

Pozzulo v Botta

2020 NY Slip Op 35006(U)

January 27, 2020

Supreme Court, Nassau County

Docket Number: Index No. 605876/2017

Judge: Anna R. Anzalone

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SUPREME COURT OF THE STATE OF NEW YORK

**PRESENT: Honorable Anna R. Anzalone
Justice of the Supreme Court**

_____ x

**IRENE POZZULO and ROCCO POZZULO,

Plaintiffs,**

**TRIAL/IAS, PART 15

NASSAU COUNTY**

- against -

**CHRISTOPHER BOTTA and CATHERINE D.
BOTTA,**

Motion Seq# 2

Index No. 605876/2017

Defendants.

_____ x

CHRISTOPHER BOTTA and CATHERINE D. BOTTA,

XXX

Third Third-Party Plaintiffs,

-against-

**INCORPORATED VILLAGE OF ROCKVILLE
CENTRE,**

Third Third-Party Defendants.

_____ x

The following papers read on this motion:

- Notice of Motion.....1
- Affirmation in Opposition2
- Reply Affirmation.....3

This instant action is one of negligence. Plaintiff Irene Pozzulo (“Irene”) alleges that on February 10, 2017 she slipped and fell on an accumulation of snow and ice situated on the driveway

apron located at 29 Milford Place, Rockville Centre, New York (“Accident”). The driveway apron is part of the defendant/third-party plaintiffs’ Christopher Botta and Catherine D. Botta (“Botta”) private residence, which adjoins/abuts South Side Middle School.

Plaintiff filed a summons and verified complaint against defendant Botta, and issue was joined on July 6, 2017 when Botta filed an answer. On September 28, 2017, Botta commenced a third-party action against Rockville Centre Union Free School District and South Side Middle School (“School District”), and issue was joined on October 19, 2017 when the School District filed an answer. On April 5, 2018, the School District commenced a second third party action against the Incorporated Village of Rockville Centre (“Village”) and issued was joined when the Village filed an answer on June 1, 2018. On April 19, 2018, Botta further commenced a third third party action against the Village and issue was joined on June 1, 2018 when the Village answered.

By Decision dated July 9, 2019 and entered July 15, 2019, this Court granted the School District’s motion dismissing the third-party plaintiff’s complaint, together with any and all cross-claims against the School District. By Decision dated January 8, 2020 and entered January 16, 2020, this Court granted the Village of Rockville Centre’s motion to dismiss all claims against them. Defendants, Christopher Botta and Catherine D. Botta (“Defendants” and/or “Botta”) now move for an Order pursuant to CPLR §3212 dismissing the Plaintiff’s complaint.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1968). To make a *prima facie* showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. *Id.* Once a *prima facie* showing has been made, 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. *Id.*; *see also Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 (1980).

A real property owner, or a party in possession or control of real property, will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only when it created the alleged dangerous condition or had actual or constructive notice of it. *Somekh v. Valley National Bank*, 151 AD3d 783, 57 NYS3rd 487 (2d Dept 2017) To establish its entitlement to summary judgment, a property owner or party in possession must establish, *prima facie*, that it neither created nor had actual or constructive notice of the dangerous condition that allegedly caused the plaintiff to fall. *Id* A general awareness that snow and ice may have been present on a driveway is legally insufficient to constitute notice on the part of property owners of any icy condition that allegedly caused a pedestrian's fall. *Kaplan v. DePetro*, 51 AD3d 730, 858 NYS 2d 304 (2d Dept 2008)

Plaintiff Irene testified that she was employed as a teacher's aide at the South Side Middle School. On the day of the accident there was a delayed opening due to snow the previous day and she left her house around 9:30 am. She indicated that the school had a small parking lot, so the school arranged for her as well as other school employees to park at the Beth Emanuel Temple which was about a block away. Irene stated that she had to walk about one block to get to the school on Milford Place, a residential area. Irene said the roadway was cleared on the day of the accident. Irene testified that she was walking along the sidewalk on Milford Place when she saw snow piled up, so she decided to walk on the driveway; specifically, the apron of the driveway. She took a step and her right foot slid down the driveway and her left foot turned in and she fell. Irene stated that she saw the snow and ice on the driveway prior to stepping on it, and she tried to

step on the clearest spot that she could find. Irene indicated that she thought she could continue when asked if there was a reason why she didn't backtrack and go to a different area, other than going down a driveway area when she saw snow and ice. Irene could not recall what part of the apron of the driveway she stepped on when shown a photograph.

Plaintiff Rocco Pozzulo testified that his wife, Irene told him that she had fallen either on the sidewalk or just stepping onto the apron of the last house. Defendant Catherine Botta testified that she and her husband Christopher Botta are the owners of premises 29 Milford Place, Rockville Centre, a one family home. In the early morning the day of the Accident, it had snowed the night before, and that morning, before she left for work, she shoveled the walkway, sidewalk, driveway, and driveway apron with a shovel because it had snowed after her husband shoveled the night before. She left for work about 8:10 am and the street had already been plowed. Defendant Christopher Botta testified that he shoveled the snow the night before the accident between 11:00 pm and midnight. He indicated that he shoveled everywhere; the front, sidewalk, driveway, apron, and he put rock salt down. Mr. Botta indicated that he shoveled the next morning and put rock salt down as well. Mr. Botta does not recall if his wife shoveled that morning.

The moving parties submit in support of their motion the testimony of Irene, and both defendants. Additionally, the defendants present the testimony of John Thorp, Director of Operations of the Department of Public Works for the Village of Rockville Centre. Mr. Thorp testified that the location of the Accident was within the jurisdiction of the Village of Rockville Centre. Mr. Thorp testimony showed that snow event required the Village employees to engage in snow clearing on all the Village Streets beginning in the evening of February 9, and into February 10, 2017.

Defendant further submits that the Village of Rockville Centre sets forth the requirements for homeowners for snow removal in Chapter 287, Article II of its Ordinance. In relevant part, the Ordinance provides:

§ 287-9. Sidewalk maintenance; penalties for offenses; civil liability.

A. The owner, occupant, agent, lessee or tenant of any premises or lot shall be jointly and severally responsible for keeping the contiguous sidewalks and the section of land, if any, between said contiguous sidewalk and the street clean and free from garbage, refuse, rubbish, litter, filth or other offensive matter, weeds and other obstructions or encumbrances. There shall be a rebuttable presumption that any person cited for a violation of this subsection shall have possessed knowledge of said violation and shall have failed to correct the same.

B. The owner, occupant, agent, lessee or tenant of any premises or lot shall be jointly and severally responsible for keeping the contiguous sidewalks free from dirt, weeds and other obstructions or encumbrances and in good and safe repair and shall cause sidewalks to be cleared of snow and ice within 24 hours after such snowfall shall have ceased or ice has formed

C. Penalties

(1) . . .

(2) . . .

D. Civil liability. The owner or occupant of lands, other than land used for a one-family or two-family dwelling, shall be liable for any injury or damage caused to any person or property by reason of such owner or occupant's omission, failure or negligence to make, maintain or repair such sidewalk or section of land, or to remove snow, ice or other obstructions therefrom, or for a

violation or nonobservance of the provisions of this Code relating to making, maintaining and repairing such sidewalks and sections of land and the removal of snow, ice and other obstructions therefrom.

Defendant submits that pursuant to said Ordinance, a homeowner shall cause sidewalks to be cleared of snow and ice within 24 hours after such snowfall shall have ceased or ice has formed, and it is undisputed that 24 hours had not elapsed at the time of the accident since the cessation of the snowfall on February 10, 2017 in accordance with the testimony of the Plaintiff and all witnesses. Additionally, subsection D of said Ordinance does not impose tort liability on the owner of a one-family dwelling for failure to comply with the requirements set forth therein.

Defendants motion for summary judgment is granted; the homeowner/ defendants have established, *prima facie*, that they neither created nor had actual or constructive notice of the dangerous condition that allegedly caused the plaintiff to fall. The evidence submitted shows that the Defendants shoveled, cleared and salted the sidewalk, more than once, prior to the time of the accident, as well as the walkway to their home, their driveway, and apron. Additionally, the defendant homeowners cleared the snow prior to the 24 hours requirement in the Rockville Centre Ordinance. Furthermore, any allegation that the defendant homeowner, owners of a one family dwelling had violated the Village Ordinance is without merit since subsection D of said Ordinance does not impose liability on the homeowner of a one-family dwelling. Moreover, the defendant's efforts to remove the snow did not create a hazardous condition *Somekh Supra*, and the defendant's general awareness that the snow or ice may be present is legally insufficient to constitute notice. *Kaplan Supra*.

Accordingly, the defendant's motion for an Order pursuant to CPLR §3212 dismissing the Plaintiff's complaint and all cross-claims asserted against them is granted.


Counsel for Defendant shall file and serve a copy of the within order with notice of entry upon all parties within twenty (20) days from the date of this Order.

The foregoing constitutes the Decision and Order of the Court.

DATED: January 27, 2020

ENTER

Mineola, New York


HON. ANNA R. ANZALONE

ENTERED
FEB 03 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE