Amelkin v CVS Pharm., Inc.
2007 NY Slip Op 33314(U)
October 10, 2007
Supreme Court, Nassau County
Docket Number: 9615-05/
Judge: Kenneth A. Davis
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

RACHAEL AMELKIN,

Plaintiff,

SUBMISSION DATE: 8/24/07
INDEX No.: 19615/05

-against-

CVS PHARMACY, INC.,
SNOW MANAGEMENT GROUP,
GREENS-KEEPER OF NASSAU, INC.,

MOTION SEQUENCE # 1,2

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause..... XX
Answering Papers..... X
Reply..... XX

Motion (seq. No. 1) by the attorneys for the defendants CVS Pharmacy, Inc. (CVS) and Snow Management Group (SMG); and cross motion (seq. No. 2) by the attorney for the defendant Greens-Keeper of Nassau, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims are denied.

On December 11, 2002 at approximately 1:00 a.m., it is alleged the plaintiff was caused to slip and fall on ice in the parking lot of a CVS store located on Atlantic Ave. in Freeport, N.Y. SMG was hired by CVS to manage its snow removal contracts at various stores, including the Freeport location. SMG then solicited bids from various contractors to perform the snow removal work. Pursuant to the terms of the contract entered into between CVS and SMG, SMG agreed to take over the defense of CVS. The complaint alleges that Greens-Keeper of Nassau, Inc. (Greens-Keeper) had a

contract with SMG for snow removal on the days of and preceding the subject accident. At her examination before trial the plaintiff testified as follows:

> Question: Can you describe the patch of ice that you slipped on?
> Answer: I just did. It was like-it was very spread out, it was about the length of my entire car. It went also towards the door.
> Question: You said it was white?
> Answer: Yes, it was white and it also clear [sic]. It was white more towards the entrance of CVS.
> Question: Right now, if you can, I am not trying to trick you, I want to know if you can describe the ice that you slipped on?
> Answer: I just did.
> Question: The ice that you slipped on was white?
> Answer: It was white-it was a large patch because-
> Answer: It was clear, relatively thick in spots.
> Question: Are you familiar with the term black ice?
> Answer: Yes.
> Question: Would you describe that as black ice?
> Answer: Yes.
> Question: Did you see the ice as you pulled into the parking spot.
> Answer: No.

A property owner is not liable for an alleged hazard on its property involving snow or ice unless it created the defect, or had actual or constructive notice of its existence. *Murphy v 136 Northern Boulevard Associates*, 304 AD2d 540. It is sufficient for the plaintiff to prove that the defendants had "notice of a condition which caused the ice to form." *Roca v Gerardi*, 243 AD2d 616, 617.

The attorneys for the defendants contend that at her

deposition, the plaintiff said she fell on "black ice," while in her affidavit in opposition she stated she fell on ice that "was white and very thick." The issue in cases such as the within action is not merely whether the ice was "black" or "white," but rather whether the plaintiff established that the alleged hazardous condition was visible and apparent, and existed for a sufficient length of time before the accident for the defendant to discover and remedy it. *Murphy v 136 Northern Boulevard Associates, supra*.

Defendant Greens-Keeper alleges it did not contract with SMG to perform work at the subject property at the time of the accident and owed no duty to the plaintiff or co-defendants. Greens-Keeper alleges that SMG contracted with a firm named MSC, Inc. to perform snow removal during the time period in question. However, the attorneys for the plaintiff have submitted copies of contracts between Greens-Keeper and CVS by its agent SMG with two different effective dates. The two conflicting dates raise triable issues of fact as to whether Greens-Keeper plowed the parking lot prior to the plaintiff's accident, which occurred on December 11, 2002. The two conflicting contracts have December 1, 2002 and December 31, 2002 as the effective dates for Greens-Keeper to do the snow plowing. The allegation by Greens-Keeper of a forgery regarding the contract dated December 1, 2002 raises a question of fact. A copy of the contract with an effective date of December 1, 2002 is annexed to the affirmation in opposition as Exhibit G. The attorney for Greens-Keeper states "plaintiff's counsel also ignores the fact that in the earlier action of *Carbone v CVS, Greens Keeper, et al.*, Nassau County Index No. 003311/04 (herein referred to as *Carbone*), arising from a slip and fall accident at the same premises in

December of 2002, Greens-Keeper was granted summary judgment (Mazzara, Reply Affirmation dated August 7, 2007, ¶ 28). He failed to annex a copy of the order. The Court acquired a copy of the decision on its own from the line database of Nassau County Supreme Court Decisions. The full caption of *Carbone* is as follows:

> SUPREME COURT OF THE STATE OF NEW YORK
>
> ----------X
>
> MARGARET CARBONE and JOSEPH CARBONE,
>
> Plaintiff,
>
> -against-
>
> CVS PHARMACY, INC., CVS ATLANTIC AVENUE, LLC., NORSE NOMINEE CORP., GREENS-KEEPER OF NASSAU, INC., and SNOW MANAGEMENT GROUP,
>
> Defendant.
>
> ----------x

The entire decision is as follows:

> "Defendant Greens-Keeper of Nassau, Corp.'s unopposed motion for the relief sought in the notice of motion is hereby granted."

Neither the attorney for Greens-Keeper nor the one-line decision explain the circumstances surrounding the reasons for the Carbone's attorneys to not oppose the motion. More importantly, ¶ 28 of the Reply Affirmation raises the issue of another "slip and fall at the same premises in December of 2002." Nevertheless, David Graber, the assistant manager of defendant CVS testified at his examination before trial on November 9, 2006, as follows (Graber pg. 60, line 16):

> Question: Other than this woman's [plaintiff, Amelkin] claimed accident, do you know of anyone else claiming to have fallen on ice in that particular

parking lot within a week before the accident?

Answer: No.

The attorneys for CVS-SMG in the present action were also the attorneys for CVS-SMG in the *Carbone* action arising out of an alleged slip and fall on ice in December, 2002 at the same location as the subject accident. CPLR 3101(1) provides for "full disclosure of all matters material and necessary in the prosecution or defense of any action. . ." to assist in the preparation for trial by "sharpening the issues and reducing delay and prolixity." *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403.

Plaintiff's expert James R. Nobile, a certified consulting meteorologist, stated in an affidavit sworn to July 31, 2007 (Affirmation in Opposition, Exhibit B) that:

> "In my opinion, within a reasonable degree of meteorological certainty, the presence of ice patches on outdoor surfaces on December 11, 2002 at 1:00 A.M., and specifically within the parking lot wherein this incident occurred, are a direct result of the enhanced melting, leakage and re-freezing of moisture onto the cleared areas adjacent to the snow piles created by the initial plow after the December 5, 2002 snow storm, nearly one week prior. Such events caused the formation and reformation of ice sheets from December 6, 2002 through the time of this incident. Without the daily application of salt or sand to the parking lot, icy and slippery conditions would be prevalent throughout the entire parking area at the times when temperatures were sufficiently low enough for re-freezing to occur. On December 10, 2002, the maximum temperature reached 38 F, well above freezing. At the time of this incident, at 1:00 AM EST December 11, 2002, the temperature was 29 F, well below freezing. (¶ 9).

In a document annexed to his affidavit entitled DocuWeather,

USA, Mr. Nobile states:

> "Meteorologists (and people in general) sometimes refer to the term "black ice." This refers to a very thin, translucent, almost microscopic coating of ice, which usually forms on initially dry, sub-freezing exposed outdoor surfaces in the presence of a trace moisture source, such as freezing drizzle and/or fog. It is very difficult, if not impossible, to detect visually. Its translucent nature would cause black paved surfaces (blacktop) to appear black (as opposed to other forms of ice and snow, which appear white or opaque), hence the term "black" ice. Non-black surfaces would appear as they normally would in its presence. Since the necessary conditions for its formation did not exist through this time on this date, or on days prior, no black ice condition would have existed at the time of loss. Ice which was present at this time was of the visible (opaque or white) variety."

There is an issue of fact as to whether CVS had notice of the ice condition. There is an issue of fact as to the origin of the icy conditions. Plaintiff has raised an issue of fact as to whether defendant had sufficient time to remedy the "alleged dangerous condition." There is an issue of fact as to whether the ice upon which plaintiff fell was the result of the snow accumulation from December 5, 2002. The evidence must be considered in a light most favorable to the plaintiff. *Simmons v Metropolitan Life Insurance Company, et al.*, 84 NY2d 972. In a motion for summary judgment the court may not weigh the credibility of the affiants unless it clearly appears that issues are not genuine but feigned. *See Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439. The assertions of the defendants during their examinations before trial that they did not know or remember other claims made by anyone else falling on ice in that particular parking lot within close proximity in time

to the subject accident when the *Carbone* action was pending precludes this Court finding as a matter of law that the defendants CVS and SMG did not have constructive notice, that is, they did not have a reasonable time within which to discover and remedy the alleged icy condition. *See Gordon v American Museum of American History*, 67 NY2d 836. The Court has considered the remaining arguments and find them to be without merit.

The motions for summary judgment are denied.

This decision constitutes the order of the court.

Dated: OCT 10 2007

KENNETH A. DAVIS J.S.C.

ENTERED
OCT 12 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE