

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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MILTON A. GILLESPIE ,
Plaintiff,

Index No.: 709122/15

Mot. Date: 5/9/17

-against-

Mot. Cal. No. 39

Mot. Seq. 3

DEVON STRACHAN AND YVETTE
STRAHAN,

Defendants.

FILED
JUN - 8 2017
COUNTY CLERK
QUEENS COUNTY

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The following papers read on this motion by for an order granting summary judgment to the defendants dismissing the plaintiff's complaint as against them.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	EF 35-46
Affirmation in Opposition-Exhibits.....	EF 47-53
Reply Affirmation.....	EF 61

Upon the foregoing papers, it is ordered that the motion is granted.

This is an action seeking damages for personal injuries allegedly sustained by the plaintiff in a slip and fall on an allegedly icy condition on exterior steps on March 7, 2015.

The last snowfall was three days prior to the date of accident. Defendant landlord Devon Strachan, who also resided on the premises, testified that he had shoveled the stairs in question on the day after the snowfall. Plaintiff testified that the stairs were clean of snow and ice, at 10:00 a.m., on the date of his accident. Plaintiff further testified that when he returned to his apartment two on three hours later, he slipped and fell on the second step from the landing on the stairs leading to his basement apartment due to black ice that had formed. Plaintiff also claims, based on the opinion of his expert, Stanley

Fein, P.E., that the cause of his fall was black ice on the stairs coming from leaking water from the overhanging leader and gutter on the side of the premises, which re-froze, forming black ice.

An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition (*see Elsayed v Al Farha Corp.*, 132 AD3d 942, 943 [2d Dept. 2015]; *Yehia v Marphil Realty Corp.*, 130 AD3d 615 [2d Dept. 2015].) That duty is premised on the landowner's exercise of control over the property, as the person in possession and control of property is best able to identify and prevent any harm to others (*see Yehia v Marphil Realty Corp.*, *supra*). Accordingly, "a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]; *see Yehia v Marphil Realty Corp.*, *supra*).

As the proponent of the motion for summary judgment, the defendant had the burden of establishing, *prima facie*, that it neither created the icy condition nor had actual or constructive notice of the condition (*see Kulchinsky v Consumers Warehouse Ctr., Inc.*, 134 AD3d 1068, 1069 [2d Dept. 2015]; *Shea v Massapequa Union Free Sch. Dist.*, 117 AD3d 817 [2d Dept. 2014]. To provide constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's [employees] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Altro v Wal-Mart Stores*, 282 AD2d 487, 488, 723 NYS2d 213 [2001]).

Here, the plaintiff's own testimony was that the steps were clean when he left his apartment in the basement. Sometime prior to his fall, a few hours later, he opined that black ice must have formed. This is insufficient time for the defendant to acquire notice of the condition, even if melting and refreezing did occur. In addition, the defendant submitted meteorological records which show that temperatures between 10:00 a.m. and 1:00 p.m. on that day never rose above freezing.

The Court also finds the opinion of plaintiff's expert as to when and how the alleged patch of ice was formed based on speculation and conjecture (*see Butler v Roman Catholic Diocese of Rockville Ctr.*, 123 AD3d 868 [2d Dept. 2014]).

Accordingly, for all of the foregoing reasons, it is hereby,

ORDERED, that motion by defendants for an order granting summary judgment and dismissing the plaintiff's complaint as against them is granted, and the plaintiff's complaint is dismissed.

Dated: June 5, 2017



TIMOTHY J. DUFFICY, J.S.C.

FILED
JUN - 8 2017
COUNTY CLERK
QUEENS COUNTY