Plauas v Corona
2012 NY Slip Op 30723(U)
March 19, 2012
Supreme Court, Queens County
Docket Number: 17439/09
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Cecelia Pluas,

Plaintiff,

- against -

Luz Dovina Corona, Jason Barrientos, Abraham Sanchez, Jacqueline Rodriguez and The City of New York,

Defendants.

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Index Number: 17439/09

Motion Date: 3/6/12

Motion Cal. Number: 28

Motion Seq. No.: 1

The following papers numbered 1 to 22 read on this motion by defendant, Luz Dovina Corona, for summary judgment; and cross motion by defendant, The City of New York, for leave to serve a late motion for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Notice of Cross-Motion-Affirmation-Exhibits.....	6-9
Affirmation in Opposition(Rodriguez/Sanchez)-Exh...	10-12
Affirmation in Opposition to Dovina(Plaintiff)-Exh.	13-15
Affirmation in Opposition to City(Plaintiff)-Exh...	16-18
Reply to Plaintiff.....	19-20
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Upon the foregoing papers it is ordered that the motion and "cross-motion" are decided as follows:

As a preliminary matter, the City's notice of "cross-motion" is deemed a notice of motion, since plaintiff is not a moving party (see CPLR 2215).

Motion by Corona for summary judgment dismissing the complaint and all cross-claims against her is granted. Motion by the City for leave to serve a late motion for summary judgment and for summary judgment is denied.

Plaintiff allegedly sustained injuries as a result of slipping

and falling upon a patch of ice on the sidewalk abutting the premises 49-01 94th Street in Queens County, owned by Corona, and the premises next door, 49-05 94th Street, owned by co-defendants Sanchez and Rodriguez, on January 19, 2009 between 8:00 a.m. and 9:00 a.m.. Plaintiff alleges that she slipped on the sidewalk traversing the community driveway shared by both properties.

Sanchez testified in his deposition that it began snowing at approximately 10:30 p.m. the night before. He arrived home at approximately 11:00-11:30 p.m., began shoveling the snow at that time and finished at approximately 2:00 a.m. He shoveled the driveway, as well as the sidewalk in front of his house, and spread salt to melt the ice. It stopped snowing approximately a half hour before he finished shoveling. After he finished shoveling he did not see any patches of ice on the driveway; it was just wet as a result of the salt. He also stated that it was very cold. When he came out of his home that morning at 8:30 a.m., the sidewalk and driveway looked like they had accumulated "a little bit more of snow" and it looked like ice, "like it rained or something and then froze". When he came out he also saw the ambulance in front. He also testified that when he would clean the driveway he would clean the whole driveway. He was always the one who cleaned the driveway. He never saw his neighbors (Corona and Barrientos) clean the driveway ever.

He also testified that his neighbors never used the driveway "because they didn't use to live there, only rent." Also, when asked, "Did you ever see any of the tenants of your neighbor's house use the driveway?" he responded, "No." And when asked if he observed "anybody who was living in that house using the driveway on a regular basis to bring their cars into the back?" he responded, "No." He said that once or twice a week people would park in the driveway when they came to check on the house or take out the garbage.

Plaintiff testified in her deposition that it was not snowing at the time of her accident but had snowed the night before. She described the patch of ice that she slipped on as crystal-colored, circular and approximately three feet in diameter. She did not see the ice before she fell, but after she fell, when she was on the ground, she saw that she had slipped on ice.

Corona does not contest any portion of plaintiff's or Sanchez' testimony. Corona moves for summary judgment upon the ground that she did not have a sufficient time to correct the ice condition as a matter of law.

An abutting property owner is not liable for injuries

sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the owner created the defective condition or caused it through some special use, or unless a statute charges the property owner with the responsibility to maintain the sidewalk and specifically imposes liability upon the property owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

Section 7-210 of the New York City Administrative Code imposes liability upon abutting property owners for their failure to maintain the public sidewalks in a reasonably safe condition, including the negligent failure to remove snow and ice. Excepted are exclusively residential premises of less than four families that are owner-occupied, which exception does not apply to Corona's premises as it is undisputed that it was not owner-occupied but rented out in its entirety on the date of the accident.

