Diaz v City of New York
2017 NY Slip Op 30499(U)
March 13, 2017
Supreme Court, Queens County
Docket Number: 703163/2014
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

SILVIA DIAZ,

Plaintiff,

-against-

CITY OF NEW YORK and MARIE FLYNN,

Defendants.

Index Number 703163/14

Motion Date August 31, 2016

Motion Seq. Nos. 2 & 3

Motion Cal. Nos. 52 & 51

The following numbered papers read on these motions by defendant Marie Flynn (Flynn) and by defendant the City of New York (the City), respectively, for summary judgment dismissing the complaint of plaintiff Sylvia Diaz and all cross claims.

	Papers Numbered
Notice of Motion No. 52.....	EF 14
Exhibits.....	EF 15-16
Amended Notice of Motion.....	EF 17
Aff. In Opposition.....	HC A
Aff. In Opposition.....	EF 19
Exhibits.....	EF 20
Aff. Of Service.....	EF 21
Aff. In Reply.....	EF 22
Notice of Motion No. 51.....	HC B
Aff. In Opposition.....	EF 23
Exhibits.....	EF 24
Aff. Of Service.....	EF 25
Aff. In Reply.....	HC C

Upon the foregoing papers it is ordered that these motions are consolidated for purposes of disposition and determined as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained on February 20, 2014 at approximately 8:00 a.m. when she slipped and fell on a public sidewalk in front of the residential property located at 115-20 Ninth Avenue in College Point, Queens, New York which was owned by Flynn. Plaintiff alleges that defendants were negligent in the ownership and control of the subject premises and adjacent sidewalk in failing to maintain it in reasonably safe condition, allowing snow and/or ice to accumulate, failing to properly remove snow/ice, and take precautions that would have prevented the accident.

Plaintiff avers that at the time of the accident, she worked as a babysitter for a family that lived two (2) houses away from the subject sidewalk, which she regularly traversed. She recalled that it was a "very cold" day and that it had snowed a few days before her accident. She observed "a little snow and ice" along the length of the sidewalk in front of Flynn's property, but could not approximate the depth of the snow. Plaintiff stated that there was more ice on the sidewalk on the day of the accident than the day before, so as she walked past the house at the corner of the block, which was next to the subject property, she held onto the fence adjoining the sidewalk. Her right foot slipped as she walked past the property and she fell backwards. She claims she did not see any ice until after she fell. She described the ice as "dark, dirty" and took up half the width of the sidewalk.

Flynn testified that snow removal for the immediately preceding snow event was performed either by her son, who lived with her, or someone they hired. Defendant testified that the subject sidewalk was clean the night before the accident, on February 19th, when she last checked it, and that she had sprinkled de-icer on the entire sidewalk. She further testified that her practice was to clean the sidewalk from one end of the property to the other, and apply de-icer on the sidewalk after it was cleared. She avers that she applied de-icer daily that week, several times a day, as did her son. Flynn was at home at the time of the accident, and saw plaintiff clutching the fence of the corner house immediately before the accident occurred, but by the time she got outside plaintiff was already on the ground. Flynn described the ice as "skim, a layer of clear ice." Flynn avers that no one ever complained about the subject sidewalk or fell on snow or ice on her property previously.

Similarly, her son, non-party Mark Flynn, testified that he and/or his girlfriend also performed snow and ice removal at the subject property, including applying de-icer. Generally, his

mother would apply de-icer on the sidewalk, then he would do it again in the middle of the night. With respect to that winter of 2014, however, he stated that his girlfriend or mother performed most of the snow removal and/or de-icing because he had a "bad back." He avers that the morning of the accident, there was no ice on the sidewalk before the accident; it was a "pristinely [] clean walkway." After the accident, he described the layer of ice as "very thin, like a flash freeze" which covered all of the sidewalk from the corner of the block and continuing along the length of the subject property.

Generally, the owner or lessee of land abutting a public sidewalk owes no duty to keep the sidewalk in safe condition (*see Berkowitz v Spring Creek, Inc.*, 56 AD3d 594, 595 [2008]), unless the landowner or lessee created the defect, caused it to occur by special use, or violated a specific ordinance or statute which obligates the owner or lessee to maintain the sidewalk and imposes liability for the failure to do so (*see Crawford v City of New York*, 98 AD3d 935, 936 [2012]; *Berkowitz*, 56 AD3d at 595-596). Section 7-210 of the Administrative Code of the City of New York (the Sidewalk Law) shifts liability from the municipality to a property owner for personal injuries proximately caused by the owner's failure to maintain the sidewalk abutting its premises in a reasonably safe condition, including the negligent failure to remove snow, ice, or other material from the sidewalk. A property owner that chooses to remove snow or ice must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by a storm (*see Gwinn v Christina's Polish Rest., Inc.*, 117 AD3d 789, 789 [2014]; *Wei Wen Xie v Ye Jiang Yong*, 111 AD3d 617, 618 [2013]). Thus, on a motion for summary judgment dismissing a cause of action under the Sidewalk Law, a landowner has the initial burden of demonstrating, prima facie, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a period of time sufficient to discover and remedy it (*see Gyokchyan v City of New York*, 106 AD3d 780 [2013]; *Olivieri v GM Realty Co., LLC*, 37 AD3d 569, 569 [2007]).

In moving for summary judgment, Flynn argues that she is exempt from liability under the Administrate Code of the City of New York Section 7-210 (the Sidewalk Law) because she is the owner of a two-family home used exclusively for residential purposes. Furthermore, she contends that neither she nor anyone who performed snow removal on her behalf created or exacerbated the alleged hazardous condition which caused plaintiff to fall through negligent snow removal efforts. She further notes that the sidewalk in front of the property was shoveled after it had

snowed a few days before plaintiff's accident, de-icer had been applied and reapplied throughout the preceding week, and she did not see any hazardous conditions when she inspected the sidewalk the prior evening.

Plaintiff also submits an expert affidavit by meteorologist Steven Roberts, in support of her contention that she could not have created or exacerbated any hazardous conditions with her alleged negligent snow removal efforts because snow melting occurred on the day before and morning of the accident. Relying on weather data recorded in the vicinity during the several days immediately before the accident, Roberts confirmed that the precipitation event that created the accumulation occurred on February 18, 2014, that it rained in the morning and afternoon on February 19th, and that on February 20th, the day of the accident, the low temperature was above freezing (35 degrees) and the temperature at the time of the accident was 38 degrees.

Here, Flynn is the owner of a two-family house, and the premises is exempt from liability under the Sidewalk Law for negligent failure to remove snow and ice from the subject sidewalk (*see Braun v Weissman*, 68 AD3d 797 [2009]). However, the court finds that defendant fails to establish, prima facie, that the snow removal work performed did not create or exacerbate the alleged icy condition (*see Viera v Rymdzione*, 112 AD3d 915 [2013]; *Braun*, 68 AD3d 797). Although the meteorological data reviewed by plaintiff's expert indicated that the temperature at the time of the accident and the lowest temperature for that day were both above freezing, and therefore too warm for ice to form, such evidence is insufficient to warrant summary judgment given the conflict with plaintiff's testimony that she saw ice on the sidewalk after she fell (*see Gyokchyan v City of New York*, 106 AD3d 780 [2013]). Both Flynn and her son also reported seeing ice on the ground after the accident. Moreover, Flynn's son was unsure whether he saw any de-icer was present on the sidewalk where plaintiff fell, and plaintiff's testimony reflects that only a "little bit" was present. Based on the record, triable issues exist which preclude summary judgment regarding whether the ice upon which plaintiff fell was formed when snow piles created by or on behalf of Flynn's snow removal efforts melted and refroze (*see Lindquist v Scarfogliero*, 129 AD3d 789 [2015]; *Arashkovitch v City of New York*, 123 AD3d 853 [2014]; *Viera*, 112 AD3d 915; *Braun*, 68 AD3d 797). Triable issues also remain whether Flynn lacked constructive notice of the alleged ice condition given Flynn's testimony that she inspected the subject sidewalk at some unspecified time the previous evening (*see Korn v Parkside Harbors Apts., LLC*, 134 AD3d 769, 770 [2015]; *Gyokchyan*, 106 AD3d 780; *Feldmus v Ryan Food Corp.*, 29 AD3d 940,

