgewood Savings Bank. Mr. Gerald does not generate any type of written records. In terms of snow removal, in October or November, defendant purchases calcium chloride in bulk and stores at least 50 bags of the calcium chloride. Calcium chloride is used on the paver sidewalk. Sand or calcium chloride was applied to the black top. Mr. Gerald was trained concerning snow and ice removal procedures.

Romel Gerald appeared for a deposition on behalf of defendant on February 5, 2020 and testified that he was trained

by the prior superintendent on how to perform snow and ice removal at the subject premises. He was trained to put chloride down on the pavers before he left for the day if it was expected to snow and ice overnight. He used the spreader to apply the chloride. If he arrived at the premises and the snow and/or ice had not melted, he would start reapplying the chloride and would continue to do so until his shift ended at about 4:00 p.m. If there were around three to four inches of snow on the ground, he would use a shovel first to remove the snow or a snow blower. Once the shoveling was completed, he would thereafter put the chloride down. The pavers would be his first priority. He reports to the property manager, Lauren Curcio. Ms. Curcio comes to the property every other day to check on things. He worked the Saturday before the subject incident until 4:00 p.m. Before leaving, he put down the chloride. Although he was typically off on Sundays, if it snowed on a Saturday, he would come in and perform the snow removal services. He never encountered a drainage issue at the property. He never received any complaints or comments about a drainage issue.

Based on the submitted testimony, counsel for defendant contends that summary judgment is warranted as there is no evidence to demonstrate that defendant had notice of the alleged icy condition.

In opposition, counsel for plaintiffs contends that there are issues of fact as to whether defendant had notice of the condition and whether there was a breach of duties. Plaintiff submits the expert affidavit of Andrew Yarmus, P.E. to establish that defendant's failure to salt and/or sand the walking surface where plaintiff fell was a breach of its property maintenance duties.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557[1980]). Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (see Kwong On Bank, Ltd. v Monrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]). The evidence will be construed in a light most favorable to the non-moving party (see Benincasa v Garrubbo, 141 AD2d 636 [2d Dept 1988]).

"A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only when it created the alleged dangerous condition or had

actual or constructive notice of it" (McBryant v Pisa Holding Corp., 110 AD3d 1034 [2d Dept. 2013] citing Feola v City of New York, 102 AD3d 827 [2d Dept. 2013] quoting Cantwell v Fox Hill Community Assn., Inc., 87 AD3d 1106 [2d Dept. 2011]."To meet their initial burden on the issue of lack of constructive notice, the defendants must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (Birnbaum v New York Racing Association, Inc., 57 AD3d 598 [1986]; see Pryzywalny v New York City Tr. Auth., 69 AD3d 598 [2d Dept. 2010]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Braudy v Best Buy Co., Inc., 63 AD3d 1092 [2d Dept. 2008]).

Here, viewing the evidence in the light most favorable to the non-moving party, defendant failed to establish its prima facie burden. Specifically, defendant failed to establish when the area in question was last cleaned or inspected relative to the time when the plaintiff fell. As such, defendant failed to establish that it lacked notice of the alleged icy condition. Moreover, issues of credibility, including whether Mr. Gerald was the superintendent working on the date of the incident, preclude summary judgment (Conciatori v Port Auth. of N.Y. & N.J., 46 AD3d 501 [2d Dept. 2007]["a court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned"]).

Regarding the cross-motion, pursuant to CPLR 3126[3], a court may issue "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party." A court may invoke the drastic remedy of striking a pleading, however, only upon a clear showing that the failure to comply with court-ordered discovery was willful and contumacious (see Argo v Queens Surface Corp., 58 AD3d 656 [2d Dept. 2009]; Paca v City of New York, 51 AD3d 991 [2d Dept. 2008]; Maignan v Nahar, 37 AD3d 557 [2d Dept. 2007]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply" (see Friedman, Harfenist, Langer & Kraut v Rosenthal, 79 AD3d 798 {2d Dept. 2010]).

Upon a review of the cross-motion papers, opposition, and reply thereto, this Court finds that plaintiffs have failed to sufficiently demonstrate that defendant acted willful or contumacious by repeatedly failing to comply with court-ordered discovery. Moreover, all paper discovery has now been exchanged.

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that defendant's summary judgment motion is denied; and it is further

ORDERED, that plaintiff's cross-motion is denied; and it is further

ORDERED, that Romel Gerald on behalf of defendant shall appear for a further deposition on or before **January 8, 2021** at **10:00 a.m.** at a Queens County Reporter or at an agreed upon location/virtually; and it is further

ORDERED, that any demands for disclosure arising out of the further deposition shall be served within 10 days of the deposition of the party upon whom the demand is made, and shall be responded to within thirty (30) days of receipt.

Dated: October 30, 2020
Long Island City, NY

ROBERT J. MCDONALD
J.S.C.

FILED & RECORDED
10/30/2020
2:45 PM
COUNTY CLERK
QUEENS COUNTY