King v Ciampa Bell LLC
2014 NY Slip Op 31955(U)
June 18, 2014
Sup Ct, Bronx County
Docket Number: 301886/2012
Judge: Mary Ann Brigantti-Hughes
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7/2/2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

_____X

VALENCIA L. KING,

DECISION/ORDER

Plaintiff,

-against- Index No.: 301886/2012

CIAMPA BELL LLC., et als.,

Defendants.

_____X

The following papers numbered 1 to 5 read on the below motion noticed on December 2, 2013 and duly submitted on the Part IA15 Motion calendar of **March 14, 2014**:

Papers Submitted	Numbered
Def. Affirmation in support of motion, memo of law, exhibits	1,2
Pl.'s Aff. In Opposition, exhibits	3,4
Def.'s Aff. In Reply, exhibits	5

Upon the foregoing papers, the defendants Ciampa Bell, LLC., Douglas Ciampa, Dominick Ciampa, Joseph D. Ciampa Jr., and Benjamin Ciampa, individually and d/b/a Ciampa Bell LLC, i/s/h/a Benjamin Ciampa individually and d/b/a Ciampa Bell Co. (collectively "Defendants") move for summary judgment, dismissing the complaint of the plaintiff Valencia King ("Plaintiff"), pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

On February 27, 2010, Plaintiff alleges that she slipped and fell on ice at around 5:45 AM in the Defendant's parking lot. At the time of this accident, Plaintiff was employed as a security guard assigned to work at the subject apartment complex. Plaintiff worked the overnight shift, beginning at 11:00PM and ending at 7:00AM. Plaintiff testified that she made her first round at approximately 12:00AM on the date of the accident, and it was not snowing. The parking lot,

however, did not appear to be shoveled or plowed. She had difficulties walking because of the snow and ice in the parking lot. Plaintiff made her second round at 2 or 2:30 AM. It was not snowing at the time. The condition of the parking lot had not changed. At around 5:35AM, Plaintiff made her third round. She testified that, again, it was not snowing at the time, and the condition of the parking lot had not changed. Plaintiff pushed open the exit door of the building and took two or three steps out onto the parking lot, walking on snow. She was outside for a "few seconds" when she slipped on ice located near the door. Plaintiff only saw the ice patch after she fell. She described it was a "little white circle" approximately two feet by one and a half feet, and a quarter of an inch thick. Plaintiff testified that the ice was "clear."

Defendants submit the deposition transcript of Juan Martinez, the building superintendent at relevant times. He detailed his daily routine, and testified that during a snow storm, the building owner dispatches a snow plow crew to service the parking lot area as soon as the snow stops falling. Mr. Martinez and the building's other on-site porters perform the snow removal from the sidewalks and walkways, while the crew plows the parking lot. He identified the accident location was an area that is shoveled by building porters. Mr. Martinez confirmed that the porters would spread salt in the area where Plaintiff's fall allegedly occurred, and did so the day before the accident. He inspected the accident location the morning after, and observed "lines" of ice that were the result of snow melting and re-freezing. The lines of ice originated from melting snow in between parked cars.

Defendants contend that they are entitled to summary judgment because they had no duty to remove snow and ice while a storm was in progress, or for a reasonable time after cessation of the storm, or temperature fluctuation that created the ice. The snow fell from 12:50AM to 3:55AM before Plaintiff's accident. Plaintiff slipped and fell about 1 hour and 50 minutes after the snow ended. Defendants provide an affidavit from meteorologist Steve Roberts, who reviewed climatological data from the time in question. The data revealed that it snowed two days before the accident, ending at 3:00PM on February 26, 2010. On that day, snow had fallen from 12:00AM until 3:00PM., and then again shortly from 6:30PM to 6:45PM. Approximately 16 inches of snow accumulated during this time. On the date of the accident, snow fell again

from 12:50AM to around 3:55AM. On that day, the air temperature remained above freezing from 12:01AM until 1:00AM, dropped to freezing until 1:40AM, rose above freezing until 2:25AM, dropped again to freezing until 3:10AM, rose to above freezing from 3:15 to 4:50AM, and then fell at or below freezing from 4:55AM to 9:55AM. Mr. Roberts therefore opined that the "lines' of ice observed by Mr. Martinez likely formed as a result of this temperature fluctuation approximately fifty (50) minutes prior to the accident, and was not the result of melting and re-freezing that occurred two days before this accident.

Defendants also argue that any claims made against the individual members of the LLC must be dismissed.

Plaintiff opposes the motion. She notes that Mr. Martinez testified that the building porters only worked from 8 to 4PM every day, and he kept no record of their work. Plaintiff argues that this presents an issue of fact as to whether the defendants' snow removal efforts were performed negligently. Moreover, Plaintiff contends that Defendants did not satisfy their initial burden of demonstrating lack of notice of this defective condition. Mr. Martinez did not remember what plowing was done in the parking lot in the days leading up to this accident. He conceded knowledge that piles of snow between cars would melt in the day and freeze at night.

Plaintiff also submits a report from Howard Altschule, a meteorologist. He concludes that no measurable precipitation fell from approximately 4:22PM on February 26, 2010, up until the time of the accident. Although there was some snow fall between 12:29 and 3:56AM the day of the accident, he states that there was no accumulation. As of the time of the accident, the air temperature was 31 degrees Fahrenheit and there was eight inches of pre-existing snow and ice on the ground. He notes that some ice formation occurred in the hours prior to the accident, but also opines that the pre-existing snow and ice condition was subjected to melting and re-freezing thus leading to new areas of ice.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient

evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

It is well established that landowners are under a duty to exercise reasonable care under the circumstances in the maintenance of their property (*See Peralta v. Henriquez*, 100 N.Y.2d 139, 144 [2003]), and may be excused from liability for hazardous conditions caused by an ongoing storm *(see Gleeson v. NYCTA*, 74 A.D.3d 161 [1st Dept. 2010]). Thus, the duty "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." *Pippo v. City of New York*, 43 A.D.3d 303 (1st Dept. 2007). Evidence of a storm in progress constitutes *prima facie* evidence of the absence of a duty, making dismissal warranted. *See Powell v. MLG Hillside Asssoc., L.P.*, 290 A.D.2d 345 (1st Dept. 2002). While a defendant has no obligation to remove any snow or ice during the storm, liability may result if the efforts it did take created a hazardous condition or exacerbated the natural hazards created by the storm (*see Marrone v Verona*, 237 AD2d 805 [3rd Dept. 1997]).

For a plaintiff to defeat a defendants' summary judgment motion premised upon this "storm in progress" defense, and support their claim that it was not precipitation from the ongoing storm which caused this fall, plaintiffs have the burden of producing admissible evidence that the ice that caused plaintiff's slip and fall existed prior to the storm in progress (*see Espinell v. Dickinson*, 57 A.D.3d 252 [1st Dept. 2008]), and that defendants had actual or constructive notice of the hazard (*Id*). *See also Meyers v. Big Six Towers, Inc.*, 85 A.D.3d 877 (2nd Dept. 2011). Plaintiffs may also defeat such a motion with evidence suggesting that snow-removal efforts undertaken by defendants created a hazardous condition or exacerbated the natural hazards created by the storm (*Pipero v. New York City Transit Authority*, 69 A.D.3d 493 [1st Dept. 2010]). A plaintiff must show more than a mere general awareness that a condition may be present when attempting to establish constructive notice of a particular condition that caused injury (*Piacquadio v. Recine,* 84 N.Y.2d 967 (1994). Rather, liability can be predicated only on failure of defendants to remedy specific danger after actual or constructive notice of the specific condition. *Id.*

Here, it is undisputed that there was a significant snowfall on the premises in the days prior to this accident. It is further undisputed that the majority of the snowfall - approximately 16 inches total - ended around 6:45PM the night before this incident. On February 27, 2010, at around 1:00AM, until around 3:00AM, the climatological record states that snowfall occurred in "T" or "trace" amounts. Defendants' expert opines that this "trace" snowfall that occurred just prior to the accident had started to melt at around 3:15AM, and re-froze at 4:55AM, just 50 minutes beforehand. Plaintiff's expert, however, opines that there was no measurable precipitation from 4:22PM the night before this accident, up until the time of the accident. Only trace snow fall occurred in the hours before the accident, with no accumulation. At the time of the accident, the air temperature was 31 degrees and approximately 8 inches of snow and ice were present and untreated. This Court disagrees with Defendant's conclusion that the Plaintiff's expert opined that "new" ice caused this accident. Rather, the expert states that some new ice likely formed in the hours prior to this accident. However, he concluded that pre-existing snow and ice from the days prior was subjected to melting and re-freezing that led to new areas of ice

formation. Whether or not the trace precipitation recorded in the hours prior to this accident constituted a storm in progress or the cessation of the storm is a factual determination (*see Castillo v. New York City Dept. of Educ.*, 30 Misc.3d 175 [Sup. Ct., N.Y. Cty., 2010]; *Powell v. MLG Hillside Assoc.*, 290 A.D.2d 345 [1st Dept. 2002])). The conflicting expert opinions present an issue of fact as to whether the ice that allegedly caused this fall had formed in the days prior to this incident, as opposed to being created shortly beforehand (*see Mike v. 91 Payson Owners Corp.*, 114 A.D.3d 420 [1st Dept. 2014]).

The record further demonstrates that the Defendants failed to satisfy their burden of demonstrating that they lacked constructive notice of the allegedly hazardous condition. Defendants presented evidence that certain snow removal efforts customarily took place at the accident location. Defendants, however, provided no evidence as to what specific efforts were taken at the time, or prior, to this alleged accident, aside from the fact that the area was salted the day before. There was therefore no evidence to establish that any maintenance was performed at the premises from the time of the last appreciable snow fall - the night before at around 6PM, or approximately 12 hours before the accident (*see Gonzalez v. American Oil Co.*, 42 A.D.3d 253 [1st Dept. 2007]). Upon the foregoing facts, there is a genuine issue of fact as to whether the Defendants failed to clear the snow and ice that fell in the days prior to this accident (*Bogdanova v. Falcon Meat Market*, 107 A.D.3d 638 [1st Dept. 2013]). Defendants' showing of their general snow removal procedures is insufficient to satisfy their burden of establishing that they lacked notice of the alleged condition prior to the accident (*Mike v. 91 Payson Owners Corp.*, supra).

Plaintiff presented no evidence to oppose dismissal of her claims against the individual defendants. Those claims, therefore, are dismissed (*Matias ex rel. Palma v. Mondo Properties LLC.*, 43 A.D.3d 367 [1st Dept. 2007]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the branch of Defendants' motion for summary judgment seeking dismissal of the complaint as asserted against the individual defendants, is granted, and those claims are dismissed with prejudice, and it is further,

ORDERED, that the remaining branches of Defendants' motion for summary judgment are denied.

This constitutes the Decision and Order of this Court.

Dated: 6/28/14

Hon. Mary Ann Brigantti-Hughes, J.S.C.