

Perez v New York City Hous. Auth.

2012 NY Slip Op 32637(U)

October 12, 2012

Sup Ct, NY County

Docket Number: 103275/09

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SHLOMO HAGLER
J.S.C. Justice

PART 17

Index Number : 103275/2009
PEREZ, DELILAH
vs.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to ~~be granted~~ *by defendant for summary judgment*

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**THIS MOTION/ORDER TO SHOW CAUSE
IS DECIDED IN ACCORDANCE WITH
THE ATTACHED ORDER.**

FILED

OCT 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/12/12

SHLOMO HAGLER J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINALE DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
DELILAH PEREZ,

Plaintiff,

Index No.: 103275/09

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X
SHLOMO HAGLER, J.:

FILED

OCT 18 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Defendant New York City Housing Authority (NYCHA) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Delilah Perez opposes the motion.

BACKGROUND

This case involves a slip and fall accident that allegedly occurred on December 15, 2007, at approximately 9 o'clock at night. Plaintiff, a tenant at a NYCHA building located on Madison Avenue in Manhattan, was disembarking from a taxi in front of her building and, while stepping up to the curb and onto a five or six inch mound of snow, slipped and fell. The complaint alleges that NYCHA, as the owner of the property, was negligent in failing to remove snow from the sidewalk or improperly removing snow from the sidewalk. Motion, Ex. B.

The crux of NYCHA's argument is that, according to all meteorological data, there could not have been such an accumulation of snow and/or ice on that date, and, other than

plaintiff's testimony, there is no independent admissible evidence to contradict the meteorological findings.

According to plaintiff's testimony at her 50-H hearing, approximately four days prior to the date of the occurrence, she saw two NYCHA employees operating two motorized vehicles pushing snow from the sidewalk in front of the building to the curb. Ex. A, at 20-21, 25. Plaintiff reiterated this statement at her examination before trial (EBT). Plaintiff EBT, at 49-51. Plaintiff further said that she thought that it had snowed three or four days before her accident (Ex. A, at 7; EBT, at 47), and asserted that the piled-up snow on which she fell was approximately five or six inches high. Ex. A, at 25; EBT, at 47. Plaintiff stated that, when she left the building earlier that evening at about 5 P.M., she noticed that snow had been pushed up to the curb. EBT, at 45, 53-56, 93-94. Plaintiff did not report the accident to NYCHA, did not seek immediate medical attention, and waited one week to see her dentist for alleged injuries to her teeth resulting from the fall. Ex. A, 32-33, 38; EBT, at 72-74.

In addition to plaintiff's testimony, plaintiff provided photographs of the area in which the accident took place, but those photographs were taken about one week after the occurrence, and there had been a snow fall in the interim period, and plaintiff admitted that the photographs do not portray the

conditions existing at the time of the accident. EBT, at 89-90. It is noted that plaintiff has not produced any medical records to substantiate her claim.

In support of its motion, NYCHA has attached the official governmental climatological data for the month of December 2007. Ex. H.¹ This report shows that, on December 2, 2007, 13 days before the alleged accident, 1.4 inches of snow fell and, the next day, the temperature reached a high of 47 degrees. On December 5, 2007, .3 inches of snow fell, and, from December 2 to December 13, 2007 the temperatures went above freezing every day. Between December 9 and December 13, 2007, it rained every day, and on December 12, 2007, the temperature reached a high of 52 degrees. On December 13, 2007, two days before the accident, a total of .2 inches of snow fell, followed by periods of rain.

Michael Johnson (Johnson), NYCHA's supervisor of housing ground keepers at plaintiff's building, was deposed in this matter and described the procedures used to remove snow from the area around the building in question. Johnson EBT, at 21-2. Johnson testified that motorized equipment is used to clear snow or ice from the sidewalk when there is an accumulation of one to one and a half inches, and that such removal is recorded in a snow and removal log. *Id.* at 33-34, 37-40, 50-51. If the depth

¹The data was collected from Central Park, which is approximately 1.25 miles from where the accident took place.

of the snow is below one-and-a-half inches, NYCHA clears the area with shovels and salt. *Id.* at 26, 34-35. All of the information regarding snow removal and weather conditions are recorded in the snow removal log by Johnson. *Id.* at 50-52. According to the snow removal log (Ex. I), the only day that any snow removal action was taken for the month of December 2007 was on December 16, the day after the accident, to remove sleet that fell on the 16th, and no ice or snow conditions were recorded for the entire period.

On the day of the accident, Johnson was working at the building from 8 A.M. to 1 P.M., and inspected the area shortly before he left. *Id.* at 8-10. In addition to his deposition testimony, Johnson has provided an affidavit in support of the motion, in which he avers that, had he noticed snow or ice on the ground, he would have had the staff remove it and would have recorded it, and there is no such record in the log. Johnson also stated that the grounds are regularly inspected several times each day. However, Johnson did state that, apart from the log, he had no independent recollection of the conditions of the area around the building for the date in question.