However, §7-210 is not a strict liability statute. Rather it only imposes liability upon abutting owners for their negligence (see Faulk v. City of New York, 2007 NY Slip Op 51346 [U] [Sup Ct, Kings Co 2007]). The ordinary rules of premises liability were not altered. Rather, the statute merely shifted that liability with respect to the negligent failure to maintain sidewalks from the owner thereof, the City, to the adjoining property owner.

In order for property owners to be found liable for a defective or dangerous condition on their premises, it must be shown that they either created the condition or, where the condition was not actually created by them but came about as a result of a failure to maintain the premises, that they had actual or constructive notice of the hazardous condition and that they had an adequate opportunity to remedy it but failed to do so (see Danielson v. Jameco Operating Corp., 20 AD 3d 446 2nd Dept 2005]).

The same standard of liability applies to slip and fall sidewalk accidents arising from an accumulation of snow or ice where liability against the adjoining property owner is premised upon §7-210 (see Martinez v. City of New York, 20 AD 3d 513 [2nd Dept 2005]).

It is well-established that a property owner may not be held liable for injuries resulting from an accumulation of snow or ice on his or her premises until after a reasonable time has passed for taking protective measures after cessation of precipitation (Newsome v. Cservak, 130 AD 2d 637 [2nd Dept 1987]). Furthermore, pursuant to §16-123 of the New York City Administrative Code, an abutting property owner has four hours after precipitation ceases to remove snow or ice from the sidewalk, which period of time does

not include the hours between 9 P.M. and 7 A.M. Thus, Corona had no obligation to remove accumulations of ice from the sidewalk from the time precipitation ended, at the earliest, at 10:30 p.m. the night of February 6th through the time of plaintiff's accident at 8:00-9:00 a.m. on February 7th. Indeed, the undisputed evidence presented, by way of Sanchez' testimony, was that there was additional ice-producing precipitation after 2:00 a.m.

Plaintiff's counsel argues that failure to comply with the provisions of §16-123 of the Administrative Code may only result in the imposition of a violation and enforcement by the municipality since that provision does not impose liability upon a homeowner for injuries sustained by a pedestrian as a result of the homeowner's failure to maintain the sidewalk, but rather §7-210 is the only statute that imposes such liability, and that section does not include the four-hour window period for removal of snow or ice after precipitation ends. Counsel's argument is without merit.

The scope of an adjacent property owner's liability regarding the maintenance of the sidewalk imposed by §7-210 "mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code section[s] 19-152 and 16-123" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). Therefore, §7-210 must be read in conjunction with those sections. Liability for failing to maintain the sidewalk under §7-210 of the Administrative Code includes "the negligent failure to remove snow, ice, dirt or other material from the sidewalk." That language mirrors the duty imposed by §16-123 of the Administrative Code to "remove the snow, ice, dirt, or other material from the sidewalk and gutter" (§16-123[a]). And although §7-210 also states that "it shall be the duty" of the homeowner to maintain the sidewalk in a reasonably safe condition (which includes removal of snow and ice), the scope of that duty is circumscribed by §16-123, which affords the homeowner four hours within which to remove snow and ice after precipitation ends. Plaintiff cites no relevant case law, and this Court is unaware of any, holding that the duty for which liability may be imposed under §7-210 is different and broader than the duty imposed by §16-123. The case cited by plaintiff's counsel, Bell v New York City Housing Auth. (6 Misc 3d 1018[A] [Sup Ct New York County 2005]), holding merely that liability is to be measured by a reasonableness standard and not by the four-hour period afforded by §16-123 since that section does not impose liability, has nothing to do with the instant issue as it involves premises liability only for which §§16-123 and 7-210 do not apply. Moreover, the two cases cited therein, Booth v City of New York (272 AD 2d 357 [2nd Dept 2000]) and Norcott v Central Iron Metal Scraps (214 AD 2d 660 [2nd Dept 1995]) antedate §7-210, and merely hold that a homeowner may not be

held liable for failing to remove snow or ice from the public sidewalk under §16-123 since that section does not specifically impose liability upon homeowners.

Even though §16-123 establishes a duty upon homeowners to clear snow and ice from the sidewalk, prior to September 14, 2003, that section could not form the basis of liability against homeowners for injuries sustained by pedestrians. In the absence of any statute making property owners liable for injuries to pedestrians, liability remained exclusively upon the City, and the City could only impose fines upon the property owners for violation of that section.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to abutting property owners for the latter's failure to abide by their duty under §16-123. And as explicitly declared by the City Council, §7-210 mirrors the duties and obligations of property owners under §16-123 and, thus, imposes liability upon homeowners for breaching whatever duty they have under §16-123 for their failure to perform the types of maintenance to the sidewalk set forth in that section, which are reiterated in §7-210.

Since the homeowner is statutorily exempted from the duty under §16-123 to remove snow or ice from the sidewalk until four hours after cessation of precipitation, which period does not include the hours of 9 P.M. to 7 A.M., he or she may not be held statutorily liable to a pedestrian pursuant to §7-210 until after such period of time. In the present matter, Corona had no duty under §16-123 to remove snow or ice from the sidewalk, and therefore was not exposed to liability under §7-210 for her failure to do so, until 11:00 a.m., which was, at least two hours after plaintiff slipped and fell.

Plaintiff's additional argument that Corona failed to establish that she did not have constructive notice of the ice patch and thus failed to meet her prima facie burden on summary judgment is without merit. Since Corona had no duty to clear the sidewalk of snow or ice prior to the time that plaintiff slipped and fell, the issue of constructive notice is irrelevant.

In any event, even were Corona exposed to liability under §7-210, she has demonstrated, even in the absence of her testimony, that she did not have constructive notice of the ice patch upon which plaintiff allegedly slipped. With respect to constructive notice, the condition must have been visible or apparent for a sufficient period of time to have reasonably allowed Corona, in the exercise of reasonable care, to have discovered and remedied the

condition (Gjoni v. 108 Rego Developers Corp., 48 AD 3d 514 [2nd Dept 2008]; Scala v. Port Jefferson Free Library, 255 AD 2d 574 [2nd Dept 1998]; see also Danielson v. Jameco Operating Corp., 20 AD 3d 446 [2nd Dept 2005]). Awareness of the presence of snow or ice in general does not constitute constructive notice of the particular condition that caused plaintiff to fall (see Kaplan v. DePetro, 51 AD 3d 730, supra). The uncontested deposition testimony of both plaintiff and Sanchez establishes that the alleged ice patch arose in the aftermath of the snowfall which occurred during the overnight hours preceding plaintiff's slip and fall at 8:00-9:00 a.m.. Sanchez also testified that he cleared the driveway completely and spread salt. Moreover, plaintiff testified that she did not see the ice patch until she was on the ground after she had fallen.

In opposition, plaintiff presented no evidence that the ice patch was visible and apparent and had existed for a sufficient period of time prior to the accident so as to have afforded Corona a reasonable opportunity to have discovered and remedied the hazard (see Christal v. Ramapo Cirque Homeowners Assoc., 51 AD 3d 846, supra). Indeed, the testimony of plaintiff that she did not see the ice patch before she fell indicates that the condition was not apparent (see Kaplan v. DePetro, 51 AD 3d 730, supra; Robinson v. Trade Link America, 39 AD 3d 616 [2nd Dept 2007]). Moreover, since the uncontested evidence, on this record, is that that the ice patch could only have formed after the snowfall that commenced at approximately 10:30 p.m. on February 6, 2009 and continued into the morning hours of February 7th, and plaintiff fell at 8:00-9:00 a.m. that morning, Corona did not have a reasonably sufficient time to have discovered and remedied the condition, as a matter of law.

But, as heretofore stated, the issue of constructive notice is moot since Corona had no duty to clear the snow and ice that had accumulated during the night prior to plaintiff's trip and fall, as a matter of law.

Corona was not obligated to submit climatological data in support of her motion, as plaintiff's counsel urges. She submitted evidence of the weather conditions in support of her motion through the testimony of Sanchez and plaintiff. If plaintiff's counsel wished to dispute their testimony, it was his obligation to submit evidence, including climatological data, in his opposition papers.

Plaintiff's counsel also makes tangential reference to there being an issue of fact as to whether Corona created the ice patch through a special use of the sidewalk which was transected by her driveway. No such issue is present in this case. There is no evidence and no allegation that Corona or any of her tenants drove

a motor vehicle up the driveway after 10:30 p.m. on February 6, 2009 or after Sanchez cleared the driveway at 2:00 a.m. February 7th so as to have supported any argument that ice could have been created by the use of the driveway.

Finally, although Corona has failed to appear for a deposition and has failed to proffer any medical proof of her claimed incompetence to testify, the unrebutted testimony of Sanchez and plaintiff alone establish Corona's prima facie entitlement to summary judgment.

Motion by the City for leave to serve a late motion for summary judgment and for summary judgment dismissing the complaint and all cross-claims against it is denied. The motion is untimely.

Pursuant to the stipulation of the parties, so-ordered by Justice Martin E. Ritholtz on September 22, 2011, "Motions for SJ shall be made returnable before the assigned judge not later than December 27, 2011. A copy of this stipulation must be attached to said motion." The instant motion was served on January 20, 2012 and was made returnable on January 24, 2012. Moreover, the City failed to attach a copy of the so-ordered stipulation to its moving papers. Therefore, it is untimely.

Pursuant to CPLR 3212(a), motions for summary judgment must be made no later than 120 days after the note of issue is filed, unless a different date is ordered by the Court, except with leave of court "on good cause shown." Moreover, CPLR 3212(a) applies to court ordered deadlines of less than 120 days (see Giudice v. Green 292 Madison, LLC, 50 AD 3d 506 [1st Dept 2008].

Unless good cause is shown for the delay, an untimely motion for summary judgment must be denied outright (see Brill v. City of New York (2 NY 3d 648 [2004]; Castro v. Homsun Corp., 34 AD 3d 616 [2nd Dept 2006]).

The City has failed to proffer any excuse for its delay in making the instant cross-motion. Therefore, its motion for leave to serve a late motion for summary judgment must be denied. Counsel for the City merely proffers the unmeritorious argument that its otherwise untimely "cross-motion" may be considered since it seeks relief on the same issues as raised in Corona's timely motion in chief.

The rationale for allowing an untimely cross-motion for summary judgment notwithstanding the absence of good cause where it seeks the identical relief sought by a timely motion is that the court, in deciding a timely motion, may search the record and grant

summary judgment to any party even in the absence of a cross-motion (see Filannino v. Triborough Bridge and Tunnel Authority, 34 AD 3d 280 [1st Dept 2006]). However, the court's search of the record is limited to those issues that are the subject of the timely motion in chief (id.). Here, plaintiff made no summary judgment motion. As heretofore stated, the City's notice of "cross-motion" is, in reality, a notice of motion. Therefore, the exception set forth in the cases cited by counsel wherein a late cross-motion may be considered if it addresses the same issues raised in a timely motion is not applicable here, and the City may not "piggyback" its untimely motion onto co-defendant's timely motion (see Gaines v. Shell-Mar Foods, Inc., 21 AD 3d 986 [2nd Dept 2005]).

Therefore, the City's untimely motion may not be considered and is denied.

Accordingly, Corona's motion is granted, the City's motion is denied and the complaint and all cross-claims are dismissed as against Corona.

Dated: March 19, 2012

KEVIN J. KERRIGAN, J.S.C.