Ferrer v Heart of the Bronx Mgmt. Corp.
2015 NY Slip Op 32473(U)
December 7, 2015
Supreme Court, Bronx County
Docket Number: 309972/2011
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

FIDEL FERRER,

Plaintiff,

-against-

HEART OF THE BRONX MGMT CORP. and CASELLA PLAZA HOUSING DEVELOPMENT FUND CORPORATION,

Defendants.

INDEX NUMBER: **309972/2011**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of **5/27/15**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant's motion for summary judgment is denied for the reasons set forth herein.

The within action involves plaintiff's claim that he was injured on February 2, 2011 at approximately 9:30 p.m. on defendants' premises located at 961 East 180th Street, Bronx, New York. Plaintiff resided at the aforementioned apartment building and claims that he fell in the parking lot of the building after he exited his vehicle and was walking to enter the building. Plaintiff claims that he was caused to slip and fall on snow and/or ice on the walkway of the parking lot that leads to the building. Plaintiff testified at his deposition that at the time of the accident, he was returning home from church. Plaintiff described the building's parking lot as rectangular in shape which had approximately 20 spaces for vehicles and was located at

the rear of the building. The lot was surrounded by a fence and had a driveway that led from the parking lot to the street which ran along the side of the building. From the back entrance door of the building, there was a walkway that led into the parking lot. Plaintiff's assigned parking space was approximately two meters from the walkway. Plaintiff testified that when he left the building and went into the parking lot that evening, the parking lot had been plowed and had been cleared of snow. However, the walkway leading from the back door of the building into the parking lot had ice on it. When asked whether the ice covered the entire pathway, he testified "[e]verything, everything." Plaintiff also testified that there were piles of snow on either side of the walkway. The snow piled up along the sides of the parking lot that were about one to two feet high. Plaintiff did not slip or fall on his way to his car, but recalled seeing the patch of ice on the walkway which allegedly caused his accident. Plaintiff did not know how long that patch of ice had existed, but believed that it was formed as a result of snow that fell earlier that day. Plaintiff did not complain to anyone regarding the patch of ice. He described the ice as clear and smooth and he could see the black pavement under it. Plaintiff testified that he slipped backwards and landed on his back and head. He was able to see where he was going with the available light at the time of the accident. Plaintiff testified that he would see the building's superintendent and his assistant removing snow from the parking lot and walkways with a shovel and a "mini truck" and applying salt to the walkways "almost immediately" after a snow storm. At the time of the accident, plaintiff's wife, Altagracia Ortega, had entered the building ahead of him and was inside of the building when his accident occurred. Plaintiff testified that there was never a time that he did not recall how he had become injured and believed he knew how his accident happened immediately after it happened. The hospital records, however, indicate that plaintiff's wife found him disoriented and he did not seem to recognize his wife at first and could not explain what had happened to him.

On the errata sheet for his deposition transcript, plaintiff changed or corrected certain areas of his testimony. He originally testified that when he walked to his car to go to church that evening, the parking lot "was clean from the snow or the snow had been cleaned." He corrected his testimony to state that "[i]t was not clean, there was ice." Additionally, he changed his testimony that he was aware that he was walking on ice at the time of the accident to state that he did not know he was walking on ice. Finally, plaintiff changed his testimony to state that he did not recall how he was injured immediately after regaining consciousness and told his wife and doctors at the hospital that he could not recall how he became injured. It should be noted that

plaintiff testified at the deposition with the aid of a Spanish interpreter. At times during the deposition, it was apparent that plaintiff was confused or did not clearly understand the questions.

Ms. Ortega testified at her deposition that she did not personally witness her husband's accident. She and her husband were returning from a trip to church and the supermarket at the time of the accident. Plaintiff had dropped Ms. Ortega off at the side entrance of the building and he went around the back of the building to park his car while she went inside. She testified that the "rear" entrance of the building was actually located at the side of the building and there was a walkway leading from the parking lot to that entrance. After entering the building, she realized she did not have keys to their apartment and went to find plaintiff. She found him inside the building, in the hallway leading to the back door and saw wetness on his clothing but no snow. Plaintiff was unable to tell her what happened and appeared confused. Ms. Ortega did not find the keys in plaintiff's pockets and then went to the parking lot to look for the keys and found them on a patch of ice where "it seems like he fell". She later corrected her testimony to state that she found the keys in the parking lot and not the walkway, about two vehicles away from the walkway. The keys were on a patch of ice near a car. She found plaintiff's hat about a foot and a half away from the keys. Ms. Ortega first saw the patch of ice when she went to look for the keys but did not know how long the ice had been there or how it was created. She did not walk through the parking lot when she and plaintiff left the building because plaintiff picked her up at the back door. Although she remembered seeing snow when they left for church, she did not know how much snow there was or whether the snow covered the entire lot or just certain areas. She testified that when she got out of the car, there was ice close to where the walkway met the parking lot and that the ice was "[w]here I went through, a little bit on the walkway" and covered part of the walkway. Ms. Ortega described the ice as hard with snow underneath and covering "a quite large space" and later testified that there was ice around the "whole building" on the walkway and on the side of the building. She recalled seeing the superintendent throwing salt on the walkway the day before plaintiff's accident before there was a snowstorm. Ms. Ortega did not see the ice when she left the building that night and does not know how long the ice had been there.

Leroy Maragh, the building's superintendent, testified at a deposition that his regular hours were from 7:30 a.m. to 4:30 p.m. but was always on call. In February 2011, he had one porter assisting him who also worked the same hours but would be on call for snow emergencies. Mr. Maragh and the porter were responsible for removing snow from the premises and they used an all-terrain vehicle with a plow and shovels to remove

snow from the sidewalk and parking lot. They would place the snow along the fence abutting the backyard of the building and Mr. Maragh would ask tenants to move their cars if more than three inches of snow had fallen so that he could push the snow away. After snow was cleared from the premises, Mr. Maragh and the porter would check the premises and apply salt to any build-up of ice. It was his custom and practice to check the premises at other times during the day, depending on the weather conditions. Mr. Maragh was aware of the tendency for snow to melt in the daytime and re-freeze as ice in the evening.

Defendants argue that they are entitled to summary judgment because it did not have any actual or constructive knowledge of the purported ice that caused plaintiff's accident. Defendants further argue that they did not create the condition that caused plaintiff's fall. Defendants rely on the superintendents testimony regarding his custom and practice when it snowed; that he used shovels and an ATV with a plow to clear the snow from the sidewalk, walkway and parking lot and after the snow was cleared, he or his porter would check the premises two to four times per day and apply salt to any build-up of ice. Defendants contend that there is no evidence that defendants' snow removal efforts created or worsened any hazardous condition on the parking lot or walkway. Defendants submit the records from the National Oceanic and Atmospheric Administration National Climatic Data Center which defendants claim support their position that there was no ice in the area where plaintiff claims to have fallen. Defendants state that the records show that rain, freezing rain and "unknown precipitation" fell in Central Park on February 2, 2011, the day of plaintiff's accident, beginning around 1:00 a.m. and continuing through 11:00 a.m. Less than an inch of precipitation fell in total and no snow was reported. The temperature was above freezing by 10:00 a.m. and remained above freezing for the remainder of the day. Similar conditions were reported at LaGuardia Airport and JFK Airport. Before February 2, 2011, the last significant snowfall, consisting of more than a trace of precipitation, was from January 26th through January 27th, when about 17 inches of snow fell in the New York City area.

The Court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary

judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*. The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986). A property owner may be held liable for a snow or ice condition where it had actual notice, or in the exercise of due care, should have had notice of the condition, and had a reasonably sufficient time after the end of the snowfall or temperature fluctuation to remedy the situation. Pepito v. City of New York, 692 N.Y.S.2d 691); DeVivo v. Sparago, 731 N.Y.S.2d 501 (2d Dept. 2001).

