

**Frey v Cornelius**

2007 NY Slip Op 31897(U)

June 25, 2007

Supreme Court, Suffolk County

Docket Number: 0029361/2004

Judge: Robert W. Doyle

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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 2-5-07  
ADJ. DATE 5-7-07  
Mot. Seq. # 001 - MD

-----X	
ANDREW THOMAS FREY and CAROLYN FREY,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
KEVIN CORNELIUS and JODI CORNELIUS,	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 9 - 20; Replying Affidavits and supporting papers 21 - 22; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants Kevin Cornelius and Jodi Cornelius for summary judgment dismissing the complaint, opposed by plaintiffs, is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Andrew Frey, when he slipped and fell on defendants' property, a private road, on February 5, 2005. Plaintiff was walking on that private roadway during the course of his employment when he was caused to slip and fall on an icy condition on that roadway.

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, and that plaintiffs cannot establish a prima facie case of negligence against them. In support of their motion, the defendants submit, *inter alia*: the pleadings; the complete deposition testimony of plaintiff, and defendants Jodi Cornelius and Kevin Cornelius.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to

judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

At his examination before trial, plaintiff testified that on February 5, 2004, he was employed by Airborne Express as a driver of their truck and delivered mail or packages to actual residences. 18C Barnes Road was an address where he had to make a delivery of a Dell box, described as 8 ½ x 11 and very light. The driveway where the accident occurred was described as a Y-shaped, pebbled driveway at the end of a dark, dead end street. He pulled all the way up the driveway toward the house, towards the end of the horse stable fence. The horse stable was between two houses. He got out of his van, walked to the back of it, got the package out and walked from the back of his van along the driver’s side to the front of his van on the driver’s side, when he slipped on ice in the driveway. Both feet went up in the air and he fell over backwards. He was wearing dark heeled rubber soled shoes, which he described as being in good shape, but which he no longer has as they were cut off by the ambulance driver. He testified he could not get up from the ground as his leg snapped in half and his foot felt like it was going to fall off. There were patches of ice on the driveway, and some in the area where he fell. There were no lights in the driveway. The house to the left had a light on. The lights on his van were on. There was no light on at the house to the right.

Jodi Cornelius testified at her examination before trial that Barns Street abuts her property. Her driveway extends from Barns Street and is covered with pea stone. She shares the driveway with another house, a cottage, at One Little Creek Path, which, at the time was occupied by Mike and Mark, but owned by her and her husband. Mark and Mike occupied the house as tenants pursuant to a lease which was renewed verbally and expressed the responsibilities of the tenants. She explained that when you turn down Little Creek Path, about 50 to 70 feet of the driveway is shared. If you proceed straight, you go right to the cottage which is another 50 to 70 feet past her home. From Barnes Road to the cottage is about 150 feet. After the first 70 feet, her driveway is to the left and perpendicular to that driveway. There is a horse stable which houses a pony and is located on her property between the house and the cottage, and which is also owned by her and her husband.

She did not recall the weather conditions on February 5, 2004. She testified that she and her husband usually take care of the shared portion of the driveway. They have a clause in the lease that the tenant is responsible for snow and ice removal from their parking lot to their door. She stated the driveway was covered with pea stone. They never found maintenance was necessary because the snow melted very quickly on the pea stone and added traction. She also added they had rock salt but never needed to put it on their driveway. She later testified that even if there was a heavy snow, there is not going to be ice on the pea stone. During the time Mike and Mark were living there, they never needed an outside company to come in to do snow or ice removal. No one had ever made a complaint about her driveway. Sometimes the tenants put rock salt down near their steps and on the carpeted portion of their steps. She was unaware if there was any accumulation of snow on the driveway thirty days prior to February 5, 2004.

Keith Cornelius testified at his examination before trial that there had been a mixture of old pea stone and gravel and occasional dirt spots on his side of the property prior to the installation of the pea stone the summer before the accident. He stated he and his wife were the owners of the property with the house, cottage and barn. He stated if there was heavy snow, he went out with a shovel and shoveled wide enough for a car to make easy access. He would shovel from the cottage to Barnes Road and from his house to Barnes Road. It was more than 100 feet from his house to the end of the driveway at Barnes Road, and about 150 to 160 feet from the cottage along the driveway to Barnes Road. He was not sure who was responsible for snow and ice removal from the cottage to Barnes Street, and did not recall if the lease addressed that issue. He did on occasion personally put rock salt on the driveway between the cottage and the turn off to his house. He never received complaints from the tenants about snowy or icy conditions of their driveway or any part of it. There would be occasions when he would walk to the cottage if it snowed to check out the situation, but did not know how often. When asked if he ever noticed ice or anything on the driveway in the winter of 2004, he responded, "Usually just snow." Then he would shovel it, unless the tenant beat him to it.

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 and are therefore entitled to an order granting summary judgment.

"Analysis of a case involving a slip and fall in winter conditions starts with the well-settled principle that a party who possesses or controls real property is under a duty to exercise reasonable care under the circumstances. A necessary precondition to the imposition of liability is a showing that the defendant had actual or constructive notice of the hazardous condition. In slip and fall cases, the plaintiff is often aware of the presence of a slippery surface caused by snow or ice. While perhaps relevant to the issues of notice and comparative negligence, the obviousness of this type of hazard does not ordinarily preclude a finding of liability on the part of the property owner" (*Stern v Ofori-Okai*, 246 AD2d 807, 668 NYS2d 68 [3<sup>rd</sup> Dept 1998]).

