Zempoalteca v Ginsberg
2017 NY Slip Op 30514(U)
March 21, 2017
Supreme Court, Kings County
Docket Number: 504763/14
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of March, 2017

PRESENT:

HON. DEBRA SILBER,

Justice.

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FEVMIN ZEMPOALTECA,

Plaintiff,

- against -

BONNIE GINSBERG and ROBERT GINSBERG,

Defendants.

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Decision / Order

Index No. 504763/14
Mot. Seq. #4

The following papers numbered 1 to 5 read on this motion:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 2
Opposing Affidavits (Affirmations)	3 - 4
Reply Affidavits (Affirmations)	5
Other Papers	

Upon the foregoing papers in motion sequence number 4, defendants Bonnie Ginsberg and Robert Ginsberg move for an order, pursuant to CPLR 3212, granting them summary judgment and dismissing the complaint of plaintiff Fevmin Zempoalteca a/k/a Fevmin Zempoaltecatl. For the reasons which follow, the motion is denied.

Facts and Procedural Background

Plaintiff commenced this action on May 26, 2014 seeking to recover damages for injuries allegedly sustained, at approximately 3:30 p.m. on January 10, 2014, when he slipped

and fell on ice on the sidewalk in front of a three-family dwelling owned by defendants and located at 272 77th Street in Brooklyn (the Property).

Defendants' Contentions

In support of their motion, defendants allege that an ice storm began in their neighborhood, at approximately 3:00 p.m. on January 10, 2014, as Mr. Ginsberg was driving home from work. Because the sidewalks were icy when he arrived at the Property, he began sprinkling ice melt. Plaintiff fell at about this time. Defendants contend, among other things, that they are entitled to summary judgment dismissing the complaint because liability cannot be imposed until they have had a reasonable opportunity to alleviate the icy condition after the storm ended, and here, the storm was still in progress when plaintiff fell. Alternatively, and to the extent that it may be argued that plaintiff's accident occurred after the storm had ended, defendants assert that they did not have a sufficient amount of time to remedy the icy condition after the storm ended.

In support of their contentions, defendants rely upon a copy of a surveillance video that shows a person using an umbrella immediately after the time of plaintiff's accident, a second person falling on the same sidewalk, and moving cars with their windshield wipers moving, to corroborate their claim that the storm had not yet ended. Defendants also rely upon certified copies of various Meteorological Records on file at the National Climatic Data Center, United States Department of Commerce, for the period from January 8, 2014 through January 10, 2014. Defendants contend that these records indicate that there was no precipitation, ice or snow in the area on January 8th and 9th, and that on January 10th,

precipitation in the form of light snow, sleet, and freezing rain fell, starting from around 5:30 - 6:00 a.m. through 8:50 a.m.[1] Then, after 8:50, precipitation fell frequently in the form of light snow, sleet, light freezing rain and drizzle through around 11:40 a.m. and after 11:40 a.m., precipitation fell frequently in the form of light rain and drizzle through the remainder of the day. Defendants assert that approximately 0.1 - 0.3 inches of snow, sleet, and freezing rain fell on this day; the high temperature was near 37 degrees and the low temperature was near 25 degrees.

Plaintiff's Contentions

In opposition, plaintiff argues that the surveillance video offered by defendants doesn't begin until after he fell, since it shows him returning to retrieve his phone and a second person falling. Plaintiff also asserts that although it was cold at the time that he fell, it was not raining or snowing and it was dark. He further alleges that he did not see the ice on the sidewalk until after he fell.

In addition, plaintiff alleges that he noticed, after he fell, that the ice on which he slipped appeared to be dirty, black and discolored; some patches appeared to have frozen footprints in them. Plaintiff also claims that he noticed what appeared to be salt or some other substance used to melt ice and snow; the substance appeared to have allowed some of the ice patches to melt and re-freeze.

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[1]Mr. Ginsberg testified at his EBT that there was no precipitation until after he left for work, and that it was 35 degrees and clear when he left for work.

The Law

A party who possesses or controls real property is under a duty to exercise reasonable care under the circumstances (*Basso v Miller*, 40 NY2d 233 [1976]). "A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Yioves v T.J. Maxx*, 29 AD3d 572, 572 [2nd Dept 2006]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [defendants] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). To meet the burden of demonstrating constructive notice, a defendant is also required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall (*see e.g. Giantomaso v T. Weiss Realty*, 142 AD3d 950, 951 [2nd Dept 2016]; *Birnbaum v New York Racing Assn.*, 57 AD3d 598, 598-599 [2nd Dept 2008]).

Further, "[a] defendant moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, prima facie, that it neither created the snow and ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition" (*Talamas v Metropolitan Transp. Auth.*, 120 AD3d 1333, 1334 [2nd Dept 2014]). The court has explained that:

> "An owner of real property, or a party in possession or control thereof, may be liable for a hazardous snow or ice condition existing on the property as a result of the natural accumulation of snow or ice only upon a showing that it had

> actual or constructive notice of the hazardous condition and that a sufficient period of time elapsed since the cessation of the precipitation to permit the party to remedy the condition."

(*Lee-Pack v. 1 Beach 105 Assoc., LLC*, 29 AD3d 644 [2nd Dept 2006] [internal citations omitted]). "Under the storm in progress rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*Bednoski v County of Suffolk*, 145 AD3d 943 [2016], citing *Dumela-Felix v FGP W. St., LLC*, 135 AD3d 809, 810 [2nd Dept 2016]; *McCurdy v Kyma Holdings, LLC*, 109 AD3d 799 [2nd Dept 2013]; *Smith v Christ's First Presbyt. Church of Hempstead*, 93 AD3d 839, 840 [2nd Dept 2012]). Further, "'if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied'" (*Rabinowitz v Marcovecchio*, 119 AD3d 762, 762 [2nd Dept 2014], quoting *Mazzella v City of New York*, 72 AD3d 755, 756 [2nd Dept 2010] [internal quotation marks omitted]). On a motion for summary judgment, the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case (*see Valentine v City of New York*, 57 NY2d 932, 933-934 [1982]).

As is also relevant herein, it has been held that:

> "[I]f a storm is ongoing, and a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating a hazardous condition or exacerbating a natural hazard created by the storm. In such an instance, a

> property owner moving for summary judgment in a slip-and-fall case must demonstrate, in support of its motion, that the snow removal efforts it undertook neither created nor exacerbated the allegedly hazardous condition which caused the plaintiff to fall."

(*Anderson v Landmark at Eastview*, 129 AD3d 750, 751 [2nd Dept 2015]).

Discussion

As a threshold issue, the court rejects plaintiff's claim that poor lighting was a factor causing his accident. Since plaintiff fell at 3:30 in the afternoon, during daylight hours, this contention is found to be patently incredible.

The court finds, however, that defendants fail to establish their prima facie entitlement to summary judgment. In the first instance, the climatological data submitted by defendants is insufficient to establish, as a matter of law, that a storm was still in progress at the time that plaintiff fell. More specifically, the data was collected from nearby locations, i.e., Central Park in New York City, John F. Kennedy International Airport, La Guardia International Airport and Newark Liberty International Airport. Data for Central Park indicates that snow in the amount of .01 and .02 inches accumulated between 8:51 a.m. and 9:32 a.m.; rain, mist and unknown precipitation of .05 inches accumulated between then and 1:49 p.m., and temperatures increased from 32 degrees at 8:24 a.m. to between 35 and 37 degrees for the remainder of the day. Data for La Guardia Airport indicates that the last accumulation of freezing rain, in the amount of .04 inches, occurred at 10:51 a.m.; after that, only drizzle and mist accumulating to .01 inch at 2:44 p.m. was reported; and the temperature remained at or above 32 degrees. Data for Kennedy Airport reveals a brief period of snow accumulating .05 inches at 9:51 a.m., with mist, drizzle and rain falling the remainder of the

day, accumulating between a trace amount up to .02 inches; temperatures steadily rose from 32 degrees at 8:13 a.m. to 37 to 38 degrees for the remainder of the day. Data for Newark Airport indicates that trace amounts of snow fell between 5:40 a.m. and 8:32 a.m.; freezing rain, ice pellets and mist in amounts of up .01 to .06 inches fell between then and 11:01 a.m.; mist and drizzle, with little, if any, accumulation, fell for the remainder of the day; and the temperature remained at 30 or 31 degrees until 11:01 a.m., when temperatures began to climb above freezing to 34 to 35 degrees for the remainder of the day.

Accordingly, given the range of weather conditions, precipitation types and amounts and temperatures around the area, a factual issue exists as to what the conditions were at defendants' property and whether the storm had ended at the time that plaintiff fell. In addition, the court notes that the climatological data relied upon by defendants indicates that there was no precipitation in Central Park at the time of the accident. Further, Mr. Ginsberg's own testimony at his EBT was that there was no precipitation until after he left for work, and that it was 35 degrees and clear when he left for work. Thus, since the evidence submitted by defendants for four different weather stations are in conflict with each other, and in conflict with defendant's own testimony, they cannot establish, as a matter of law, that the storm in progress rule applied (*see e.g. Yassa v Awad*, 117 AD3d 1037, 1038 [2nd Dept 2014]; *Abramo v City of Mount Vernon*, 103 AD3d 760, 761 [2nd Dept 2013]).

Similarly, the court finds the surveillance video to be insufficient to establish that an ice storm was still in progress. In the first instance, it is not clear from watching the video whether any precipitation was still falling, and if so, in what form. Further, it is not possible

to determine if precipitation had tailed off to such an extent that there was no longer any appreciable accumulation, so that the storm in progress rule would not apply (*see Rabinowitz*, 119 AD3d at 762). In addition, because defendants fail to establish when the storm ended, they have not made a prima facie showing that four hours had not elapsed since the storm ended so as to entitle them to the protections of New York City Administrative Code § 16-123[2] (*see generally Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431 [1st Dept 2015]).

Further, defendants fail to satisfy their initial burden of establishing that they did not have constructive notice of the alleged dangerous condition. In this regard, defendants allege, in reliance upon the deposition testimony of Ms. Ginsberg, that they always inspect their property for snow and ice. This testimony is insufficient to demonstrate any particularized or specific inspection or procedure in place on the date of the accident, and is therefore insufficient to satisfy defendants' burden (*see generally Birnbaum*, 57 AD3d at 598-599).

In addition, defendants also fail to make a prima facie showing that their snow removal efforts undertaken prior to the accident did not create or exacerbate the hazardous condition which allegedly caused plaintiff to fall (*see generally Cotter v Brookhaven Mem. Hosp. Med. Ctr.*, 97 AD3d 524, 524 [2nd Dept 2012]; *Kantor v Leisure Glen Homeowners Assn.*, 95 AD3d 1177, 1177 [2nd Dept 2012]). More specifically, an issue of fact is raised

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[2] New York City Administrative Code § 6-123(a) provides, in relevant part, that "[e]very owner . . . 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 . . ."

with regard to whether defendants' efforts to melt the ice[3] made the condition of the sidewalk more dangerous by, for example, exposing a more slippery surface (*see generally Rector v City of New York*, 259 AD2d 319, 320 [1st Dept 1999]) or by causing snow left by prior removal efforts to melt and re-freeze (*see generally Ming Hsia v Valle*, ___ AD3d ___, 2017 NY Slip Op 01193 [2nd Dept 2017]; *Lindquist v Scarfogliero*, 129 AD3d 789, 790 [2nd Dept 2015]); *Keese v Imperial Gardens Assoc., LLC*, 36 AD3d 666, 667 [2nd Dept 2007]). In reaching this conclusion, it is also significant to note that Mr. Ginsberg testified at his deposition that his tenants sometimes shoveled the snow before he arrived at the premises during a storm (*see generally Anderson*, 129 AD3d at 751).

Since defendants did not meet their prima facie burden of proof, their motion for summary judgment dismissing the complaint is properly denied without the need to consider the adequacy of plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cotter*, 97 AD3d at 525). Moreover, even if defendants had met their burden of proof, issues of fact exist, as discussed above, that are sufficient to overcome a prima facie case for dismissal. (*see e.g. Coons v Sorrentino*, 145 AD3d 854 [2nd Dept 2016] [the submissions of defendant failed to eliminate all triable issues as to whether an adequate period of time passed following the cessation of the storm on the morning of the subject accident so as to have allowed it the opportunity to ameliorate the hazards alleged to have

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[3]The time of plaintiff's accident is alleged to be prior to defendant's arrival home from work, but plaintiff claims he saw an ice melt/salt type substance on the ground. This creates an inference that either defendant spread ice melt/salt on the sidewalk before he left for work or that someone else spread it before he arrived at his home. Defendant testified that his tenants sometimes cleared the snow when he was not at home.

caused plaintiff's accident]; *Lester v Ackerman*, 82 AD3d 847 [2nd Dept 2011] [plaintiff raised several issues of fact that precluded summary judgment where she testified at her deposition that it was not snowing or raining at the time of her accident]; *Lotenberg v Long Is. R. R.*, 34 AD3d 435 [2nd Dept 2006] [in light of the conflict in the testimony of the parties and the climatological data, issues of fact exist as to when the snow fall ceased and whether the defendant had an adequate opportunity to ameliorate the hazardous condition, if any, caused by the snow fall].

Conclusion

Defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court