Telesco v Smith
2020 NY Slip Op 34867(U)
December 14, 2020
Supreme Court, Ulster County
Docket Number: Index No. EF2018-2609
Judge: Richard Mott

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

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NICHOLAS TELESCO and CAROLINE TELESCO,

Plaintiffs,

DECISION/ORDER

-against-

Index No. EF2018-2609
R.J.I. No. 55-19-1867
Richard Mott, J.S.C.

MATTHEW SMITH and LINDA SMITH,

Defendants.

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Motion Return Date: October 16, 2020

APPEARANCES:

Plaintiffs: George A. Kohl 2nd, Esq.
Finkelstein And Partners
1279 Rt 300
Newburgh, NY 12551

Defendants: Kimberly Hunt Lee, Esq.
McCabe & Mack, LLP
63 Washington Street
Poughkeepsie, NY 12601

Mott, J.

Defendants move to reargue the denial of their summary judgment motion seeking dismissal of this negligence action. Plaintiffs oppose.

Background

On February 7, 2018, Plaintiff Nicholas Telesco (Plaintiff), a commercial tenant of Defendants' premises, slipped and fell near a gutter downspout while walking to the bathroom, on a 3 to 4-foot wide concrete apron-walkway adjacent to the building. That day snow flurries began at 8:00 AM and it was still flurrying when Plaintiff fell.

Parties' Contentions

Defendants claim that the Court misapprehends Plaintiffs' expert meteorological report (Roberts) and assumes facts that are contradicted by Plaintiff's deposition, to incorrectly conclude a triable issue of fact exists as to whether Plaintiff fell on ice that pre-existed the storm in progress. Defendants maintain that Plaintiff merely assumed he fell on ice as he was unable to describe its dimensions, and aver he only observed the ice at the mouth of the gutter downspout. Further, they aver that Roberts' report of trace ice/snow the night prior to Plaintiff's fall refers only to untreated and undisturbed surfaces, but that Plaintiff fell on a surface that had been treated following a snowfall three days earlier. In addition, they assert that Defendant Matthew Smith (Defendant) and Plaintiff confirm they did not observe ice the day before the accident, such that it was error to conclude, upon any fair interpretation of the evidence, that Plaintiff fell on pre-existing ice rather than the slippery condition caused by recent snowfall.

Plaintiffs contend that Defendants' rehash of their motion contentions does not merit reargument. They insist that the gutter, having a discharge path over the apron-walkway, as depicted in photographs, rendered ice formation foreseeable given the prior day's trace ice/snow, .6" snowfall and above-freezing temperatures for 1-2 hours in the late afternoon. Further, they assert that Plaintiff's inability to describe ice dimensions does not negate his direct observation thereof.[1] In addition, they aver that because Defendant designed and installed the gutters which cause water to flow into a seam on the apron-walkway, it is reasonable to infer that ice pre-existed the storm and Defendant's

[1] Plaintiff's deposition is that before he slipped he saw a dusting of snow on the walkway and that after he fell, he saw "ice coming out of the downspout and on top of the walkway under the snow." Pg. 56-57.

constructive knowledge thereof. Finally, they cite Defendant's deposition denying an actual memory of conditions the day prior to the accident and knowledge of the gutter discharge flow.

Discussion*/Motion to Reargue*

"[A] motion to reargue is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind." *Richardson v. Lindenbaum & Young*, 14 Misc.3d 1223(A), 2007 WL 218722 (Kings County, 2007), citing Siegel, *New York Practice (5th ed)*, ¶254, p. 449. However, it may not serve as "a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Foley v. Roche,* 68 A.D.2d 558, 567 (1st Dept. 1979). Thus, CPLR §2221(d)(2) requires that such motion "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion…".

Upon reflection, the Court has not misapprehended the facts. Defendants' insistence that Plaintiff did not see the ice upon which he fell is belied by the latter's deposition and his inability to describe its dimensions merely raises a credibility issue for the trier of fact. Moreover, expert testimony is not required for a lay juror to reasonably infer that Roberts' report of at and above freezing temperatures for 2 hours the day before the accident caused a melt/ refreeze, as there is no evidence that the roof or gutters had been cleared of prior snowfalls.[2] *Nevins v Great Atl. and Pac. Tea Co.,* 164 AD2d 807 [1st Dept 1990] (removal of snow and ice is not a subject calling for expert professional or technical knowledge).

[2] Defendants' meteorological expert confirms .63" of snowfall the day before the accident.

Further, Defendants ignore Plaintiffs' expert proffer as to the hazardous condition created by gutter discharge, including photographs of the accident site evidencing same, rendering reasonable the inference that ice formation on the apron-walkway was foreseeable. *Mondello v DiStefano*, 16 AD3d 637, 639 [2d Dept 2005] (photographs of gutter outfall and effect on adjoining pavement raised triable issues of fact as to whether defendant had actual knowledge of a recurrent dangerous condition sufficient to establish constructive notice thereof). Indeed, Defendants submitted an expert affidavit asserting the gutters were adequate, thereby acknowledging that contested issue.

Finally, here, unlike *Mosquera v Orin,* 48 AD3d 935, 936 [3d Dept 2008], Plaintiff observed the ice upon which he fell and there is evidence from which it is reasonable to infer more than a general awareness that ice pre-existed the storm. Thus, the lack of a prior observation/complaint of such dangerous condition does not preclude Defendant's constructive knowledge thereof. See, e.g., *San Marco v Vil./Town of Mount Kisco*, 16 NY3d 111, 117 [2010] (piling plowed snow is a pragmatic solution to snow accumulation "that presents the foreseeable, indeed known, risk of melting and refreezing.").

Accordingly, the motion is denied.

This constitutes the Decision and Order of this Court. The Court is E-filing this Decision and Order, but that does not relieve Plaintiffs from compliance with the provisions of CPLR §2220 with regard to notice of entry thereof.

Dated: Hudson, New York
December 14, 2020

RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Motion, Memorandum of Law and Affirmation of Kimberly Hunt Lee, Esq., dated September 17, 2020 with Exhibits 1-6;
2. Opposition Affirmation of George A. Kohl 2nd, Esq., dated October 5, 2020, with Exhibit A;
3. Reply Memorandum of Law of Kimberly Hunt-Lee, Esq., dated October 13, 2020.