

Gelzer v DOLP 1133 Props. II LLC

2016 NY Slip Op 31675(U)

September 8, 2016

Supreme Court, New York County

Docket Number: 156990/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 55

-----X
 KIA GELZER,

Plaintiff,

DECISION/ORDER
Index No. 156990/2014

-against-

DOLP 1133 PROPERTIES II LLC

Defendant.

-----X
 HON. CYNTHIA KERN, J.:

Plaintiff Kia Gelzer commenced the instant action seeking to recover for injuries she allegedly sustained when she slipped and fell on black ice located on the sidewalk in front of premises owned by defendant DOLP 1133 Properties II, LLC. Defendant now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint. For the reasons set forth below, defendant's motion is granted.

The relevant facts are as follows. On or about February 4, 2014 at approximately 9:45 a.m., plaintiff, an employee of the Department of Treasury, Internal Revenue Service (the "IRS"), allegedly slipped and fell on black ice located on the sidewalk in front of defendant's premises located at 110 West 44th Street, New York, New York (the "building" or "subject premises"). The IRS was one of the tenants in the building at that time and had a separate entrance to the building for its employees and visitors. Plaintiff testified that she when she arrived at the subject premises in the morning before her work day began, the sidewalks in front of the building appeared to have been shoveled and snow was pushed off to the side of the walkway. She testified that when she was in front of the entrance to the building, approximately two sidewalk flags away from the door, she allegedly slipped on black ice causing her to fall and sustain injuries (the "accident"). Plaintiff further testified that she was unable to see the ice on the ground prior to her fall.

The weather report for Central Park establishes that approximately eight inches of snow fell on February 3, 2014, the day before plaintiff's accident, and that the snow stopped falling at approximately 6:00 p.m. on that date. Additionally, the weather report establishes that between 6:00 p.m. on February 3, 2014 and 9:45 a.m. on February 4, 2014, when plaintiff's accident allegedly occurred, the temperature did not rise above freezing and there was no additional snowfall or precipitation whatsoever.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it did not create the condition and that it did not have actual or constructive notice of the condition. *See Branham v. Loews Orpheum Cinemas*, 31 A.D.3d 319 (1st Dept 2006). "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 defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837-838 (1986). Further, a defendant moving for summary judgment in a slip and fall case involving snow and ice on a sidewalk must "proffer[...] affidavit or testimony based on personal knowledge as to when its employees last inspected the sidewalk or the sidewalk's condition before the accident." *Spector v. Cushman & Wakefield, Inc.*, 87 A.D.3d 422, 422 (1st Dept 2011).

In the instant action, defendant has established its *prima facie* right to summary judgment dismissing the complaint. Initially, defendant is entitled to summary judgment as it has demonstrated that it did not create the black ice on which plaintiff slipped and fell. Patrick Mollin, defendant's Manager of Building Services, testified as to the snow and ice removal performed on the sidewalk in front of the building.

Specifically, Mr. Mollin testified that pursuant to defendant's policies and procedures, building porters begin spreading calcium chloride salt on the sidewalks around the building as soon as the snow starts falling, which in this case, would have been on February 3, 2014, the day before plaintiff's accident. Mr. Mollin testified that in the event of a major snowstorm, which includes a storm of six inches of snow or more, the building porters keep a six-foot-wide path clear at all times from corner to corner and along the property line sidewalk. Additionally, Mr. Mollin has affirmed that Balla Cisse, one of the building's day porters, worked overtime until 12:29 a.m. on the date of the accident to assist the night porters in performing "emergency snow removal" on the sidewalks in front of the building. This is further supported by plaintiff's testimony that there was no snow on the sidewalk on the date of her accident as it had been shoveled to the side. Further, defendant has provided the affidavit of Said Ibrahim, a day porter for the building, who has affirmed that on the date of the accident, he was working as a porter from approximately 6:00 a.m until 3:00 p.m. and that his responsibilities included inspecting the perimeter of the building to determine whether any snow or ice removal needed to be performed on the sidewalks. He testified that if he saw snow on the sidewalk, he "would shovel it into the adjacent street, off of the sidewalks, then apply salt to the shoveled walkway. If the sidewalks had already been shoveled, [he] would determine whether there were any icy spots on the sidewalks and apply additional salt, if necessary."

Additionally, defendant is entitled to summary judgment on the ground that it has demonstrated that it did not have actual or constructive notice of the black ice on which plaintiff slipped and fell based on the evidence provided demonstrating that the building took the appropriate measures to clear the snow and ice from the sidewalks and based on Mr. Mollin's testimony that there were no records of anyone other than plaintiff slipping and falling on ice or snow in front of the building.

In opposition, plaintiff has failed to raise an issue of fact sufficient to defeat defendant's motion for summary judgment. Plaintiff's assertion that defendant has failed to establish its right to summary judgment because there is no evidence as to what snow removal was actually performed on the sidewalk at issue is without merit. Specifically, plaintiff points to the portions of Mr. Mollin's testimony and affidavit and the affidavit of Mr. Ibrahim which only discuss snow and ice removal procedures for the building but

not what was actually done prior to plaintiff's accident. However, Mr. Mollin, in testifying and affirming that Mr. Cisse, a day porter at the building, performed snow removal on the sidewalk at issue the evening prior to plaintiff's accident, relied on Mr. Cisse's timecard which explicitly states that Mr. Cisse was at the building until 12:29 a.m. on the morning of the accident and that he was indeed performing "emergency snow removal." Further, it is undisputed by the parties that at the time of plaintiff's accident, the sidewalks had been shoveled and were free from snow and that it was not snowing or precipitating on the date of the accident. Indeed, plaintiff herself testified that it was not snowing or raining on the date of her accident and that when she arrived at the building prior to her fall, there was no snow on the sidewalk as it had been shoveled to the side.

Accordingly, defendant's motion for summary judgment is granted and the complaint is hereby dismissed in its entirety. This constitutes the decision and order of the court.

DATE :

9/8/16


KERN, CYNTHIA S., JSCHON. CYNTHIA S. KERN
J.S.C.