Fernandez v State of New York
2013 NY Slip Op 33967(U)
September 13, 2013
Court of Claims
Docket Number: 118692
Judge: Richard E. Sise
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STATE OF NEW YORK COURT OF CLAIMS

RAMON FERNANDEZ and JOHANNY FERNANDEZ,

Claimants, DECISION

-v-

THE STATE OF NEW YORK, Claim No. 118692

Defendant.

BEFORE: HON. RICHARD E. SISE
Acting Presiding Judge of the Court of Claims

APPEARANCES: For Claimants:
DELL, LITTLE, TROVATO & VECERE, LLP
BY: Christopher R. Dean, Esq.

For Defendant:
HON. ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
BY: Faisal H. Sheikh, Esq. and Kimberly Kinirons, Esq.
Assistant Attorney General

On February 14, 2007, near the Cancer Center of Stony Brook Hospital, Claimant Ramon Fernandez[1] was walking along an asphalt pathway leading from a parking lot toward the building housing the center when he slipped and fell, suffering personal injuries. The claim alleges that his fall was caused by the negligence of the State, as owner of the property, in its design and maintenance of the walkway. Trial of this action was bifurcated, and this decision relates to the issue of liability only.

[1] The claim of Johanny Fernandez is derivative in nature and, unless otherwise indicated or required by context, the term "claimant" shall refer to Ramon Fernandez.

Claimant contends that the build-up of ice on which he slipped was caused by negligent placement of a drainage pipe, negligent design of the ramp on which he was walking, and failure to keep the area free of hazards and in good repair. Claimant also alleges that the State violated several regulatory requirements in its construction and maintenance of the walkway. Defendant, on the other hand, asserts that there was no negligence and that the weather conditions together with Claimant's failure to take reasonable precautions were the only proximate causes of his injuries. At trial, the witnesses for Claimant were Claimant himself; James Prudenti, Director of Plant Operations for SUNY-Stony Brook; and engineering expert Peter Pomeranz. Witnesses for Defendant were Joseph Kelly, Supervisor of the Stony Brook Grounds Department, and John Purga, an engineering expert.

Testifying with the aid of an interpreter, Claimant stated that on February 14, 2007, he was working for his employer, Classic Valet Parking, and engaged in parking cars for individuals who were going into various buildings at the hospital complex. He had arrived at work at 9:00 a.m. Although his usual work location was at the main hospital building, on the day in question he was sent to the cancer center to cover a shift for someone else. It was around 3:05 p.m. or 3:10 p.m., after he had completed his shift and was walking from the cancer center back to the main building, that the accident occurred.

The relevant portion of the walkway is shown in Exhibits 1 and 2, which were admitted only for the purpose of showing the relationship of the walkway to the main hospital and cancer care center. The walkway is asphalt and at this location it curves around in a counterclockwise direction as it descends from a higher to a lower elevation. There is a concrete block retaining

wall running along the top portion of this section of the walkway, ending several feet before the end of the walkway.

Claimant said that it was not snowing when he began his walk from the cancer center and that the condition of the first (upper) part of the walkway was "fine" (Tr, 31).[2] "Then I started going down and then that was where the problem was" (*id.*). Claimant later reiterated that when he was on the upper part of the walkway, "there was no problems until I started walking down and the problem was at the bottom" (Tr, 39).

On Exhibit 2, Claimant identified the location on the pathway where he fell by placing an "X" with his initials[3] near the bottom of the slope, where the walkway intersects with a parking lot. A second "X", also with the initials "RF," was placed above the first one and to the left of the walkway. This, he testified both at trial and at the earlier depositions, was the place where "there was water leaking" (Tr, 35). This second "X" is placed on the lower end of a black pipe, which appears to be made of plastic or PVC. The pipe lays on top of the soil next to the retaining wall and ends at the location where the retaining wall stops, several feet above the bottom of the walkway.

When asked what caused him to fall, Claimant said that there was "[i]ce, when I tried to get up, it was all ice" (*id.*). On exhibit 1 (lower picture), Claimant made notations indicating that the ice covered the portion of the walkway that was below the end of the retaining wall

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[2] Citations to the transcript of the first day of trial will be in this format: "Tr, [page number]." Citations to the transcript of the second day of trial will be indicated as "Tr II, [page number]."

[3] These marks were placed on the photograph at an earlier deposition when he was asked to identify the spot where he fell (Tr, 33).

