Maslankowski v City of New York
2018 NY Slip Op 33471(U)
December 18, 2018
Supreme Court, Richmond County
Docket Number: 150372/2016
Judge: Thomas P. Aliotta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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SUSAN MASLANKOWSKI,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 150372/2016

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, SAMEH MORCOS and LIZA MORCOS,

Motion No.: 3570-003

Defendants.

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The following papers numbered "1" through "3" were marked fully submitted on the 31st day of October 2018.

	Papers Numbered
Notice of Motion for Leave to Reargue by Plaintiff SUSAN MASLANKOWSKI, with Supporting Papers, Exhibits (dated August 21, 2018)	1
Affirmation in Opposition by Defendant CITY OF NEW YORK, with Exhibits (dated October 15, 2018)	2
Reply Affirmation of Plaintiff SUSAN MASLANKOWSKI, (dated April 3, 2018)	3

Upon the foregoing papers, plaintiff's motion for leave to reargue is denied.

Plaintiff SUSAN MASLANKOWSKI (hereinafter "plaintiff") commenced this action to recover damages for injuries she sustained on January 26, 2015, when she allegedly slipped and fell on snow and ice that accumulated on the sidewalk in front of 202 Barlow Avenue in Staten

Island. 202 Barlow Avenue is a two-family home owned by defendants SAMEH MORCOS and LIZA MORCOS. The proof indicates that 5.1 inches of snow fell on January 24, 2015 until 5:00 P.M. Further, the temperature fluctuations above and below the freezing mark occurred from the commencement of the snow on January 24, 2015, until the time of plaintiff's accident on January 26, 2015. There is also proof of some on-going precipitation starting at 5:00 A.M. on the morning of plaintiff's fall.

In her complaint, plaintiff asserted allegations of negligence against THE CITY OF NEW YORK (hereinafter 'THE CITY'), in allowing a dangerous condition to exist on the streets and sidewalk after the snow had subsided. It was alleged by plaintiff that a sufficient amount of time had elapsed following the cessation of the snow event, thereby allowing for the imposition of notice upon the City of any dangerous snow conditions existing on the streets and sidewalks.

Plaintiff further asserted allegations of negligence against defendants/homeowners SAMEH MORCOS and LIZA MORCOS (hereinafter collectively referred to as 'MORCOS'), alleging that their tenant negligently removed the snow and ice from the sidewalk following the cessation of snow on January 24, 2015, leaving a patch of ice upon which plaintiff slipped and fell.

In a prior Decision and Order dated July 20, 2018, this Court granted the City's motion and the Morcos' cross motion for summary judgment, thereby dismissing plaintiff's complaint. In the decision, this Court found that defendants submitted sufficient proof demonstrating that the City commenced snow removal operations on January 24, 2015, including the use of salt spreaders, in accordance with established procedures by completing primary roads first, followed by secondary and tertiary roadways, to effect safe travel conditions and prevent dangerous

obstructions on the roadways, and that such snow removal operations continued through January 26, 2015. It was further noted that while it did not appear that there was any significant storm in progress at the time of plaintiff's accident on January 26, 2015, there was some continued precipitation, along with temperature fluctuation occurring on and off from January 24th through January 26, 2015, which permitted the thawing and re-icing of wet conditions. These conditions were found to be sufficient to establish an ongoing weather hazard, and that a sufficient amount of time had not elapsed to charge the City or codefendants with negligence for failing to clear a specific area of snow and ice.

The Court further found that proof submitted by Morcos was sufficient to demonstrate that the Morcos' tenant performed snow removal and salting of the sidewalk in front of the subject premises on January 25, 2015, and that such snow removal operations did not make the condition of the sidewalk more hazardous. Although plaintiff's expert refuted the tenant's claim that he salted the sidewalk, it was the opinion of this Court that proof of the overall conditions then existing, *i.e.*, remnants of the snowfall occurring on January 24, 2015, along with the fluctuation of temperatures, and additional precipitation, all within a two-day time period, established conditions sufficient to establish an on-going weather hazard.

Plaintiff now moves to reargue this decision and contends that the Court misapplied the law with regard to the "storm in progress" rule, and that triable issues of fact exist regarding defendants' snow removal efforts, and whether such efforts created a hazardous condition or exacerbated a natural condition created by the subject storm.

According to plaintiff, after the initial snow event on January 24, 2015, the Morcos' tenant attempted to clean the sidewalk in front of the Morcos' residence, and botched such

cleaning, which resulted in the formation of a layer of ice on which plaintiff slipped and fell. Plaintiff alleges that proof indicates that the day before the accident, temperatures fluctuated up to 42 degrees and then dropped below freezing in the hours before the accident. Accordingly, plaintiff argues the ice condition formed before the precipitation which occurred on the day of the accident, and therefore refutes any "storm in progress" defense. Moreover, 38 hours had expired between the cessation of the first storm on January 24, 2015 and plaintiff's accident. Therefore, there were two distinct weather patterns, the second of which was inconsequential. Thus, the substandard snow removal efforts by the Morcos' tenant following the first storm created a hazardous condition on the sidewalk that caused plaintiff's injury.

Plaintiff further argues that the Morcos' tenant admits that he shoveled snow onto either side of the sidewalk, and that photographs taken shortly after the subject accident corroborate this fact. Plaintiff argues that this proof, in addition to the alleged failure to properly salt the sidewalk, all contributed to the re-freezing of snow that had melted onto the sidewalk after the temperature fluctuation causing a hazardous condition to exist on the sidewalk.

In opposition, the Morcos defendants argue that plaintiff has again failed to raise triable issues of fact. According to said defendants, it is uncontroverted that at the time of plaintiff's fall, there was an ongoing snow event, which had commenced at approximately 5:00 A.M. and was sufficient to cover the sidewalk. Accordingly, the burden then shifted to plaintiff to somehow raise an issue regarding their liability during an ongoing storm. The Morcos further posit that plaintiff incorrectly reargues that an icy condition on the sidewalk resulted from water runoff due to melting and re-freezing because salt was not properly applied. It is their argument that plaintiff's expert, however, fails to address the steady temperature drop following the

tenant's snow removal operations, and merely concludes that the ice condition was the result of inadequate snow removal efforts by the tenant. Finally, the Morcos argue that the failure to apply salt does not bear upon a defendants' potential liability (*see* Santos v. Deanco Servs., Inc., 142 AD3d 137 [2d Dept. 2016]). In view of the foregoing, it is their position that plaintiff's motion must be denied.

CPLR 2221(d)(2) requires that a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. Here, plaintiff has failed to demonstrate that the court overlooked any relevant fact, misapprehended the law or, for some other reason, mistakenly arrived at its earlier determination (see Schneider v. Solowey, 141 AD2d 813 [2d Dept. 1988]).

In its prior decision, this Court duly considered all of the proof submitted with regard to the precipitation and temperature fluctuations from January 24, 2015 up to the time plaintiff fell, and contrary to plaintiff's contentions, it did not mistakenly arrive at its earlier determination. In addition, the Court reviewed the deposition testimony and the expert affidavit submitted in opposition to the motions, and determined that plaintiff, both then and now, has failed to raise a triable issue of fact. It was noted by the Court that while there was no significant storm in progress at the time of plaintiff's fall, the proof submitted confirms the existence of ongoing hazardous weather conditions preceding the time of plaintiff's fall, including the thawing and re-freezing of wet conditions, which was all by confirmed by plaintiff's expert. Accordingly, a sufficient amount of time must elapse before charging defendant's with negligence for failing to clear a specific area of the existing hazardous condition, which is not present here.

Moreover, photographs and testimony regarding the existence of snow on either side of the sidewalk, and the presence of snow and ice on the sidewalk prior to plaintiff's fall, merely confirm the already hazardous conditions. It is well established that a failure to remove all the snow is not negligence and liability will not result unless it is shown that the defendant made the sidewalk more hazardous through his or her removal efforts (*see* Prado v. City of New York, 276 AD2d 765 [2d Dept 2000]. Since the proof fails to establish that the Morcos' tenant made the condition more hazardous, defendants cannot be held liable under the circumstances presented here.

Accordingly, it is

ORDERED that plaintiff's motion for leave to reargue is denied.

E N T E R,

HON. THOMAS P. ALIOTTA, J.S.C.

Dated: December 18, 2018