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 [2<sup>nd</sup> Dept 1998]; *Kraemer v K-Mart Corporation*, 226 AD2d 590, 641 NYS2d 130 [2<sup>nd</sup> Dept 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 [2<sup>nd</sup> Dept 1998]).

A landowner's responsibility is to assure that the conditions on his property are reasonably safe (*Perkins v Gervis et al*, 2006 NY Slip Op 50335U, 11 Misc.3d 1061A; 816 NYS2d 700). Landowners are under a duty to maintain their premises in a reasonably safe condition in view of the circumstances, including the likelihood of injury to others (*Comeau v Wray*, 241 AD2d 602, 603, 659 NYS2d 347 [3<sup>rd</sup> Dept 1997]). This duty encompasses warning others of the danger, including obvious ones, or take reasonable steps to protect others from the dangers (*Comeau v Wray, supra*).

In this case, the Court concludes that the defendants have failed to establish their prima facie burden on their motion for summary judgment and finds issues of facts concerning whether defendants used reasonable care in maintaining their driveway. Both defendants testified they did not know when it last snowed before the accident. Jodi Cornelius did not know if it had snowed within thirty days of the accident and was not aware that the accident occurred until months after it happened. She testified you cannot use maintenance equipment such as a snow thrower or snow blower with pea stone and if there is a heavy snow, there is not going to be ice on the pea stone. Jodi Cornelius also testified there was no maintenance necessary on the driveway because the pea stone made the snow melt quickly, and that they had rock salt but never needed to put it on their driveway. Her testimony, however, raises factual issues with the testimony given by her husband.

Keith Cornelius could not testify as to when it last snowed before the accident, but stated that if there was a snow accumulation, he would shovel snow in the driveway wide enough for a car to make easy access and put down rock salt, if it was necessary. There would be occasions when he would walk to the cottage if it snowed to check out the situation, but did not know how often he did this. When asked if he ever noticed ice or anything on the driveway in the winter of 2004, he responded, "Usually just snow."

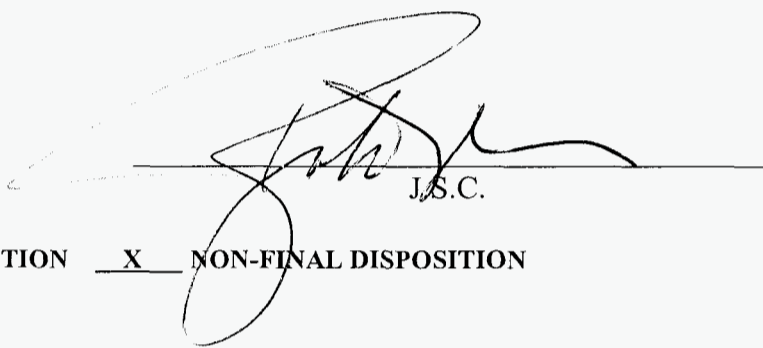
There was no testimony from defendants that there was no accumulation of ice in the driveway about the time of the accident. In fact, they did not know if it snowed one month prior to the accident, nor did they become aware that an accident occurred until months later. Plaintiff testified there were ice patches in the driveway and that he slipped on an ice patch. There are factual issues concerning the origin of the ice, how long it was there for, whether defendants took reasonable care in maintaining the driveway on the date of the accident, and whether the driveway was in a reasonably safe condition. As such, the defendants' own proof creates issues of fact also 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 [2<sup>nd</sup> Dept 2002]), and if defendants used reasonable care in maintaining their driveway. Defendants' proof raises 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 [2<sup>nd</sup> Dept 2003]).

On a motion for summary judgment to dismiss a complaint based upon lack of notice, a defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of

law. No other admissible evidence has been submitted by defendants to demonstrate snow fall or precipitation, or lack thereof around the date of the accident. Defendants have not met their burden of demonstrating entitlement to an order granting summary judgment as a matter of law on the issue of whether or not they were aware that ice existed in their driveway at the time plaintiff claims to have slipped on ice in their driveway. They were unaware of the condition of the driveway at the time of the accident, and only learned of the accident months later. They did not know if it snowed even within a month of the accident. Since they could only testify to their custom and practice, defendants have failed to establish as a matter of law that their snow removal activities did not create a dangerous condition which caused plaintiff's injuries (*see, Giamboi v Manor House Owners Corp.*, 277 AD2d 201, 716 NYS2d 872 [2<sup>nd</sup> Dept 2000]). Therefore, defendants have not demonstrated prima facie entitlement to an order granting summary judgment, and the burden therefore has not shifted to plaintiff to come forward with admissible evidence to demonstrate the existence of factual issues to preclude an order granting summary judgment (CPLR 3212[b]; *Zuckerman v City of New York*, supra).

Accordingly, defendants' motion (001) for an order granting summary judgment on the issue of liability is denied.

Dated:         JUN 25 2007        

  
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J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION