STATE OF NEW YORK
SUPREME COURT SULLIVAN COUNTY

CAYLA PODHURST,

Plaintiff,

-against

Decision & Order
Index No.: E2017-1462

VILLAGE OF MONTICELLO AND LANDFIELD AVENUE SYNAGOGUE JEWISH GENERAL AID SOCIETY,

Defendants.

Supreme Court, Sullivan County
Return Date: May 15, 2020
RJI No.: 52-39914-18

Present: Julian D. Schreibman, JSC

Appearances:

Finkelstein & Partners, LLP
Attorneys for Plaintiff
1279 Route 300, P.O. Box 1111
Newburgh, New York 12551
By: Lawrence D. Lissauer, Esq.

The Law Offices of Craig P. Curcio
Attorneys for Defendant/ Jewish General Aid Association s/h/a Landfield Avenue Synagogue Jewish General Aid Society
384 Crystal Run Road, Suite 202
Middletown, New York 10941
By: Ryan Bannon, Esq.

Schreibman, J.:

This is a slip and fall case. Plaintiff Kayla Podhurst slipped on ice and broke her ankle on the morning of February 18, 2017. Ms. Podhurst fell as she began to ascend steps from Landfield Avenue to a public sidewalk in front of the temple owned and operated by the Defendant Landfield

Avenue Synagogue Jewish General Aid Society. Although the steps are not owned by the synagogue, because of their proximity to the front entrance, the Defendant maintained the steps including, as relevant here, performing snow removal.

The Court denied the defendant's motion for summary judgment and the case proceeded to trial before a jury on November 18, 19, 20 and 22, 2019. The jury found that both the plaintiff and defendant were negligent but that only the defendant's negligence was a substantial factor in causing Ms. Podhurst's injuries. The jury awarded her $100,000 for past pain and suffering; it did not award her any compensation for future pain and suffering.

Both sides filed post-trial motions. Plaintiff moved for a new trial on damages or, in the alternative, additur on the grounds that the damages awarded were legally insufficient based on the evidence and the parameters of damages for similar injuries in other cases. The defendant moved for judgment notwithstanding the verdict. For the reasons set forth herein, the defendant's motion is granted. The plaintiff's motion is accordingly moot but, in anticipation of appellate review, the Court notes that the motion would have been denied for the reasons discussed below.

Defendant's Motion for Judgment

CPLR §4404(a) authorizes a trial court to set aside a jury verdict "and direct that judgment be entered in favor of a party entitled to judgment as a matter of law[.]" "Before a court may set aside a verdict unsupported by legally sufficient evidence and grant judgment as a matter of law, it must determine that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Neissel v Rensselaer Polytechnic Institute*, 54 AD3d 446, 449 [3rd Dept. 2008] (internal brackets and citations omitted)). "The test is not whether the jury erred in

weighing the evidence presented, but whether any viable evidence exists to support the verdict." (*Kozlowski v City of Amerstdam*, 111 AD2d 476, 477 [3rd Dept. 1985]).

Only one of plaintiff's theories of recovery survived summary judgment: that the defendant's snow removal efforts had created a dangerous condition. In the summary judgment decision, the Court summarized the applicable substantive law on a case involving a slip and fall on ice:

> The caselaw . . . creates a somewhat anomalous liability rule in which a party who clears snow ineffectively, leaving in place a dangerous condition, is not liable for injuries but a party whose otherwise effective snow clearing gives rise to a dangerous condition at a later date or time can be held liable. (*See, e.g., Hutchings v Garrison Lifestyle Pierce Hill, LLC,* 157 AD3d 1034, 136-37 [2nd Dept. 2018]; *DiGrazia v Lemmon*, 28 AD3d 926, 928 [3rd Dept. 2006]). Nonetheless, liability may only attach if the errant snow removal efforts result in conditions that are more hazardous than the naturally-occurring conditions those efforts were intended to ameliorate. (*See Cangemi v Burgan*, 81 AD3d 583, 583 [2nd Dept. 2011]).

