Osipova v Friedman
2020 NY Slip Op 35321(U)
September 17, 2020
Supreme Court, Kings County
Docket Number: Index No. 510381/2018
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 17th day of September 2020.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

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SVETLANA OSIPOVA,

Plaintiff,

-against-

YEOSHUA FRIEDMAN,

Defendant.

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Index No.: 510381/2018

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	13 - 24
Opposing Affidavits (Affirmations)	26 - 31
Reply Affidavits (Affirmations)	33

Introduction

Defendant, Yehoshua Friedman, moves by notice of motion, sequence number one, pursuant to CPLR § 3212 for summary judgment, dismissing plaintiff's complaint. Plaintiff, Svetlana Osipova, opposes this application.

Background

Plaintiff allegedly sustained personal injuries on March 8, 2018, when she tripped and fell on an accumulation of ice on the sidewalk adjacent to the premises located at

2270 85th Street, owned by defendant. Plaintiff appeared at an examination before trial (EBT) on May 23, 2019 (*see generally,* NYSCEF Doc. # 19). She testified that she passed the premises on her way to the train at approximately 7:00 a.m. on March 8, 2018. There was some snow and ice on the ground from a previous snowfall (*see id.* at 9). Plaintiff testified that at the accident location, the sidewalk "looked clean" (*id.* at 15). There was snow off to the sides; it looked as if someone had shoveled the sidewalk (*see id.*). She does not recall whether she observed salt or sand on the sidewalk (*see id.*). Her right foot slipped on the sidewalk, causing her to fall (*see id.* at 16).

Plaintiff marked photographs of the sidewalk at her deposition, taken by her boyfriend, which plaintiff states fairly and accurately show the area where she fell. This Court notes that these photographs are not annexed to the moving papers. Plaintiff testified that she slipped on tire tracks shown in defendant's exhibit C (*see id.* at 25). She testified that the sidewalk was slippery, but she did not fall prior to the accident (*see id.* at 27). She was looking straight ahead as she walked and did not see the ice before she fell (*see id.* at 27-29). She did not look down because that block was shoveled (*see id.* at 29).

Defendant appeared at an EBT on May 23, 2019 (*see generally,* NYSCEF Doc. # 20). He is the owner of the premises in question. The premises, a four-family dwelling, is currently occupied by two tenants, one of whom is his daughter. There are two parking space in front of the building used by defendant, his daughter and sometimes their neighbor. The building has no superintendent. Maintenance, such as cleaning the sidewalk, taking the garbage out, calling repairpersons, are performed by defendant and his wife (*see id.* at 20). With respect to snow removal, defendant would call someone if

the storm was big (*see id.*). During the snowfall in question, the sidewalk was cleared by defendant's wife Zlata Friedman (*see id.* at 21). Defendant testified that his wife shoveled and salted the sidewalk at 11:00 p.m. on March 7, 2018 (*see id.* at 22). Defendant learned that a lady fell the morning of the accident, when a neighbor told him (*see id.* at 32). When he arrived at the scene, he did not see ice. He saw that the sidewalk was "really clean" with salt still around (*see id.* at 35).

Defendant owns two vehicles. He testified that he believes that both vehicles were parked in the driveway (*see id.* at 26). He testified that his vehicle was in his parking space at 11:00 p.m. the night before the accident and he did not go outside from 11:00 p.m. to 7:00 a.m. the following day (*see id.* at 23). He does not know if there was car in the second parking space (*see id.*). Defendant does not know whether any cars entered or exited the driveway between the time his wife shoveled at 11:00 p.m., and the time plaintiff fell at 7:00 a.m. (*see id.* at 40). At times they will park on the street, when a spot is available (*see id.* at 26). Further, their neighbor sometimes also used the parking spot (*see id.* at 39). This Court notes that photographs were shown at defendant's EBT which are not included in the moving papers.

Zlata Friedman, defendant's wife, appeared at an EBT on May 23, 2019 (*see generally,* NYSCEF Doc. # 21). Mrs. Friedman testified that she shoveled the sidewalk and put salt down at 11:00 p.m. on March 7, 2018, the night before the accident. She did not clear any other areas (*see id.* at 13). She does not remember if there was a car parked in the driveway the night before the accident (*see id.* at 14). She does not recall seeing the tire track across the sidewalk the night before while shoveling (*see id.* at 20-21).

When she went inside, "there was nothing… it was all clean" and she put salt down (*id.* at 21). She testified that it was "still coming down" when she finished shoveling (*see id.* at 23). She does not know if it was snow or freezing rain (*see id.*).

Plaintiff, in opposition provided the photographs marked at her EBT (*see* NYSCEF, Doc. # 27-28). The photographs show the sidewalk outside of the premises is mostly clear, but snow remains in the driveway, which is located between the sidewalk and the house. The photograph marked as Exhibit C, shows plaintiff on the ground holding her leg, and behind her a snowy tire track from the driveway to the street (*see id.* at 27). Plaintiff identified this tire track as the ice which caused her to fall. Plaintiff further provided copies of numerous violations issued to defendant for an illegal curb cut/driveway and front yard parking (*see* NYSCEF Doc. # 29).

The certified meteorological records from the National Centers for Environmental Information, Asheville, North Carolina state that there was precipitation from March 6, 2018 to March 8, 2018 (*see* NYSCEF Doc. # 24). On March 7, 2018, there was a total of 2.8 inches of snowfall (*see id.*). Defendant alleges that trace precipitation continued until 3:00 a.m. on March 8, 2018 (*see* NYSCEF Doc. # 14, Affirmation in Suport at ¶ 44). However, the Local Climatological Data Hourly Observations from the station at Newark Liberty Airport, provided herein by defendant, show that on March 7, 2018, from 22:51 to March 8, 2018 at 23:51, the "Precip. Total (in)" is listed as 0.0 (*see id.*). According to this report, which shows trace precipitation on March 7, 2018 from 20:51 to 21:51, the storm ceased at 21:51 or 9:51 p.m. on March 7, 2018 (*see id.*).

The note of issue was filed on January 14, 2020 (*see* NYSCEF Doc. # 23).

Discussion

Summary Judgment

"[T]he 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 absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

Storm in Progress Rule

Defendant contends that he is entitled to summary judgment as he had no duty to remedy a dangerous condition due to the Storm in Progress Rule. "Pursuant to Administrative Code section 16–123(a), owners of abutting properties have four hours from the time the precipitation ceases, excluding the hours between 9:00 p.m. and 7:00

a.m., to clear ice and snow from the sidewalk" (*Schron v. Jean's Fine Wine & Spirits, Inc.*, 114 A.D.3d 659, 979 N.Y.S.2d 684 [2 Dept., 2014], citing N.Y.C. Administrative Code § 16–123[a]). "Under the so-called '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 its 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" (*Bryant v. Retail Prop. Tr.*, -- A.D.3d --, 2020 N.Y. Slip Op. 04725 [2 Dept., 2020], quoting *Marchese v. Skenderi,* 51 A.D.3d 642, 856 N.Y.S.2d 680 [2 Dept., 2008]). "On a motion for summary judgment, the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case … However, [i]f the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied [internal citations and quotation marks omitted]" (*Casey-Bernstein v. Leach & Powers, LLC*, 170 A.D.3d 651, 95 N.Y.S.3d 314 [2 Dept., 2019]).

Here, defendant failed to meet his burden, as his own climatological data shows that the storm ceased at 9:51 p.m. on March 7, 2020. Furthermore, the testimony established that defendant's wife shoveled and salted the driveway at 11:00 p.m. on March 7, 2020. At best, Mrs. Friedman's testimony that the precipitation continued after 11:00 p.m. would create a question of fact. This Court notes that at oral argument defendant did not dispute that precipitation stopped by 10:00 p.m.

Premises Liability

Defendant further contends that he is not liable as he had no actual or constructive notice of the accumulation of ice on the sidewalk prior to plaintiff's fall. "A property owner is charged with the duty of maintaining its premises in a reasonably safe condition" (*Stanley v. New York City Hous. Auth.*, 183 A.D.3d 564, 121 N.Y.S.3d 612 [2 Dept., 2020], citing *Basso v. Miller,* 40 N.Y.2d 233, 386 N.Y.S.2d 564 [1976]). "To demonstrate entitlement to summary judgment, an owner of real property must establish that it maintained the premises in a reasonably safe condition, and that it did not create a dangerous or defective condition on the property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it" (*Reed v. 64 JWB, LLC*, 171 A.D.3d 1228, 98 N.Y.S.3d 636 [2 Dept., 2019], *lv. denied,* 35 N.Y.3d 902, 147 N.E.3d 578 [2020]). "A property owner, or a party in possession or control of real property, will be held liable for an accident involving snow and ice on its property only when it created the dangerous condition that caused the accident or had actual or constructive notice of its existence" (*Velasquez v. Pro Park, Inc.*, 173 A.D.3d 1246, 104 N.Y.S.3d 674 [2 Dept., 2019], citing *Bennett v. Alleyne*, 163 A.D.3d 754, 81 N.Y.S.3d 504 [2 Dept., 2018]). "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 defendant's employees to discover and remedy it" (*Johnson v. 101-105 S. Eighth St. Apartments Hous. Dev. Fund Corp.*, 185 A.D.3d 671, 124 N.Y.S.3d 852 [2 Dept., 2020], quoting *Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 501 N.Y.S.2d 646 [1986]).

In the instant case, defendant failed to meet his burden and establish entitlement to summary judgment as a matter of law. Here, it is undisputed that defendant established through the deposition testimony of himself and his wife, that they did not have actual or constructive notice of the ice on the sidewalk prior to plaintiff's accident at 7:00 a.m. on March 8, 2018. However, the evidence shows that the sidewalk in front of the premises was clear of snow and ice, except for the tire tracks from the driveway area to the street, which is where plaintiff slipped. Defendant failed to establish that he or another person using the driveway of the premises, did not cause and create the icy condition. Further, defendant failed to establish that his wife did not exacerbate the alleged condition through her failure to clear the snow from the driveway portion of the premises.

Conclusion

Accordingly, the defendant's motion for summary judgment is denied. The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.