Hill v Lewis
2021 NY Slip Op 33130(U)
December 22, 2021
Supreme Court, Queens County
Docket Number: Index No. 714384/18
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED
12/22/2021
COUNTY CLERK
QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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DONNELL HILL,

Plaintiff(s),

- against -

TYRONE H. LEWIS,

Defendant(s).

----------x

Index No.: 714384/18

Motion Date:10/19/21

Motion Cal. No.: 18

Motion Seq. No.: 01

The following papers numbered 1 - 9 read on this motion by defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Service.....	8 - 9

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

In this personal injury action, plaintiff alleges that at approximately 3:45 am on November 11, 2017, he slipped on a patch of ice on the public sidewalk abutting defendant's premises at 134-16 Garrett Street, County of Queens, City and State of New York. It is undisputed that the premises is a 2-family residential building, at which defendant resides. Plaintiff asserts a single cause of action for negligence, alleging that defendant failed to maintain the sidewalk in a safe manner, and permitted a dangerous condition to remain. In his bill of particulars, plaintiff claims that defendant is liable under sections 7-210 and 19-152 of the Administrative Code of the City of New York ("NYC Admin Code"), as well as the common law.

Defendant now moves for summary judgment dismissing the complaint. Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of any material issues of

fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of his or her cause of action or defense (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant makes the *prima facie* showing, the burden then shifts to the non-movant to raise a material issue of fact requiring a trial (*see id*). Courts must view the evidence in the light most favorable to the non-movant (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and draw all reasonable inferences in his or her favor (*see Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]).

Defendant argues that he is entitled to summary judgment because he did not create the icy condition on which plaintiff slipped, and had no duty to maintain the sidewalk to begin with. Although property owners have a duty to maintain their premises in a reasonably safe condition (*see generally Basso v Miller*, 40 NY2d 233 [1976]), the general rule is that landowners are not liable for injuries sustained as a result of a dangerous condition on the public sidewalks abutting their property, subject to the following exceptions:

> "when the landowner actually created the dangerous condition, made negligent repairs thereby causing the condition, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance imposing liability on the abutting landowner for failing to maintain the sidewalk"

(*Crawford v City of NY*, 98 AD3d 935, 936 [2d Dept 2012]). Plaintiff contends that the last of these exceptions governs the instant matter, because NYC Admin Code § 7-210 imposes liability for personal injuries arising from the failure to maintain public sidewalks upon the owners of the abutting real property. However, this liability is not imposed upon the owners of one-, two-, and three-family residential real property, which is owner-occupied, in part or in whole, and used exclusively for residential premises (*see* NYC Admin Code § 7-210 [b]; *Crawford*, 98 AD3d at 936). It is undisputed that defendant resides in the subject premises, which is a two-family house. Hence, defendant has established, *prima facie*, that NYC Admin Code § 7-210 is inapplicable to the facts at bar, and plaintiff has not raised a triable issue of fact on this specific issue.

Plaintiff also alleges that defendant's liability arises under the common law. As discussed, property owners may still be held liable for injuries sustained by a plaintiff as a result of a dangerous condition on a public sidewalk, even in the absence of statutory liability, if they created the condition (*see Crawford*,

98 AD3d at 936; *see also Stubenhaus v City of NY*, 170 AD3d 1064, 1066 [2d Dept 2019]). Moreover, with respect to the facts at bar,

> "[i]f water from private property is permitted to flow by artificial means onto an abutting public street where it creates a dangerous condition on that public street, the private landowner may be held liable to a person injured as a result of that dangerous condition"

(*Tomei v Town of Riverhead*, 174 AD3d 761, 762 [2d Dept 2019]). In support of summary judgment, defendant submits, *inter alia*, the transcripts of the parties' depositions, and photographs of the scene which were used at the depositions. Plaintiff testified that it was cold on the night of his accident, but it had not been raining or snowing, and he slipped and fell on an ice patch that spanned four sidewalk flags. Plaintiff did not see the ice before he fell, but while he was on the ground, he noticed a raised sprinkler head on the abutting property, and presumed that it was the source of the water which formed the ice patch.

Defendant testified that the sprinkler system was installed on his front lawn in 2016, the year before plaintiff's November 11, 2017 accident. Every October, defendant turned off the system, and had it professionally winterized, which entailed bleeding the line of water, and repairing the sprinkler heads, and he kept the system off until the following spring. His landscapers sometimes knocked off the sprinkler heads, and this could have happened in 2017. Defendant recalled a prior incident where the sprinkler system had leaked onto the sidewalk; he believed it occurred during the summertime, but could not say whether that was in 2017. Before the accident, defendant had not been made aware of any icy conditions on the sidewalk caused by leaks from his sprinkler system.

The court finds that defendant has failed to eliminate all issues of fact so as to affirmatively establish that a leak from his sprinkler system did not create the ice patch on which plaintiff slipped and fell. Since plaintiff testified that it had not been raining or snowing, but he saw a raised sprinkler head on defendant's lawn next to where he fell, it may be inferred that the sprinkler was the likely source of the water that formed the ice patch. Although defendant's custom may have been to turn off the sprinkler system and have it professionally winterized each October, he did not testify that he specifically recalled doing so in October of 2017. Moreover, at his deposition, defendant could not recall the name of the company he used, nor did he submit any invoices or receipts from any such business, which may have shown when the winterizing occurred, and the specific services rendered. Defendant also acknowledged that his system had previously leaked onto the sidewalk, and his testimony as to when that occurred was equivocal. Defendant's failure to satisfy his burden as the proponent of summary judgment obviates the need for this court to

consider plaintiff's opposing papers (*see Alvarez*, 68 NY2d at 324).

Even assuming *arguendo* that defendant had satisfied his *prima facie* burden, plaintiff raised a triable issue of fact through the submission of the affidavit of non-party Robert Hall, who responded to the scene and helped plaintiff up off the ground. Hall averred that he saw "ice and water covering the sidewalk where [plaintiff] fell," and "a lawn sprinkler that was broken in front of the [adjacent] property... ." According to Hall, "it looked like the sprinkler froze and was leaking water onto the sidewalk... ." Based on Hall's testimony, a fact-finder could conclude that the dangerous condition was created by the water that allegedly leaked from defendant's sprinkler system.

Defendant argues that Hall's affidavit is of no moment because there is no indication that defendant had any knowledge of the alleged leak before the accident. However, defendant confuses the parties' respective burdens at this juncture. "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*L&D Serv. Sta., Inc. v Utica First Ins. Co.*, 103 AD3d 782, 783 [2d Dept 2013]). As the proponent of summary judgment, defendant bears the burden to affirmatively establish, as a matter of law, that he neither created, nor had notice of, the dangerous condition (*see Castillo v Silvercrest*, 134 AD3d 977, 977 [2d Dept 2015]). "To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's accident" (*Reed v 64 JWB, LLC*, 171 AD3d 1228, 1229 [2d Dept 2019]). On this motion, defendant did not proffer any evidence as to when he had last inspected the sprinkler system before the accident, and so, he necessarily failed to affirmatively establish that he lacked constructive notice of the alleged leak.

For the foregoing reasons, the court finds that defendant has not demonstrated entitlement to summary judgment. Accordingly, the above-referenced motion is **DENIED.**

The foregoing shall constitute the decision and order of this court.

Dated: December 22, 2021

JANICE A. TAYLOR, J.S.C.

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COUNTY CLERK
QUEENS COUNTY

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