Herbert v Klarman

2007 NY Slip Op 30125(U)

March 6, 2007

Supreme Court, Suffolk County

Docket Number: 0005782

Judge: Robert W. Doyle

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SHORT FORM ORDER

INDEX No. 05-5782
CAL. No. 06-01700-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9/15/06
ADJ. DATE 10/13/06
Mot. Seq. # 003 - MD
004 - XMD

HARTMUT H. HERBERT, Plaintiff, - against - KENNETH KLARMAN and DIANE KLARMAN, Defendants.	JAY D. UMANS, ESQ. Attorney for Plaintiff 90 Merrick Avenue, 5th Floor East Meadow, New York 11554
	CONGDON FLAHERTY O'CALLAGHAN DONLON TRAVIS & FISHLINGER Attorneys for Defendants 333 Earle Ovington Boulevard, Suite 502 Uniondale, New York 11553-3625

Upon the following papers numbered 1 to 27 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 22; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 23; 24; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Kenneth Klarman and Diane Klarman for summary judgment dismissing the complaint is denied; and it is further

ORDERED that this cross motion by plaintiff Hartmut Herbert for summary judgment against the defendants on the issue of liability is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when he slipped and fell on defendants' property on January 27, 2005, at approximately 6:15 p.m. The plaintiff alleges that he drove his van onto the defendants' driveway, intending to go out to dinner with defendant Kenneth Klarman, and after exiting his van and walking upon the defendants' driveway, he slipped and fell on ice.

The defendants now move for summary judgment on the basis that the evidence fails to establish that they created the alleged icy condition or had actual or constructive notice of it. In support of their motion, the defendants submit, *inter alia*: the pleadings; the complete deposition testimony of the plaintiff; the complete deposition testimony of defendants Kenneth Klarman and Diane Klarman; affidavits of defendants Kenneth Klarman and Diane Klarman; and local climatological data.

Specifically, the defendants point to the portions of the plaintiff's deposition testimony wherein he testified to the effect that he drove his van to the defendants' home on January 27th and that the weather conditions that evening were dry and cold. The plaintiff testified that he believed that a dusting of snow had fallen approximately two days earlier and that there had been a major snowfall of 14 inches approximately four days earlier. The plaintiff also testified to the effect that: as he drove his van onto the driveway that evening he did not notice any snow or anything covering the surface of the driveway; the driveway was black tar; when he opened the door of his van, he did not notice anything on the surface of the driveway; he got out of his van, walked the entire length of the driver's side of the van, and had no problem slipping; when he got to the back of his van, he turned toward the left, intending to walk to the front door; and he took one step, slipped, and fell.

At his deposition, the plaintiff also stated that after his fall he rolled over and saw a patch of ice approximately two feet by one foot. When asked to describe the ice, the plaintiff answered, "I would say it was black ice." When he was further questioned as to what he meant by black ice, the plaintiff answered, "The driveway is black asphalt. It was kind of dark outside. All I saw was a shiny patch of ice." The plaintiff also stated that he remained on the ground, and after yelling, defendant Kenneth Klarman came out of the house. He stated that after telling defendant Kenneth Klarman that he had fallen and that he was in pain, defendant Kenneth Klarman responded, "Oh, my God, I feel so guilty. I thought this was all taken care of. They [the snow removal service] did a terrible job." Lastly, the plaintiff testified that he did not know how long the ice patch had been in that condition before his fall.

The defendants also point to the deposition testimony of defendant Kenneth Klarman wherein he testified that he first learned of the plaintiff's accident at approximately 6:30 that evening when he came out of his house and saw the plaintiff lying in the driveway. Kenneth Klarman further testified to the effect that: he recalled that there was a snow storm within approximately three days of the accident; he had an oral agreement with "David" a snow removal contractor, who was supposed to come see him if any snow fell; David and his crew were supposed to remove all snow from the driveway, the walkway, and the mailbox area; although he did not remember specifically when David performed snow removal for him prior to the plaintiff's incident, he believed, to the best of his recollection, that David performed snow removal within three days of the incident; after David and his crew performed snow removal services on the driveway, he inspected the area and did not see any snow or ice; he did not see any ice when he saw plaintiff on his driveway; and he never told the plaintiff at any time that David and his crew did a poor or lousy job with respect to the snow removal. In his supporting affidavit, Kenneth Klarman reiterates that he did not tell plaintiff at any time that he believed the driveway was icy or in any way dangerous. Kenneth Klarman also states in his affidavit that he was not aware of any icy condition that existed in the driveway before or at the time of the plaintiff's accident.

Additionally, the defendants highlight portions of the defendant Diane Klarman's testimony wherein she stated that she did not recall seeing any snow on their driveway between January 22, 2005, and January 27, 2007. Diane Klarman also testified that she had a friend over to their house on the day of the accident and that she also left the house several times that day for a hair appointment, yoga class, and errands. Further, Diane Klarman alleges in her supporting affidavit, that when she left her home earlier that day, she did not observe any ice in the driveway, nor is she aware of any icy condition which allegedly caused the plaintiff's accident. She states that she never received any complaints regarding the condition of the driveway at any time prior to plaintiff's fall. Finally, Diane Klarman alleges in her

affidavit that although she does not specifically recall when it had snowed before this incident, she knows that when the last snowfall occurred, their contractor, David, and his employees removed snow from their driveway.

The defendants further point to the submitted weather records which indicate that: on the morning of the accident there was trace snow/precipitation; the high temperature, the day before the incident, was 35°; and the high temperature, the day of the incident, was only 18°. Thus, allege the defendants, the weather records suggest a condition of thawing and re-freezing.

The defendants argue that the above evidence demonstrates that they did not create the icy condition and that they had no actual or constructive notice of it. They claim that importantly, the plaintiff concedes that he does not know how long the particular icy condition was there prior to his accident nor does he know the origin of the ice. They contend that since there is no evidence as to how long the condition existed before the plaintiff's fall, a jury would have to speculate that the alleged icy condition was present for any appreciable length of time so as to constitute constructive notice. As such, the defendants assert that they are entitled to summary judgment.

The plaintiff opposes the defendants' motion and cross-moves for summary judgment on the issue of liability. In support of his motion, he submits, *inter alia*: portions of his deposition testimony; portions of defendants Diane Klarman's and Kenneth Klarman's deposition testimony; the affidavit and report of a forensic meteorologist; the affidavit of Linda Ricci; and a hand-written statement given by defendant Kenneth Klarman to his insurance company.

Initially, the plaintiff argues that defense counsel improperly characterizes his deposition testimony wherein he described the ice as "black ice." He points to the portion of his testimony wherein he described the ice as "shiny" and alleges that such testimony makes it clear that the ice was visible and apparent. He claims that he did not see the ice before the accident because it was not within his view since he was just turning the corner from the driver's side to the rear of his vehicle. Plaintiff also points to the portion of his deposition testimony wherein he testified to the effect that defendant Kenneth Klarman told him after his fall that: the driveway was supposed to be all cleaned up; he thought the driveway was "all taken care of"; there had been no sanding of the driveway; and the driveway should have been sanded or salted.

In addition, the plaintiff points to the portion of defendant Kenneth Klarman's deposition testimony wherein he stated that he could not recall whether he went outside on the day of the accident nor could recall the last time he set foot on his driveway prior to the accident. The plaintiff also highlights a portion of defendant Kenneth Klarman's statement to his insurance company wherein Klarman wrote that the plaintiff claimed to have slipped on ice but that he (Klarman) did not closely inspect the area. The plaintiff argues that Kenneth Klarman's testimony demonstrates that he never went outside on the day of his accident and thus had no opportunity to observe the conditions of his driveway.

Next, the plaintiff focuses on the affidavit and report of his forensic meteorologist, William Sherman, who alleges that the temperature fell below freezing at approximately 1 p.m. on January 26, 2005, the day before the accident, and remained below freezing through the time of the incident. Mr. Sherman also alleges that in his opinion, ice was formed and/or created and/or existed no later than 2

p.m. on January 26th and was in existence to be discovered and remedied for a period of no less than twenty-eight hours prior to the plaintiff's accident. Finally, the plaintiff highlights the affidavit of Linda Ricci, who alleges that she has known the plaintiff and the defendant for many years. Ms. Ricci states that at the time of the plaintiff's accident, defendant Kenneth Klarman told her that he was at fault because his workers left ice on his driveway and had his workers done a good job, the plaintiff would not have slipped.

The plaintiff argues that the evidence shows that the defendants had constructive notice of the condition since the ice was visible and apparent and existed for more than twenty-eight hours. He contends that the defendants created the ice patch since the defendants affirmatively treated the driveway without sanding and salting. The plaintiff maintains that the defendants had actual notice because defendant Kenneth Klarman admitted that he knew the plaintiff slipped on the ice.

The defendants oppose the plaintiff's cross motion. They claim that the evidence herein points to the fact that the alleged icy condition formed only moments before the plaintiff's fall. They maintain that the plaintiff's meteorologist never qualified himself to be an expert in the time it takes black ice to form and remain on a parking lot surface. Furthermore, assert the defendants, the plaintiff's meteorologist never even references the fact that the plaintiff testified that it was black ice.

It is well settled that in order for a plaintiff in a slip and fall case to establish a prima facie case of negligence, the plaintiff is required to prove that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of such condition (*see*, ***Golding v Powell & Dempsey, Inc.***, 247 AD2d 510, 669 NYS2d 323 [1998]; ***Kraemer v K-Mart Corporation***, 226 AD2d 590, 641 NYS2d 130 [1996]). To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837; 501 NYS2d 646, 647[1986]). Moreover, a general awareness that a dangerous condition might exist is legally insufficient to constitute notice of the specific condition which caused the injury (***Baumgartner v Prudential Insurance Company of America***, 251 AD2d 358, 674 NYS2d 84 [1998]).

In this case, the Court concludes that the defendants have failed to establish their prima facie burden on their motion for summary judgment. Although both of the defendants' affidavits allege that they did not observe any icy condition in the driveway earlier that day, defendant Kenneth Klarman at his deposition testified that he had no recollection of going outside at any time on the day of the incident prior to the plaintiff's fall, and defendant Diane Klarman at her deposition testified that she had no recollection of inspecting the driveway on the day of the incident. As such, the defendants' own proof creates an issue of fact as to whether the ice existed for a sufficient length of time before the accident for the defendants to discover and remedy it (*see*, ***Backer v Central Parking Systems***, 292 AD2d 408, 739 NYS2d 404 [2002]). In addition, defendants have provided the Court with the plaintiff's deposition testimony wherein the plaintiff testified that defendant Kenneth Klarman told him that his snow removal contractor had done a terrible job and that the ice should not have been there. Thus, the defendants' proof also raises an issue of fact as to whether they had actual notice of the icy condition of the driveway before the plaintiff's fall (*see*, ***Dawson v Raimon Realty Corp.***, 303 AD2d 708, 758 NYS2d 100 [2003]).

The Court also concludes that the plaintiff has failed to meet his prima facie burden on his cross motion. At his deposition, the plaintiff clearly characterized the ice patch as "black ice," a term that is commonly used to describe ice that is difficult to see, and he also admitted that he did not see the ice until after his fall (*see*, ***Carricato v Jefferson Valley Mall Limited Partnership***, 299 AD2d 444, 749 NYS2d 575 [2002]; ***Lewis v Bama Hotel Corp.***, 297 AD2d 422, 745 NYS2d 627 [2002]). The plaintiff's proof is thus insufficient to establish that an icy condition was visible and apparent and existed for a sufficient length of time prior to the accident for the defendants to discover and remedy such condition (*see*, ***Murphy v 136 Northern Boulevard Associates***, 304 AD2d 540, 757 NYS2d 582 [2003]). Furthermore, the plaintiff's meteorologist's affidavit and report are too conjectural and lack probative force to support any finding of actual or constructive notice (*see*, ***Borden v Wilmorite, Inc.***, 271 AD2d 864, 706 NYS2d 230 [2000]; *lv denied* 95 NY2d 767). The fact that it had been cold enough for water to freeze in the twenty-eight hour period prior to the plaintiff's fall supports only speculation about the actual conditions at the accident scene (*see*, ***Neidert v Austin S. Edgar, Inc.***, 204 AD2d 1030, 612 NYS2d 529 [1994]). Additionally, the plaintiff's contention that the defendants created the ice by their failure to sand and salt the driveway is unsupported since the supposed failure would constitute nonfeasance on the defendants' part rather than the affirmative negligence required to constitute creation of a dangerous condition (*see*, ***Digrazia v Lemmon***, 28 AD3d 926, 813 NYS2d 560 [2006]; *lv denied* 7 NY3d 706). Finally, the fact that defendant Kenneth Klarman may have acknowledged after the accident that he knew the plaintiff slipped on ice does not amount, as claimed by plaintiff, to an admission of actual notice.

Accordingly, the defendants' motion and the plaintiff's cross motion for summary judgment are denied.

Dated: MAR 05 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION