IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JOHN SZTYBEL and ROSE MARIE SZTYBEL,	)	C.A. No. K10C-05-028 JTV
Plaintiffs,	)	
v.	)	
WALGREEN CO., an Illinois corporation, and HAPPY HARRY'S, INC., a Delaware corporation, d/b/a HAPPY HARRY'S STORE 11063,	)	
Defendants.	)	

Submitted: April 1, 2011
Decided: June 29, 2011

Scott E. Chambers, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Plaintiffs.

Stephen F. Dryden, Esq., Robinson, Grayson, Dryden & Ward, Wilmington, Delaware. Attorney for Defendants.

Upon Consideration of Defendants' Motion For Summary Judgment
DENIED

VAUGHN, President Judge

Sztybel et al., v. Walgreen, et al.
C.A. No. 10C-05-028 JTV
June 29, 2011

ORDER

Upon consideration of the defendants' motion for summary judgment, the plaintiff's opposition, and the record of the case, it appears that:

1. On February 10, 2010, at about 10:30 a.m, the plaintiff, John Sztybel, slipped and fell while exiting a Happy Harry's store located in Magnolia, Delaware. He states that he slipped on compacted ice and snow. In early February 2010, severe snow storms hit the State of Delaware. Blizzard-like conditions started on February 5, 2010 and ultimately produced over twenty inches of snow and ice.

2. The defendant, Happy Harry's contends that the continuous storm doctrine is a complete defense in this case. Pursuant to the doctrine:

> [A] business ... in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform or steps. The generally controlling principle is that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier, effective action, and that ordinary care does not require it.[1]

3. This Court has found that a landowner "has no legal duty to begin ice removal until precipitation has stopped, regardless of the severity of the storm."[2] In coming to that conclusion, the Court relied on a Virginia Supreme Court decision that

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[1] *Young v. Saroukos*, 185 A.2d 274, 282 (Del. Super. 1962); *aff'd* 189 A.2d 437 (Del. Supr. 1963).

[2] *Cash v. East Coast Prop. Mgmt.*, 2010 WL 2336867, at *2 (Del. Super. June 8, 2010).

held that "a storm does not have to be raging in order for a business inviter to wait until the end of the storm before removing ice and snow from its premises."[3] The reasoning behind such a holding is that the law requires only reasonable care by a business inviter. And, "the necessity of repeated excursions into [a] storm, with the attendant risks of exposure and the injury to himself, in order to relieve the invitee of all risk from [a] natural hazard, is unreasonable."[4]

4. The first relevant snowstorm hit Delaware on February 5, 2010 and lasted until February 6, 2010. A state of emergency went into effect. The storm produced approximately twenty-one inches of snow and ice accumulation. On February 8, 2010, the Governor called off the state of emergency. No precipitation fell on February 8th. Late on February 9, 2010, a second snow storm hit Delaware. The second storm continued through about 10:45 p.m. on February 10th and produced twelve inches of snow and ice accumulation. A state of emergency for the second storm went into effect February 10, 2010 and lasted through February 12, 2010. Under these circumstances, there is at least an issue of fact as to whether there were two separate storms, as opposed to one continuous storm. The snow removal company for the Happy Harry's site did, in fact, remove the snow and ice twice, once on February 7th and then again after the second storm.

5. The defendants contends that the accident was caused by snow and ice accumulation produced by the February 9th - 10th storm, which was in progress when

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[3] *Amos v. Nations Bank*, 504 S.E.2d 365, 367-68 (Va. 1998).

[4] *Walker v. Mem'l Hosp.*, 45 S.E.2d 898, 907 (Va. 1928).

the plaintiff fell. The defendants also contend that the plaintiff cannot establish which storm produced the snow that he slipped on. The defendants further contend that under the continuous storm doctrine, they were entitled to wait until after the February 9th - 10th snow storm ended before removing snow and ice, and therefore, they are not liable for a fall which occurred on February 10th.

6. The plaintiff contends that his fall was caused by compacted snow and ice left immediately outside the Happy Harry's store from the first storm. He further contends that the defendants had time to remove the snow from the first storm after that storm ended and before his fall occurred. The plaintiff further contends that the facts of the case fall within an exception to the continuous storm doctrine known as the unusual circumstances exception. The alleged circumstances are that the store remained open during a state of emergency without mitigating the danger resulting from the pre-existing snow storm.

7. Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[5] The moving party bears the burden of establishing the non-existence of material issues of fact.[6] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[7] In considering the motion, the facts

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[5] Super. Ct. Civ. R. 56(c).

[6] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. 2007).

[7] *Id.*

must be viewed in the light most favorable to the non-moving party.[8] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[9] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[10]

8. The plaintiff has filed an affidavit in which he states that "he fell on approximately six inches of snow and packed ice that accumulated on the walkway ... from the storm that impacted the area on February 5, 2010 into February 6, 2010...." He came to that conclusion "because it was packed down and did not appear to be from fresh snow that had fallen that day." The defendant contends that such a statement is inadmissible opinion testimony from a lay witness.

9. I find that the plaintiff's statement that he "fell on approximately six inches of snow and packed ice" is admissible. It is based on his perception of the conditions where he fell and is not opinion.

10. Weather information in the record indicates that on February 10th, precipitation in the form of freezing rain and/or sleet occurred prior to approximately 1:50 a.m. and between approximately 2:30 and 3:45 a.m. After 3:45 a.m.

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[8] *Pierce v. Int's Ins. Co. Of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[9] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[10] *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *4 (Del. Super. 2007).

precipitation fell in the form of snow and/or sleet, occasionally mixed with light freezing rain, through around 10:45 p.m. As stated above, the plaintiff's fall occurred around 10:30 a.m. Jurors are permitted to draw reasonable inferences from the evidence. Viewing the facts in the light most favorable to the plaintiff, I believe that jurors could infer that based upon the time of day that the defendant fell and all the attendant circumstances, snow and ice from the second storm had not yet been compacted when the plaintiff fell, and that plaintiff's counsel could reasonably so argue in summation. These conclusions lead me to deny the defendant's motion. The jury could conclude that there were two separate storms, that the plaintiff fell on approximately six inches of snow and compacted ice, that since the ice was compacted, under the circumstances it must have been left over from the first storm, and therefore the continuous storm doctrine does not apply. I express no opinion on the merits of the case before the jury.

11. The defendant's motion for summary judgment is, therefore, ***denied***. Whether the plaintiff can take the extra step of expressing an opinion that the snow and ice upon which he fell came from the first storm is deferred to at least the pre-trial conference.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary
Order Distribution
File