Small v Coney Island Site 4A-1 Houses, Inc.
2003 NY Slip Op 30086(U)
August 8, 2003
Supreme Court, Kings County
Docket Number: 3004753/2000
Judge: Bert A. Bunyan
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[* 1]

At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8TH day of August, 2003

PRESENT:

HON. BERT A. BUNYAN,
Justice.

-X

MARIETTA SMALL, AS ADMINISTRATRIX OF THE ESTATE OF EUSEBIO SANTIAGO, DECEASED,

Plaintiff,

- against -

Index No.47532/00

CONEY ISLAND SITE 4A-1 HOUSES, INC., INDIVIDUALLY AND D/B/A BAY PARK ONE L.P. BAY PARK ONE CO., HRH CONSTRUCTION INDIVIDUALLY AND D/B/A BAY PARK ONE, L.P., LEWIS WEINFELD, INDIVIUDALLY AND D/B/A BAY PARK ONE L.P., GRENADIER REALTY COPR., INDIVIDUALLY AND D/B/A BAY PARK I,

Defendants.

-X

The followina papers numbered 1 to 11 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	**1-4**
Opposing Affidavits (Affirmations)	5-10
Reply Affidavits (Affirmations)	11
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants Coney Island 4A-1 Houses, Inc. (Coney Island) and Grenadier Realty Corp. (Grenadier) (collectively, "defendants") move, pursuant to CPLR 3212, **for** summary **judgment dismissing plaintiff's complaint against** them.

[* 2]

On January 15, 1999, at approximately 8:00 a.m., Eusebio Santiago (Mr. Santiago) was found lying on his back on the floor of an exterior, partially exposed, corridor on the 21st floor of his apartment building located at 3325 Neptune Avenue in Brooklyn. There was an accumulation of ice on the walkway in the area where Mr. Santiago was discovered, which was near the building's elevator. Emergency personnel were called as soon as Mr. Santiago was discovered and he was transported to Coney Island Hospital where he was pronounced dead shortly after his arrival. An autopsy performed by the Office of the Medical Examiner determined that the cause of death was "blunt impact head trauma" and listed the manner of death as accidental. There were no witnesses to Mr. Santiago's accident.

By summons and complaint dated November 15, 2000, plaintiff Marietta Small (plaintiff), the administratrix of Mr. Santiago's estate, brought the instant action against defendants seeking damages for wrongful death and the conscious pain and suffering of Mr. Santiago. In particular, plaintiff alleges that Coney Island and Grenadier, the respective owner and managing company of the apartment building, were responsible for Mr. Santiago's death inasmuch as they created and/or failed to remedy the icy condition on the exterior walkway which caused Mr. Santiago to slip and fall.

In their motion, defendants argue that, inasmuch as there were no witnesses to Mr. Santiago's accident, there is no evidence that defendants' negligence caused the accident. Specifically, defendants maintain that plaintiff cannot prove that the ice on the walkway is what caused Mr. Santiago to fall. In the alternative, defendants argue that, even if the icy condition on the walkway caused Mr. Santiago's accident, they may not be held liable for

his death because there was a storm in progress at the time that Mr. Santiago was discovered on the walkway. In support of this argument, defendants submit certain weather observation charts, as well as the sworn affidavit of Mark Kramer, a Senior Meteorologist, which indicate that between the early morning hours of January 14, 1999 and 9:00 a.m. on January 15, 1999, snow, ice pellets, and freezing rain fell in the New York metropolitan region.

Finally, defendants maintain that plaintiffs action must be dismissed because Mr. Santiago did not die as a result of head injuries sustained in a slip and fall accident. Instead, defendanis claim that Mr. Santiago actually died as a result of heart disease caused by chronic cocaine use. In support of this claim, defendants submit an expert affidavit by Charles V. Wetli, a forensic pathologist. Based upon his review of the ambulance call report, hospital records, and autopsy report, Dr. Wetli avers that the Medical Examiner's findings were erroneous and that Mr. Santiago's death was the result of "acute cocaine cardiotoxicity not a 'blunt impact head trauma.'"

In opposition to defendants' motion, plaintiff contends that, even though the accident was not witnessed, a reasonable inference can be drawn from the circumstantial evidence present that Mr. Santiago's death was caused by the icy condition on the walkway. In this regard, plaintiff asserts that Mr. Santiago was found lying on his back on a patch **of** ice and that the Medical Examiner determined that Mr. Santiago's death was caused by blunt impact head trauma as a result of an accident.

Plaintiff further argues that there is a triable issue of fact regarding whether or not defendants created and/or had notice of the icy condition. Specifically, plaintiff maintains

that the condition was caused by an inadequate drainage system and that defendants were well aware of this problem. In support of this claim, plaintiff submits the sworn affidavits of Lissett.: Colon and Elizabeth Valazquez, both of whom resided on the 21st floor of the subject premises. These residents aver that the drains on the exterior walkway were inadequate, creating a year-round problem whereby standing water would accumulate near the elevator and, in the winter time, freeze to form ice patches. Ms. Colon also states that the icy condition on the walkway near the elevator had existed for "a day or two before" the accident and that no sanding or salting had been performed by defendants on the walkway. In addition to these affidavits, plaintiff points to the deposition testimony of the building's superintendent, Fred Charpentier, who acknowledged that drains on the subject walkway would sometimes become clogged.

Plaintiff has also submitted an expert affidavit by Robert Schuman, a licensed engineer. Based upon an inspection of the premises, as well as a review of the documents and photographs in this action, Mr. Schuman concludes that the drains on the walkway were insufficient to prevent the accumulation of standing water inasmuch as the drains were higher than the lowest point of the floor and the floor was not contoured sufficiently to lead water to the drain. According to Mr. Schuman, this inadequate drainage problem violated New York City Building Code § C26-604(f).

Plaintiff further maintains that the so called "storm in progress" rule cited by defendants is inapplicable in the instant case because the icy condition arose from

defendants' failure to provide adequate drainage, rather than the precipitation at the time of the accident.

Finally, plaintiff argues that, irrespective of the claims of defendants' medical expert, a jury could reasonably conclude that Mr. Santiago died as a result of blunt force head trauma (rather than heart failure) based upon the Medical Examiner's report. In further support of this contention, plaintiff submits an affidavit by her own medical expert, Lone Thanning, a forensic pathologist, who concludes that, based upon his review of the evidence, Mr. Santiago died from a closed head injury secondary to a fall.

In wrongful death actions involving an unwitnessed accident, "a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence" (***Noseworthy*** v ***City of New York,*** 298 NY 76, 80). In such cases, which must rely upon circumstantial evidence, the "[p]laintiffs' evidence is deemed sufficient to make out a prima facie case if it shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (***Wragge*** v ***Lizza Asphalt Constr.*** Co., 17 NY2d 313, 320). Thus, there is no requirement that the circumstantial evidence "exclude all other possible causes of the accident" (***id.*** at 321). Nevertheless, plaintiffs have "the obligation to provide some proof from which [defendants'] negligence could reasonably be inferred" and that this negligence caused the accident (***Coughlin*** v ***Bartnick,*** 293 AD2d 509, 510, quoting ***Byrd*** v ***New York City Trans. Auth.***, 228 AD2d 537). Furthermore, when there are several equally plausible explanations for the cause of the accident, "one or more of which are not causally related to

any alleged negligence of the defendant," a plaintiff's action must be dismissed since any finding of negligence would be speculative (*Schafrick* v *Shinnecock Bait & Tackle Co.*, 204 AD2d 706, 708; *see also, Johnson v Sniffen*, 265 AD2d 304).

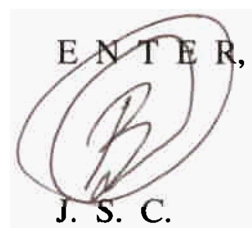
In the instant case, a reasonable inference can be drawn from the circumstantial evidence that Mr. Santiago died as a result of slipping on a patch of ice in the exterior corridor and striking his head on the floor. In this regard, the court notes that Mr. Santiago was found lying on his back on the floor of the walkway and that both the Medical Examiner, and plaintiff s own medical expert have concluded the cause of death to be blunt impact head trauma caused by an accident. However, this evidence is insufficient to show that the accident was caused by defendants' negligence. It is well settled that "a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*Dowden* v *Long Island Rail Road*, __AD2d__, 759 NYS2d 544,545; *see also, Chapman v City of New York*, 268 AD2d 498; *Taylor* v *New York City Trans. Auth.*, 266 AD2d 384).

Here, defendants have produced meteorological records which demonstrate that, beginning on the morning before the accident and continuing up to the time that Mr. Santiago was discovered, mixed precipitation in the form of snow, ice pellets, and freezing rain fell in the are;. where the building was located. Accordingly, defendants have made a prima facie showing of entitlement to judgment as a matter of law and the burden shifts to plaintiff to

produce evidence that the icy condition was not caused by the ongoing storm (***Dowden,*** 759NYS2d at **545).**

Plaintiff has failed to meet this burden. Plaintiffs claim that the ice patch was actually caused by inadequate drainage in the walkway and the freezing of pre-existing standing **water** is speculative since it is just as plausible that the ice patch in question was created by the ongoing snow and ice storm. Although Yolanda Echeverria (Mr. Santiago's common-law wife) testified at her deposition that the ice was "thick," she also testified that "it looked like it was new." Chastity Santiago (Mr. Santiago's daughter) testified that there were "little patches of snow" on the ice. Finally, Ms. Colon's statement that she first noticed the ice "a day or two before" the accident roughly coincides with the beginning of the storm. Under the circumstances, defendants' motion for summary judgment dismissing plaintiffs complaint against them is granted.

This constitutes the decision, order, and judgment of the court.



HON. BERTA. BUNYAN