O'Sullivan v City of Long Beach
2021 NY Slip Op 33295(U)
January 6, 2021
Supreme Court, Nassau County
Docket Number: Index No. 602852/2018
Judge: Helen Voutsinas

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 25
Present: Hon. Helen Voutsinas, J.S.C.

_____X

DEBRA O'SULLIVAN,

Plaintiff,

Index No.: 602852/2018
Motion Seq. No.: 001

-against-

THE CITY OF LONG BEACH,

Short Form Order

Defendant.

_____X

The following papers have been read on this motion:

Notice of Motion, Affirmation and Affidavit in Support, Exhibits..... 1
Affirmation and Affidavits in Opposition, Exhibits..... 2
Reply Affirmation.....3

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Upon the foregoing papers, the motion of defendant The City of Long Beach (the "City") for an Order pursuant to CPLR 3212, granting summary judgment dismissing the complaint, is decided as hereinafter provided.

This is an action to recover for personal injuries alleged to have been suffered by plaintiff on March 19, 2017, as a result of a slip and fall on ice and snow on the City of Long Beach's boardwalk approximately 50 feet east of Magnolia Boulevard. Plaintiff alleges that as a result of the fall, she sustained serious injuries to her wrist that required open reduction internal fixation to repair.

The City contends that it is entitled to summary judgment because there was no prior written notice of any defective condition on the steps, and the case does not fall within either the affirmative negligence or special use exceptions to the prior written notice rule.

In support of its motion the City submits, *inter alia*, plaintiff's notice of claim, the pleadings, the transcripts of plaintiff's General Municipal Law §50h hearing, the transcript of the deposition of Thomas Canner, the Superintendent of the City's Beach, Parks and Central Maintenance Department, and the affidavit of John Mirando, the Commissioner of Public Works of the City of Long Beach.

It is well established that a proponent of a summary judgment motion must make a prima facie case of entitlement to judgment as a matter of law when there are no material issues of fact (*Alvarez v. Prospect Hosp.,* 68 NY2d 320 [1986]). Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists. (*Id.* at 325; *Andre v. Pomeroy*, 35

NY2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept*., 146 AD2d 572 [2d Dept 1989]). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc*., 182 AD2d 446 [1st Dept 1992]). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395 [1957]; *Gervasio v. Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v. United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]).

In deciding a summary judgment motion the court must draw all reasonable inferences in favor of the nonmoving party (*Nicklas v. Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]), and the evidence must be construed in a light most favorable to the party opposing the motion (*Benincasa v. Garrubbo*, 141 AD2d 618 [2d Dept 1988)]). "[E]ven the color of a triable issue forecloses the remedy". (*Rudnitsky v. Rabbins*, 191 AD2d 488, 489 [2d Dept 1993]. Furthermore, the credibility of the parties is not an appropriate consideration for the Court. (*See S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp*., 34 NY2d 338 [1974]).

The movant, in this matter the defendant, has the initial burden of proving entitlement to summary judgment, and failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*See Winegrad v. N.Y.U. Medical Center*, 64 NY2d 851 [1985]).

A landowner is under a duty to maintain its premises in a reasonably safe condition "in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v. Miller*, 40 NY2d 233, 241 [1976]. "To be entitled to summary judgment in a premises liability case, the defendant is required to show, prima facie, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises" (*Taub v. JMDH Real Estate of Garden City Warehouse, LLC*, 150 AD3d 1301, 1302 [2d Dept 2017]). Foreseeability includes what the defendant actually knew, as well as what it reasonably should have known and is generally an issue of fact for the factfinder (*J.R. v. City of New York*, 170AD3d 1211, 1212 [2d Dept 2019] (internal citations omitted)).

A municipality that has enacted a prior written notice provision "may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition, or an exception to the prior written notice requirement applies" (*Palka v Village of Ossining*, 120 AD3d 641, 641 [2d Dept 2014]; See *Larenas v Incorporated Vil. of Garden City*, 143 AD3d 777, 778 [2d Dept 2016]; *Abreu-Lopez v. Inc. Village of Freeport*, 142 AD3d 515, 516 [2d Dept 2016]; *Amabile v. City of Buffalo*, 93 NY2d 471, 473–474 [1999]; *Kelley v. Inc. Village of Hempstead*, 138 AD3d 931 [2d Dept 2016]).

Two exceptions to the prior written notice requirement have been recognized, "namely, where the locality created the defect or hazard through an affirmative act of negligence and where a 'special use' confers a special benefit upon the locality" (*Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999] [citation omitted]; *see Loghry v Village of Scarsdale*, 149 AD3d 714, 715 [2d

Dept 2017]; *Larenas v Incorporated Vil. of Garden City*, 143 AD3d at 778; *Braver v Village of Cedarhurst*, 94 AD3d 933, 934 [2d Dept 2012]).

It is not disputed that the City has a prior written notice statute. Section 256A[2] of the Charter of the City of Long Beach provides that no civil action based on a snow or ice condition may condition may be maintained against the City unless it had prior written notice of the snow or ice condition.

In his affidavit in support of the City's motion, John Mirando, Commissioner of the Department of Public Works of the City of Long Beach (the "Department"), attests that the Department is charged by law with the responsibility of keeping the records of the notices received of defect and snow or ice accumulations within the City. He states that he has checked the Department's record book with regard to plaintiff's claim, and that, according to the record book, which is kept in the regular course of business, the City had received no written notice of any snow or ice condition on the boardwalk in the area approximately 50 feet east of Magnolia Boulevard prior to plaintiff's accident.

In opposition to the motion, plaintiff did not refute the City's proof that it had no prior written notice. The Court finds that the City has demonstrated, prima facie, that it had no prior written notice of the alleged defective condition. However, this is not the end of the inquiry.

" '[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings' " (*Loghry v Village of Scarsdale*, 149 AD3d at 715, quoting *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]; *see Piazza v Volpe*, 153 AD3d, 563, 564 [2d Dept 2017]; *Larenas v Incorporated Vil. of Garden City*, 143 AD3d at 778; *McManus v Klein*, 136 AD3d 700, 701 [2d Dept 2016]; *Steins v Incorporated Vil. of Garden City*, 127 AD3d 957, 958 [2d Dept 2015]; *Braver v Village of Cedarhurst*, 94 AD3d at 934).

Here, plaintiff alleged in her notice of claim, that the City was negligent in, inter alia:

> causing, creating, permitting and/or allowing ice to accumulate on the aforesaid Boardwalk; in causing, creating, permitting and/or allowing the aforesaid Boardwalk to be, become and remain in a slippery and ice-filled condition, with patches of ice and/or snow existing thereat; in affirmatively creating the dangerous condition by improperly removing snow from portions of the Boardwalk and piling snow near the bench portion of the Boardwalk at the above location causing the snow to accumulate on the Boardwalk for an extended period of time which thereafter froze into ice; . . . in failing to properly and adequately remove, shovel, salt and/or cart away the ice and snow in the areas near and/or adjacent to the location of the occurrence; in causing, creating, permitting and/or allowing irregular, uneven, slippery and icy conditions on the aforesaid Boardwalk . . . .

In her verified complaint, plaintiff alleged that defendant was negligent "in affirmatively creating the dangerous condition by improperly removing snow from portions of the Boardwalk and piling snow". In her verified bill of particulars, plaintiff alleges "in affirmatively creating the dangerous condition by improperly plowing/removing snow from portions of the Boardwalk and piling snow north of the bicycle path and between the path and the buildings adjacent to the Boardwalk at the Location causing the snow to accumulate on the Boardwalk thereat for an extended period of time which thereafter froze and/or melted and refroze into ice". Finally, in her supplemental verified bill of particulars, plaintiff alleges "improperly removing snow from only the middle portion of the Boardwalk (bicycle path portion) by snow plow and piling or pushing snow in a straight line down the Boardwalk to the walking sides and onto the north side of the Boardwalk's bicycle path and between the bicycle path and the buildings adjacent to the Boardwalk (walking section), including the area where the accident occurred, and thereafter failing to remove this piled snow; which would freeze, partially melt and refreeze repeatedly over several days prior to the accident and creating a source of runoff and melt/water subjected to repeated melting and refreezing on 3/15, 3/16, 3/17 and 3/18".

Based on plaintiff's allegations, the City was required to demonstrate both that it did not have prior written notice of the subject ice condition and that it did not create that condition (See *Seegers v Vil. of Mineola*, 161 AD3d 910, 910-912 [2d Dept 2018]; *Piazza v Volpe*, 153 AD3d at 564; *Loghry v Village of Scarsdale*, 149 AD3d at 715; *Larenas v Incorporated Vil. of Garden City*, 143 AD3d at 778; *McManus v Klein*, 136 AD3d at 701; *Steins v Incorporated Vil. of Garden City*, 127 AD3d at 958; *Braver v Village of Cedarhurst*, 94 AD3d at 934).

Although the City demonstrated that it did not receive written notice of an ice condition in the subject area, it failed to demonstrate, prima facie, that it did not create the ice condition that allegedly caused plaintiff to fall (*see Larenas v Incorporated Vil. of Garden City*, 143 AD3d at 778; *McManus v Klein*, 136 AD3d at 701; *Steins v Incorporated Vil. of Garden City*, 127 AD3d at 958; *Braver v Village of Cedarhurst*, 94 AD3d at 934).

Plaintiff testified at a 50h hearing and at a deposition, and her testimony was as follows. On March 19, 2017 at approximately 1:00 pm, plaintiff and her husband went for a walk on the Boardwalk. The weather was clear. It had not snowed that day. According to plaintiff, the last snow fall was March 13 - March 14. Plaintiff and her husband entered the Boardwalk on Edwards Avenue, and proceeded to walk westbound. She testified that there is a bicycle path on the Boardwalk that runs down the middle of it, and that the bicycle path was clear of all snow/ice. There were bicyclists going back and forth, so they began walking slightly to the right of the bicycle path in the area designated for pedestrians to walk. Plaintiff's husband was to her left, closer to the bicycle lane. The buildings were to their right as they walked. She did not see any sand or salt along the Boardwalk. Plaintiff noticed a row of piles of snow and ice on the Boardwalk to her right. They were approximately four feet away from (and to the north of) the bike lane. There were piles along the whole way, in a straight line or row with some piles as high as two feet, and some much less. It looked, to her, like the bicycle lane had been plowed (or snow removed) and the snow was pushed to the side in a straight line creating these large piles.

Plaintiff testified that she slipped on ice and partially melted ice and fell to the ground on her left side and landed on her left wrist. She did not see the ice that caused her to fall prior to the

accident. She saw it while she was on the ground. While on the ground, she observed to her right side there was a pile of snow that was "like four feet in length, two feet in width, and it was just water and ice when I was down there. I kind of remember, kind of, my husband getting me up and I'm looking, and it was just a big patch." The snow was dirty and gray. It was in the same line as the other piles she had passed that had appeared to be snow pushed from the bike lane and piled to this area. She testified "when you looked down you could see intermittent piles like they plowed the bike path and just left it. I don't know" and "[i]t was just like when I looked up the Boardwalk you could tell there was intermittent show piles, like off to - the snow was to the side". Plaintiff testified that it looked like the ice had melted and refroze from this run-off of the piled snow. She did not walk on top of the piled snow. She slipped on the residual of that pile that had extended further into the Boardwalk.

Thomas Canner, Superintendent of the Beach Park and Central Maintenance Department of the City of Long Beach, testified on behalf of the City as follows. His Department maintains the City's boardwalk, including snow removal on the boardwalk. Mr. Canner explained that the method used to remove snow from the boardwalk is plowing with a John Deere ATV. This is a small vehicle with a rubber edge on the plow so it does not damage the wood. The John Deere is driven east-west but the plow itself is set up facing south so that the snow is pushed to the south side of the boardwalk. Mr. Canner testified that, depending the amount of snowfall, such that his Department is busy with snow removal in other areas of the City, they might only "make a couple of passages you know make it 10 feet wide we may do just the bike lane". According to Mr. Canner, the City's snow removal activities do not create snow piles but there is rollover from the plow on either side of the blade.

Mr. Canner stated that there was no set number or inches of snowfall would trigger snow removal on the boardwalk, or a decision as to perform or not perform snow removal on the boardwalk. He stated that "[i]t depends how busy we are in the street. If there's a blizzard we don't even do the boardwalk. We have to take care of the streets. Clear that first. Clear all the handicapped areas before we even do the boardwalk." Mr. Canner testified further that there are no records or work logs maintained by the City relating to snow removal of the Boardwalk and he had no independent recollection of snow removal for the date of accident or prior thereto. The City has no records, logs, knowledge, or recollection as to the extent and manner in which snow was plowed or removed from the Boardwalk after the last snow fall prior to the incident. The City also has no record of post snow removal inspections. Mr. Canner stated that "it is possible" that a plow just went down the bicycle lane to remove snow after the last snow fall prior to the date of incident but he had no way of knowing one way or the other. He stated that on other occasions he had observed accumulations of snow off to both sides of the bicycle path where the plow would run through in the area where pedestrians would walk that were a result of "rollover from the plow". He testified that, the greater the amount of snow, the greater the amount of rollover created by the snow plow he would see.

The City argues that there is no evidence, but only speculation, that the City created the pile of snow that plaintiff testified caused her fall. However, reviewing the parties' testimony in a light most favorable to nonmoving party, and drawing all reasonable inferences in favor of the nonmoving party, is not the equivalent of speculation and conjecture. From that testimony it would be reasonable to infer that City had plowed the bicycle lane and in doing so left rollover to the side

of the bicycle lane. Plaintiff testified that the bicycle lane was clear of snow and ice and bicyclists were actively cycling back and forth, forcing her to walk to the side where there were piles of snow. While Mr. Canner testified that the City's plowing efforts do not create "piles", he did acknowledge that there would be "rollover from the snow".

Accordingly, the Court finds that the City has failed to show, prima facie, that the affirmative negligence exception does not apply in the instant case. (See *Abreu-Lopez v Inc. Vil. of Freeport*, 142 AD3d 515, 516 [2d Dept 2016]). The City, therefore, failed to demonstrate its prima facie entitlement to judgment as a matter of law (*see Larenas v Incorporated Vil. of Garden City*, 143 AD3d at 778; *McManus v Klein*, 136 AD3d at 701; *Steins v Incorporated Vil. of Garden City*, 127 AD3d at 958; *Braver v Village of Cedarhurst*, 94 AD3d at 934).

As stated by the Second Department in *Larenas v. Incorporated Village of Garden City*, 143 AD3d 777 [2d Dept 2016], "While the mere failure to remove all snow or ice from a sidewalk is an act of omission, rather than an affirmative act of negligence . . . a municipalities' act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes to create a dangerous icy condition, constitutes an affirmative act excepting the dangerous condition from the prior written notice requirement". (See *Smith v. County of Orange*, 51 AD3d 1006 [2d Dept 2008] (triable issues of fact regarding whether the ice that plaintiff slipped on was formed when snow piles created by the County's snow removal efforts melted and froze); *Brownell v. City of New York*, 277 AD 31 [1st Dept 2000] (jury verdict that defendant affirmatively created dangerous icy condition upheld where defendant's snow removal procedures included plowing an area that could cause snow to accumulate near curb cuts on sidewalk and then melt and refreeze near the curb cuts).

Even, assuming arguendo, that defendant had satisfied its burden, plaintiff has raised triable issues of fact, based upon her testimony and the affidavit of certified meteorologist George Wright, submitted by plaintiff in opposition. Mr. Wright states that he is the owner of Wright Weather Consulting, LLC. He attests that his affidavit was prepared after his review of all the pleadings, the parties' deposition transcripts, and after having reviewed official weather and climatological data in order to determine, to a reasonable degree of meteorological certainty, the weather conditions that existed at the location of the incident on and prior to March 19, 2017. The weather data used in his analysis is attached to his affidavit.

Mr. Wright opines that, based on the certified climatological data, between 2.0 and 2.5 inches of snow fell on the Boardwalk on March 10, 2017 and between 4.5 and 5.0 inches of snow and sleet fell on March 13-14, 2017. He states that melting and refreezing of any piled snow on the Boardwalk would have occurred during the March 16-18, 2017 period as the temperature cooled below freezing during the night, producing a build-up of ice on the Boardwalk. Mr. Wright states that piled snow produces more meltwater when it melts since the piling concentrates the amount of snow in a given area and creates a repeated, long-standing melting and refreezing condition when the temperature fluctuates above and below freezing as was the case here. The temperature on the Boardwalk remained above freezing from approximately 6:30 a.m. on March 18, 2017 through the time of this incident, a period of more than 30 hours. There was no precipitation on March 19, 2017, and because the temperature remained above freezing, no new ice formed after 6:30 a.m. on March 18, 2017 until the time of incident. Since the temperature

remained above freezing from approximately 6:30 a.m. on March 18, 2017 through the time of plaintiff's incident, the ice plaintiff slipped and fell upon was present on the Boardwalk for more than 30 hours prior to her incident and was therefore a long-standing condition.

The Court, having carefully reviewed and considered the evidence submitted, drawing all reasonable inferences in favor of the nonmoving party and construing the evidence in a light most favorable to the nonmoving party, as it must, finds that defendant City of Long Beach falls short of establishing its prima facie case of entitlement to summary judgment. Accordingly, defendant's motion for summary judgment is **DENIED**.

The case is presently scheduled for a Pre-Trial Conference on April 6, 2021, in the Calendar Control Part. Due to the ongoing coronavirus pandemic and potential changes in Court operations, the parties should monitor for changes in the status of the next scheduled appearance on the Court's website.

Any relief requested and not specifically granted is denied.

This constitutes the Decision and Order of the Court.

Hon. Helen Voutsinas
Justice of the Supreme Court

Dated: January 6, 2021
Mineola, NY

ENTERED
Jan 20 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE