

Voss v D & C Parking

2001 NY Slip Op 30007(U)

May 29, 2001

Supreme Court, Kings County

Docket Number: 0031360/3601

Judge: Reinaldo E. Rivera

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MEMORANDUM

SUPREME COURT - KINGS COUNTY

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VIKI VOSS,

Plaintiff,

Civil Term, Part 27

Hon. Reinaldo E. Rivera, J.S.C.

-against-

Date: May 29, 2001

D & C PARKING AND TWO TREES
MANAGEMENT CO.,

Index No.: 31360/1998

Defendants.

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INTRODUCTION

In this personal injury action, the defendant D & C Parking [Hereinafter "D & C"] moves for an order: (1) granting summary judgment, pursuant to CPLR 3212, dismissing the plaintiff's complaint; or, in the alternative; (2) vacating the plaintiff's note of issue and certificate of readiness; and (3) compelling the plaintiff to submit to an orthopedic examination. The plaintiff opposes the motion in all respects.

FACTUAL AND PROCEDURAL BACKGROUND

The moving defendant, D & C, operated a parking lot at 77 Plymouth Street, Brooklyn, New York. The plaintiff was a monthly customer at the subject parking lot. On January 2, 1997, she arrived at the lot at approximately 8:20 or 8:30 a.m., and observed that the ground was wet from snow that had fallen during the previous night. After parking her vehicle, she further noticed that there was no visible snow or ice in the spot where she stationed her car. The plaintiff opened the door of her vehicle and saw mud on the ground. As she attempted to get out of the car, her left foot started to slip. Upon getting up, she noticed that she had slipped on ice

which was under the mud. The plaintiff testified that she did not notice any other ice on any portion of the parking lot. She stated that the lot had weeds, tin cans and garbage. According to the president of D & C, Mr. Charles Cara, he had not received any complaints regarding the condition of the lot.

On or about September 2, 1998, the plaintiff commenced the instant action. A preliminary conference was held on August 26, 1999. At that conference, the plaintiff was directed to file the note of issue on or before January 27, 2000. Pursuant to stipulation, the date to file the note of issue was extended to April 12, 2000. On April 29, 2000, D & C received a copy of the plaintiff's note of issue/ certificate of readiness for trial which was dated April 12, 2000. These documents affirmed that all discovery was complete. D & C moved to strike the plaintiff's action from the trial calendar on the basis that discovery remained outstanding, including the parties' EBT.

On May 5, 2000, the parties appeared for a compliance conference and this court directed further discovery, extending the plaintiff's time to file a note of issue to September 14, 2000. On July 12, 2000, the EBTs of all parties were held. On September 14, 2000, a further compliance conference was held. At such conference, the plaintiff's time to file the note of issue was again extended to October 16, 2000.

On September 15, 2000, this court (Patterson, J.), granted summary judgment on behalf of defendant Two Trees Management.

On October 27, 2000, the parties again attended a compliance conference, wherein plaintiff's time to file the note of issue was further extended to November 27, 2000. At a follow-up compliance conference, held on December 8, 2000, D & C discovered that a note of issue had

been filed by the plaintiff on May 10, 2000. According to D & C, it never received the plaintiff's note of issue of May 10, 2000.

By notice of motion, dated December 12, 2000, D & C made the instant motion, seeking, inter alia, dismissal of the plaintiff's complaint.

LEGAL ANALYSIS

The law is well-settled that in order "to prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition" (Dwoskin v Burger King Corp., 249 AD2d 358 quoting Bradish v Tank Tech Corp., 216 AD2d 505, 506; Gaeta v City of New York, 213 AD2d 509; see also, Gordon v Waldbaum, Inc., 231 AD2d 673, 674; Maguire v Southland Corp., 245 AD2d 347; Bykofsky v Waldbaum's Supermarkets Inc., 210 AD2d 280; Gordon v American Museum of Natural History, 67 NY2d 836). Constructive notice "requires a showing that the [condition] was visible and apparent and existed for a sufficient period of time prior to the accident to permit [defendants] to discover and remedy it" (Gernard v Agosti, 228 AD2d 994, 995 quoting George v Ponderosa Steak House, 221 AD2d 710, 711).

The defendant D & C, as the movant seeking summary judgment, has made a prima facie showing affirmatively establishing that it did not create the condition that caused the accident and that it had neither actual or constructive notice of the condition. First, there is no evidence that D & C Parking created the ice under the mud which caused the plaintiff's fall. Second, the plaintiff's own testimony at her deposition demonstrates that no obvious dangerous condition existed which would have placed D & C Parking on notice. In this regard, the plaintiff testified that prior to placing her left foot on the ground, she noticed the ground and saw only mud. It was

only after she slipped that she noticed ice under the mud. She testified further that she did not notice any other ice on any other portion of the parking lot. The record bears out that the ice which was under the mud was not visible and apparent, and there is no indication as to the length of time it had been there.

In opposition, the plaintiff has failed to submit any proof which raises an issue of fact requiring a trial. The plaintiff's argument that, following the accident, someone apparently employed by D & C warned her to "[b]e careful, we have patches of ice," and stated that they had not yet received a delivery of sand does not require denial of the instant motion. This court is also not persuaded by plaintiff's claim that summary judgment should be denied because, on the day of the accident, the parking lot had weeds, mud, beer cans and debris, which show that the lot was in a "poor and hazardous condition." A general icy condition in the parking lot or garbage strewn throughout the lot, cannot, as a matter of law, constitute adequate notice of the specific dangerous condition, namely the ice which accumulated under ground (see, Gordon v American Museum of Natural History, *supra*).

This court notes that in plaintiff's counsel's opposition affirmation, counsel alleges that the plaintiff fell from "ice and mud that accumulated in a hole in the parking lot." The plaintiff did not testify regarding any hole. Counsel's claim that the defendant's D & C 's failure to "repair, repave and make level the entire parking lot" caused the accident, is, at best, speculation.

This court rejects the plaintiff's claims that the instant motion is untimely since it was made approximately eight months after the filing of the note of issue. While it is true that the court's computer reflects that plaintiff filed a note of issue on May 10, 2000, during the numerous compliance conferences held after May 10, 2000, both parties, through counsel represented to this court that extensive discovery was still outstanding and that an extension of

plaintiff's time to file the note of issue was required. The record shows that the examinations before trial of the parties were not conducted until July 12, 2000. This court and the defendant were reasonably under the impression that no note of issue had been filed. This court will not penalize the defendant D & C, nor permit the plaintiff to benefit therefrom.

Finally, the plaintiff's claim that summary judgment should be denied because all relevant discovery has not been exchanged is without merit.

Accordingly, the defendant D & C's motion for summary judgment is granted. The plaintiff's complaint is dismissed. In light of the foregoing, the court need not address the defendant's application to (a) vacate the plaintiff's note of issue and (b) compel the plaintiff to appear for a further orthopedic examination.

This shall constitute the decision, order and judgment of the court.

ENTER,



HON. REINALDO E. RIVERA
J.S.C.