NYCHA has also provided the affidavit of George Wright (Wright), a certified consulting meteorologist (Ex. I), who opined, with a reasonable degree of meteorological certainty, that the sidewalk in front of the building where plaintiff

alleges that the accident took place was dry with no snow or ice present at approximately 9 P.M. on December 15, 2007. Wright based his expert opinion on the following information: plaintiff's EBT and the transcripts from her 50-H hearing; the verified bill of particulars; the EBT of Johnson; and the official climatological data.

In opposition to the instant motion, plaintiff states that, according to the building's daily log books (Opp., Ex. A), there was snow removal performed at the building on December 2, 2007, that snow removal equipment was distributed on December 12, 2007, and that a meeting was held on the morning of December 13, 2007 to address snow removal.²

In reply, NYCHA says that, in her opposition, plaintiff fails to proffer any evidence that corroborates her testimony or which refutes NYCHA's proof. Further, all of the evidence, including the work log relied upon by plaintiff, indicates that there was no snow or ice on the ground for at least 10 days prior to December 15, 2007, and the only evidence refuting this claim is plaintiff's self-serving testimony. Moreover, NYCHA maintains that the photographs are inadmissible since they were taken several days after the accident, snow had fallen in the interim,

²Plaintiff also says that the log indicates snow removal on December 6, but the court notes that the log indicates that calcium was placed on an "icy spot" at a different NYCHA building than the address at which plaintiff allegedly fell.

and plaintiff conceded that they did not represent the curb at the time of the occurrence.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Any record of the observations of the weather, taken under the direction of the United States weather bureau, is prima facie evidence of the facts stated. CPLR §4528. An expert may permissibly conclude, based on the weather conditions, that it would have been impossible for there to have been a precipitation-related ice or snow condition in the vicinity of plaintiff's fall. *Perez v Canale*, 50 AD3d 437, 437 (1st Dept

2008); *Daley v Janel Tower L.P.*, 89 AD3d 408 (1st Dept 2011); *Clapp v City of New York*, 302 AD2d 347 (2d Dept 2003).

In opposition to defendant's certified meteorological reports and accompanying expert affidavit, plaintiff has provided no countervailing expert analysis (see generally *Estate of Burke v Peter J. Repetti & Co.*, 255 AD2d 483 [2d Dept 1998]; *Maust v Arseneau*, 116 AD2d 1012 [4th Dept 1986]). Further, the case relied upon by plaintiff, *Massey v Newburgh W. Realty, Inc.* (84 AD3d 564 [1st Dept 2011]), is clearly distinguishable from the case at bar.

In *Massey*, where the Appellate Division concluded that the defendant's climatological data and expert affidavit were insufficient, as a matter of law, to grant defendant's dispositive motion, the climatological report contained data from the general geographical region, but not near to where the accident took place; the expert failed to take into account either the plaintiff's testimony, and he did not address the photograph of the scene taken a few hours after the occurrence; and the defendant failed to present any evidence that the area was regularly inspected. In addition, in *Massey*, the plaintiff provided the testimony and affidavit of an eye witness.

In the instant matter, the climatological report provided by NYCHA was compiled from weather conditions only slightly over one

mile from the location of plaintiff's accident, Wright's expert affidavit states that, in reaching his conclusion, he considered plaintiff's EBT and 50-H hearing testimony, and Johnson testified that the building's grounds were inspected several times each day. Moreover, the building's snow removal log and daily log books substantiate the assertion that there was no snow removal or snow for over one week prior to the incident in question. Further, there is no witness to the accident to bolster plaintiff's claims.³

Lastly, the court agrees with NYCHA that the photograph of the scene of the alleged accident is not admissible.

"Photographs may be used to prove constructive notice of an alleged defect shown in the photographs if they are taken reasonably close to the time of the accident and there is testimony that the condition at the time of the accident was substantially as shown in the photographs [internal quotation marks and citation omitted]."

Rivera v New York City Transit Authority, 22 AD3d 554, 555 (2d Dept 2005).

In the case at bar, the photographs were taken several days after the accident, it is uncontroverted that there had been snow in the intervening period, and plaintiff testified that the photograph did not reflect the condition of the curb as of the

³In *Perez v Canale*, *supra*, where the court found for the defendant based on climatological data and expert opinion, in addition to the plaintiff's testimony, the plaintiff also provided an affidavit from a friend, which the court found insufficient to overcome the defendant's evidence.

time of her accident. Hence, the photographs cannot be used to support plaintiff's opposition.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 12, 2012

ENTER:



Shlomo Hagler, J.S.C.

FILED

OCT 18 2012

**NEW YORK
COUNTY CLERK'S OFFICE**