

Brito v American Broadcasting Cos., Inc.

2012 NY Slip Op 32373(U)

September 5, 2012

Sup Ct, NY County

Docket Number: 115527/08

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

BRITO
-v-
AMERICAN

INDEX NO. 115527-08

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE
w/ ATTACHED DECISION

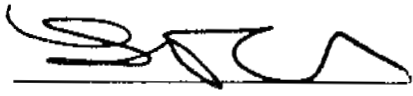
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

SEP 13 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9-5-12

 J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL 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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
OCTAVIO BRITO,

Plaintiff,

Index No.
115527/08

- against -

Decision and
Order
Mot. Seq. No. 001

AMERICAN BROADCASTING COMPANIES, INC.
and ABC STUDIOS EAST, INC.

Defendants.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Octavio Brito brings this action for personal injuries allegedly sustained on March 16, 2007 at approximately 5:15 p.m. when he was caused to slip and fall due to snow and ice accumulated on the sidewalk owned by the defendants located between the entrances of two ABC buildings on Columbus Avenue between West 67th and 66th Streets in the County and State of New York. Defendants American Broadcasting Companies, Inc. ("ABC") and ABC Studios East, Inc. ("ABC Studios") move for summary judgment pursuant to CPLR §3212. Plaintiff opposes.

Defendants, in support of their motion, submits the attorney affidavit of Virginia Goodman Futterman. Annexed as exhibits to Futterman's Affidavit are the following: the pleadings, plaintiff's bill of particulars, supplemental bill of particulars, and second supplemental verified bill of particulars; plaintiff's deposition transcript; a Google map photo marked at plaintiff's deposition; Occurrence Report; DVD depicting the sleet event and weather conditions as they allegedly existed at the time of the accident; and three certified weather reports.

Defendants argue that the Complaint should be dismissed because plaintiff can show no duty owed by ABC to clear any snow, sleet, and/or ice on the sidewalk adjacent to its buildings during the progress of the storm on the day of the accident. Defendants also contend that the efforts taken by ABC to remove snow during the

storm were not in the area that plaintiff fell and did not otherwise create or exacerbate any hazardous condition. Defendants argue that "Plaintiff cannot establish any factual dispute as to the impact of ABC's snow removal efforts on the condition of the sidewalk in the location where Plaintiff fell, and his claims are appropriately analyzed and dismissed under the 'storm in progress doctrine.'" Defendants also contend that dismissal as to ABC Studios is warranted because ABC Studios was not in existence at the time of the alleged accident, but, instead, was first incorporated as a domestic corporation on May 30, 2008. Defendants contend that upon that basis alone ABC Studios should be dismissed from this matter.

Plaintiff, in opposition, submits the attorney affirmation of Ashley Shain. Annexed as exhibits to Shain's affirmation are: the pleadings; plaintiff's bill of particulars and supplemental bill of particulars; plaintiff's deposition transcript; deposition transcript of Peter Perillo, the assistant director of facilities management for the ABC premises located between West 66th and 67th Street and Columbus Avenue, 7 Lincoln Square West; deposition transcript of Jeffrey Smith, weatherman for defendants; Harvard Operations Snow Removal Work Orders; and the Master Janitorial Services Agreement with Harvard Maintenance. The snow removal guidelines set forth in the agreement state that "snow/ice removal is to begin at the start of snowfall and continue until snowfall stops. All sidewalks, driveways and ramps must be maintained in a totally clear and safe condition." Plaintiff contends that summary judgment must be denied because there are triable issues of fact regarding whether defendants caused or exacerbated the dangerous condition of the sidewalk causing or contributing to plaintiff's accident. Plaintiff does not address dismissal of the Complaint as to ABC Studios on the basis that it was not created as an entity and was not in existence on the day of the accident.

Plaintiff testified that during the afternoon of March 16, 2007, he was at Columbus Avenue and West 65th Street making a stop for his job with Safety Cleaning. Afterwards, he walked north to the bakery located on Columbus Avenue between 68th and 69th Streets and then was walking back towards his van parked on Columbus and West 65th Street when he fell. A severe storm consisting of snow, ice, and sleet had been in progress since early morning and it was sleeting at the time of the incident. As plaintiff was walking towards Columbus and West 65th Street, the ramp at the corner of the curb on 67th and Columbus was cleared of snow for approximately six to seven feet. After the ramp, the next forty feet was covered in snow and then there was another cleared patch of approximately seven to eight feet

[* 4]

of sidewalk in front of the entryway to the ABC Building between 67th and 66th Street. After passing over the cleared entryway, plaintiff took about five steps onto white snow before his left foot slipped and he fell to his side onto a patch of ice that had been covered by the snow. When plaintiff fell to the ground, he alleges that underneath the snow was ice. As a result of his fall, plaintiff sustained multiple injuries to his left knee, including meniscus tears that required arthroscopic surgery.

Peter Perillo testified that, on the date of plaintiff's accident on March 16, 2007, he was the assistant director of facilities management for the ABC premises located between West 66th and 67th Street and Columbus Avenue. As a manager, Perillo was responsible for maintenance of the premises, including overseeing snow removal. Perillo testified that on March 16, 2007, the maintenance staff worked from 8:00 am through 5:00 pm removing snow, including at the 77 West 66th Street complex which included the entrance to 7 Lincoln Square. Perillo also testified that he gives specific instructions when there is active snow for maintenance staff regarding snow removal. He testified that the maintenance department is required to remove snow and salt continuously during ongoing snow and not to wait until the snowstorm is over to begin clearing. He testified that when there is snowfall continuously accumulating during the hours of 7:00 am and 8:00 am through 5:00 pm, the regular practice of defendants is to continuously remain outside on the sidewalk, removing snow and ice.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

A defendant who moves for summary judgment in a slip-and fall action 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. Once a defendant

establishes prima facie entitlement to such relief as a matter of law, the burden then shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice. *Rodriguez v. 705-7 East 179th Street Housing Development Fund Corp.*, 79 A.D.3d 518, 520 (1st Dept. 2010).

“[I]t is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended.” *Espinell v. Dickson*, 2008 NY Slip Op. 9638, *1 (1st Dept. 2008) (citing *Pippo v City of New York*, 43 AD3d 303, 304 [2007]).

“An owner or lessee of property owes no duty to pedestrians to remove ice and snow that naturally accumulates upon the sidewalk in front of its premises, but, if it undertakes to do so, it can be held liable in negligence where its acts create or increase the hazards inherent in ice and snow on the sidewalks.” (*Juiz v. City of New York*, 244 A.D. 2d 298, 298 [1st Dept 2007]).

Defendants establish that a severe storm consisting of snow, ice and sleet had been in progress throughout the day of plaintiff’s accident and that it was sleeting at the time of plaintiff’s accident. Furthermore, while ABC concedes that it cleared a path in front of entrances to two ABC buildings on Columbus between 67th and 68th Streets during the storm, plaintiff testified that he did not fall on that path. Rather, plaintiff testified that he fell after he passed over the cleared path. Plaintiff claims that Defendants created or exacerbated the alleged dangerous condition where he fell “by salting and sanding and then not continuing to do so, thus causing a melting and re-freezing condition that left ice on the sidewalk which was subsequently covered by snow resulting in a hidden icy condition that is more dangerous than simply leaving the snow on the sidewalk.” However, plaintiff’s claim is not supported by any evidence or testimony (expert or otherwise) and as such is mere conjecture. See *Scheer v. City of New York*, 211 A.D. 2d 778, 778 (1995) (“Speculation, guess and surmise, however, may not be substituted for competent evidence.”); *Grob v. Kings Realty Associates, LLC*, 4 A.D.3d 394 (2d Dept 2004). There is simply no testimony that, on the area where plaintiff fell, it had been salted, sanded and that such efforts were suspended, allowing a melting and re-freezing. Indeed, the evidence establishes that a storm was in progress and that several inches of sleet had fallen at the time of plaintiff’s accident, creating a naturally occurring hazard.

For the foregoing reasons, it is hereby:

ORDERED that defendants ABC Broadcasting Companies, Inc. and ABC Studios East, Inc.'s motion for summary judgment is granted; and it is further

ORDERED that plaintiff Octavio Brito's action against defendants ABC Broadcasting Companies, Inc. and ABC Studios East, Inc. is dismissed; and it is further

ORDERED that Clerk is directed to enter judgment dismissing plaintiff Octavio Brito's action in itsentirety.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED:

9/5/12


EILEEN A. RAKOWER, J.S.C.

FILED

SEP 13 2012

COUNTY CLERK'S OFFICE
NEW YORK