Dula v Palladino
2007 NY Slip Op 32338(U)
July 24, 2007
Supreme Court, Suffolk County
Docket Number: 0010814/2006
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 06-10814
CAL. No. 06-02555-OT

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3/23/07
ADJ. DATE 4/6/07
Mot. Seq. # 001 - MD
002 - XMD

DAVID DULA, as Administrator of the Estate of LISA VERDE DULA, deceased, and DAVID DULA, individually,

Plaintiffs,

- against -

HELEN PALLADINO, FRANCIS PALLADINO a/k/a FRANK PALLADINO and HUDSON'S LANDING REALTY MANAGEMENT, LLC,

Defendants.

JOSEPH C. STROBLE, ESQ.
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Upon the following papers numbered 1 to 115 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers 20 - 94; Answering Affidavits and supporting papers 96-97; 106-111; Replying Affidavits and supporting papers 98 - 105; Other 18-19 (defendants' memorandum of law; 95 (plaintiffs' memorandum of law; 112-115 (sur-reply affirmation in opposition); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants, Helen Palladino and Francis Palladino a/k/a Frank Palladino and Hudson's Landing Realty Management, LLC ("defendants"), for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiffs' complaint is denied.

ORDERED that this cross motion by plaintiffs, David Dula as Administrator of the Estate of Lisa Verde Dula and David Dula ("plaintiffs"), for an order pursuant to CPLR 3212, granting them summary on the issue of liability judgment is denied.

David Dula, individually and as administrator of Lisa Verde Dula's estate, commenced this action to recover damages for injuries allegedly sustained by Mrs. Dula as a result of a slip and fall incident that occurred at the premises located at 94 Columbus Avenue, Valhalla, New York. Frank Palladino is the owner of the subject premises, and his mother, Mrs. Helen Palladino, resides in the home as well as manages the property. Mr. and Mrs. Dula leased the second floor apartment of the house from Mr. Palladino pursuant to a written lease agreement with all rental monies to be paid to defendant Hudson Landing. The accident occurred on February 4, 2005 at approximately 6:15 a.m. From January 17th through the 30th, snow storms and other various types of precipitation occurred, leaving light accumulations of snow on the ground. During

this time period the temperature fluctuated between a minimum of 12 degrees Fahrenheit on January 17th and a maximum of 45 degrees Fahrenheit on February 4th. Another light snow storm along with rainy conditions occurred during the early morning hours of February 3rd through 4th and ended at about 6:56 a.m. Mrs. Dula, as she was returning from walking her dogs, slipped and fell on ice on the second step of the home's exterior stairway. Mrs. Dula sustained a fractured left ankle. On February 15, 2005, Lisa Verde Dula died from a bilateral pulmonary embolism due to thrombosis of deep leg veins.

Defendants now move for summary judgment on the basis that a negligence cause of action may not be maintained for plaintiff's decedent's injuries because a snow storm was in progress when the decedent injured herself and defendants had to have been given a reasonable amount of time to clear the snow after the storm's cessation. The defendants also assert that they did not have actual or constructive knowledge of a defective condition existing on the front entrance steps. Defendants submit the pleadings, decedent plaintiff's death certificate, copies of the deposition transcripts of plaintiff and defendants, January and February National Climatological Data for White Plains, New York, and photographs of the situs of the accident.

Plaintiffs oppose defendants' motion on the grounds that the "storm in progress" theory is inapplicable in the instant matter because defendants were given actual notice of the defective state of the stairwell before the February 4th snow storm occurred.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). However, a defendant in moving for summary judgment bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (***Altieri v Golub Corporation***, 292 AD2d 734, 741 NYS2d 126 [2002]), and the burden will only shift to the plaintiff after the defendant has demonstrated that it neither created the defective condition nor had actual or constructive notice of the defective condition (***Altieri v Golub***, *supra*; ***Portanova v Trump Taj Mahal Associates***, 270 AD2d 757, 704 NYS2d 380 [2000]). But where a plaintiff fails to submit any evidence that the condition alleged to have caused the injury was actually defective or dangerous, summary judgment must be granted in defendant's favor (***Przbyszewski v Wonder Works Construction, Inc.***, 303 AD2d 482, 755 NYS2d 435 [2003]).

