Johnson v Pawling Cent. Sch. Dist.
2018 NY Slip Op 34178(U)
November 13, 2018
Supreme Court, Dutchess County
Docket Number: Index No. 52378/2016
Judge: Edward T. McLoughlin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
---X
DENNIS R. JOHNSON,

Plaintiffs,

- against -

PAWLING CENTRAL SCHOOL DISTRICT,

Defendant.
---X

DECISION and ORDER

Index No. 52378/2016

McLOUGHLIN, EDWARD T., AJSC

The following papers were considered in connection with defendant's motion for summary judgment seeking to dismiss the complaint:

Defendant Motion/Affirmation /accompanying exhibits	15-36
Plaintiff's Affirmation in Opposition /accompanying exhibits	38-42
Reply Affirmation	43

On February 16, 2016, the plaintiff fell in the parking lot of the defendant, Pawling Central School District. Plaintiff sustained injuries as a result of his fall and commenced the instant action on September 27, 2016.

Defendant has now moved for summary judgment seeking dismissal of this action. Defendant claims that there are no triable issues, as the defendant was not negligent in their maintenance of the property in question due to a storm being in progress at the time of the plaintiff's accident. The defendant also argues that because the plaintiff cannot identify the cause of his fall without speculation, that the defendant's application should be granted. Lastly, the defendant claims that they did not have actual or constructive knowledge of the alleged icy

condition which is purported to be the cause of the plaintiff's fall. The plaintiff opposes the summary judgment application and requests the Court deny the same.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits. See Vega v. Restani Construction Corp., 18 NY3d 499; Millerton Agway Co-Op v. Briarcliff Farms, Inc., 17 NY2nd 57. It is not the Court's function to determine credibility. See Chimbo v. Bolivar, 142 AD3d 944 (2nd Dept. 2016). Issue finding, rather than issue determination, is the key to the procedure. Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395.

Initially, the proponent must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. However, once the movant makes such a sufficient showing, 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 Hospital, 68 NY2d 320. In making this determination, the Court must view the evidence in a light most favorable to the opposing party and must give that party the benefit of every inference which can be drawn from the evidence. Nash v. Port Washington Union Free School District, 83 AD3d 136 (2nd Dept. 2011).

It is well settled that a land owner or tenant in possession of the premises must act reasonably in maintaining the premises in question in a safe condition in view of all the circumstances. Basso v. Miller, 40 NY2d 233.

However, a landowner does not have a duty where the alleged hazardous condition is a claim of the presence of snow or ice where it can be shown that there was a storm in progress at the

time of the accident. Pankratov v. 2935 OP LLC, 160 AD3d 757 (2nd Dept. 2018). The "storm in progress" rule provides that a property owner will not be held responsible for accidents that are the result of the accumulation of snow and/or ice on their premises until an adequate period of time has passed following the cessation of the storm to permit the owner the opportunity to remove the hazards caused by the storm. Aronov v. St. Vincent's Housing Development Fund Co., Inc., 145 AD3d 648 (2nd Dept. 2016).

The plaintiff's own deposition testimony acknowledged that there had been a winter storm occurring over the last several hours before his fall, which had resulted in a wintery mixture of precipitation, including snow, sleet and rain. When the plaintiff left his home at 8:00 a.m. on February 16, 2016, he was aware that precipitation was continuing to fall. This fact was substantiated by the plaintiff's wife in her deposition.

When the plaintiff arrived at the defendant's property, he acknowledged that the precipitation continued to fall and that the area where he parked his car contained snow, ice, water and was messy.

Even taking the plaintiff's testimony at face value, the fact that the precipitation changed from a wintery mix to rain at the time that he fell does not serve to remove the matter from the "storm in progress" doctrine. Sherman v. New York State Thruway Authority, 27NY3d 1019.

Plaintiff also argues that the defendant's motion for summary judgment should be dismissed because the winter storm had concluded, thereby obligating the defendant to remove any hazardous conditions that may have existed from the winter storm. This argument is without merit.

While it is well settled that a property owner has a reasonable time after the cessation of a winter storm to correct hazardous snow and ice related conditions created while the storm was in

progress, the storm in question had not concluded as plaintiff would argue. Again, viewing the facts in the light most favorable to the plaintiff, it is clear that while the storm had experienced a lull, this was merely a break in the storm and not the conclusion of the same. Wexler v. Ogden Cap Props., LLC, 154 AD3d 640 (1st Dept. 2017), lv. den. 31 NY3d 909.

The plaintiff acknowledged that when he fell, there was active precipitation, even though the most significant precipitation had fallen during the overnight hours. This evidence reveals a lull in the storm, not a cessation of the same. Grinnell v. Phil Rose Apartments, LLC, 60 AD3d 1256 (3rd Dept. 2009). Because there was a lull or break in the storm and not the cessation of the same, the defendant was not provided a reasonable time after a cessation of the storm to correct any hazardous snow or ice related conditions. Krautz v. Betz Funeral Home, 236 AD2d 704 (3rd Dept. 1997).

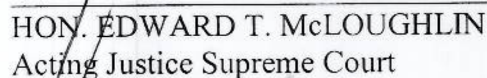
Where the defendant has established, by prima facie evidence, that the "storm in progress" doctrine is applicable, the motion for summary judgment must be granted. Sherman, supra; Krautz, supra.

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment dismissing the complaint is granted.

The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
November 13, 2018



HON. EDWARD T. McLOUGHLIN
Acting Justice Supreme Court

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