941 [2006]). Thus, resolving all reasonable inferences in the manner most favorable to the opponent of the motion, defendant fails to meet her prima facie burden on summary judgment, and the court need not consider the sufficiency of the papers in opposition (*see Lindquist*, 129 AD3d 789; *Martinez v Khaimov*, 74 AD3d 1031 [2010]).

Turning to the City's summary judgment motion, a municipality is obligated to keep the streets within its jurisdiction in a reasonably safe condition for travel (*see Mazzella v City of New York*, 72 AD3d 755, 756 [2010]; *Gonzalez v City of New York*, 148 AD2d 668, 670 [2010]). To hold a municipality liable for an injury caused by a hazardous snow or ice condition on the streets, the plaintiff must establish that "the condition constitutes an unusual or dangerous obstruction to travel and that either the municipality caused the condition or a sufficient time had elapsed to afford a presumption of the existence of the condition and an opportunity to effect its removal" (*Mazzella*, 72 AD3d at 756, *quoting Gonzalez*, 148 AD2d at 670; *see Williams v City of New York*, 214 NY 259 [1915]). Moreover, transitory conditions on a street or walkway, such as debris, oil, ice, or sand, have been found to constitute potentially dangerous conditions for which prior written notice must be given pursuant to Administrative Code of the City of New York § 7-201(c)(2) before a municipality will be rendered liable (*see Farrell v City of New York*, 49 AD3d 806, 807 [2008]; *Estrada v City of New York*, 273 AD2d 194 [2000]). The only two exceptions to compliance with prior written notice statutes are where the municipality affirmatively created the alleged defect or dangerous condition, or where a special use conferred a special benefit upon the municipality (*see Minew v City of New York*, 106 AD3d 1060 [2013], *citing Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Amabile v City of Buffalo*, 93 NY2d 471, 474 1999]). Additionally, the affirmative negligence exception is "limited to work by the City that immediately results in the existence of a dangerous condition" (*Levy v City of New York*, 94 AD3d 1060, 1061 [2012]). Neither actual nor constructive notice may substitute or override a prior written notice requirement (*see Silva v City of New York*, 17 AD3d 566, 567 [2005]).

The City argues that it is not liable for the alleged hazardous ice condition because reasonable time had not passed for defendant to remedy the condition and it did not create or have actual or constructive notice thereof. It further argues that the condition was not usual or dangerous so as to warrant imposing liability on the City. In opposition, plaintiff highlights the City's testimony acknowledging that it does not clean snow or ice from sidewalks in front of residential

properties.

Insofar as the City denies having received any prior written notice of the alleged hazardous condition on the sidewalk, which plaintiff does not contest, and presented testimony by its witness, an employee with the City's Department of Sanitation, that no complaints were made to the City regarding the alleged ice condition, liability may not be imposed against the municipality (*see Hanover Ins. Co. v Town of Pawling*, 94 AD3d 1055 [2012]; *Levy*, 94 AD3d 1060; *Farrell*, 49 AD3d 806). In opposition, plaintiff fails to raise any triable issues of fact as to whether either of the two (2) exceptions to written notice applies, that is, by presenting evidence raising triable issues that the City created the alleged condition or made special use of the subject sidewalk (*see Levy*, 94 AD3d 1060; *Forbes v City of New York*, 85 AD3d 1106 [2011]). Thus, summary judgment is appropriate, as neither actual nor constructive notice obviates the need for prior written notice under the Administrative Code (*see Minew*, 106 AD3d at 1061-1062).

Accordingly, Flynn's motion for summary judgment is denied, but the City's motion for summary judgment dismissing the complaint and all cross claims is granted.

Dated: March 13, 2017

Howard G. Lane, J.S.C.