(Decision & Order, October 28, 2019 ("Summary Judgment Order"), 4). "Merely plowing" snow "cannot be said to have created or exacerbated a dangerous condition." (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]). Liability can be found in cases where a person clears snow from a location but piles the removed snow in a manner that leads ice to form in the cleared area when the piled snow melts. (*Braun v Weissman*, 68 AD3d 797, 798 [2nd Dept. 2009]; *Torosian v Bigsbee Village Homeowners Ass'n.*, 46 AD3d 1314, 1316 [3rd Dept. 2007]). The act of piling the snow in this fashion is the key first step toward liability. Here, on summary judgment the parties agreed that ice sometimes formed on or near the steps when adjacent snow piles melted, but disagreed as to whether defendant or the municipality put the snow there. This was one of the disputed facts – indeed the critical disputed fact - identified by the Court in denying summary judgment. (Summary Judgment Order, 5).

This dispute was conclusively resolved at trial. Ismael Bou, the defendant's full-time maintenance worker, testified that, in addition to snowfall, the steps would become blocked by snow created in the ordinary course of street plowing by the municipality. Bou would clear this snow with a shovel and/or snowblower and testified that he always cleared the snow exclusively to the downhill side of the steps. He testified that the reason he did this was his recognition that snow placed on the uphill side of the steps would melt and flow downhill, creating ice in the vicinity of the steps. (Trial Transcript ("Tr."), 40:16-41:7). He testified that he followed this procedure when he conducted snow removal on the day before the accident and that he put down extra salt on the steps knowing that they would be used over the weekend. (Tr. 43:6-15; 48:9-23). Bou's testimony was not impeached or controverted. Accordingly, no reasonable juror could have concluded that the ice was created by snow melt from snow piled by the defendant. This Court has found no case imposing liability on a defendant where the defendant did not place the snow that melted. To the contrary, removing snow from a path, into which the remaining snow on the sides of the path may thereafter melt, has been held not to give rise to liability. *DiGrazia*, 28 AD3d at 928. Such ice is, essentially, a new naturally occurring condition. The same analysis applies here, and bars recovery by the plaintiff.

The fact that Bou acknowledged knowing that the uphill snow (i.e., the snow that was naturally occurring or had accumulated due to street plowing) sometimes melted and froze in the vicinity of the steps does not alter the analysis. Notice is generally not relevant to a fall case where the theory of recovery is creation of a hazardous condition. (*See Torosian*, 46 AD3d at 134). In any event, no evidence was presented that the defendant was aware that ice was present on the morning of the plaintiff's fall. That is the knowledge, constructive or actual, that would be required. "[G]eneral awareness that icy conditions might have existed is insufficient to establish

constructive notice of the specific condition that resulted in plaintiff's injuries." (*DiGrazia*, 28 AD3d at 927). "The opinion of plaintiff's meteorologist that any ice on the steps must have formed" within a certain time period before the fall "also fails to shed any light on whether that ice was visible and apparent so as to permit discovery before the accident." (*Id.* at 928). It bears repeating, in this context, that the steps were not on defendant's property but rather joined a public roadway to a public sidewalk.

Nonetheless, relying on the defendant's alleged general knowledge of the phenomenon, plaintiff in her arguments to the jury repeatedly and improperly asked the jury to find the defendant at fault for failing to require Bou to conduct snow and ice remediation on Saturdays. The case law is clear that nonfeasance cannot give rise to liability in an ice-fall case. (*DiGrazia*, 28 AD3d at 928). In this Court's view, plaintiff's repeated arguments that the defendant should be held liable for what it *failed to do* were prejudicial and, at a minimum, would entitle defendant to a new trial on liability. (*See Leto v Amrex Chemical Co., Inc.*, 85 AD3d 1509, 1509 [3rd Dept. 2011]).

There is a second, separate failure of proof that also bars plaintiff's recovery here. As discussed above, in order for a defendant to be found liable in the context of snow and ice remediation, the defendant must not simply have created a dangerous condition, the condition must be *more dangerous* than if the defendant had done nothing at all. (*Bautista v City of New York*, 267 AD 265, 265 [2nd Dept. 1999]). Proof of this necessarily requires comparative evidence. (*Rudloff v Woodland Pond Condominium Ass'n.*, 109 AD 810, 811 [2nd Dept. 2013] (requiring some showing that premises were left in more dangerous condition than they were found)). Here, no proof was presented concerning how hazardous the steps would have been if the defendant had not cleared them. For example, although there was some testimony about aggregate snow fall, there was no testimony regarding the height or condition of the snow banks created by municipal

plowing.[1] Absent an evidentiary basis for comparing the hazardousness of the steps pre-clearing with the hazardousness of the steps post-clearing, the jury's conclusion could only be speculative. This is not permitted.

For the foregoing reasons, judgment will be entered for the defendant.

Plaintiff's Damages Motion

There is no doubt that plaintiff incurred a painful and significant injury when she fell. She suffered an ankle fracture requiring surgery. Due to complications, she ultimately had three surgeries. Plaintiff does not seriously contend that $100,000 is a legally inadequate measure of her past pain and suffering. What plaintiff really objects to is the award of zero dollars for future pain and suffering.

As to the ongoing repercussions of her injury, each side presented expert medical testimony which disagreed as to the source and severity of the plaintiff's present and potential future difficulties. Plaintiff's motion is essentially predicated on the testimony of plaintiff and the medical evidence she presented, including the testimony of Dr. Richard Saunders. The jury's award of no damages for future pain and suffering is inconsistent with the evidence she presented. The jury, however, as the judge of the facts, was permitted to credit the testimony of the defendant's expert, Robert Hendler. And Dr. Hendler's testimony was, in essence, that the plaintiff could have mild pain or swelling associated with weather changes, but otherwise he did not believe she would have any long-term effects attributable to this fall.

While plaintiff of course disagrees with Dr. Hendler's assessment and subjected it to thorough cross-examination, there is no suggestion that Dr. Hendler is not qualified in this subject

[1] Plaintiff herself did testify that, further down the street where she parked, the snow bank was sufficiently large as to be impassable. (Tr.131:11-19).

area or that his testimony is otherwise legally defective. The jury's verdict is consistent with accepting Dr. Hendler's testimony over that of Dr. Saunders. Nor was the jury required to credit Ms. Podhurst's subjective description of her condition. (*Richards v Fairfield*, 127 AD3d 1290, 1291 [3rd Dept. 2015]). Where a jury concludes that future pain and suffering are *de minimis* its award of zero damages is not unreasonable as a matter of law. (*See Hornicek v Yonchik*, 284 AD2d 895, 896-97 [3rd Dept. 2001]; *Failla v Amodeo*, 225 AD2d 965, 967 [3rd Dept. 1996]). That determination is entirely within the jury's province and was a permissible conclusion based upon the evidence admitted. Accordingly, the Court would not disturb it even if the motion were not moot.

For the foregoing reasons, it is hereby

ORDERED, that the verdict of the jury in favor of the plaintiff is vacated; and it is further

ORDERED, that the plaintiff's motion for a new trial on damages or additur is denied as moot; and it is further

ADJUDGED that defendant is entitled to judgment as a matter of law.

This shall constitute the Decision and Order of the Court. The original Decision and Order is being filed with the Sullivan County Clerk via NYSCEF. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: September 14, 2020

ENTER,

JULIAN D. SCHREIBMAN, JSC

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Papers considered: Post-Trial Notice of Motion and Affirmation by Kenneth Fromson, Esq. dated February 7, 2020, with Exhibits A-J; Plaintiff's Post-Trial Memorandum of Law by Lawrence D. Lissauer, Esq.; Affirmation in Opposition by Ryan Bannon, Esq. dated February 28, 2020; Reply Affirmation of Lawrence D. Lissauer, Esq. dated May 4, 2020; Plaintiff's Reply Memorandum of Law by Lawrence D. Lissauer, Esq.; Notice of Motion and Affirmation in Support by Ryan Bannon, Esq. dated February 7, 2020, with Exhibits A-J; Affirmation in Opposition by Lawrence D. Lissauer, Esq. dated March 3, 2020, with Exhibit A; Plaintiff's Post-Trial Memorandum of Law in Opposition by Lawrence D. Lissauer, Esq.; and Affirmation in Reply by Ryan Bannon, Esq. dated May 29, 2020.