Lugo v City of New York
2018 NY Slip Op 32018(U)
August 16, 2018
Supreme Court, New York County
Docket Number: 153109/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 153109/2015

ELSA LUGO,

Plaintiff,

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK and NEW YORK CITY HOUSING AUTHORITY,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 85

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this slip and fall action commenced by plaintiff Elsa Lugo, defendant New York City Housing Authority ("NYCHA") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is denied.

FACTUAL BACKGROUND

On January 5, 2014, between 9:30 and 10:00 a.m., plaintiff was walking on a sidewalk in front of 149 West 142nd Street in Manhattan ("the premises") when she allegedly slipped on a patch of snow and ice and was injured. (Doc. 79 at 1.) Plaintiff thereafter commenced this suit against defendants the City of New York and NYCHA alleging that, as owners of the sidewalk,

they were negligent in their maintenance of the premises for permitting snow and ice to accumulate on the morning of her accident. (Docs. 69, 71.)

NYCHA now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.[1] (Doc. 61.) In support of its motion, NYCHA submits meteorological reports establishing that a winter storm was in effect the morning of January 5, 2014. Certified data collected from a Central Park observatory reflects that about three inches of snow fell in Manhattan on both January 2 and 3, 2014. (Docs. 62 at 5–6, 65 at 7, 66 at 42.) No snow fell on January 4. (*Id.*) According to NYCHA's expert witness, a melting and refreezing process occurred on January 4 that led to the formation of new ice. (Doc. 65 at 8.) The expert further opines that an advisory for freezing rain was in effect at the time of plaintiff's accident on January 5, 2014, and that new ice was accumulating on exposed, untreated, and undisturbed surfaces. (*Id.* at 9.) NYCHA has also submitted a news report regarding motor vehicle accidents that occurred in and around New York City due to the slippery road conditions on January 5. (Doc. 76 at 1–2.)

POSITIONS OF THE PARTIES:

NYCHA first argues that it is entitled to summary judgment as a matter of law because this evidence establishes that there was a storm in progress at the time of the accident, thereby suspending its duty as an owner of the sidewalk to clear away snow and ice for a reasonable period following the termination of the storm. (Docs. 62 at 2–5, 67 at 3–5.) NYCHA further asserts that the ice on which plaintiff slipped was created by the ongoing January 5 storm. (Docs. 62 at 5–9, 67 at 5–6.) In support of this contention, NYCHA refers to portions of plaintiff's

[1] By an order dated March 2, 2017, this Court (Tisch, J.) granted the City of New York's motion for summary judgment dismissing plaintiff's claims. (Docs. 35, 38.)

deposition transcript, in which she stated that there was "hard, heavy" snow falling when she left her apartment (Doc. 81 at 3–4), that the ice on the sidewalk was "transparent, smooth, clear" (Doc. 72 at 41), and that the ice was "clear, white, clear" (*id.* at 33). NYCHA also relies on plaintiff's concession that the ice she saw on January 5 was not the same ice that she observed on the sidewalk after the January 2 and 3 storms. (*Id.* at 41–42.) Therefore, NYCHA contends that plaintiff's claim that the ice on the sidewalk was pre-existing is speculative. (Docs. 62 at 5, 81 at 11.)

In opposition, plaintiff asserts that there is a triable issue of fact as to whether a winter storm was in progress at the time of her accident. (Doc. 79 at 4.) Plaintiff relies on the deposition of Evelyn Ortiz ("Ortiz"), a NYCHA employee who removed snow from the sidewalks in front of the premises on the morning of January 5. (*Id.* at 4–6.) During her deposition, Ortiz estimated that the storm began after 10:00 a.m., by which time plaintiff's accident had already occurred. (*Id.*) Plaintiff also submits a climatological data report which reflects that no precipitation fell on January 5 until after 10 a.m. (*Id.* at 6.) Because Ortiz stated that she was working that morning to salt the ice that had formed on January 4, plaintiff further argues that factual questions exist regarding whether NYCHA had actual or constructive notice of the dangerous, slippery conditions. (*Id.* at 7–11.)

In response, NYCHA reaffirms its position that plaintiff slipped on ice during an ongoing winter storm. According to NYCHA, plaintiff misinterprets both the climatological data report and Ortiz's testimony. (Doc. 81 at 4–7.) Specifically, NYCHA argues that the report reflects an ongoing January 5 storm (*id.* at 5–7) and that Ortiz's testimony, when taken in the correct context, does as well (*id.* at 4–5).

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

Under the "storm in progress" rule, "it is well settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended." (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007].) This rule is "designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering the effort fruitless." (*Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345 [1st Dept 2002].) If the evidence establishes that the plaintiff's injury occurred while a storm was in progress, then dismissal of the complaint is warranted. (*See Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016] (dismissing complaint where defendant submitted uncontroverted evidence that there was an ongoing storm when plaintiff fell); *Krinsky v Fortunato*, 82 AD3d 409, 409 [1st Dept 2011] (same).)

Here, NYCHA established its prima facie showing of entitlement to summary judgment as a matter of law. The weather reports submitted by NYCHA's expert witness, who is a licensed meteorologist (Doc. 64), establish that a freezing rain advisory was in effect on January 5, 2014, from 7:47 to 10:00 a.m. (Doc. 65 at 11.) The advisory was renewed twice that morning: at 8:03 a.m., it was extended until 1:00 p.m. and, at 11:07 a.m., it was extended until 4:00 p.m. (*Id.* at 11–12.) According to the expert witness, "mostly continuous periods of light freezing rain fell from approximately 8:21 a.m. through 1:02 p.m." on January 5. (*Id.* at 8.) Moreover, certified data from two observatories confirms that freezing rain was falling around the time of plaintiff's accident: data from an observatory in Central Park demonstrates that precipitation had begun by 9:23 a.m. (Doc. 66 at 36.), and data from another observatory near LaGuardia Airport in Queens confirms that freezing rain was falling by 9:41 a.m. (*id.* at 47). Therefore, this Court concludes that NYCHA satisfied its prima facie burden of establishing that there was a storm in progress at the time of plaintiff's alleged accident. (*See Powell*, 290 AD2d at 345 ("Such evidence is especially persuasive when based upon the analysis of a licensed meteorologist."); *Filius v New York City Hous. Auth.*, 156 AD3d 434, 434–35 [1st Dept 2017] (certified meteorological reports and plaintiff's testimony sufficient to demonstrate a storm was in progress).)

The burden thus shifted to plaintiff to raise a genuine, triable issue of fact. In attempting to meet this burden, plaintiff relies on Ortiz's deposition testimony and a portion of a certified meteorological report, submitted by defendant, which allegedly shows that precipitation began after 10:00 a.m. The report shows the hourly precipitation for each day in January of 2014. (Doc. 80 at 2.) For the row marked as January 5, no number appears in the column marked for 9:00 a.m. (*Id.*) Under the column marked for 10:00 a.m., however, the number "0.02" appears. (*Id.*) Plaintiff interprets the report as showing that precipitation on January 5 began after 10:00 a.m.

(Doc. 79 at 6.) However, that interpretation is mistaken because the report itself specifies that the numbers underneath the columns represent total inches at the end of each reported hour. (Doc. 80 at 2.) The report should thus be interpreted as establishing that 0.02 inches of precipitation fell between 9:00 and 10:00 a.m. on January 5. (*Id.*) Therefore, the report supports NYCHA's argument that it is entitled to summary judgment.

However, plaintiff raises a triable issue of material fact regarding the ice storm based on Ortiz's deposition testimony that there was no precipitation until after 10:00 a.m. (Doc. 79 at 6.) Plaintiff relies on the following portions of Ortiz's deposition transcript:

> Q: So from when you got to work that day at 7 in the morning up until 10:20 when you returned to 149 West 142nd Street, the ice conditions continued; is that fair?
> A: Not from 7 o'clock to 10 o'clock in the morning. It started about 10 o'clock in the morning.

(Doc. 73 at 62.) Later in the deposition, Ortiz added:

> Q: Do you remember around when they [the icy conditions] started on the 5th of January 2014?
> A: Yes, I recall. Because it was—I was supposed to be going on break. But it started to rain hail and I said oh, let me hurry up and salt this area so I can go to my next area. So it started in between my first time.
> Q: And that was in the 10 o'clock hour?
> A: Yes.
> Q: That's why you didn't go on that break?
> A: That's why I didn't go on the break.

(*Id.* at 63.) Ortiz further testified that the ice storm in question ended after 10:00 a.m.:

> Q: Am I correct that the ice conditions continued through that entire morning?
> A: Not the entire morning, no.
> Q: Did they stop at some point?
> A: Yes.
> Q: When did they stop as far as you recall?
> A: I can't recall.
> Q: Did they stop before 10 o'clock or after 10 o'clock?
> A: After 10 o'clock.

(*Id.* at 61–62.) Therefore, although NYCHA introduced climatological reports of an ice storm that occurred the morning of January 5, plaintiff has presented admissible evidence that raises a question of material fact regarding whether the storm was ongoing at the time of plaintiff's accident, which happened between 9:30 and 10:00 a.m. (*See Calix v New York City Tr. Auth.*, 14 AD3d 583, 584 [2d Dept 2005] (summary judgment denied where deposition and trial testimony conflicted with climatological data).) This Court thus concludes that NYCHA is not entitled to judgment as a matter of law dismissing the complaint based on the "storm in progress" doctrine.

This Court further notes that Ortiz's testimony raises a question of fact regarding whether NYCHA was negligent in maintaining the sidewalk. While plaintiff admitted at her 50-h hearing[2] that she could not remember whether she observed any ice on the sidewalk from the January 2 and 3 storms (Doc. 68 at 20), she also testified at her deposition that there was no salt on the sidewalk when she left her apartment on January 5 (Doc. 72 at 32). However, Ortiz represented in her deposition that she began salting at 7:30 a.m. on January 5 due to the "ice conditions from the night before . . . ." (Doc. 73 at 62.) Thus, summary judgment must also be denied on the ground that the testimony given by plaintiff and Ortiz raises issues of fact regarding whether the sidewalk was salted and, even if it was, whether NYCHA was negligent in removing the snow and ice. (*See Pipero v New York City Tr. Auth.*, 894 NYS2d 39, 40 [1st Dept 2010] (summary judgment denied where questions of fact existed as to defendant's snow and ice removal operations).)

Because plaintiff has raised triable issues of fact regarding whether there was an ongoing storm at the time of her accident on January 5 and whether the ice on which she fell was a result

[2] General Municipal Law § 50-h provides, *inter alia*, that, where one files a claim against a municipality, the municipality may examine the claimant under oath regarding the occurrence.

of the January 2 and 3 storms, this Court concludes that defendant NYCHA is not entitled to summary judgment dismissing the claims against it.

In accordance with the foregoing, it is hereby:

ORDERED that defendant the New York City Housing Authority's motion for summary judgment is denied; and it is further

ORDERED that this constitutes the decision and order of this Court.

8/16/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

153109/2015 LUGO, ELSA vs. CITY OF NEW YORK
Motion No. 001