Jakubowski v Axton Owner LLC
2016 NY Slip Op 31222(U)
June 24, 2016
Supreme Court, New York County
Docket Number: 154493/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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HANNA JAKUBOWSKI and HENRIK JAKUBOWSKI,

Plaintiffs,

-against-

AXTON OWNER LLC, STARRETT CORPORATION, and VANGUARD CONSTRUCTION & DEVELOPMENT, INC.,

Defendants.

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Index No. 154493/14

Motion seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, JSC:

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Defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint against them. (NYSCEF 34, 51). Plaintiff opposes the motions except as to Vanguard's. (NYCSEF 73, 78).

I. PERTINENT FACTS

On January 21, 2014, at 11 p.m., plaintiff Hanna Jakubowski slipped and fell on a temporary sidewalk that was placed in the gutter on the south side of West 96th Street, slightly east of Amsterdam Avenue in Manhattan. (NYSCEF 53). At her deposition, Hanna testified that there was snow and ice on the temporary sidewalk and the streets, that it had snowed earlier in the day, and that it was not snowing at the time of her accident. (NYSCEF 55).

Hanna's husband Henrik Jakubowski testified at his deposition, in pertinent part, that the area where Hanna fell was under construction, and that two to four hours after snow falls, the

area is not cleared. (NYSCEF 56). In an affidavit, Henrik states, in pertinent part, that from 4 p.m. to 9 p.m. the evening of the accident, he and Hanna were having dinner with their son in a "far part of Queens," and that from there it took them at least two hours to return to their apartment at 96th Street and Amsterdam Avenue. (NYCSEF 66). While at his son's home, Henrik saw no snow falling, and upon arriving at the accident location, the street was covered with packed snow, ice, and sleet; he observed no precipitation for at least six hours before the accident. (*Id.*).

In an affidavit, a resident of 160 West 96th Street states that at approximately 5 p.m. the day of the accident, she looked through her apartment window and noticed that no snow was falling, and that the next morning, she noticed that there was snow on the temporary walkway, whereas the walkway in front of her building was cleared of snow. (NYSCEF 72).

Movants submit a "Site Specific Weather Analysis Report" for January 19 to 22, 2014 for 175 West 95th Street based on hourly weather data reported from data sites at the Central Park Observatory, La Guardia Airport, and Teterboro Airport in New Jersey, by the National Weather Service, and from numerous other networks and data resources. (NYCSEF 60, 71). The report reflects that near the accident location there was no precipitation on January 19 or 20, 2014, and that on January 21, 2014, snow fell frequently from 8:10 to 8:25 a.m., and continued through the rest of the day, including at the time of Hanna's accident, and by that midnight, 10.5 to 11 inches of snow had fallen. (*Id.*). On January 22, 2014, light snow frequently fell before 4 to 4:50 a.m., producing approximately .5 inches of snow. (*Id.*). A Consulting Meteorologist, certified by the American Meteorological Society, reviewed official weather data from the National Oceanic and Atmospheric Administration, which includes the data set forth in the Report referenced above

and other data, and opined within a reasonable degree of meteorological certainty that when plaintiff fell, it was snowing, and that it had been snowing approximately 14 to 15 hours prior thereto. (NYSCEF 61).

II. ANALYSIS

"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 eliminate any material issues of fact from the case." (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2 at 853). When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party, which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562).

An owner or occupant of premises has a duty to remove an accumulation of snow or ice inside or outside the premises which may be dangerous, or to take other measures to ensure the safety of the premises, when it has actual or constructive notice of the existence of the condition and a reasonable opportunity to act. (*See eg Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]; *Helms v Regal Cinemas, Inc.*, 49 AD3d 1287, 1288 [4th Dept 2008]; *Blackwood v New York City Tr. Auth.*, 36 AD3d 522, 523 [1st Dept 2007]; *Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735-36 [1st Dept 2005], *affd* 6 NY3d 734; *Hussein v New York City Tr. Auth.*, 266 AD2d 146, 146-47 [1st Dept 1999]; *Zonitch v Plaza at Latham LLC*, 255 AD2d

808, 808-809 [3d Dept 1998]; 86 NY Jur 2d, Premises Liability § 341; 355 [2016]; 15 NY Prac, New York Law of Torts § 12:11 [2015]).

However, an owner or occupant of premises "will not be held liable for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter." (*Solazzo*, 6 NY3d at 735; 15 NY Prac, New York Law of Torts § 12:11]). Thus, the duty "to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended." (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]). As a lull or break in precipitation may not give the defendant enough time to remedy the hazard (*Ndiaye v NEP W. 119th St. LP*, 124 AD3d 427, 428 [1st Dept 2015]; *Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345-346 [1st Dept 2002]), there is no duty to remove an accumulation of snow until the storm ceases in its entirety (*Rabinowitz v Marcovecchio*, 119 AD3d 762, 762 [2d Dept 2014]; *DeStefano v City of New York*, 41 AD3d 528, 529 [2d Dept 2007]; *Ioele v Wal-Mart Stores, Inc.*, 290 AD2d 614, 616 [3d Dept 2002]; *Powell*, 290 AD2d at 345), when "the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation." (*Powell*, 290 AD2d at 345-346).

