Crooms v County of Suffolk
2018 NY Slip Op 30935(U)
May 15, 2018
Supreme Court, Suffolk County
Docket Number: 12-3287
Judge: Peter H. Mayer
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[* 1]

SHORT FORM ORDER

INDEX No. 12-3287

CAL. No. 17-00224OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-6-17 (001)
MOTION DATE 6-30-17 (002)
MOTION DATE 6-13-17 (003)
ADJ. DATE 10-20-17
Mot. Seq. # 001 MG
002 MG
003 MG; CASEDISP

SHARON CROOMS and MICHAEL CROOMS,

Plaintiffs,

- against -

COUNTY OF SUFFOLK, TOWN OF BABYLON, LONG ISLAND RAILROAD, METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant County of Suffolk, dated May 2, 2017; Notice of Motion by defendant Town of Babylon, dated May 18, 2017; Notice of Motion by defendants Long Island Railroad and Metropolitan Transportation Authority, dated May 17, 2017 and supporting papers (including Memorandum of Law by the County of Suffolk dated May 2, 2017); (2) Affirmation in Opposition by defendant Long Island Railroad and Metropolitan Transportation Authority, dated August 2, 2017, and by plaintiff dated October 18, 2017 and supporting papers;

(3) Reply Affirmation by defendant County of Suffolk, dated October 18, 2017 and by defendants Long Island Railroad and Metropolitan Transportation Authority, and supporting papers; (4) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. 001) of defendant County of Suffolk, the motion (seq. 002) of defendant Town of Babylon and the motion (seq. 003) of defendants Long Island Railroad and Metropolitan Transportation Authority are consolidated for the purposes of this determination; and it is further

ORDERED that the motion of defendant County of Suffolk for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion of defendant Town of Babylon for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion of defendants Long Island Railroad and Metropolitan Transportation Authority for summary judgment dismissing the complaint and cross claims against them is granted.

Plaintiff Sharon Crooms commenced this action to recover damages for personal injuries she allegedly sustained on February 2, 2011, when she slipped and fell on ice at the Deer Park Train Station located in Deer Park, New York. Plaintiff's husband, Michael Crooms, sues derivatively for loss of services and companionship. By verified bill of particulars, plaintiffs allege that the defendants were negligent in failing to maintain the steps and platform area in a reasonably safe manner, in failing to remove ice from such area, and in failing to warn of a dangerous condition.

Defendants County of Suffolk (hereinafter the County) and the Town of Babylon (hereinafter the Town) move for summary judgment dismissing the complaint and cross claims against them on the grounds that they did not receive prior written notice of the icy condition, and that they had no duty to maintain the subject area. In opposition, plaintiffs' counsel states that plaintiffs do not oppose the motions by the County or the Town. In support of its motion, the County submits copies of the pleadings, the verified bill of particulars, the transcript from plaintiff's 50-h hearing, transcripts of the parties' deposition testimony, and affidavits by Paul Morano and Jason Richberg. The Town's submissions in support of its motion include copies of the pleadings, the verified bill of particulars, the transcript from plaintiff's 50-h hearing, and the transcripts of the parties' deposition testimony.

Plaintiff testified that on the morning of the incident, she arrived at the Deer Park Train Station at approximately 7:00 a.m to take the 7:30 a.m. train to Penn Station to go to work. She testified that her husband drives her to the station every morning, and that on the day of the incident it was very cold, and there was no snow on the ground. She testified that she exited the vehicle from the passenger's side, walked onto the sidewalk and then slipped and fell on ice that was covered with a puddle of water.

Plaintiff's husband, Michael Crooms, testified that after plaintiff exited the vehicle and took a couple of steps, "she disappeared," so he got out of the vehicle and observed her sitting on the ground. He testified that the sidewalk was wet, and that he observed snow pushed to the sides, which he had observed the day before the incident. Mr. Crooms testified that after he assisted plaintiff, he observed the puddle of water but could not provide details of its size.

Timothy Herrmann testified that he has worked for the County of Suffolk for 15 years, and that he is a general foreman for the highway department. He testified that he is a highway zone supervisor, and that his department is responsible for maintaining and repairing highways and parking lots. Mr. Herrmann testified that the Deer Park Train Station is within his jurisdiction. He testified that the County does not maintain or repair sidewalks unless it caused the damage to them or the sidewalks are situated on certain county-owned properties. He testified that the County clears snow and ice from the parking lot of the Deer Park Train Station and described the procedures for doing so, including plowing snow away from the platforms and the sidewalks.

