

Karkatselos v Yogurt Le Crepe Inc.

2018 NY Slip Op 31887(U)

August 8, 2018

Supreme Court, Queens County

Docket Number: 700099/16

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

KIRIAKI KARKATSELOS

Plaintiff,

-against-

YOGURT LE CREPE INC. and ANODUS
REALTY, LLC,

Defendants.

Index Number: 700099/16

Motion Date: 3/27/18

Motion Seq. No. 2

The following papers read on this motion by defendant SLV Inc., d/b/a Yogurt La Crepe, sued herein as Yogurt Le Crepe Inc. (Yogurt La Crepe) seeks an order granting summary judgment dismissing the complaint and all cross claims and counterclaims against it, with prejudice. Co-defendant Andros Realty, LLC (Andros Realty) cross moves for an order granting summary in its favor dismissing the complaint and all cross claims.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Memorandum of Law.....	EF 38-55
Notice of Cross Motion-Affirmation-Exhibits.....	EF 56-65
Opposing Affirmation-Exhibits.....	EF 68-70
Reply Affirmation.....	EF 71
Sur Reply Affirmation.....	12-13
Memorandum of Law.....	

Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiff Kiriaki Karkatselos allege that on March 4, 2015, she sustained personal injuries including a fractured right elbow and right wrist when she slipped and fell on snow and ice on the public sidewalk abutting the premises located at 29-02 Ditmars Boulevard, Astoria, New York, which is owned by Anodos Realty and leased to Yogurt La Crepe. Plaintiff in complaint alleges that the accident occurred at approximately 6:00 a.m.; that the defendants negligently failed to fully clean, maintain, clear or make safe the abutting sidewalk; that the sidewalk was icy, snow filled, unsalted and unsanded; the existence of a

defective condition; and that the defendants had actual and constructive notice of said condition. In her bill of particulars plaintiff alleges that the defective condition is “that the poor condition of the sidewalk contributed to the collection of ice on the sidewalk”. She further alleges that defendants violated the Administrative Code of the City of New York §§ 7-201, 7-210, 19-102, 19-152 and Section 2-09 of the Rules of the City of New York.

Defendant Yogurt La Crepe served an answer and interposed 11 affirmative defenses and a cross claim against Anodos Realty for common law contribution and indemnification. Defendant Anodos Realty served an answer and interposed four affirmative defenses and a cross claim against Yogurt La Crepe for indemnification.

Defendants each seek summary judgment on the grounds that there was storm in progress at the time of the plaintiff’s accident. Defendant Yogurt La Crepe in support of its motion submits a copy of the pleadings, an affirmation from its counsel, copies of the parties’ deposition transcript, certified meteorological data, an unsworn report from its expert meteorologist, and a copy of the defendants’ lease agreement. Defendant Anodos Realty in support of its cross motion submits copies of the pleadings, copies of the parties’ deposition testimony, and the lease agreement and also seeks to rely upon the certified meteorological data and the expert’s unsworn report submitted by the co-defendant.

Plaintiff in opposition to the motion submits an affirmation from her counsel, copies of photographs and a copy of her deposition transcript.

Plaintiff Kiriaki Karkatselos testified at her deposition that in March 2015 she was employed as an assistant manager at Raw Organic, located on 8th Avenue in Manhattan near Madison Square Garden, and commuted from her home located on 28th Street in Astoria to her place of employment by train (subway). She stated that she took the same route from her home to the nearby train station and passed the Yogurt La Crepe storefront at least twice a day.

Ms. Karkatselos stated that on March 4, 2015, she left her home on 28th Street at approximately 6:30 a.m. and that it was very cold and very dark. She stated that did not recall if it was raining or snowing at the time of her accident, and also stated that it was neither raining or snowing. She stated she walked to Ditmars Boulevard and made a right turn onto Ditmars Boulevard without crossing any streets, and that it took her three minutes to reach the corner of 29th Street and Ditmars Boulevard where she could see a pile of snow on the other side of 29th street. She then crossed 29th Street and stepped onto the sidewalk with her right foot when she slipped and fell. After she got up, she saw that she had fallen on a patch of ice which she described as one and a half to two feet long, part of which was “clear” and part had a “white kind of stain or glass”, with maybe an inch or two of snow

on top of it. She did not see the ice patch prior to falling and stated that the area was not salted or sanded. When she got up her pants were wet and she shook off a minimal amount of snow. She stated that the Yogurt La Crepe store was not open at the time of her accident; that she did not make any complaints about the sidewalk to anyone at the store prior to her accident. Plaintiff continued to her place of employment and shortly thereafter took a taxi to Lenox Hill Hospital.

Ms. Karkatselos further stated that when she left her home that morning she saw piles of snow that had been left on the sidewalks near the curb, and that there was a very dirty pile of snow on the sidewalk next to where she fell that looked like it had been there for a long time (Tr 38). She stated that she had to go around a pile of snow; that there was not a clear path to walk; and that the area next to the pile of snow was large enough for maybe one person to walk on. Plaintiff stated that she thought she would just be stepping on snow and not ice, and also stated that she thought she stepping onto the sidewalk itself and not ice or anything else. Ms. Karkatselos stated that it had been a snowy and cold winter; that it had snowed the day before the accident “[p]retty much the whole day” (Tr 35), on and off, stopping at nighttime; and that she could not remember whether it had stopped by the time she reached the intersection of 29th Street and Ditmars Boulevard at approximately 6:00 p.m. on March 3, 2015, but that there was some accumulation that day.

Vincent Fragale was deposed on behalf of defendant Yogurt La Crepe. Mr. Fragale stated that he is part owner of the business along with his son Sal, and that the property is leased pursuant to a written lease. He stated that the business hours are 11 a.m. to 10:30 p.m., Monday through Friday, and until 11 p.m. on the weekends. He stated that there are three employees who worked different schedules, and that he, or his son, or the available employee would sweep the sidewalk and clean the snow and ice, and that he had received no complaints about the condition of the sidewalk prior to the plaintiff’s accident. Mr. Fragale stated that when it stops snowing they shovel and put down salt, and that he stored two to three bags of salt in the basement. He stated that the day before the plaintiff’s accident it had snowed all day; that it stopped snowing around 8:00 p.m.; that he and an employee started cleaning the sidewalk around 8:30 p.m. and finished around 9:00 p.m. at which time he closed up and left around 9:30 p.m. He also stated that on March 4, 2015, the day of the plaintiff’s accident, it was raining from about 5:00 a.m. to 9:00 a.m.; that he lives in Westchester; and that he arrived at work around 12:00 p.m.

George Apergis was deposed on behalf of the property owner Anodos Realty. He stated that his father-in-law, who died in January 2015, “owned” Anodos Realty. Mr. Apergis stated that he has been taking care of all of the leases and that he collects the rent check from Yogurt La Crepe each month. He stated that he lives in the residential building located at 22-01 29th Street, which was also owned by his father-in-law, and that it has a separate entrance

from the commercial space leased to Yogurt La Crepe. Mr. Apergis stated that the tenant is responsible for snow removal at 29th Street and Ditmars Boulevard, all the way up the residential entrance. He stated that he walks past Yogurt La Crepe every morning on his way to work; that the sidewalk is always cleaned; and that he never has had to call the tenant and tell them to clean the sidewalk. He further stated that Yogurt La Crepe entered into a written lease, in 2014, and that the lease required the tenant to maintain the sidewalk and the entrance of the building free of snow and ice, and that as Mr. Fragale lives in Westchester he sent him a PDF of the Department of Sanitation regulations for cleaning the sidewalk when he first executed the lease.

The subject lease agreement provides, at paragraph 46, that the tenant is responsible to maintain the sidewalk, including 18 inches into the street in front of and along side of 29th Street to the Ditmars Boulevard entrance, keeping it free of snow, ice and other debris.

The expert's report submitted in support of defendant Yogurt La Crepe's motion and relied upon by co-defendant Anodos Realty LLC in support of the cross motion is unsworn and, thus, not in admissible form (*see Accardo v Metro-North R.R.*, 103 AD3d 589, 589 [1st Dept 2013]). Accordingly, said report lacks probative value and will not be considered.

The certified meteorological data was recorded at La Guardia Airport. According to said data, as of February 28, 2015, there was 5 inches of snow on the ground, and no precipitation was recorded. On March 1, 2015, there was rain, freezing rain, snow, ice pellets, fog, freezing fog and mist, with an accumulation of 3.5 inches, and a total snow depth of 7 inches on the ground as of 7 p.m. On March 2, 2015, there was a trace of snow with no accumulation, and a total of 5 inches of snow on the grounds as of 7 p.m. On February 28 and March 1, 2015, the recorded temperature remained below 32 degrees Fahrenheit. On March 2, 2015, the recorded temperature ranged between 38 degrees Fahrenheit during the day, and 28 degrees Fahrenheit.

On March 3, 2015, according to said data, rain, freezing rain, snow, ice pellets, fog, freezing fog and mist, were recorded, with an accumulation of 1 inch, and a total snow depth of 5 inches on the ground. It began snowing a little past 3:00 p.m.; there were ice pellets by approximately 5:59 p.m.; then rain beginning at 8:02 p.m., freezing rain from 8:02 until 8:24 p.m.; and then rain until 11:24 p.m. The total snow fall for the day was 1 inch and the total rain averaged about .40 of an inch. The snow depth on the ground was 4-5 inches as of 7:00 p.m. The temperature ranged from 24 degrees Fahrenheit in the very early morning to the mid-20s during the day, and reached 34 degrees Fahrenheit by 10:00 p.m. The temperature thereafter began to rise, and remained at 36 degrees Fahrenheit between 1 a.m. and 7 a.m. on March 4, 2015.

On March 4, 2015, according to said data, it began to rain at 5:51 a.m., and continued to rain to until 10 a.m. after which it rained at various times through the afternoon. The total rainfall was approximately .25 inches, with a low temperature of 36 degrees Fahrenheit, prior to 7 a.m. and a high temperature of 47 degrees Fahrenheit in the afternoon. The snow depth on the ground was 4 inches as of 7:00 a.m.

Section 7-210 (a) of the Administrative Code of the City of New York imposes a duty on 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”. Subdivision (b) of said section provides, in pertinent part, that “[n]otwithstanding 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...proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to...the negligent failure to remove snow, ice, dirt or other material from the sidewalk”. The exceptions for owners of one, two or three family homes that are owner occupied is not applicable here. Section 7-210 imposes a non-relegable duty upon the property owner (*see Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]).

As the proponents of the motion and cross motion for summary judgment, the defendants have the burden of establishing, prima facie, that they neither created the ice condition nor had actual or constructive notice of the condition (*see Brandimarte v Liat Holding Corp.*, 158 AD3d 664, 664-666 [2d Dept 2018]; *Ryan v Taconic Realty Assocs.*, 122 AD3d 708, 709 [2d Dept 2014]; *Smith v Christ’s First Presbyt. Church of Hempstead*, 93 AD3d 839 [2d Dept 2012]; *Meyers v Big Six Towers, Inc.*, 85 AD3d 877 [2d Dept 2011]). This burden may be satisfied by presenting evidence that there was a storm in progress when the plaintiff allegedly slipped and fell (*see Brandimarte v Liat Holding Corp.*, 158 AD3d at 664-666; *Huan Nu Lu v New York City Tr. Auth.*, 113 AD3d 818, 819 [2d Dept 2014]; *Smith v Christ’s First Presbyt. Church of Hempstead*, 93 AD3d at 839-840). “Under the so-called “storm in progress” rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm” (*Marchese v Skenderi*, 51 AD3d 642, 642 [2d Dept 2008]; *see Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735, [2005]; *Dylan v CEJ Props., LLC*, 148 AD3d 1115, 1116 [2d Dept 2017]; *Aronov v St. Vincent’s Hous. Dev. Fund Co., Inc.*, 145 AD3d 648, 649 [2d Dept 2016]). Even a lull or a temporary break in a storm does not impose a duty on the owner to immediately remove the accumulation of snow (*see Guntur v Jetblue Airways Corp.*, 103 AD3d 485 [1st Dept. 2013]; *Mazzella v City of New York*, 72 AD3d 755 [2d Dept 2010]; *Ioele v Wal-Mart Stores, Inc.*, 290 AD2d 614 [2d Dept 2002]).

Here, the deposition testimony of the plaintiff and Mr. Fagale, and the certified climatological records, establish that on the day prior to the accident that it snowed, followed by freezing rain and then rain, and that there was a cessation in the storm after 11:24 p.m. The evidence presented also establishes that defendant Yogurt La Crepe shoveled snow that had accumulated on the sidewalk during evening of March 3, 2015, prior to the cessation of the rain. Mr. Fragale did not specifically state that salt was applied on this occasion after the sidewalk was cleared, and did not state whether said snow removal extended to the corner of Ditmars Boulevard and 29th Street where the plaintiff's accident occurred. Under these circumstances, defendants have failed to make a prima facie showing that the storm in progress rule applies, and that the snow removal efforts on March 3, 2015 did not create or exacerbate the allegedly dangerous condition on the sidewalk (*see Morales v Davidson Apts., LLC*, 157 AD3d 884 [2d Dept 2018]; *McBryant v Pisa Holding Corp.*, 110 AD3d 1034, 1035-1036 [2d Dept 2013]; *see also Burniston v Ranric Enters. Corp.*, 134 AD3d 973, 973-974 [2d Dept 2015]; *Schwint v Bank St. Commons, LLC*, 74 AD3d 1312, 1313 [2d Dept 2010]).

The court further finds that the evidence submitted by the defendants also fails to establish, prima facie, that the ice upon which the plaintiff slipped was the result of an ongoing storm as opposed to an accumulation of ice from prior snowfalls (*see Burniston v Ranric Enters. Corp.*, 134 AD3d at 973-974). Notably, plaintiff testified that she left her house at approximately 6:30 a.m., and it took her three minutes to walk to the corner of Ditmars Boulevard and 29th Street; that it was not raining or snowing at that time, or that she did not recall any such precipitation; and the climatological data does not establish that it was raining prior to 6:51 a.m. on the morning of March 4, 2015. In addition, plaintiff stated that when she stepped on the sidewalk there was not a clear path on which to walk; that she had to go around a dirty pile of old snow; that she fell on ice in a narrow pathway next to said snow pile; and that the ice patch was one and half to two feet long, and was clear in part and white in part, covered with an inch or two of snow.

Since the defendants failed to meet their initial burden as the movants, it is not necessary to review the sufficiency of the evidence submitted by the plaintiff in opposition.

Accordingly, defendants' motion and cross motion are denied in their entirety.

Dated: August 8, 2018

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J.S.C.