Additionally, every owner of a building in New York City abutting a street with a paved sidewalk is required to remove snow from the sidewalk within four hours after the snow ceases falling, although the hours between 9 p.m. and 7 a.m. are not part of the four-hour period. (Administrative Code of City of NY § 16-123 [a]). Thus, if snow ceases to fall on or after 9 p.m., there is no municipal duty to remove it until 11 a.m. following morning. (*See e.g. Bi Fang Zhou v 131 Chrystie St. Realty Corp.*, 125 AD3d 429, 430 [1st Dept 2015] [owner had until 11

a.m. where snow stopped at 11 p.m.]; *Schron v Jean's Fine Wine & Spirits, Inc.*, 114 AD3d 659, 660 [2d Dept 2014] [owner had until 11 a.m. where storm stopped at 5 a.m.]; *Colon v 36 Rivington St., Inc.*, 107 AD3d 508, 508 [1st Dept 2013] [owner had until 11 a.m. where snow stopped at 6 a.m.]; *Rodriguez v New York City Hous. Auth.*, 52 AD3d 299, 300 [1st Dept 2008] [had until 11 a.m. "at the earliest"]).

Evidence of a storm in progress thus constitutes *prima facie* evidence of no duty, and it is "especially persuasive when based upon the analysis of a licensed meteorologist." (CPLR 4528; *Powell*, 290 AD2d at 345). Here, the meteorological data and plaintiff's expert meteorologist's analysis based on weather observations made, *inter alia*, at the Central Park Weather Station, which is 1.3 miles from the location of the accident, reflect that snow began falling the morning of the accident and continued during and after plaintiff's accident. Movants have thus established, *prima facie*, that there was a storm in progress when plaintiff fell. (CPLR 4528 ["any record of the observations of the weather, taken under the direction of the United States weather bureau, is *prima facie* evidence of the facts stated"]; *see Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541, 542 [1st Dept 2015] [weather records and meteorologist's affidavit sufficient to establish storm in progress]; *Weinberger*, 102 AD3d at 619 ["*prima facie* entitlement to summary judgment by submitting certified climatological data"]; *Boynton v Eaves*, 66 AD3d 1281, 1282 [3d Dept 2009] [affidavit of meteorologist sufficient to establish storm in progress]; *Simeon v City of New York*, 41 AD3d 344, 344 [1st Dept 2007] [defendant granted summary judgment as plaintiff slipped and fell during snowstorm; snowfall confirmed by climatological records]; *DeStefano*, 41 AD3d at 529 [defendant established entitlement to judgment by submitting proof, including climatological data, that storm was in progress]; *Hassanein v Long Is. R.R. Corp.*, 307

AD2d 954, 954 [2d Dept 2003] [defendant made *prima facie* showing as matter of law that storm was in progress at time of plaintiff's accident by submitting climatological reports and affidavit of meteorologist]).

That Henrik observed no snow between 4 p.m. to 9 p.m. when he was in a "far part of Queens" raises no factual issue absent any indication that he made his observations near to where the accident occurred. (*See Scarlato v Town of Islip*, 135 AD3d 738 [2d Dept 2016] [plaintiff's testimony that weather was clear at another location two hours before accident insufficient to raise triable issue as to whether storm was in progress at location where she later fell]). That he saw no snow during the two hours it took to get home indicates nothing more than a lull in the storm. (*See Levene*, 126 AD3d 541 [plaintiff did not establish that in 30 hours preceding accident there was a four-hour lull that would give rise to duty to clear snow]; *Guntur v Jetblue Airways Corp.*, 103 AD3d 485, 486 [1st Dept 2013] [testimony that storm "on and off" did not raise triable issue of fact that accident occurred during "significant lull" or "reasonable time after storm had ceased"]; *Ioele*, 290 AD2d at 616 [testimony that it was not snowing at time of accident establishes, at best, that accident occurred during three-hour lull]). The same may be said for the neighbor's observation that she saw no snow falling at 5 p.m. (*See Boynton*, 66 AD3d at 1282 [plaintiff's statement that it was not snowing when she fell showed only lull which was insufficient to defeat summary judgment]; *Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153, 1153-54 [4th Dept 2006] [plaintiff failed to raise issue of fact by testimony that it was not snowing morning of accident; defendant submitted records showing snowfall continued for four days after accident]). The building superintendent's inability to recall the weather conditions on that day is immaterial.

Consequently, defendants' duty to clear the snow did not begin until the following morning, well after Hanna's accident, and thus, plaintiffs fail to demonstrate the existence of any triable issues as to whether defendants violated a duty to clear the snow from the sidewalk before Hanna's accident.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, defendant defendants Axton Owner LLC's, Starrett Corporation's, and Vanguard's Construction & Development, Inc.'s motions for summary judgment are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: June 24, 2016
New York, New York