Plaintiff objects to the Court considering the records submitted by defendants from the National Climatic Data Center on the grounds that the records are uncertified. However, the Court may rely on these

records as long as it is not the only evidence considered by the Court. See, Guzman v. L.M.P. Realty Corp., 691 N.Y.S.2d 483 (1st Dept. 1999). The records actually raise an issue of fact as to whether there was snow that melted and re-froze in the area where plaintiff claims that his accident occurred thereby creating a hazardous condition. The records indicate that on the date of plaintiff's accident, which plaintiff claims occurred on February 2, 2011, at around 9:30 p.m., there had been rain, freezing rain, mist and unknown precipitation which ended at approximately 11:00 a.m. The high temperature for that day was 38 degrees and the low temperature was 27 degrees. The day before plaintiff's accident, February 1st, there was also rain, freezing rain, snow, mist and unknown precipitation. The temperature did not go above freezing that entire day, ranging from 25 to 30 degrees. On January 31st, the temperatures again did not go above freezing, with a high of 31 degrees and a low of 22 degrees. From January 30th through January 28th, there was a low temperature below freezing every day. On January 27th, there was a snowfall of 6.7 inches and the temperatures ranged from 36 to 29 degrees. On January 26th, there was a snowfall of 8.3 inches and temperatures ranged from 35 to 30 degrees.

Between January 26th and 27th, there was a substantial amount of snowfall in the New York City area, approximately 17 inches in total. Following those snowstorms, the temperatures dipped below freezing every single day, including the date of plaintiff's accident. For two days prior plaintiff's accident, the temperature never rose above freezing. The superintendent testified there were snow piles in the parking lot from the snow he and the porter had plowed. Additionally, plaintiff testified that the walkway where his accident occurred had snow piles on either side. As the weather records demonstrate, with the temperature fluctuations of above and below freezing in the days before plaintiff's accident, it is a reasonable inference that the snow that was purportedly piled in the parking lot, on either side of the walkway, as testified to by plaintiff, melted and ran into the walkway and then froze. The superintendant testified that he was aware of the tendency for snow to melt in the daytime and re-freeze as ice in the evening. Therefore, the temperature fluctuations together with the testimony of the parties raises an issue of fact as to whether there was a hazardous condition on the premises that caused plaintiff's accident. The evidence raises an issue of fact as to whether the alleged condition was created by defendants by piling the snow in the manner that they did near the walkway and whether defendants' knew or should have known that an ice condition could form as a result of the temperature fluctuations.

This case is like those cases where the temperatures rise above freezing after a snow fall, and

then fall below freezing sometime thereafter, at which time the melted snow then creates an icy condition. See, Santiago v. New York Health and Hospitals Corp., 66 A.D.3d 435 (1st Dept. 2009)(Summary judgment denied where evidence failed to establish that defendant did not have constructive notice of ice on its sidewalk. The climatological records indicated that the ice must have formed after the temperature returned to freezing, more than 24 hours before the accident.); Braun v. Weissman, 68 A.D.2d 797 (2d Dept. 2009)(Summary judgment denied where material fact existed as to whether the ice upon which plaintiff slipped was formed when snow piles created by owners' snow removal efforts melted and refroze creating a more hazardous condition.)
This deduction does not require expert testimony to understand it. Moreover, with respect defendants' argument regarding certain contradictory testimony of the plaintiff and his wife, as already noted, both the plaintiff and his wife testified with a Spanish interpreter and a reading of the entire deposition transcripts shows that plaintiff appeared confused by certain questions and did not understand all of the questions asked.

Accordingly, defendants' motion for summary judgment is denied.

This constitutes the decision and Order of this court.

Dated: 12/7/15

Hon. Alison Y. Tuitt