

Powell v Cedar Manor Mut. Hous. Corp.

2007 NY Slip Op 30312(U)

March 12, 2007

Supreme Court, Queens County

Docket Number: 0026071

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
JOYCE POWELL,

Index No: 26071/04
Motion Date: 1/3/07
Motion Cal. No: 23

Plaintiff,

-against-

CEDAR MANOR MUTUAL HOUSING
CORPORATION and ARCO WENTWORTH
MANAGEMENT CORPORATION,

Defendants.

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The following papers numbered 1 to 10 read on this motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint on the ground that there are no triable issues of fact as to any negligence on the part of defendants.

| | PAPERS NUMBERED |
|-------------------------------------------|--------------------|
| Notice of Motion-Affidavits-Exhibits..... | 1 - 4 |
| Affirmation in Opposition-Exhibits | 5 - 8 |
| Affirmation in Reply..... | 9 - 10 |

Upon the foregoing papers, it is ordered that the motion is resolved as follows:

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Moreover, it is well established that to impose liability in a slip and fall context for injuries resulting from an allegedly defective condition, a plaintiff must demonstrate that defendant either created the condition that caused the accident, or had actual or constructive notice of it. "Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of

constructive notice.” Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2nd Dept. 2000). To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant’s to discover and remedy it. Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2nd Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2nd Dept. 1999); Russo v. Eveco Development Corp., 256 A.D.2d 566 (2nd Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2nd Dept.1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2nd Dept.1996). Where, as here, if the defendant moves for summary judgment dismissing the complaint based upon lack of notice, “the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law.” Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept.1999).

Additionally, “it is well settled that a property owner may not be held liable for snowy or icy conditions unless it has actual [or constructive] notice thereof [and] it has had a reasonably sufficient time from the cessation of the precipitation to remedy the conditions caused thereby [see, Simmons v. Metropolitan Life Ins. Co., 84 N.Y.2d 972 (1994); Grillo v. New York City Tr. Auth., 214 A.D.2d 648 (2nd Dept.1995)].” Baum v. Knoll Farm, 259 A.D.2d 456 (2nd Dept. 1999); see, Smith v. 1327 Jefferson Realty, Inc., 300 A.D.2d 466, 467 (2nd Dept. 2002); Soon Rae Kim v. Caesar Chemists, Inc., 297 A.D.2d 797 (2d Dept. 2002). Here, defendants have met their burden of making a prima facie showing affirmatively establishing the absence of notice or creation of a dangerous condition by submitting evidence that, inter alia, there was a storm in progress at the time of the incident. See, Lee-Pack v. 1 Beach 105 Associates, LLC, 29 A.D.3d 644 (2nd Dept. 2006).

Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasan v. State Bank of India, New York Branch, 283 A.D.2d 601 (2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2001). Pursuant to CPLR 3212, summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Taft v. New York City Tr. Auth., 193 AD2d 503, 505 (1993). In opposing the summary judgment motion, plaintiff was required to show that defendant indeed had actual or constructive notice of the condition. Kucera v. Waldbaums Supermarkets, 304 A.D.2d 531 (2003); Associated Mut. Ins. Co. v. Kipp's Arcadian II, Inc., 298 A.D.2d 478 (2002); Bradish v. Tank Tech Corp., 216 A.D.2d 505, 506 (1995); Gaeta v. City of New York, 213 A.D.2d 509 (1995).

Here, plaintiff’s opposition is insufficient to establish that defendants created the hazardous condition, had actual notice of the condition existing on the premises, or to impute notice to defendant that the condition existed for a period of time sufficient to give rise to constructive notice. See, Pirillo v. Longwood Associates, Inc., 179 A.D.2d 744 (2nd Dept. 1991). “[W]here, as here, the allegation is that the icy surface was created sometime before the storm, it is [the] plaintiff’s burden to establish that the precipitation from the storm in progress was not the

cause of the incident' (citations omitted). The plaintiff's evidence that ice had been present for a ' day or two before [the incident]' was insufficient to raise a triable issue of fact as to whether [she] allegedly fell on "old" ice (citations omitted). To say that "old" ice caused the subject ice patch as opposed to the storm in progress would require a jury to resort to conjecture and speculation in order to determine the cause of the incident (citations omitted)." Small v. Coney Island Site 4A-1 Houses, Inc., 28 A.D.3d 741, 742 (2nd Dept.2006). Accordingly, defendants' motion for summary judgment is granted, and the complaint hereby is dismissed.

Dated: March 12, 2007

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J.S.C.