Palka v Village of Ossining
2013 NY Slip Op 33718(U)
February 21, 2013
Sup Ct, Westchester County
Docket Number: 20520/09
Judge: Mary H. Smith

DECISION AND ORDER

FILED & ENTERED
2/22/13

FILED
FEB 22 2013
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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DAVID PALKA and KATHLEEN PALKA,

Plaintiffs,

-against-

THE VILLAGE OF OSSINING, CHI HIS TAN, ATLANTIC BAR & RESTAURANT CORP.,

Defendants.
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MOTION DATE:2/15/13
INDEX NO.:20520/09

The following papers numbered 1 to 9 were read on this motion by defendant Atlantic Bar & Restaurant Corp. For summary judgment dismissing the complaint and cross-claims, and on this cross-motion by defendant Village of Ossining for summary judgment dismissing the complaint and cross-claims.

Papers Numbered

Notice of Motion - Affidavit (Flake) - Exhs. (A-Q) 1-3
Notice of Cross-motion - Affirmation (Svensson) 4-5
Answering Affirmation (Esposito) 6
Answering/Replying Affidavit (Flake) 7
Replying Affirmations (Svensson) 8,9

Upon the foregoing papers, it is Ordered and adjudged that this motion and cross-motion are disposed of as follows:

This is a personal injury action wherein defendant David Palka seeks to recover for injuries he allegedly had sustained, on February 7, 2009, at approximately 10:45 p.m., as a result of his slipping and falling on ice and/or snow located on the sidewalk adjacent to 84 Croton Avenue, Ossining. Plaintiff asserts that defendant Village of Ossining ("Village") negligently had plowed Croton Avenue, on or about February 5, 2009, and thereby had caused snow to pile up on the sidewalk in front of 84 Croton Avenue, where it had been left. Defendant Tan Chi Hsi owns the property located at 84 Croton Avenue, from which defendant Atlantic Bar & Restaurant Corp. (Collectively defendants "Atlantic") operates its business. Plaintiff claims that defendants Hsi and Atlantic had been negligent in failing to remove snow and ice from said sidewalk, in failing to spread sand, salt and any other de-icing substance on the sidewalk, and in failing to warn and post notice of the slippery and icy sidewalk condition.

According to plaintiff's testimony, two hours prior to his alleged fall, he had been a passenger in his friend's vehicle, which had been parked on Croton Avenue. Plaintiff had testified that he and his two friends had gotten out of the vehicle and walked approximately fifteen feet to a restaurant called Tropicalis, where they had eaten and drank. After dinner, the three had walked back to the parked vehicle. Plaintiff had

observed a three-foot wide patch of ice on the sidewalk, extending as far as he could see and, as plaintiff opened the car door and had been attempting to enter the rear of the vehicle, his feet both slipped backwards and he fell forward.

According to Sergei Bezzubikoff, president of defendant Atlantic, he performed snow removal at the premises in February, 2009, and, after removing the snow from the sidewalk area following a snow event, he would throw down salt or sand. According to Mr. Bezzubikoff, prior to plaintiff's fall, he had been instructed by a Village employee to not place the removed snow onto the street, and so Mr. Bezzubikoff would place the shoveled snow next to the curb. Mr. Bezzubikoff also had testified that, when the Village plowed, the snow that it removed would fall on top of the sidewalk curb.

Michael Duffy, the Village's Assistant Foreman for the Highway Department, had testified on behalf of the Village. According to Mr. Duffy, the Village plows both during and after snow events, applying salt to the roadway, and the Village had performed plowing on February 3, 2009. Mr. Duffy had agreed that plowed snow would get pushed to the curb and that snow would fall on adjacent sidewalks, if not blocked by parked cars. He had testified that he was unaware of any municipal plan to salt or remove snow and ice from a sidewalk once it was there.

Presently, defendants Atlantic are moving for summary judgment dismissing the complaint and cross-claims, arguing that the Ossining Municipal Code, and specifically section 229-6(A)(1), does not impose tort liability upon adjacent landowners for their failure to maintain municipal sidewalks, and arguing that they had not made any "special use" of the sidewalk, had not created the allegedly dangerous sidewalk condition, and had not negligently repaired the sidewalk resulting in the alleged defect, and thus that there exists no basis to impose liability upon defendants Atlantic, particularly given that plaintiffs do not allege that Atlantic's actual snow removal had caused the dangerous condition upon which plaintiff had fallen but rather only that the Village's snow removal efforts had caused the dangerous condition.

Defendant Village too is moving for summary judgment dismissing the complaint and cross-claims, arguing that the Village did not have prior written notice of the alleged defect, as required by Village Law section 6-628, that it did not have knowledge of any dangerous condition as a result of its having undertaken an inspection or performed work immediately prior to plaintiff's fall, and that it had not created the allegedly defective condition by any affirmative act of negligence, the Appellate Division previously having determined that the plowing of snow onto curbs, as here occurred, by itself, is not evidence of

negligent snow removal.[1] Indeed, defendant Village argues that there is no evidence regarding warming and freezing weather conditions and expert analysis of same. Defendant Village maintains that plaintiff's fall had occurred because of plaintiff's own deliberate action in disregarding a safety threat of which he had been aware, rather than his simply walking further down the street to enter his friend's car.

Plaintiffs oppose the motion, arguing that both defendants Atlantic and the Village admit that, prior to plaintiff's fall, they collectively had removed snow from both the road and the sidewalk and both had piled this removed snow into and onto the curb adjacent to 84 Croton Avenue where plaintiff fell, and thus plaintiffs submit that there are presented triable issues of fact regarding whether defendants' snow removal had created or increased a dangerous condition which proximately had caused plaintiff's injury.

It is well-settled that on a motion for summary judgment, the Court is called upon to determine whether a bona fide issue exists. 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

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[1]Defendant Village notes that plaintiff does not allege that the Village made any "special use" of the sidewalk.

the case. See, e.g., Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1990); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Although the papers are carefully scrutinized in the light most favorable to the party opposing the motion, see Robinson v. Strong Memorial Hospital, 98 A.D.2d 976 (4th Dept. 1983); Strychalski v. Mekus, 54 A.D.2d 1068, 1069 (4th Dept. 1976), and summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact, see Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978), bald, conclusory assertions and the "shadowy semblance of an issue" are insufficient to defeat a summary judgment motion. See Ehrlich v. American Moninga Greenhouse Manufacturing Corp., 26 N.Y.2d 255, 259 (1970); see, also, S.J. Capelin Associates v. Globe Mfg. Co., 34 N.Y.2d 338 (1974); Blankman v. Incorporated Village of Sands Point, 249 A.D.2d 349 (2nd Dept. 1998). Rather, it is incumbent upon a party who opposes a summary judgment motion to "assemble, lay bare and reveal his proofs, in order to show that the matters set up in his [pleading] are real and capable of being established upon a trial." DiSabato v. Soffes, 9 A.D.2d 297, 301 (1st Dept. 1959), app. dsmd. 11 A.D.2d 660 (1st Dept. 1960); see, also, S. J. Capelin Associates v. Globe Mfg. Co., supra; Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 (1st Dept. 1971), affd. 29 N.Y.2d 617 (1971). Averments merely stating conclusions of fact or law are

insufficient to defeat summary judgment. See Banco Popular North America v. Victory Taxi Management, 1 N.Y.3d 381, 383-384 (2004).

Applying the foregoing principles to defendants Atlantic's motion seeking summary judgment, said motion is granted; the claims and cross-claims against defendants Atlantic are hereby dismissed. The inescapable fact is that, throughout the three and one-half years this action has been litigated, plaintiffs only have asserted in their bills of particular as against defendants Atlantic that said defendants had failed to remove the snow and ice from the adjacent sidewalk and that they had failed to apply a de-icing agent to the sidewalk. Necessarily, plaintiffs are bound by and limited to these asserted theories of liability and will not be heard now for the first time, in opposition to defendant Atlantic's summary judgment, to claim that Atlantic's negligent snow removal had caused the icy condition upon which plaintiff had fallen. See Mezger v. Wyndham Homes, Inc., 81 A.D.3d 795 (2nd Dept. 2011); Pinn v. Baker's Variety, 32 A.D.3d 463, 464 (2nd Dept. 2006); see, also Langan v. St. Vincent's Hosp. Of New York, 64 A.D.3d 632 (2nd Dept. 2011).

Accordingly, with respect to plaintiffs' only asserted claim that defendants Atlantic had failed to maintain the sidewalk, section 229-6(A)(1) of the Ossining Municipal Code makes clear that tort liability cannot be imposed upon adjacent landowners for their

failure to maintain municipal sidewalks. See Marx v. Great Neck Park District, 92 A.D.3d 925, 926 (2nd Dept. 2012); Hilpert v. Village of Tarrytown, 81 A.D.3d 781 (2nd Dept. 2011). Accordingly, defendants Atlantic are entitled to dismissal of plaintiff's complaint.

Addressing next the Village's summary judgment motion, the Court agrees with said defendant that its unrefuted proof that it had not received prior written notice of the extant icy sidewalk condition at 84 Croton Avenue precludes a finding of municipal liability, see Gorman v. Town of Huntington, 12 N.Y.3d 275, 279-280 (2009), unless there is proof that the Village had created the icy condition through an affirmative act of negligence, which is the only claimed exception to the prior written notice requirement cited by plaintiffs as a basis for liability. See Amabile v. City of Buffalo, 93 N.Y.3d 471, 474 (1991).

On this record, the Court finds that there exist triable issues of fact, based upon the submitted photographic evidence of the ice condition and the deposition testimony, as to whether the Village's snow removal efforts four days prior to plaintiff's fall, which included its plowing the snow against the Croton Avenue curb, proximately had caused the foreseeable icy sidewalk condition upon which plaintiff had fallen, irrespective of plaintiff's failure to have submitted meteorological records establishing what were the

temperature and weather conditions on the days and nights preceding plaintiff's fall and that a pattern or condition of melting and re-freezing had occurred, and whether the Village had fulfilled its duty to maintain the sidewalks in a reasonably safe condition. See San Marco v. Village/Town of Mount Kisko, 16 N.Y.3d 111, 117 (2010); Repetto v. Alblan Realty Corp., 97 A.D.3d 735 (2nd Dept. 2012); Urban v. City of Albany, 90 A.D.3d 1132 (3rd Dept. 2011), app. dsmd. February 21, 2012; Foreman v. City of White Plains, 5 A.D.3d 434 (2nd Dept. 2004); Ricca v. Ahmad, 40 A.D.3d 728 (2nd Dept. 2007); Roca v. Gerardi, 243 A.D.2d 616 (2nd Dept. 1997); cf. Smith v. County of Orange, 51 A.D.3d 1006 (2nd Dept. 2008).

This action is hereby severed and Ordered continued. The parties shall appear in the Settlement Conference Part, Room 1600, at 9:30 a.m., on March 21, 2013.

Dated: February 21, 2013
White Plains, New York

MARY H. SMITH
J.S.C.