Cullen Lory testified that he works for the Metropolitan Transportation Authority as a logistical support engineer, and that his duties include obtaining weather forecasts from Metro Weather Consultants and sharing it with the Long Island Railroad's maintenance department at daily meetings. He testified that the maintenance department is responsible for removing snow and ice from the platforms, the overpasses, stairways, and sidewalks, and that the chief engineer determines whether snow removal procedures should be implemented. Lory testified that the employees who perform snow removal services maintain daily logs and submit them to the WEMS coordinator, who enters them into the computer system. He testified that WEMS stands for weather emergency management system, and that it is a software program for maintaining such data. He testified that he maintains records of forecasts prepared by Metro Weather, and that the forecast for February 1, 2011 anticipated snow and freezing rain beginning after 6:00 p.m., continuing through February 2 and February 3, 2001, and ending between 7:00 p.m and 9:00 p.m. on February 3, 2011. Lory searched WEMS and obtained the records for such dates. According to the document, at 2:30 a.m. on February 2, 2011, shoveling was conducted and deicer was applied. Lory testified that he is not familiar with interpreting WEMS. He testified that there are no written rules for the employees to follow for the snow removal procedures, that they use their own judgment.

In addition, Lory testified that he is unaware of any complaints of an icy condition at the Deer Park Train station, as such complaints are made to the public information office located in Jamaica, New York. He testified further that he is unaware of any contracts between MTA, LIRR and the Town of Babylon for snow removal services.

Douglas Gregorio testified that he has worked for the Town of Babylon for 30 years and is a labor crew leader in the tree department. He testified that he maintains the roadways in the areas of Wyandanch, North Amityville, and East Farmingdale, and that such maintenance includes repairing pot holes and removing snow. He testified further that neither he nor his crew perform any snow removal services at the Deer Park Train Station.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Here, both the Town and the County have established, prima facie, that they did not have a duty to remove snow and ice from the sidewalks at the Deer Park Train Station. As plaintiff does not oppose their motions, summary judgment is granted to both defendants.

The MTA and LIRR move for summary judgment dismissing the complaint against them on the grounds that they neither created nor had notice of the icy condition that allegedly caused the plaintiff to slip and fall. Further, defendants argue the "storm in progress" rule precludes liability for the icy condition. In support of the motion, defendants submit copies of the pleadings, the bill of particulars, transcripts of the parties' deposition testimony, the affidavit of Mark Kramer and meteorological records from the National Climatic Data Center.

Common carriers owe the same duty of care to passengers that other tortfeasors owe: the duty of reasonable care under the circumstances (***Bethel v New York City Transit Auth.***, 92 NY2d 348, 681 NYS2d 201 [1998]). While traditionally the degree of duty owed by a common carrier to its passengers varied depending upon whether the plaintiff was injured while a passenger or while on the premises of the carrier's facility, the standard of care owed by a carrier with respect to its station facilities "such as platforms, halls, stairways and the like," has historically been to exercise ordinary care in view of the dangers to be apprehended (***Kelley v Manhattan Ry. Co.***, 112 NY 443, 20 NE 383, 385 [1889]).

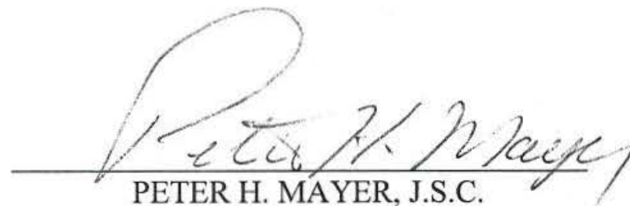
When a stairwell or approach is primarily used as a means to access and egress from a common carrier, the carrier has a non-delegable duty to exercise reasonable care to maintain it in a safe condition, or when applicable, to warn users of any unforeseen dangers, and such duty applies even if the area is owned or maintained by another (***Bingham v New York City Tr. Auth.***, 8 NY3d 176, 832 NYS2d 125 [2007]). Areas used for ingress and egress at a train station that are served by one common carrier must be maintained by that carrier regardless of ownership (***Mashall v Long Island R.R.***, 149 AD3d 721, 50 NYS3d 554 [2d Dept 2017]).

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 neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Mercedes v City of New York***, 107 AD3d 767, 968 NYS 2d 519 [2d Dept 2013]). In slip-and-fall cases involving snow and ice, a property owner is not liable unless he or she created the defect, or had actual or constructive notice of its existence (***Castillo v Silvercrest***, 134 AD3d 977, 24 NYS3d 86 [2d Dept 2015]; ***Smith v Hariri Realty Assoc., Inc.***, 109 AD3d 897, 971 NYS2d 451 [2d Dept 2013]; ***Gil v Manufacturers Hanover Trust Co.***, 39 AD3d 703, 704, 833 NYS2d 634 [2d Dept 2007]). A defendant may be exonerated from liability even if he or she has notice of the dangerous condition under the "storm in progress" rule. Under the storm in progress rule, a property owner will not be held responsible for accidents caused by snow or ice that accumulates on its premises during a storm or for a reasonable period of time thereafter (***Sherman v New York State Thruway Auth.***, 27 NY3d 1019, 32 NYS3d 568 [2016]; ***Talamas v Metropolitan Transp. Auth.***, 120 AD3d 1333, 993 NYS2d 102 [2d Dept 2014]; ***Popovits v New York City Hous. Auth.***, 115 AD3d 657, 658, 981 NYS2d 562 [2d Dept 2014]). The determination of what constitutes a reasonable time may be decided on a motion for summary judgment, based upon the circumstances of the case (*see* ***Valentine v City of New York***, 57 NY2d 932, 457 NYS2d 24 [1982]; ***Dumela-Felix v FGP W. St., LLC***, 135 AD3d 809, 22 NYS3d 896 [2d Dept 2016]).

Here, defendants have submitted the affidavit of Mark Kramer, a forensic meteorologist, and certified copies of meteorological records from the National Climatic Data Center setting forth local climatological data for February 2011. The records are from Republic Airport and MacArthur Airport, which are the weather stations closest to the site of the alleged accident, and, thus, are proof in proper evidentiary form to establish the weather conditions set forth therein (CPLR R 4528). In his affidavit, Kramer states that on February 1, 2011, light snow and freezing rain commenced in the morning, and that on February 2, 2011, between 12:00 a.m. and 8:00 a.m., a total of .75 inches of precipitation fell at the MacArthur Airport station and .57 inches of precipitation fell at Republic Airport station. He states that freezing rain mixed with sleet occurred at 6:02 a.m. on February 2, 2011, and that temperatures ranged between 24 degrees and 34 degrees on February 1, 2011, and were below freezing prior to 5:37 a.m. on February 2, 2011. He states that the temperature was between 27 degrees and 36 degrees through 7:54 a.m. Kramer opines with a reasonable degree of certainty that there was an ongoing ice storm in the vicinity of the Deer Park Train Station from February 1, 2011 through the morning of February 2, 2011, and that temperatures did not rise above freezing until shortly before the incident. He opines further that any salt or deicers would have been diluted by the continued precipitation.

Defendants' submissions establish that there was a storm in progress at the time the incident occurred and defendants duty to ameliorate the icy condition did not arise (***Sherman v New York State Thruway Auth***., 27 NY3d 1019, 32 NYS3d 568 [2016]). Having established, prima facie, their entitlement to summary judgment, the burden shifted to plaintiffs to raise a triable issue of fact. In opposition, plaintiffs submit the transcripts of the deposition testimony of the parties and an affirmation of their attorney. However, it is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). Plaintiff has not submitted any affidavits of their own or of an expert to rebut defendants' prima facie showing and raise a triable issue of fact as to whether the accident was caused by a slippery condition that existed prior to the storm as opposed to precipitation from the storm in progress (***Gervasi***

v Blagojevic, 158 AD3d 613, 2018 NY Slip Op 00823 [2 Dept 2018]; ***Burniston v Ranric Enters. Corp.***, 134 AD3d 973, 21 NYS3d 694 [2d Dept 2015]). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790; ***Burns v City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). Accordingly, the motion by the Long Island Railroad and the Metropolitan Transportation Authority for summary judgment in their favor is granted.



Dated: May 15, 2018

PETER H. MAYER, J.S.C.