(which was also near the end of the black pipe) down to the point of impact at the bottom of the walkway.

On cross-examination, Claimant stated that it had been snowing on the morning of the 14th when he left for work; he had to shovel his driveway and clear his car of snow and ice. During the time he was at the cancer center, it was snowing off and on, not steadily. He also agreed that there had been freezing rain during the day, although not at the time that he fell (Tr, 46-47). He said that he had been taken to the cancer center by car and therefore his journey from the cancer center back to the main hospital was the first time that day that he used the walkway.

Claimant again asserted that he fell because there was water leaking from the lower end of the black pipe and flowing onto the walkway, where it froze (Tr, 55-57). He knew the water was coming from that location because he saw it with his own eyes (Tr, 57). At an earlier deposition, however, he had stated that he assumed the water was coming from the black pipe "because there was no other place" from which it could originate but that he had not actually seen water running from that source (Tr, 59). When asked about the discrepancy at trial, Claimant said that he had made a mistake at the deposition and reiterated that he had seen water running from the black pipe after he fell (Tr, 67).

James Prudenti, Director of Plant Operations at SUNY-Stony Brook, testified that his area of responsibility encompassed the main hospital, the cancer center and the walkway between them and that in February 2007 he supervised several areas of operation, including ground maintenance. Prudenti said that he had held this same position when the walkway in question was built (Tr, 79), but he had had no say in its design and was uncertain about many of the details of its installation (Tr, 81).

Prudenti acknowledged that it was the goal of the grounds maintenance that hospital sidewalks and walkways should be free of snow and non-slippery at all times (Tr, 87). According to his department's snow record (Exhibit D), the weather on February 14, 2007 was described as "snow to ice" (Tr, 90). The record also shows that there were a large number of man hours expended by the maintenance crew, as well as extensive use of snow removal equipment and material. This indicated, he said, that there had been significant activity in snow and ice removal during the day (Tr, 133, 135). Prudenti also identified the department's snow plan (Exhibit B), which sets out the priorities for snow removal. The priorities noted on the plan reflect the importance placed on specific buildings or areas and reflect factors such as the number of people expected to go into and out of each location and its importance to the overall operation. The location with the highest priority is the hospital itself, while the pathway on which Claimant fell, which is not directly connected to the hospital, is considerably lower on the priority list (Tr, 136-138)

With respect to the black pipe adjacent to the retaining wall that is shown in Exhibit 2, Prudenti stated at trial that he would not consider it to be a drainage pipe (Tr, 103), although he had said that it appeared to be one (Tr, 104). He was not asked what characteristics he would consider as making something a drainage pipe. When asked if "the application that's depicted of that drainage pipe is utilized in other places around the facility," he said that it was not (Tr, 107-108). He could not recall that he or anyone in his department had ever made an inspection of this walkway and the pipe (Tr, 113). Prudenti also stated that, in connection with this claim, his office was directed to search for "records regarding prior complaints on the subject pathway" before February 2007 and, in response to a question, he agreed that the search revealed no

complaints about an icing condition at this location (Tr, 127-128). He stated that he did not inquire about or conduct a similar search of the records of any other department (Tr, 131).

Peter Pomeranz, a Licensed Professional Engineer, also testified on behalf of Claimant. He stated that he had visited the accident site in May 2012 and, based on that visit, measurements he made, and photographs, he determined elevation grade from the end of the pipe to the bottom of the walkway to be 32.0 per cent downhill and 23.9 per cent transverse. This, he stated, would cause any water flowing through the pipe to flow down in a "triangular plume" onto the lower part of the walkway ramp (Tr, 151). The slope of the walkway itself he also described as "steep," with an overall downslope of 8.9 per cent and a transverse slope of 6.4 per cent. It was even steeper at the location where Claimant indicated he fell.

It was Pomeranz's opinion, with a reasonable degree of engineering certainty, that "the water coming out of this three inch pipe would flow directly onto [the] walkway and . . . in freezing weather, that water would freeze and create a hazardous condition for pedestrians walking on [the] walkway" (Tr, 152). This situation, he stated, created a "predictable and rather obvious" defect that was not in compliance with good and accepted engineering practice and could easily have been avoided by using safer, alternative ways of handling the run-off such as directing the pipe into a leach or catch basin (Tr, 153-154).

Pomeranz also testified that, in his opinion, the configuration of the walkway violated the following provisions of the New York Building Code, which is comprised of the Property Maintenance Code and the Fire Code:[4]

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[4] Defendant objected to the introduction of evidence relating to statutory or regulatory violation but was given additional time between the days of testimony to obtain its own expert.

- Section 302.2 of the Property Maintenance Code requires that a premises be graded and maintained to prevent the erosion of soil.

- Section 302.3 of the Property Maintenance Code requires all sidewalks, walkways and similar areas to be kept in a proper state of repair and maintained free from hazardous conditions.

- Section 1010.2 (1003.3.4.1)[5] of the Fire Code of New York State requires that slope "Ramps used as a part of a means of egress shall have a running slope not steeper than one unit vertical in 12 units horizontal (8-percent slope)." On this portion of the walkway in question, Pomeranz measured an 8.9 per cent slope.

- Section 1010.3 (1003.4.2) of the Fire Code requires a maximum of a 2 per cent cross-slope (perpendicular to the direction of travel), while the walkway in question showed a 6.4 per cent cross-slope at the end of the retaining wall and a 3.7 per cent cross-slope at the end of the ramp.

- Section 1002.1 (1003.4.5) of the Fire Code defines a ramp as a walking surface that has a running slope steeper than a five per cent slope and Section 1010.6 (1000.6.2) requires

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[5] In his first day of testimony, Pomeranz used section numbers from the 2010 Building Code but on the second day he provided the Fire Code section numbers used in the 2003 version of the Code, which was applicable at the time of Claimant's accident. Both numbers will be listed here, with the 2003 number in parentheses, since witnesses used both. None of the other section numbers and no part of the content of any of the sections was changed between 2003 and 2010 (Tr, II, 7-8).

there to be a landing, with a slope of less than 2 per cent at the top and bottom of each ramp. Here, there were slopes of 7.4 per cent and 3.7 per cent at the bottom of the ramp.

- Section 1010.7.2 (1003.3.4.6.2) of the Fire Code requires outdoor ramps and outdoor approaches to be designed "so that water will not accumulate on walking surfaces" (Tr, 160).

On cross-examination, counsel for Defendant challenged Pomeranz's assumptions regarding these alleged violations (discussed below). Pomeranz also acknowledged that any water flowing out of the black pipe would cross approximately 12 inches of soil and sod before reaching the asphalt surface of the walkway (Tr II, 45-46).

Defendant's engineering expert, John A. Purga, also visited the accident site in addition to reviewing relevant portions of the record and listened to the entire testimony of Claimant's expert. He did not consider the walkway in question to be a means of egress because it connected a parking lot and a parking lot with access road and sidewalk, none of which would be considered an occupied building or structure (Tr II, 69, 71-73). In his opinion, the walkway's continuous, relatively steep slope would prevent any water from accumulating (Tr II, 74, 107), and the sidewalk above and parking lot below, both of which are relatively horizontal, serve appropriately as the landings at either end of the walkway ramp (Tr II, 74),

His inspection of the black drainage pipe, carried out in July 2012, revealed vegetation growing outside the pipe, partially covering the opening, and debris and decayed leaves within the pipe. The purpose of the pipe, he stated, was to remove accumulated water from behind the

retaining wall, to prevent freezing, expansion and cracking that would damage the wall. The water then "flow[ing] downhill based on the gravity feed situation to the outlet," usually from a "trickle to drops to nothing" (Tr II, 78). The black pipe, three inches in diameter, was not connected to the bigger storm water drainage system from the upper parking lot, leading to the conclusion that its only purpose was to divert ground water, which would flow out in "drops" and "trickles" (Tr II, 80-81).

Purga's measurements revealed an overall 9.5 per cent longitudinal measurement for the slope, and he acknowledged that if this walkway was a means of egress that would constitute a violation of the Code (Tr II, 85). He doesn't, however, consider it a means of egress. Purga did agree that the subject pathway constituted a ramp, which had to be kept free from hazardous conditions (Tr II, 86).

Defendant's fact witness was Joseph J. Kelly, Supervisor of the Grounds Department at SUNY - Stony Brook. He stated this he oversees the grounds work for the hospital, ambulatory and cancer center and that he and his staff are responsible for collecting trash from throughout this area, cleaning, and during the winter months carrying out snow removal (Tr II, 119). The policy and procedure manual for snow removal (Exhibit B) provides the general plan for conducting snow removal operations. In the event of an anticipated snowstorm, the staff's normal working hours of 6:30 a.m. to 2:30 p.m. are altered, and on February 13 and 14, 2007, the storm reports (Exhibits C and D) reveal that snow was expected to start around 8:00 p.m. on February 13, and the weather was expected to change from snow to ice on the 14th. The record of man-hours and material use showed that a significant amount of work was done by the grounds crew on the 14th, something he would classify as a major snow event.

Kelly confirmed that his ground crew was responsible for snow removal on the sidewalks and walkways as well as the roads, and that the walkway involved in this action was relatively low on the list of priorities (Tr II, 134). Nevertheless, the walkway had been cleared of snow and ice sometime on the day in question (Tr II, 132-133). Kelly had no independent knowledge of the event involving Claimant on the day in question or, in fact of any events of that particular day, but he was confident that the records he maintained presented a reliable picture of what transpired as far as the clean-up effort was concerned (Tr II, 138, 141-142).

The weather records for February 14, 2007 (Exhibit A) for Nassau County and northwest Suffolk County reveal light snow beginning late in the evening on February 13, turning to mixed snow, sleet and freezing rain in the early morning hours. On the morning of February 14, a mixture of heavy sleet and freezing rain developed and continued through noon, ending with light snow. Approximately one-half inch of ice accumulated on tree limbs, power lines and roadways across the northern half of the County, compounded by one to two inches of accumulated sleet (Tr II, 153-154).

Applicable Law

To establish a prima facie case of negligence a claimant must establish "(1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) an injury suffered by the plaintiff which was proximately caused by the breach" (Kampff v Ulster Sanitation, 280 AD2d 797 [3d Dept 2001, quoting Murray v New York City Hous. Auth., 269 AD2d 288, 289 [1st Dept 2000]; Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315 [1980]; Donohue v Copiague Union Free School Dist., 64 AD2d 29, 32-33 [2d Dept 1978], *affd* 47 NY2d 440 [1979]). When the State acts as a landlord, it has a duty to maintain its premises in a reasonably safe condition

(Basso v Miller, 40 NY2d 233 [1976]), although it is not an insurer of pedestrians on the grounds of its institutions (*see* Bowers v State of New York, 241 AD2d 760 [3d Dept 1997]). Individuals, for their part, have a duty to see and be aware of what is in their view and to use reasonable care to avoid accidents (Terrell v Kissel, 116 AD2d 637 [2d Dept 1986]), in other words, "to see what by the proper use of [their] senses [they] might have seen" (Le Claire v Pratt, 270 AD2d 612 [3d Dept 2000], quoting Weigand v United Traction Co., 221 NY 39 [1917]).

Where landowners have created the condition that poses a foreseeable risk of injury or where they have reason to anticipate that harm may result despite the fact that the danger is obvious, they "owe a duty of reasonable care to either warn such persons of the danger or to take other reasonable steps to protect them from it" (Comeau v Wray, 241 AD2d 602, 603 [3d Dept 1997], citing to Restatement [Second] of Torts § 343 A [1]; Smith v Zink, 274 AD2d 885 [3d Dept 2001]). When the alleged danger was created by the State's own actions, proof they had notice of the condition is not required, as the State is assumed to be aware of its own actions and their results. (Horan v Molberger, 38 AD2d 587 [2d Dept 1971]; Calkins v City of Plattsburgh, 11 AD2d 153 [3d Dept 1960], *lv denied* 8 NY2d 708 [1960]).

When a pedestrian is injured by a fall, the claimant is required to establish that a dangerous condition existed and that Defendant either created the dangerous condition or had actual or constructive notice thereof and failed to alleviate the condition within a reasonable time (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]). With respect to individuals who are injured when falling on ice and snow, the standard of care must be applied with appreciation of the problems caused by winter weather, and Claimant must prove by

competent evidence that the presence of snow or ice created a dangerous condition that the State knew of or should have known existed and that there had been a reasonable opportunity to correct the condition (Condon v State of New York, 193 AD2d 874 [3d Dept 1993]; Marcellus v Littauer Hosp. Assn., 145 AD2d 680 [3d Dept 1988]; NY PJI Civil 3d 2:111A). When it comes to snow and ice removal, too, the "storm in progress" doctrine allows the State a reasonable time after a storm ends to take measures to remove snow and ice (Freund v State of New York, 137 AD2d 908 [3d Dept 1988], *lv denied* 72 NY2d 802 [1988]). Liability will result only if it is established that something other than the normal presence of ice and snow was the cause of the injury (Ali v Village of Pleasantville, 95 AD3d 796, 797 [2d Dept 2012]). That "something else" can be actions on the part of the defendant that exacerbate the natural hazards associated with the storm (*id.*).

Violation of the building code can be considered as some evidence of negligence (Hill v Cartier, 258 AD2d 699, 701 [3d Dept 1999]), which is relevant so long as the negligence that it tends to prove is causally related to the injury. Such violations may also, in some circumstances, establish negligence per se or, in conjunction with Labor Law § 241(6), provide an independent basis for liability,(*see* 85 NY Jur 2d Premises Liability § 271; Town of Carmel v Melchner, 105 AD3d 82, 101 [2d Dept 2013]; Smith v Homart Dev. Co., 237 AD2d 77 [3d Dept 1997]). In the instant case, because Claimant was late in alleging such a cause of action, it was agreed that any regulatory violation proven here would be considered only as evidence.

Discussion

Claimant's theory of liability in this case is straightforward and very plausible. Claimant contends that the pipe located next to the retaining wall, which ended at the point that the

retaining wall ends, operated to direct a flow of water onto the bottom part of the walkway. This, it is asserted, created a wet area, roughly triangular in shape, where the thin layer of water froze and created a dangerous condition even after the walkway had been cleared of snow and ice in the regular manner. If these facts are proven, most of the elements necessary to establish liability would be satisfied: the danger would have been caused by something that the State itself had built, the feature it installed was unlikely to be recognized by even a diligent pedestrian as a source of danger, and the danger thus created was exacerbated by a slope of the sidewalk at that location which, it appears, is steeper than that recommended by the relevant Building Code.

Claimant did not, however, prove by a preponderance of the credible evidence that the black pipe operated in this fashion. Both experts agreed that the pipe was not attached to any other drain or conduit, and therefore it was not part of a planned drainage system regularly removing water from the parking lot above. The purpose of this pipe, both agreed, was collect and remove any water that might collect behind the retaining wall. The stones of the retaining wall appear to be at most one to two inches above the ground in the back and the land behind it is sloped downward, toward the wall. The State employees added no information of significance about the pipe: Kelly did not mention it at all and Prudenti was asked very few questions about it.

It is difficult, if not impossible, to conclude that, even if Claimant did observe water coming from the end of the black pipe, that there was a sufficient quantity of water, moving with enough velocity to cross the 12 inches of unpaved ground, and then spread out to cover a large triangular area at the bottom of the walkway. The key fact, on which there is essentially no proof, is the volume of water that would have been running out of the end of the pipe under the conditions presented that day. If when there was snow accumulation (as opposed to rain), the

liquid water that would accumulate behind the retaining wall and go into the pipe was no more than a "trickle" or "droplets," it would simply not be sufficient to create the dangerous condition posited by Claimant. And unless there was enough run-off water to create the alleged dangerous condition, neither the slope of the walkway nor any of the other suggested Building Code violations would have had a contributory role in causing the accident. It may be true that if sufficient water came out of the drainage pipe to cover the distance to the walkway and then disperse, the slope of the walkway (which allegedly violated the Building Code in several respects) could have had the effect on the dispersal of the water described by Claimant's expert. But first it must be proven that there was sufficient water coming out of the pipe, and that proof is lacking. In his posttrial memorandum, counsel for Claimant makes much of the fact that there was no evidence or testimony to rebut "Claimant's factual assertions" about the amount of water coming out of the drainage pipe (Claimant's posttrial brief, page 18). However, the burden of proof was on Claimant to prove those allegations, not on Defendant to disprove them.

Perhaps the most probative piece of evidence, however, was the report by the Director of Plant Operations Prudenti that a search of the records of his department revealed no prior complaints relating to the subject pathway. If the black pipe did in fact operate in the manner asserted by Claimant, then an area of unanticipated ice at the bottom of this walkway is something that would be created with every snowfall. It is logically inconceivable that Claimant would be the first person to fall at this location.

Claimants have failed to meet their burden of proving, by a preponderance of the credible evidence, that any negligence on the part of Defendant was a proximate cause of the injuries that

he suffered in connection with this accident. The Chief Clerk is directed to enter judgment in favor of Defendant and dismissing the claim.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Albany, New York
September 13, 2013

RICHARD E. SISE
Acting Presiding Judge of the Court of Claims