

Hui Ling Mai v Shu Fa Feng

2018 NY Slip Op 33314(U)

October 25, 2018

Supreme Court, Kings County

Docket Number: 514314/2016

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 514314/2016

SE017 003

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

HUI LING MAI AND ZHOU YAO MAI, INDIVIDUALLY
AND AS THE HUSBAND OF HUI LING MAI,

Plaintiffs,

against

SHU FA FENG AND TUIN SHEUNG FUNG,

Defendants.

Papers

Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u> </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other	<u> </u>

Upon the foregoing papers, defendants' motion for summary judgment is decided as follows:

Plaintiffs brought this action against defendants for damages allegedly sustained when plaintiff Hui Ling Mai slipped and fell on property owned and/or controlled by defendants. Plaintiff testified at her deposition that the accident occurred at noon on February 2, 2015. She left her apartment and began to descend the exterior steps from her door, when she slipped and fell on the second step. Plaintiff was not holding the handrail when she fell. She testified that, as she slipped, she reached for the handrail but it was too high. Plaintiff contends that it was not snowing when she fell, and that a thin layer of clear ice coated the staircase.

Plaintiff's son states in his affidavit that he lives with the plaintiff. He saw plaintiff on the steps after she had fallen and recalls that there was a layer of dirty ice on the steps, footprints on the ice, and piles of snow on the side of the steps. He further states that defendant Feng has, in the past, not cleared the snow from the steps, but rather left piles of snow on the side of the steps.

Defendant Feng testified at his deposition that he and his wife, defendant Fung, own the building and occupy the first floor. He recalled that it was snowing on the day of the accident, and that it was snowing hard.¹ He shoveled and salted twice, once at 7:30 am and again at 10:00 am. Once he completed this second round of shoveling, the steps were cleared of snow and ice, but the snow continued to fall. Snow continued to accumulate on the steps, but there was no ice.

Both plaintiffs and defendants submit reports from weather experts. Defendants' report from CompuWeather is unsworn and therefore inadmissible (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]). However, defendants also submit certified records from the United States Department of Commerce, which show that a combination of rain, sleet and snow fell February 2, 2015, from approximately 7:00 am to approximately 2:00 pm. As certified government records, these documents are admissible (*Lawton v Palmer*, 126 AD3d 945 [2d Dept 2015]; CPLR Rule 4540).

Plaintiffs submit a certified report from Forensic Weather Consultants LLC, which is incorporated into the affidavit of the report's author, Howard Altschule, a Certified Consulting Metrologist. Mr. Altschule states in his report that there was snow accumulation in the days before the accident. He also states that the temperature on February 1, 2015, the day before the accident, fluctuated between above freezing and below freezing. Mr. Altschule concludes that these conditions allowed pre-existing snow and ice to melt and re-freeze.

¹ Plaintiffs contend that defendant Feng testified that the snow was "hard" citing page 40 of his deposition transcript. The question asked was whether it was "snowing hard, easy, soft, something else . . .". Defendant Feng responded that it was hard. In the context of the question, defendant was referring to the rate of ongoing snowfall, and not the solidity of the snow already on the ground.

Plaintiffs also submit the affidavit of William Marletta, Ph.D., CSP, a board certified safety professional. Dr. Marletta states that the step that plaintiff slipped on was not level, but rather pitched forward. He concluded that the step was dangerous as a result, and even more dangerous when covered by ice. He further concluded that the stairs and handrail violated the New York City Building Code and Multiple Dwelling Law because the stairs and treads are not uniform and the handrail was too high.

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Generally, a property owner may be liable for a dangerous condition on the property caused by the accumulation of snow or ice if the owner had actual or constructive notice of the condition (*Rabinowitz v Marcovecchio*, 119 AD3d 762, 762 [2d Dept 2014]). Under the "storm in progress" rule, the owner will not be held liable until a reasonably sufficient time had lapsed since the end of the storm to take protective measures (*id.*). However, the property owner may still be held liable if the icy condition existed prior to the ongoing storm (*Weiss v Kraus Mgt., Inc.*, 164 AD3d 1292 [2d Dept 2018]).

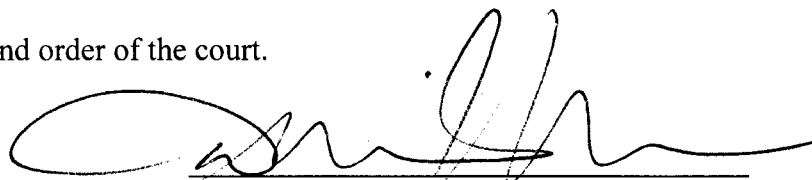
Defendants claim that they cleared the steps of ice upon completion of their second shoveling that morning at 10:00 am. In contrast, plaintiff contends that there was a layer of ice on the steps when she fell. Plaintiffs' weather expert, Mr. Atschule, states that snow

accumulated during the days preceding the accident, and that conditions allowed the snow to melt and re-freeze.

Given the conflicting factual accounts of the snow and ice on the steps, as well as the opinions regarding the safety of the steps from plaintiffs' experts, there are triable issues of fact that prevent an award of summary judgment at this time. Accordingly, defendants' motion is denied.

This constitutes the decision and order of the court.

October 25, 2018
DATE



DEVIN P. COHEN
Acting Justice, Supreme Court

KINGS COUNTY CLERK
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