

Fasciglione v City of New York

2007 NY Slip Op 30178(U)

March 13, 2007

Supreme Court, Richmond County

Docket Number: 0012971

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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NANCIE FASCIGLIONE,
Plaintiff,

PART C - 2

-against-

Present:
Hon. Thomas P. Aliotta

THE CITY OF NEW YORK and JEWISH BOARD
OF FAMILY & CHILDREN SERVICES, INC.,
Defendants.

DECISION & ORDER

Index No. 12971/03
Motion No. 2490 - 002

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The following papers numbered 1 to 3 were used on this motion on the 24th day of
January, 2007:

| | Pages | Numbered |
|--|-------|----------|
| Notice of Cross Motion for Summary Judgment with Supporting Papers..... | | 1 |
| Affirmation in Opposition..... | | 2 |
| Reply Affirmation..... | | 3 |

Upon the foregoing papers, the cross motion for summary judgment of defendant the City of New York (hereinafter "City") is granted, and the complaint is dismissed.

In this personal injury action, plaintiff maintains that on December 8, 2002, she fell on the sidewalk in front of premises owned by codefendant Jewish Board of Family & Children Services, Inc., located at 19 Vedder Avenue, Staten Island, New York.¹ According to plaintiff, she slipped and fell on a clear sheet of ice approximately 1½ inches thick that was covered by

an estimated ½ inch of “packed down snow” (Plaintiff’s Examination Before Trial, City’s Exhibit “C”). It is undisputed that the last snowfall prior to plaintiff’s accident occurred three days earlier, on December 5, 2002.

In cross-moving for summary judgment, the City maintains that no evidence has been adduced by plaintiff as to how long this sidewalk had presented an alleged hazard, pointing to so much of plaintiff’s deposition testimony as indicated that she could not recall the condition of the sidewalk during the two or three days which preceded her fall. The City has also submitted local climatological data indicating that (1) the last prior snowfall ended at 9:00 p.m. on December 5, 2002, (2) the ambient temperatures exceeded freezing on both December 6 and 7, 2002, and (3) from 10:00 p.m. on December 7, 2002 until approximately 7:00 a.m. on December 8, 2002, the temperature remained below freezing. It is uncontroverted that plaintiff’s fall occurred sometime thereafter. Base on these facts, the City contends that the fluctuations in temperatures above and below freezing between the date of the last snowfall and the time of plaintiff’s accident renders her claim that the City had actual or constructive notice of this particular ice patch wholly speculative.

The Court agrees.

In response to the City’s prima facie showing that it neither created nor had actual or constructive notice of the alleged dangerous condition that caused plaintiff to fall (*see Stone v Long Is. Jewish Med. Ctr.*, 302 AD2d 376, 377), it was incumbent upon plaintiff to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320). Here, however, plaintiff has failed to adduce any proof that is probative on the question of whether the City may be charged with actual or constructive notice of the alleged icy condition. Manifestly, evidence that it had snowed several days prior to the accident is insufficient to establish notice in the absence of any

demonstration that the ice upon which plaintiff allegedly slipped and fell was the product of that snowfall, rather than the subsequent fluctuations in temperature that persisted until shortly before her accident (*see* Simmons v Metropolitan Life Ins. Co., 84 NY2d 972, 973; Gam v Pomona Professional Condominium, 291 AD2d 372; Pepito v City of New York, 262 AD2d 619, 620).

Accordingly, it is

ORDERED, that cross motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

The foregoing constitutes the Decision and Order of the Court.

Law Clerk to notify both sides of this Decision/Order.

DATED: MAR 13, 1007

/s/ _____
HON. THOMAS P. ALIOTTA, J.S.C.

ASN BY EVE/pt on 3/14/07

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¹ This defendant's motion for summary judgment dismissing the complaint as against it was granted at oral argument on January 24, 2007.