Savino v Meronchek
2020 NY Slip Op 30577(U)
January 29, 2020
Supreme Court, Richmond County
Docket Number: 150978/2018
Judge: Wayne M. Ozzi

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: DCM PART 23

----------X

IRENE SAVINO,

Plaintiff,

Index No. 150978/2018
Decision & Order

-against-

WILLIAM MERONCHEK and
FRANCES MERONCHEK

Defendants.

----------X

Ozzi, J.

By motion dated September 12, 2019, the defendants move this Court for an Order granting summary judgment in their favor. The defendants contend that they do not bear any liability for the happening of the accident as the accident was a result of conditions created during a storm in progress.

This action arises out of a slip and fall incident which took place in front of 216 McVeigh Avenue in Staten Island, New York. Plaintiff claims that at approximately 6:00 a.m. on February 16, 2016, she fell after she slipped on ice while walking up the ramp of the defendants' driveway after crossing the street in front of 216 McVeigh Avenue. Plaintiff's Deposition p. 11, 14. Plaintiff testified at her deposition that it had snowed the night prior to her fall and that it was still dark at the time of her fall. She further testified that it was not snowing at the time she fell. Plaintiff's Deposition p. 8. Non-party witness Barbara Bilotti, who lives next door to the defendant, testified that at the time of the accident, it was "sleeting rain" and that it had been sleeting all night. Bilotti Deposition pp. 39-41. Plaintiff's daughter-in-law, Casey Savino, testified that it began snowing during the evening of February 15 and that while she unsure when

it stopped snowing, it was not snowing when she looked outside at 11:00 p.m.. Casey Savino Deposition pp. 21-23.

In further support of their motion for summary judgment, the defendants submitted an affidavit of meteorological expert James V. Bria III, C.M., dated July 25, 2019. In his affidavit, Bria states that he reviewed and analyzed the weather data, including official copies of the National Weather Service data, for February 14, 2016 through February 16, 2016 for the area around and including 216 McVeigh Avenue. Mr. Bria opined that on the evening of February 15, 2016, the day preceding the subject accident, a mixture of snow, sleet, and freezing rain fell prior to 11:30 p.m. From approximately 11:30 p.m. on the evening of February 15, 2016 through approximately 3:00 a.m. on the morning of February 16, 2016 (the date of the subject accident), periods of rain and drizzle continued to fall. Mr. Bria further noted that on February 15, the high temperature was approximately 33 degrees Fahrenheit and the low temperature was approximately 13 degrees Fahrenheit. Mr. Brea concluded that, based on his analysis, the snow and ice cover present at the location was "entirely the result of the snow and ice that ended at approximately 11:30 P.M. EST on February 15, 2016." See Bria Affidavit p. 3.

On a motion for summary judgment, the primary function of the Court is issue finding as opposed to issue determination. Weiner v. Ga-Ro Die Cutting, 104 A.D.2d 331 (2nd Dep't 1984). A motion for summary judgment must be dehied if there are facts sufficient to require a trial of any issue of fact. CPLR 3212(b). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issue of fact. Moreover, "the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion." Marine Midland Bank, N.A. v. Dino et. al., 168 A.D.2d 1610 (2nd Dep't 1990); see also Glennon v. Mayo, 148 A.D.2d 580 (2nd Dep't 1989). Summary judgment should not be

granted where there is any doubt as to the existence of a triable issue of fact or where the existence of an issue of fact is arguable. American Home Assurance Co. v. Amerford International Corp., 200 A.D.2d 472 (1st Dep't 1994).

A party who possesses or controls real property has a duty to exercise reasonable care under the circumstances. Basso v. Miller, 40 N.Y.2d 223 (1976). "A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice" of the existence of the defect or condition. Yioves v. T.J. Maxx, 29 A.D.3d 572 (2nd Dep't 2006). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendants to discover and remedy same. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

As the proponents of the summary judgment motion in an action predicated upon the presence of ice or snow, the defendants bear the burden of establishing, prima facie, that they neither created nor had actual or constructive notice of the snow and ice condition present in front of 216 Mc Veigh Avenue. Bandimarte v. Liat Holding Corp., 158 A.D.3d 664 (2nd Dep't 2018), citing Ryan v. Taconic Realty Assoc., 122 A.D.3d 708, 709 (2nd Dep't 2014); see also Talamas v. Metropolitan Transp. Auth., 120 A.D.3d 1333, 1334 (2nd Dep't 2014); Lee-Pack v. 1 Beach 105 Assoc, LLC, 29 A.D. 3d 644 (2nd Dep't 2006). A defendant can satisfy this burden by submitting evidence that there was a storm in progress when the plaintiff allegedly slipped and fell on his or her property. Bandimarte v. Liat Holding Corp., supra. Pursuant to the "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 his or her 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. Skenden, 51 A.D.3d 642 (2nd Dep't 2008). New York City Administrative Code §16-123(a) further provides:

> Every owner.... having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall, within four hours after the snow ceases to fall... remove the snow or ice...from the sidewalk and gutter, the time between nine [p.m.] and seven [a.m.] not being included in the above period of four hours...

In support of their motion for summary judgment, the defendants have established their prima facie entitlement to summary judgment by submitting an affidavit of an expert meteorologist. Specifically, the defendants submitted the affidavit of meteorological expert James V. Bria, III, who concluded based on his analysis of certified weather records that the period of snow and ice which occurred during the evening prior to the incident, ended at approximately 11:30 p.m. It then continued to rain and/or drizzle until 3:00 a.m. on the morning of February 16. Based on the weather reports and data, Mr. Bria concluded that the snow and ice cover present on the defendant's property was "entirely the result of the snow and ice at ended at approximately 11:30 p.m. on February 15, 2016." See Affidavit of James v. Bria, III. Under these circumstances, as a matter of law, when the alleged accident occurred at 6:00 a.m. on the morning of February 16, an adequate period of time had not passed following the cessation of the storm to allow defendants an opportunity to ameliorate the hazards caused by the storm. See Dowden v. Long Island Rail Road, 305 A.D.2d 631 (2nd Dept 2003); see also Santana v. New York City Housing Authority, 128 A.D.3d 564 (2nd Dep't 2015); Administrative Code §16-123(a).

To defeat the defendants' motion for summary judgment premised upon the "storm in progress" defense, the plaintiff has the burden of coming forward with admissible evidence that

the ice and snow that caused her to fall "existed prior to the storm in progress and that defendants had actual or constructive notice of the hazard." Pacelli v. Pinsley, 267 A.D.2d 706, 707 (3rd Dep't 1999). Here, plaintiff has failed to raise a triable issue of fact. Plaintiff has not submitted an affidavit from a meteorological expert to counter the Mr. Bria's expert opinion as to when the snow and ice formed on the sidewalk and, specifically, when the period of snow and ice ended. Any arguments contained in plaintiff's opposition papers regarding when the weather event may have ended and whether the defendant had constructive notice of the snow and ice on his property are based on mere speculation and conjecture and are insufficient to defeat a motion for summary judgment. See e.g., Zhou v. 131 Christie Street Realty Corp., 125 A.D.3d 429 (1st Dep't 2015). The fact that it may not have been snowing when the Plaintiff fell, as she testified at her deposition, is of no moment, as pursuant to Administrative Code §16-123(a), she fell within the exclusionary time period of the four hour rule provided by the Administrative Code. Finally, the plaintiff has not come forward with any evidence that the defendants caused or created the condition upon which she fell, relying instead on speculation and conjecture.

Consequently, for the reasons set forth herein, defendant's motion for summary judgment is granted. The foregoing constitutes the decision and Order of the Court.

Dated: January 29, 2020

HON. WAYNE M. OZZI, J.S.C.