SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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CRISTOBAL TORRES,

Plaintiff,

-against-

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, JBB FOODS, INC. d/b/a MCDONALD'S STORE # 6160, RONALD J. BAILEY and JOHNIE BEA M. BAILEY d/b/a X-SPA. INC., and MCDONALD'S CORPORATION,

Defendants.

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Index No. 153662/12

JOAN A. MADDEN, J.:

In this personal injury action, defendants The Trustees of Columbia University in the City of New York ("Trustees of Columbia"), JBB Foods, Inc. d/b/a McDonald's Store #6060, and Ronald J. Baily and Johnie Bea M. Bailey d/b/a X-Span Inc. move for summary judgment dismissing the amended complaint.[1] Plaintiff Cristobal Torres ("Torres") opposes the motion, which is denied for the reasons below.

Background

Torres alleges that on February 2, 2011, he slipped and fell on ice in front of a McDonald's Restaurant ("the store" or "McDonald's") located at or near 600 West 125th Street in Manhattan. The restaurant is owned by the Trustees of Columbia and is occupied and operated by Ronald J. Bailey and Johnie Bea M. Bailey d/b/a X-Span, Inc ("X-Span") and JBB Foods, Inc. d/b/a McDonald's store #6160 ("JBB Foods").

[1]The action has been discontinued against Defendant McDonald's Corporation.

Torres testified that before the accident, at approximately 10:00 a.m., he was walking towards the one train, from his girlfriend's apartment, which is about one and a half blocks from the location of his fall. (Torres dep. at 22-24). It was not snowing at the time of his accident but it had snowed the evening before. Id. at 25. He was walking down a pathway in the middle of the sidewalk to stairs leading to the train platform. Id. at 33. The pathway was cleared of snow and was wide enough for a pedestrian to walk. Id. at 37. Torres stepped on a piece of ice, which he did not see beforehand, slipped, and fell forward. Id. at 46. The piece of ice he slipped on was about "a foot and a half" wide, "circular" in shape, and "dirty." Id. at 41. There was no salt or melting agents where he fell. Id. at 38. A Good Samaritan came over to help Torres up and a police officer who was there called an ambulance. Id. at 48. Torres remained sitting in the same spot until the ambulance came and took him to New York Presbyterian Hospital. Id.

Brian Bailey ("Bailey"), who was employed as a supervisor at the McDonald's testified that in that position, he oversees staff and is also responsible for maintenance and good repair of McDonald's.(Bailey dep. at 9). According to Bailey, the maintenance staff would clear snow from the sidewalk that abuts the McDonald's. Id at 34. The only instructions the maintenance staff are given are to clear a walkway on the sidewalk and lay salt. Id. at 37. Depending on how much it snows, "they would use a snowblower as a starting point to help clear the sidewalk and they will come behind with a shovel and salt." Id. at 39. The area would then be inspected either by himself or a store manager to make sure enough snow was cleared and that enough salt was put down. Id. at 40. Bailey has no independent recollection or knowledge of what snow removal took place on the sidewalk at that McDonald's on February 1 or 2. Id. at 40.

Maintenance worker, Miguel Morocho ("Morocho"), he testified that he was employed by

Ronald Bailey, testified that his job duties and responsibilities included general maintenance and snow removal. Id. at 8. He did not recall if he worked on the date of the incident. Id. at 22. Morocho has no knowledge of the condition of the sidewalk at the time of the incident and if any snow removal or salting had taken place to the sidewalk before the incident. Id.

Defendants move for summary judgment dismissing the amended complaint, on the grounds that defendants' duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while a storm is in progress. In support of their argument that a storm was in progress at the time of the accident, defendants submit "Site Specific Weather Analysis Report" prepared by CompuWeather. The report analyzes the weather conditions from January 31 to February 2, 2011. The CompuWeather report states that on January 31, 2011, "approximately 17 inches of snow and ice cover was present throughout the day" (Analysis Report, 5). There was light snow from around 11:40 p.m. through the remainder of the evening, which produced less than 0.1 inch of snow. Id. On February 1st, "approximately 1.1 inches of snow, sleet, and freezing rain fell on this day." Id. On February 2nd, the date of the incident, freezing rain, freezing drizzle, and sleet occurred frequently prior to approximately 8:25 – 8:55 am" Id. After that time, "precipitation fell frequently in the form of rain and drizzle, occasionally mixed with sleet, through around 10:15 – 11:25 AM EST." Id.

Defendants also argue that the evidence of general habits regarding snow removal are insufficient to raise an issue of fact as to whether defendants may have engaged in snow removal that led to the accident. JBB Foods and X-Span argue that as tenants of the premises, they do not owe a duty under the City's Administrative Code to pedestrians, like Torres, to maintain the sidewalk in safe condition, including by removing snow and ice. The individual defendants

Ronald J. Bailey and Johnie Bea M. Bailey also argue that they cannot be held liable for any negligence by the corporation X-Span.

Torres opposes the motion, arguing that the defendants failed to make a prima facie showing of entitlement to summary judgment as they have not shown their affirmative acts of negligence did not create or exacerbate the ice hazard that caused his injuries. Torres also argues that genuine issues of fact exist as to whether defendants performed an earlier gratuitous snow removal that created or exacerbated the ice hazard.

Discussion

On a motion for summary judgment, the proponent "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 the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

"Under the 'storm in progress rule,' a landowner generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter.... However, once a landowner elects to engage in snow removal activities, it is required to act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm." Kantor v. Leisure Glen Homeowners Ass'n, Inc., 95 AD3d 1177, 1177 (2d Dept 2012).

The court will first address the liability of the Trustees of Columbia, which, as the owner

of the property at issue owes a duty to pedestrians under Administrative Code 7-210,[2] to keep the sidewalk in a reasonably safe condition and may be held liable for the negligent failure to remove, inter alia, snow and ice. Although the Trustees of Columbia owe Torres a duty to maintain the sidewalk in a safe condition, it is well established that liability will not be imposed on a property owner for failing to remedy an icy condition on the sidewalk unless it can be demonstrated that the property owner created the dangerous condition which caused the accident or had actual or constructive notice of it. See DeCanio v. Principal Bldg. Services, Inc., 115 AD3d 579 (1st Dept. 2014); Robinson v. Trade Link America, 39 AD3d 616 (2nd Dept. 2007). "'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 [the] defendant's employees to discover and remedy it.'" Birnbaum v. New York Racing Association, Inc., 57 AD3d 598, 598 (2nd Dept. 2008), quoting Gordon v. American Museum of Natural History, 67 NY2d 836, 837 (1986).

Here, to meet its burden on the issue of notice, the Trustees of Columbia must submit some evidence, such as an affidavit or testimony based on personal knowledge, as to when the sidewalk was last inspected or the sidewalk's condition before the accident. See Spector v.

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[2] Section 7-210 of the Administrative Code provides that:

> It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
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> Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk..... (emphasis added)

Cushman & Wakefield, Inc., 87 AD3d 422, 423 (1st Dept. 2011) (holding that defendant was not entitled to summary judgment and dismissing complaint when it "failed to meet its burden with respect to actual or constructive notice of the ice because it proffered no affidavit or testimony based on personal knowledge as to when its employees last inspected the sidewalk or the sidewalk's condition before the accident"); Ross v. Betty G. Reader Revocable Trust, 86 AD3d 419, 421 (1st Dept. 2011); Birnbaum v. New York Racing Association, Inc., 57 AD3d 598-599. Here, as the Trustees fail to submit such evidence, it has not met its burden of proving lack of notice and its motion for summary judgment must be denied. Moreover, as explained below, as there are issues of fact as to whether the snow was negligently cleared, the storm in progress doctrine does not relieve the Trustees of liability.

As for JBB Foods and X-Span (together "the Tenants"), which, as indicated above, occupied and operated the premises, although the Tenants do not owe a duty to keep the sidewalk clear of snow and ice under the Administrative Code, a duty may arise, and they may be held liable to Torres if there is evidence that they removed snow and/or ice in an unreasonable manner which caused or contributed to Torres' injuries. See Sanchez v. The City of New York, 48 AD3d 275 (1st Dept. 2008); Rugova v. 2199 Holland Ave. Apt. Corp., 272 AD2d 261 (1st Dept. 2000); .Salvanti v. Sunset Industrial Park Associates, 27 AD3d 546 (2nd Dept. 2006).

Here, the record raises an issue of fact as to the liability of the Tenants based on their failure to use reasonable care in clearing the sidewalk of snow and ice, and that this failure exacerbated the hazardous condition caused by any ongoing storm, such that the storm in progress doctrine does not shield them from liability. See Rugova v. 2199 Holland Ave. Apt. Corp., 272 AD2d at 263 (holding that while defendant did not owe a duty to clear the snow while

a storm was in progress, summary judgment is not warranted where a jury could find that defendant's snow removal increased the hazard.). Specifically, Torres' testimony that there was a path on the sidewalk that was cleared for walking and his description of the condition on which he fell as a "dirty" "one and a half foot ice path" suggests that sidewalk was not properly cleared. Moreover, there is also evidence that the Tenants were responsible for clearing snow and ice, and generally performed snow and ice removal and inspected the area after such removal.

Under these circumstances, the court finds that the record raises triable issues of fact as to whether snow removal efforts taken by these defendants caused or contributed to the condition on which Torres fell, and whether his accident was caused by old ice that was not properly cleared away from the previous storm. See Sanchez v. City of New York, 48 AD3d at 276 (noting that while defendant's superintendent testified that it was his regular practice to clear ice from the sidewalk area, plaintiff's testimony that she fell on a dirty ice patch within a narrow path raised triable issues of fact as whether defendant made the path more hazardous through its snow removal efforts); Salvanti v. Sunset Industrial Park Associates, 27 AD3d at 546 (holding that a defendant may be held liable for a slip-and-fall incident involving snow and ice on its property upon a showing that the defendant created a dangerous condition or had actual notice or constructive notice of it).

Finally, as there is no basis for holding individual defendants Ronald J. Bailey and Johnie Bea M. Bailey liable, and Torres does not oppose this aspect of the motion, summary judgment is granted in favor of these defendants. See Aguirre v. Paul, 54 AD3d 302 (2d Dept 2008)(noting that "[a] corporate officer is not held liable for the negligence of the corporation merely because

of his official relationship to it [and that] [i]t must be shown that the officer was a participant in the wrongful conduct").

Accordingly, it is

ORDERED that the motion for summary judgment by defendants Trustees of Columbia, JBB Foods and X-Span is denied; and it is further

ORDERED that summary judgment is granted in favor of defendants Ronald J. Bailey and Johnie Bea M. Bailey individually; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: November 25, 2015

HON. JOAN A. MADDEN
J.S.C.