Cozzi v County of Nassau
2008 NY Slip Op 31045(U)
April 7, 2008
Supreme Court, Nassau County
Docket Number: 0789-04/
Judge: Edward W. McCarty
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.

[* 1]

ENTERED IN COMPUTER

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. EDWARD W. MC CARTY, III
Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

ROBERT COZZI AND JASMIN COZZI,

Plaintiff(s)

INDEX No. 789/04

-against-

COUNTY OF NASSAU, TOWN OF HEMPSTEAD AND LONG ISLAND RAILROAD d/b/a MTA LONG ISLAND RAILROAD,

MOTION DATE: 12/06/07
MOTION SEQ.# 001-002-003

Defendant(s)

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Cross-Motion	XX
Answering Affidavit	XXX
Replying Affidavits	XXX

Motion (#001) by defendant County oF Nassau for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint and any and all cross claims against the County; cross motion (#002) by defendant Town of Hempstead for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint and any and all cross claims against the Town; and cross motion (#003) by defendant Long Island Rail Road d/b/a MTA Long Island Railroad (hereinafter, "LIRR") for an order granting summary judgment to the LIRR, are granted.

This personal injury action arises from plaintiff Robert Cozzi's slip and fall on an icy or snowy sidewalk near the Baldwin LIRR station on February 10, 2003, at approximately 5:45 p.m.

Defendants County and Town seek to dismiss the complaint and any and all cross claims against them on the ground that neither the County nor the Town had received prior written notice of the alleged snow or ice condition on the sidewalk where the injured plaintiff's accident occurred. Pursuant to Section 12-4.0(e) of the Administrative Code of Nassau County and Chapter 6 of the Code of the Town of Hempstead, the County and the Town, respectively, must receive prior written notice of a defective sidewalk condition as a condition precedent to a civil action. Plaintiffs concede that neither defendant County, nor defendant Town, were given the requisite prior written notice of the snow or ice condition which allegedly caused the injured plaintiff's slip and fall.

However, an exception will be made to the statutory prior written notice rule where the municipality created the alleged hazard through "an affirmative act of negligence." (See, *Amabile v City of Buffalo,* 93 NY2d 471, 474.)

Plaintiffs attempt to raise an issue of fact that defendant County created the alleged snowy or icy condition on the subject sidewalk by offering the deposition testimony of a County snow plow operator who when asked if when plowing the road, snow "ever" went beyond the curb onto the sidewalk, answered "yes" (Siebert EBT, p. 33, lines 10-14). However, he further testified that he had never observed snow being pushed onto the sidewalk at the subject location as a result of the County's plowing (Siebert EBT, pp. 20-21, lines 13-17, 2), and he himself had never pushed snow onto a sidewalk (Siebert EBT, p. 25, lines 9-10). Testimony that snow plows occasionally push snow onto sidewalks while clearing roads is insufficient to demonstrate "an affirmative act of negligence" on the part of defendant County. (See, *Connerton v City of Binghamton,* 236 AD2d 685.) Moreover, it should be noted that evidence was submitted that the County had not plowed the road adjacent to the sidewalk where the injured plaintiff's accident occurred since February 7, 2003 and the accident occurred on February 10, 2003, after defendant Town had shoveled and salted the sidewalk on February 7, 2003 and February 10, 2003. Thus, any speculation that defendant County's plowing of the adjacent road may have deposited snow on the subject sidewalk, in addition to being unsubstantiated, would be irrelevant given defendant Town's subsequent work clearing the sidewalk.

Therefore, due to the conceded lack of prior written notice to defendant County and due to plaintiffs' failure to raise a triable issue of fact that defendant County was affirmatively negligent, defendant County's motion (#001) for summary judgment dismissing plaintiffs' complaint and all cross claims against it is granted.

With regard to defendant Town's cross motion for summary judgment, in light of plaintiffs' concession that defendant Town had no prior written notice of the alleged sidewalk defect, defendant Town is entitled to summary judgment unless plaintiffs raise a triable issue of fact with respect to whether the Town affirmatively created a dangerous condition which caused the injured plaintiff to fall. (See *Lopez v Town of Hempstead, __AD3d__, __NYS2d__,* 2008 WL 893918.) Plaintiffs have failed to offer any evidence of such affirmative negligence.

Failure to remove snow and ice is an act of omission, not an act of affirmative negligence (See, *Bucellato v County of Nassau,* 158 AD2d 440.) Moreover, one who attempts to remove ice or snow from a sidewalk is not liable solely for failure to remove all ice and snow, but may be liable if the removal efforts made the sidewalk more dangerous. (See, *Joseph v Pitkin Carpet, Inc.,* 44 AD3d 462.) Plaintiffs failed to raise any issue of fact that defendant Town of Hempstead's snow removal efforts made the sidewalk where the injured plaintiff fell more dangerous. (See, *Gjoni v 108 Rego Developers Corp.,* 48 AD3d 514.)

Defendant Town's cross motion (#002) for summary judgment dismissing the complaint and all cross claims against it is granted.

Defendant LIRR has also cross moved for summary judgment dismissing the complaint. The LIRR argues that it may not be held liable for the injured plaintiff's accident because snow removal at the scene of the accident was assumed by defendant Town. This argument is without merit. A common carrier, such as defendant LIRR, must maintain a safe means of ingress and egress for its passengers. This duty applies even to areas owned and maintained by others if "constantly and notoriously" used by passengers as a means of approach, and such duty may not be delegated to another. (See, *Bingham v New York City Transit Authority,* 8 NY3d 176). The case cited by defendant LIRR in support of this argument: *Ambriano v Town of Oyster Bay,* 266 AD2d 415, is inapposite, as it dealt with snow removal in Town owned parking lots. The snow removal at issue herein involved an area steps away from a stairway which led to the LIRR train platform. The Town's assumption of snow removal duties in that area does not absolve defendant LIRR from liability herein.

However, defendant LIRR also raises the additional argument that all of the defendants are entitled to summary judgment due to applicability of the ongoing storm doctrine, which holds that a "property owner will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing

storm or for a reasonable time thereafter." (See, *Solazzo v New York City Transit Authority,* 6 NY3d 734,735.)

Defendant LIRR submitted certified climatology records, as well as the affidavit of a meteorologist, to establish that it was snowing on the date of the subject accident, both before and after the accident occurred. While plaintiffs attempt to find flaws in the data and the meteorologist's interpretation of same, such efforts are insufficient to raise an issue of fact as to whether it was snowing at the accident site. (See, *DeStefano v City of New York,* 41 AD3d 528; *Skouras v New York City Transit Authority,* 48 AD3d 547.) It is particularly difficult for plaintiffs to raise an issue of fact in this regard since the injured plaintiff himself in his deposition testified that it was snowing at the time of his accident. (R. Cozzi EBT, p. 82, line 2).

Therefore, defendant LIRR's cross motion (#003) for summary judgment is also granted.

Motions (#001, #002 and #003) granted.

Complaint dismissed.

Date 4.7.08

EDWARD W. McCARTY III

J.S.C.

X X X

ENTERED

APR 09 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE