Pena v City of New York
2015 NY Slip Op 32380(U)
November 6, 2015
Supreme Court, Bronx County
Docket Number: 303162/2011
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27

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ROBYN PENA,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

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Index No. 303162/2011

DECISION and ORDER

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Defendant's motion for summary judgment pursuant to CPLR 3212 dismissing the complaint:

Papers	Numbered
Notice of Motion. Affirmation & Exhibits	
Affirmation in Opposition, Expert Affidavits & Exhibits	2
Reply Affirmation	3

Plaintiff commenced this action alleging injuries sustained when she slipped and fell on January 4, 2011 at 2:30 p.m. in the cross-walk at the intersection of Bronxwood and East 227th Street. The Bill of Particulars dated July 25, 2013 alleged that the City was negligent, *inter alia*: . . .

> in failing to shovel/plow snow in a timely fashion; failed to salt or otherwise remove an accumulation of ice and snow in a timely fashion; failed to perform snow or ice removal with reasonable care; caused; allowed to exist, or failed to prevent a dangerous condition. . . in having actual and constructive notice of the dangerous and hazardous condition and in failing to correct same in a proper and timely basis ...

After discovery Defendant City of New York moves for summary judgment pursuant to CPLR 3212 dismissing the complaint; in support thereto, the City submits the deposition testimony of the parties, photographs and the climatological reports.

It is agreed that between 15 and 20 inches of snow fell on December 26 and 27 in the Bronx during the Blizzard of 2010. The City's witness, **John McInerney**, a supervisor at the Department of Sanitation, testified that the intersection at Bronxwood Avenue and East

227th Street fell under a primary route, i.e., "route 6", which had priority in the snow operations. Snow operations included clearing, plowing and salting crosswalks. McInerney testified that snow operations began when it started snowing on December 26, 2010 and continued through January 5, 2011. McInerney testified that route 6 was salted on December 26, 2010, was salted and plowed on December 28, 2010; indeed, route 6 was covered by salt spreading operations between December 26, 2010 and January 4, 2011. The City argues that temperatures fluctuated below and above freezing for several days prior to January 4, 2011, and therefore, due to rapidly fluctuating weather conditions involving snow and ice in the days preceding Plaintiff's accident on January 4, 2011, there was insufficient time for the City to have received sufficient notice to have remedied such condition.

In opposition to summary judgment Plaintiff submitted her affidavit, the affidavit of meteorologist George Wright, the affidavit of a snow and management expert, John Allin and the relevant climatological data. Plaintiff presents that there had been no precipitation for seven to ten days prior to the day she fell; that she observed a path cut between dirty snow and ice pile on the curb and no sand; after she fell she noticed ice, described as "black ice," which she had not seen prior to her fall.

Mr. Wright analyzed the weather conditions and concluded that Plaintiff "slipped and fell upon ice formed not later than 3:00 a.m. on January 4, 2011, as that was the last melting and re-freezing cycle prior to her accident. As that ice had been there for more than 11 hours, it was, by that time, a long standing condition" when Plaintiff fell at 2:30 p.m.

Mr. Allin also reviewed the weather data for December 2010 and January 2011. Allin stated that the persons charged with addressing snow and ice management at the intersection should have known about "thaw and refreeze" and failed to address this "treacherous and dangerous" condition at the intersection. According to Allin, the condition at the intersection existed for six days prior to Plaintiff's fall, and "six days is more than an adequate time to remediate such obviously dangerous conditions such as what occurred at

this intersection, and the Defendant should have found and remedied the condition" [¶¶21 & 20 of Affidavit].

The Law:

It is well settled that the moving party on a motion for summary judgment has the burden of demonstrating 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." *Apollon v. City of New York*, 45 Misc.3d 1213, 2014 WL 5642361 (Sup. Ct. Qns. Co. 2014), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y..2d 851, 852 (1985). Once the movant 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. *Apollon*, Id. citing *Alvarez v. Prospect Hospital*, 86 N.Y.2d 320, 324 (1986).

In a premises liability action, a defendant must submit evidence that it maintained its premises in a reasonably safe condition as a matter of law, that it neither created the allegedly dangerous condition or had actual or constructive notice thereof. *Boodie v. Town Hall Foundation*, 5 A.D.3d 210 (1st Dept. 2004) and *Schmidt v. Barstow Associates*, 276 A.D.2d 784 (2nd Dept. 2000). 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 a defendant to discover and remedy it. Moreover, a general awareness that a dangerous condition may be present is not sufficient to establish notice of the particular condition which caused a plaintiff to fall. *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 492 N.E.2d 774, 501 N.Y.S.2d 646 (1986); *Rooney v. Webb Ave. Associates, Ltd.*, 1 A.D.3d 246 (1st Dept. 2003).

After consideration of the parties' submissions, the Court finds that Defendant City met its burden of proof that it did not have actual or constructive notice of the icy condition which allegedly caused Plaintiff's accident, as a reasonable amount of time had not elapsed since the fluctuation of freezing and melting temperatures.

Note that that *Valentine v. City of New York* and its progeny is applicable. 86 A.D.2d 381 (1st Dep't 1982) aff'd. 57 N.Y.2d 932 (1983). *Valentine* stands for the proposition that a municipality is not liable for injuries sustained on a public roadway or sidewalk unless the condition was both dangerous and unusual, and the municipality had a reasonable amount of time after the cessation of the storm to remedy it. Here, the blizzard dropped 20.9 inches of snow by Dec. 27, 2010 [see ¶4 of Wright affidavit], and the City had salted and plowed the accident site by Jan. 4, 2011. However, between December 31, 2010 and January 2, 2011 the temperatures remained above freezing with the average in the mid-forties. On January 2, 2011 the temperature rose to 46 degrees with traces of precipitation. On January 3, 2011 the temperature was 36 degrees at 1. a.m., then 30 degrees at 7 a.m., 37 degrees at 1 p.m. and remaining above freezing thereafter. At 4 p.m. on January 4, 2011 the temperature was recorded at 41 degrees; Plaintiff fell at 2:30 p.m.

The Court further finds that Plaintiff failed in her burden of rebuttal by failing to raise an issue of fact as to: (a) whether the City had a reasonably sufficient time to have cleared the sidewalk from the last sequence of fluctuating temperatures before Plaintiff's accident, and/or (2) whether the City was negligent in clearing the sidewalk from ice and snow. Cf. *Acar v. Ecclesiastical Assistance Corp.*, 125 A.D.3d 464, 4 N.Y.S.2d 3 (1st Dept. 2015) (plaintiff's expert meteorologist failed to raise a triable issue of fact as to whether ice was a result of melting and refreezing of runoff); *Slates v. New York City Housing Authority*, 79 A.D.3d 345, 914 N.Y.S.2d 12 (1st Dept. 2010) (defendant did not have constructive or actual notice of the black ice); *Gerber v. City of New York, et al.*, 280 A.D.2d 289, 719 N.Y.S.2d 650 (1st Dept. 2001) (City properly granted summary judgment where it did not have a reasonable time to clear the sidewalk of any black ice within days of inclement weather).

For the foregoing reasons, the City's motion for summary judgment is **granted**, and therefore it is ORDERED that the complaint is dismissed.

Dated: Nov. 6, 2015

Hon. Julia I. Rodriguez, J.S.C.