Saroop v Mihovich
2012 NY Slip Op 31984(U)
June 1, 2012
Sup C, Queens County
Docket Number: 5610/11
Judge: Kevin J. 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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Amarnath Saroop,

Plaintiff,

- against -

Anthony Mihovich, Joseph Fiorito, Michael Sakhal, Cloverdale at Howard Beach II, and The City of New York,

Defendants.

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Index Number: 5610/11

Motion Date: 5/8/12

Motion Cal. Number: 15&14

Motion Seq. No.: 3&4

The following papers numbered 1 to 30 read on these motions by defendant, Anthony Mihovich, for summary judgment and to compel discovery, and "cross-motion" by Cloverdale at Howard Beach II for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits................	1-4
Notice of Motion-Affirmation-Exhibits................	5-8
Affirmation in Support................................	9-10
Affirmation in Opposition-Exhibit.....................	11-13
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Reply...	20-21
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Affirmation in Opposition-Exhibits....................	26-28
Reply...	29-30

Upon the foregoing papers it is ordered that the motions and "cross-motion" are decided as follows:

As a preliminary matter, Mihovich's motion for summary judgment (Calendar No. 15) and his motion to compel discovery (Calendar No. 14) are consolidated for disposition. Also, since plaintiff is not a moving party, Cloverdale's "cross-motion" was improper (see CPLR 2215). Moreover, Cloverdale does not indicate whether it is "cross-moving" against Mihovich's motions, or against either of the companion motions for summary judgment by the City

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(Calendar No. 13) or by Fiorito and Sakhai (Calendar No. 16), which motions were all submitted on May 8, 2012. In the interest of judicial economy, however, and in the absence of any objection by any party to the improper form of the application, the Court deems Cloverdale's notice of "cross-motion" a notice of motion and, for purposes of convenience, also consolidates said motion with the instant motions by Mihovich.

In the first instance, plaintiff's counsel's argument that the motion must be denied outright because it was short-served since it was served on February 1, 2012 and set a return date of February 21, 2012, and thus gave plaintiff only 20 days' notice instead of the required 21 days, in violation of the statutory deadlines for service of motions pursuant to CPLR 2214(b), is without merit.

Pursuant to CPLR 2214(b), a motion must be served at least eight days prior to the return date. Where it is served by ordinary mail, five days must be added pursuant to CPLR 2103(b)(2), so that the return date must be at least 13 days after the date of service of the notice of motion. Since the instant motion was served by ordinary first class mail on February 1, 2012 and noticed to be heard on February 21, 2010, 20 days after service thereof, it was not short-served.

Plaintiff's counsel fails to set forth his rationale for his contention that movant was required to set a return date at least 21 days after the date of service, other than an explanatory parenthetical, "(16 days plus 5 for mailing)". The Court surmises that counsel is referring to the last sentence of CPLR 2214(b) which provides that in the event the notice of motion demands that answering affidavits and notices of cross-motion be served at least seven days before the return date, then the notice of motion must be served at least 16 days prior to the return date, in which case, if it is served by ordinary mail, the additional five-day requirement boosts the minimum amount of notice required to 21 days. However, the instant notice of motion did not demand service of answering papers seven days before the return date, and plaintiff's counsel does not argue that it did. Therefore, the motion which was made returnable on February 21, 2012, 20 days after service thereof, was not short-served. In any event, even had the motion been short-served by one day, plaintiff has failed to show any prejudice so as to require denial of the motion, since the motion was adjourned, at plaintiff's request, three times – from February 21, 2012 to March 6th, thereafter to March 27th and then to April 17th, on which date plaintiff's attorney submitted his opposition to the motion, and the motion was thereupon and finally adjourned to May 8th for submission of reply papers. Thus, plaintiff had ample time to submit opposition papers and, in fact, availed

himself of that opportunity, submitting his opposition 56 days after the motion was noticed to be heard on February 21, 2012.

Motion by Mihovich for summary judgment dismissing the complaint against him is granted.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Mihovich has met his burden.

Plaintiff allegedly sustained injuries as a result of slipping and falling on snow and ice on the public sidewalk abutting 156-15 77th Street in Queens County at approximately 10:00 p.m. on February 10, 2010. It is undisputed that 156-15 is a three-family condominium unit owned by Mihovich and that it, in turn, is part of a condominium development of 46 units under the name of Cloverdale at Howard Beach II. It is also undisputed that Cloverdale hired a snow removal company, J and W Snow Removal, to clear the public sidewalk of snow and ice but only after there was an accumulation of a minimum of two inches of snow and only after cessation of precipitation. Co-defendant Fiorito was the owner of J&W and co-defendant Sakhai was his employee.

Mihovich moves for summary judgment, inter alia, upon the ground that he had no duty to remove snow or ice from the public sidewalk abutting his premises while a snowstorm was in progress.

It is well-established that a property owner may not be held liable for injuries resulting from an accumulation of snow or ice on its premises until after a reasonable time has passed for taking protective measures after cessation of precipitation (Amplo v Milden Ave Realty Assoc., 52 AD 3d 750 [2nd Dept 2008]; Newsome v. Cservak, 130 AD 2d 637 [2nd Dept 1987]).

The climatological data from JFK Airport annexed to the moving papers and the climatological data from LaGuardia Airport submitted by plaintiff in his opposition both indicate that it snowed throughout the day and night of February 10, 2010, leaving a total accumulation of 10.9", according to the JFK report, or 10.4", according to the LaGuardia report.

Plaintiff, in his deposition on November 2, 2011, contradicted this data, testifying that that snow started falling at approximately 3:00 p.m. on February 10, 2010, that it was not snowing at the time of his accident and that the total accumulation

of snow on the ground at the time of his accident was approximately two inches, which estimate he later doubled to approximately four inches. When asked when the snow stopped falling, he stated, "It stopped falling I think maybe 5:00, 5:30 around there" (transcript page 70, lines 9-10). Both Mihovich and Sakhai testified in their respective depositions that it snowed basically the entire day on February 10, 2010. Mihovich estimated the time when the snow stopped falling to be 7:00-10:00 p.m. and Sakhai testified that it was still snowing when he went to bed at approximately 10:00 p.m. and that he observed approximately one foot of snow on the ground the next morning when he woke up.

Plaintiff's counsel contends that plaintiff's testimony, which contradicts the climatological data, raises an issue of fact as to whether there was a storm in progress at the time of his accident or whether precipitation had ended at 5:00-5:30 p.m., which, in turn, raises a triable issue of fact as to whether such time period was a reasonable one for Mihovich to have removed the snow and ice.

An abutting homeowner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the homeowner created the defective condition or caused it through some special use, or unless a statute charges the homeowner with the responsibility to maintain the sidewalk and specifically imposes liability upon the homeowner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

Property owners in the City of New York are required to "remove the snow, ice, dirt, or other material from the sidewalk and gutter" pursuant to §16-123(a) of the Administrative Code of the City of New York. However, a violation of the duty imposed by that section, prior to September 14, 2003, 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.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to abutting property owners. Only §7-210 imposes liability upon property owners for injuries resulting from their failure to maintain and repair the public sidewalks abutting their properties, including "the negligent failure to remove snow, ice, dirt or other material from the sidewalk" (§7-210[b]).

Since the scope of an adjacent property owner's liability regarding the repair and 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[]...16-123" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193), §7-210 must be read in conjunction with §16-123.

As heretofore stated, §16-123 creates a duty for property owners to remove the snow and ice from the sidewalk. However, that duty is limited. The Court notes that §16-123 also provides, "Every owner...or other person, having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall, within four hours after the snow ceases to fall...remove the snow or ice...from the sidewalk and gutter, the time between nine post meridian and seven ante meridian not being included in the above period of four hours" (emphasis added). Therefore, since the homeowner has four hours after cessation of precipitation to clear the sidewalk of snow and ice, with the hours of 9 p.m. to 7 a.m. not included in the four-hour time period, the property owner's duty, and hence his liability for breaching that duty, does not arise within that time period.

In light of plaintiff's own concession that precipitation may have ended as late as 5:30 p.m., since 9:00 p.m. is only 3 ½ hours after that time and Mihovich was not required to perform any snow or ice clearing from 9 p.m. that night to 7 a.m. the following morning, Mihovich was thus not required to have cleared the sidewalk in front of his property of snow and ice until 7:30 a.m. on February 11, 2010. Thus, taking the evidence in a light most favorable to plaintiff and crediting his own testimony as to when he believes the storm ended, no liability attaches to Mihovich for the ice and snow condition on the sidewalk at 10:00 p.m. on February 10, 2010 as a matter of law.

Plaintiff's counsel contends that plaintiff is not alleging that he slipped on snow or ice from the snowstorm on February 10, 2010, but on snow and ice that existed before the February 10th storm commenced. He also contends that plaintiff's testimony as to how he fell and how he never saw salt or sand spread in the area following a snowfall raises a triable issue of fact whereby a jury could conclude that plaintiff slipped on pre-existing ice residue from a previous storm, thus rendering unavailing movant's "storm-in-progress" defense. Counsel's argument is without merit, as it is based upon mere conjecture and a false characterization of plaintiff's testimony.

Plaintiff did not testify that he fell on "one inch of pre-existing ice hidden and obscured by the February 10, 2010 snowfall". These words are purely of plaintiff's counsel's

authorship. Plaintiff's testimony, to which counsel refers and which counsel mis-characterizes, was that he slid on ice that was under the snow and that the snow on top was "hard, like slush with ice underneath". Plaintiff did not testify that there was ice that pre-existed the snowfall of February 10, 2010, and no evidence has been presented that the ice under hard, slushy snow as plaintiff described was or could have been old ice from a prior snowfall that had not been removed. Indeed, plaintiff himself testified that prior to 3:00 p.m. on February 10, 2010 when it started snowing there was no snow, slush or ice on the ground and that the ground was completely clear as it is in the middle of summer and was "very nice".

Plaintiff's counsel, in his affirmation in opposition, calls attention to the climatological report from LaGuardia Airport annexed to his opposition papers which indicates that there was one inch of snow/ice on the ground at LaGuardia Airport at 7 a.m. on February 10, 2010 and then leaps to the speculative non-sequitur conclusion that there was, therefore, also one inch of snow and ice on the ground at the exact location of plaintiff's accident that pre-existed the snowfall of February 10th, that this pre-existing ice is what plaintiff slipped on and not any snow or ice that had accumulated from the raging snowstorm of that day and that this pre-existing ice was caused because of Mihovich's careless and sloppy snow and ice-removal operations prior to February 10, 2010.

No evidence whatsoever is presented that there was any pre-existing ice on the sidewalk in front of Mihovich's property from a prior snowstorm or that Mihovich or anyone else caused that condition through incompetent snow and ice-removal attempts. Merely because a climatological report measured an inch of snow on the ground at LaGuardia Airport at 7:00 a.m. is no evidence that there was ice present on the sidewalk in front of Mihovich's residence many miles away at such hour, much less that such ice was residue from a prior snowstorm that remained due to a negligent shoveling operation performed an indeterminate number of days previously. Moreover, counsel, in making such argument, ignores plaintiff's own emphatic testimony that the sidewalk where he fell had no snow or ice but was completely clear and very nice as on a summer day prior to 3:00 p.m. on February 10, 2010.

Finally, the climatological report merely records the observation that there was one inch of snow/ice on the ground at LaGuardia Airport at 7:00 a.m. on February 10th. Such observation does not establish that this accumulation was from a prior snowstorm. On the contrary, the Court notes that the report's hourly precipitation chart records a total precipitation of .12 inches having fallen that morning by 7:00 a.m., specifically, from

1:00a.m to 7:00 a.m. on February 10th. This accumulation is a water equivalent, which translates to a substantially greater snow/ice accumulation. There is thus no evidence that the one-inch snow accumulation at 7:00 a.m. was from a prior snow event, but in fact, the LaGuardia climatological report upon which plaintiff's counsel relies indicates that such accumulation was from precipitation from the morning of February 10, 2010.

Mihovich also proffered uncontested testimony that neither he nor anyone in his employ or under his direction performed any snow or ice removal on February 10, 2010 and, thus, has demonstrated that he did not create the icy condition of the sidewalk or make it worse through any snow removal efforts. Indeed, plaintiff himself testified that the area where he fell was unshoveled. In any event, there are no issues of whether the snow and ice accumulation on February 10, 2010 was a dangerous condition and whether Mihovich exacerbated the dangerous condition by his snow removal efforts, since plaintiff's counsel, in his affirmation in opposition, apprised the Court that plaintiff is not claiming that his accident was the result of an ice condition that formed as a result of any precipitation or accumulation from the February 10, 2010 snowfall.

In addition, no issue has been raised as to whether Mihovich caused the condition through a special use of the sidewalk.

The Court need not reach, and will not decide, movant's remaining grounds for dismissal.

Since Mihovich is entitled to summary judgment as a matter of law, his motion to compel plaintiff to comply with discovery is moot.

Motion by Cloverdale for summary judgment dismissing the complaint and any cross-claims against it is also granted.

In the first instance, the notice of motion was not short-served, as plaintiff's counsel contends. It was served by ordinary mail on January 24, 2012 and was noticed to be heard 14 days later, on February 7, 2012. Moreover, it did not demand that answering affidavits be served at least seven days before the return date. As heretofore stated, pursuant to CPLR 2214(b), a motion must be served at least eight days prior to the return date. Where it is served by ordinary mail, five days must be added pursuant to CPLR 2103(b)(2), so that the return date must be at least 13 days after the date of service of the notice of motion. Thus, Cloverdale provided adequate notice thereof pursuant to CPLR 2214(b). The Court is at a loss in understanding why plaintiff's counsel believes the motion was required to have been noticed at least 17

days after the date of service.

Cloverdale also moves for summary judgment upon the ground that it was not required to have cleared the sidewalk because there was a storm in progress.

Assuming that Cloverdale was responsible for the condition of the subject sidewalk pursuant to §7-210 of the Administrative Code rather than only Mihovich, the fee owner of the abutting premises, an issue not raised by the parties on this motion, then for the same reasons as set forth with respect to Mihovich's motion, taking the evidence in a light most favorable to plaintiff and crediting his testimony that the snow ended no later than 5:30 p.m. on February 10, 2010, pursuant to §16-123 of the Administrative Code, Cloverdale was not in breach of its duty to clear the sidewalk of snow and ice until 7:30 a.m. on February 11, 2010 and, therefore, was not liable to plaintiff pursuant to §7-210 for plaintiff's injuries sustained as a result of slipping and falling upon snow and ice on the sidewalk at 10:00 p.m. on February 10, 2010, as a matter of law.

Plaintiff's counsel also contends that Cloverdale was negligent in its management and supervision of J&W's snow and ice removal work, allowing J&W to create or exacerbate a dangerous ice condition by its inadequate snow and ice removal efforts. Counsel references the one-inch of snow/ice on the ground at 7:00 a.m. on February 10th as recorded in the LaGuardia Airport climatological report, arguing that Cloverdale failed to take appropriate steps to supervise the snow removal efforts of J&W and that such failure was the proximate cause of plaintiff's slip and fall on this one-inch of ice.

Counsel's argument is without merit, for the same reasons as heretofore stated, and for the reasons set forth in the order of this Court issued on May 29, 2012 in the companion motion by Fiorito and Sakhai for summary judgment (Calendar No. 16).

Not only does counsel's wholly speculative argument ignore his own client's explicit testimony that there was no snow or ice on the ground at the locality of his accident prior to 3:00 p.m. and that the sidewalk at the time of his accident was unshoveled, but it also ignores Sakhai's testimony that he (J&W) performed no snow or ice removal until the following day. No evidence is presented that J&W performed any snow/ice-removal work on February 10th so as to raise an issue of fact as to whether its work created or exacerbated a dangerous ice condition. Moreover, as heretofore mentioned, no evidence is presented that the alleged ice upon which plaintiff slipped and fell was pre-existing from a previous storm.

Therefore, Cloverdale is entitled to summary judgment as a matter of law. The Court need not reach, and will not decide, the remaining grounds for the motion.

Accordingly, Mihovich’s and Cloverdales’ motions for summary judgment are granted, Mihovich’s motion to compel discovery is denied as moot and the complaint and all cross-claims are dismissed as against Mihovich and Cloverdale.

Dated: June 1, 2012

KEVIN J. KERRIGAN, J.S.C.