It is axiomatic that a landowner is required to maintain its premises in a reasonably safe manner (***McCord v Olympia & York Maiden Lane Company***, 8 AD3d 634, 779 NYS2d 542 [2004]; ***Backiel v Citibank, N.A.***, 299 AD2d 504, 751 NYS2d 492 [2002]; ***Zelonka v Town of Schodack*** 245 AD2d 795, 665 NYS2d 757 [1998]). A landowner will not be held liable for a hazardous condition existing on its premises due to an accumulation of snow or ice until an adequate period of time has passed following the cessation of the storm, even if a lull in the storm has occurred, to allow the party to remedy the situation (***Solazzo v New York City Tr. Auth.***, 6 NY3d 734, 810 NYS2d 121 [2005]; ***Simmons v Metropolitan Life Ins. Co.***, 84 NY2d 972, 622 NYS2d 496 [1994]; ***DeStefano v City of New York***, __ AD3d __, __ NYS2d __, 2007 NY Slip Op 5215, 2007 NY App Div LEXIS 7414 [2d Dept, Jun 12, 2007]). Therefore, in order to defeat defendant's motion based on stormy weather conditions, a plaintiff is required to show that the condition which caused plaintiff's injury was in existence prior to the storm and that the accumulation from the storm was not the cause of plaintiff's fall and subsequent injury (***Lyons v Cold Brook Creek Realty Corp.***, 268 AD2d 659, 700

NYS2d 603 [2000]; ***Jornov v Ace Suzuki Sales & Serv***, 235 AD2d 855, 648 NYS2d 800 [1996]). Furthermore, liability will not be imposed upon a landowner for a defective condition in existence on its premises because of an accumulation of snow or ice without the landowner having actual or constructive notice of said condition (***Schleifman v Prime Hospitality Corp.***, 246 AD2d 789, 668 NYS2d 258 [1998]; ***Boyko v Limowski***, 223 AD2d 962, 636 NYS2d 901 [1996]). Plaintiff must establish that the icy condition was apparent and visible and existed for a significant period of time prior to plaintiff's accident to allow the landowner to remedy the situation (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bernard v Waldbaums, Inc.***, 232 AD2d 596, 648 NYS2d 700 [1996]). Moreover, a general awareness that a defective condition may exist is legally insufficient to constitute notice of the particular condition that resulted in plaintiff's injury (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]; ***Gordon v American Museum of Natural History***, *supra*).

In the instant case, defendants' proof, including climatological records, establishes that a light snow storm was in progress on the morning of February 4th when the plaintiff's decedent's fall occurred. Thus, defendants have met their prima facie burden of establishing their entitlement to judgment as a matter of law by demonstrating that a storm was in progress on the morning of plaintiff's decedent's injuries (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Krichevskaya v City of New York***, 30 AD3d 471, 817 NYS2d 103 [2006]; ***Reagan v Hartsdale Tenants Corps***, 27 AD3d 471, 817 NYS2d 103 [2006]).

Plaintiff, in opposition, has raised a triable issue of fact as to whether defendants had actual notice of the hazardous icy condition in existence on their premises prior to plaintiff's decedent's fall (***Altieri v Golub Corporation***, *supra*; ***Piacquadio v Recine Realty Corp.***, *supra*; ***Gordon v American Museum of Natural History***, *supra*). Plaintiff testified that it had snowed approximately three to four days prior to the February 4th's snow storm and that he had complained to Mrs. Palladino about the ice that had accumulated on the steps from the previous snow storm. Plaintiff stated that in response to his complaint, Mrs. Palladino informed him that she would "take care of it." Plaintiff explained that he had cleared a one-half to one inch wide pathway with his foot because "no one came to clear the snow that had accumulated from the prior snow storm." Plaintiff also testified that immediately after his wife, the decedent, informed him of her fall, he went downstairs with a shovel and chipped away the "very same ice that he had previously complained to Mrs. Palladino about" from the steps. Therefore, it cannot be stated that defendants did not have actual notice of the hazardous condition in existence on the exterior stairway of the property (***Martin v Wagner***, 30 AD3d 733, 816 NYS2d 243 [2006]; ***Schlisser v Athens Assoc.***, 19 AD3d 979, 798 NYS2d 175 [2005]; ***Hilsman v Sarwill Assoc., LP***, 13 AD3d 692, 786 NYS2d 225 [2004]).

Moreover, despite the fact that Mrs. Palladino testified that she hired a gentleman named "Steve" to remove the snow and ice from the premises after a snow storm, she was unable to recall the last time that "Steve" provided snow removal services prior to the decedent's slip and fall and further stated that she did not contact "Steve" at all to remove ice or snow from the premises in January or February of 2005. In addition, the decedent, Lisa Verde Dula, informed her husband as well as Police Officer James Reilly, one of the officers that responded to the 911 call, that she slipped and fell on ice on the exterior stairway. Thus, defendants have failed to refute the plaintiff's testimony that the decedent slipped and fell on ice that existed on the steps of the exterior stairway prior to the commencement of the storm that occurred on February 4, 2005 (***Simmons v Metropolitan Life Ins.***, *supra*; ***DiGrazia v Lemmon***, 28 AD3d 926, 813 NYS2d 560 [2006]; ***Chapman v City of New York***, 268 AD2d 498, 702 NYS2d 355 [1999]; ***Robles v City of New York***, 255 AD2d 305, 679 NYS2d 340 [1998]).

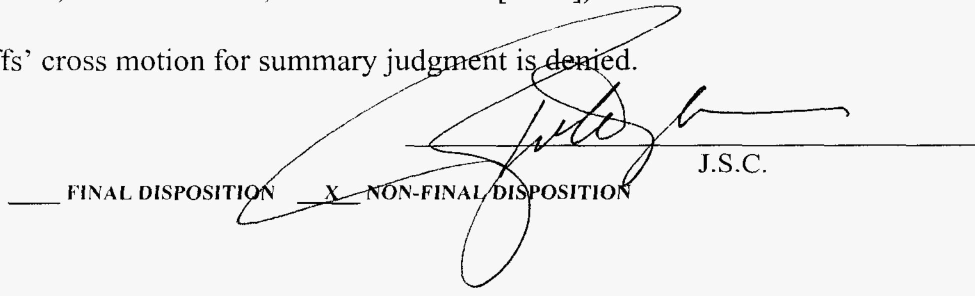
Accordingly, defendants' motion for summary judgment is denied.

Plaintiffs also cross-move for summary judgment on the basis that the defendants violated the New York State Building Code ("Building Code") and the Mount Pleasant Zoning Code ("Zoning Code") by failing to enclose the exterior stairs of the home and by converting the single-family home into an illegal multiple dwelling. Plaintiffs submit plaintiff's affidavit, the affidavit of Glenn Hasse, plaintiff's expert, Paul Dula's affidavit, Police Officer John Riley's sworn deposition testimony, affidavit and related reports, photographs depicting the situs of the accident, certificate of occupancy for the subject premises, Building Code, Zoning Code, copies of plaintiff's and defendants' examination before trial and the medical examiner's report and death certificate.

Building Code §1003.3.3.5.2 provides that "outdoor stairways and outdoor approaches to stairways shall be designed so that water will not accumulate on walking surfaces...treads, platforms and landings that are apart of exterior stairways in climates subject to snow or ice shall be protected to prevent the accumulation of same." Additionally, when interpreting a statute, code or ordinance, the Court, must give its legislative intent due deference and regard and may not impose it owns interpretation of what the Legislature meant when enacting the statute, code or ordinance (***Matter of Daimler Chrysler v Spitzer***, 7 NY3d 653, 827 NYS2d 88 [2006]; ***Riley v County of Broome***, 95 NY2d 455, 719 NYS2d [2000]; ***Warner v Adelphi Univ.***, 240 AD2d 730, 660 NYS2d 50 [1997]; *see also,* McKinney's Cons Laws of NY, Book 1, Statutes § 92[a], at 177).

Here, plaintiffs have failed to demonstrate their entitlement to judgment as a matter of law (***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). Plaintiff's allegations that the defendants were required to install "a canopy or protective covering with sides extending from the canopy roof to the ground, all over the exterior set of concrete steps on which the decedent slipped and fell" is unsubstantiated by the cited provisions of the Building Code. The Building Code as cited only requires that exterior stairways are protected, so as to prevent the accumulation of snow and ice and therefore, it cannot be said as a matter of law that defendant Frank Palladino's covering as installed failed to comply with the Building Code (***Smalls v Tyres***, 33 AD2d 1055, 308 NYS2d 730 [1970]; ***Lepke v Sclafani & Sons, Inc.***, 20 Misc. 2d 50, 192 NYS2d 58 [1959]). Moreover, the violation of a local ordinance or regulation is merely some evidence of defendants' negligence and does not constitute negligence as a matter of law (***Bauer v Female Academy of the Sacred Heart***, 97 NY2d 445, 741 NYS2d 491 [2002]; ***Zimmer v Chemung County Performing Arts, Inc.***, 65 NY2d 513, 493 NYS2d 102 [1985]; ***Bjelicic v Lynned Realty Corp.***, 152 AD2d 151, 546 NYS2d 1020 [1989]). However, it does raise questions of fact as to whether defendant Frank Palladino, by converting his single-family home into a multiple dwelling with separate means of ingress and egress after receiving a certificate of occupancy for a single-family dwelling violated the Zoning Code and Building Code and whether that violation was a proximate cause of the decedent's injuries (***Malloy v Trombley***, 50 NY2d 46, 427 NYS2d 969 [1980]; ***Holleman v Miner***, 267 AD2d 867, 699 NYS2d 840 [1999]; ***Kadyszewski v Ellis Hosp. Assn.***, 192 AD2d 765, 595 NYS2d 841 [1993]).

Accordingly, plaintiffs' cross motion for summary judgment is denied.



Dated: JUL 2 4 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION