Tricoukes v Birchwood on the Green Owners Corp.

2008 NY Slip Op 31518(U)

April 30, 2008

Supreme Court, Suffolk County

Docket Number: 0003875/2004

Judge: Martin J. Kerins

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SHORT FORM ORDER

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INDEX No. 04-3875
CAL. No. 07-01742-OT

SUPREME COURT - STATE OF NEW YORK
IAS PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. MARTIN J. KERINS
Justice of Supreme Court

MOTION DATE 11-29-07
ADJ. DATE 2-21-08
Mot. Seq. # 002 - MG

---X
CATHERINE TRICOUKES,

Plaintiff,

- against -

BIRCHWOOD ON THE GREEN OWNERS CORP., MICHAEL'S COMPLETE LAWN MAINTENANCE, INC. and SPIRE MANAGEMENT CORP.,

Defendants.
---X

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13 - 14 ; Replying Affidavits and supporting papers 15 - 16 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Birchwood on the Green Owners Corp. and Spire Management Corp. for summary judgment dismissing plaintiff's complaint is granted.

Plaintiff Catherine Tricoukes commenced this action to recover damages for injuries allegedly sustained as a result of a slip and fall accident that occurred on February 4, 2004 at an apartment complex located on Wilshire Lane in Oakdale, New York. Defendant Birchwood on the Green Owners Corp., a cooperative housing corporation, allegedly owns the apartment buildings and defendant Spire Management Corp. allegedly manages the premises. Plaintiff, a resident at the premises, allegedly slipped and fell on an accumulation of ice as she was walking on the sidewalk outside of her apartment. By her bill of particulars, plaintiff alleges that defendants failed to maintain the premises in a reasonably safe and proper condition, and allowed an icy condition to exist on the sidewalk.

Defendants Birchwood and Spire now move for summary judgment dismissing all claims against them on the ground that they did not create nor have notice of the alleged dangerous condition on the

property. In support of the motion, defendants submit the pleadings, copies of the parties' deposition transcripts, and the affidavit of Arthur Hansen, the superintendent of the subject premises. Mr. Hansen states in his affidavit that at no time prior to February 4, 2004 was he aware of any icy conditions on the sidewalk in front of plaintiff's apartment. The affidavit further states that Mr. Hansen conducted inspections of the sidewalks on the days prior to the accident without discovering ice or snow accumulations and that after the accident he inspected the area where the plaintiff fell and found it clear of snow and ice. In opposition, plaintiff contends that defendant's summary judgment motion should be denied, because a triable issue exists as to whether defendants had notice of the icy condition on the sidewalk in front of plaintiff's apartment.

At her examination before trial, plaintiff testified that she left her apartment to go to work at approximately 6:00 a.m. the day of the accident. She testified that it snowed the night before the accident, but had stopped snowing sometime in the morning. She testified that there was a dusting of snow covering the sidewalk the morning of the accident, and that snow had been cleared from the sidewalk the night before she fell. Plaintiff testified that she slipped on black ice, and that she did not see any ice on the sidewalk prior to the accident. She testified that she was not aware that anyone had fallen on the sidewalk before her accident, and that she did not make any complaints to defendants with respect to the conditions of the sidewalk prior to the accident. Plaintiff further testified that on the day before the accident, she overheard the superintendent Mr. Hansen listening to his answering machine, which contained messages complaining about ice on the premises.

Arthur Hansen testified that he is employed by defendant Birchwood and was employed as the superintendent of the apartment complex at the time of the accident. He testified that his duties as superintendent involved maintaining the inside of the apartments as well as the outside property including the sidewalks and walkways to the apartments. He testified that after he learned plaintiff had slipped on the sidewalk, he went to inspect the area but could not recall what he saw. He further testified that he believes that there was snow along the edges of the sidewalk, but that the sidewalk itself was clear of snow. Mr. Hansen testified that he does not recall whether he assigned any employees to clear the subject area of snow and ice during the two days prior to the accident. He testified that he did not recall whether he went to clear the subject area of snow and ice. Mr. Hansen also testified that he does not recall whether there were any complaints regarding an accumulation of snow or ice on the premises during the days leading up to the accident.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see*, ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487,

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521 NYS2d 272 [1987]).

To prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see*, ***Scoppettone v ADJ Holding Corp.***, 41 AD3d 693, 839 NYS2d 116 [2007]; ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [1995]). 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 the defendant's employees to discover and remedy it (*see*, ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2004]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see*, ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]).

Defendants established prima facie that they neither created the icy condition on the sidewalk where plaintiff slipped, nor did they have actual or constructive notice of the condition (*see*, ***Voss v D&C Parking***, 299 AD2d 346, 749 NYS2d 76 [2002]). In the superintendent's affidavit, he stated that he was at no time aware of any icy conditions on the sidewalk in front of plaintiff's apartment and that he inspected the that area during the days leading up to the accident and did not discover ice accumulations. Furthermore, plaintiff testified that she slipped on black ice which was not visible and that there was a dusting of snow covering the ice. The burden, therefore, shifted to plaintiff to raise a triable issue as to whether defendants had actual or constructive notice of the icy condition (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, *supra*).

Plaintiff, in opposition, relied on her testimony that she heard the superintendent, Mr. Hansen, listening to complaints by residents regarding the icy condition of the premises that had been left on his answering machine. Statements which are not offered to establish the truth of the facts asserted therein are not hearsay (*see*, ***Gelpi v 37th Ave. Realty Corp.***, 281 AD2d 392, 721 NYS2d 380 [2001]; ***Stern v Waldbaum, Inc.***, 234 AD2d 534, 651 NYS2d 187 [1996]). Plaintiff's testimony about the complaints she overheard are not offered to establish that the condition of the sidewalk was icy, but to demonstrate that the superintendent had actual notice of the alleged defect. However, this evidence is insufficient to defeat summary judgment as plaintiff was not able to testify as to the sum and substance of the complaints, especially the location of the complained of icy conditions. Defendants' general awareness that some dangerous condition may have existed somewhere on the premises is insufficient, as a matter of law, to charge it with constructive notice of the specific condition, namely black ice concealed by a dusting of snow on the sidewalk in front of plaintiff's apartment, which allegedly caused plaintiff's injuries (*see*, ***Piacquadio v Recine Realty Corp.***, *supra*; ***Baumgartner v Prudential Ins. Co. Of Am.***, 251 AD2d 358, 674 NYS2d 84 [1998]).

As plaintiff's submissions failed to establish any triable issues of fact, summary judgment dismissing the complaint and the cross claim against defendants Birchwood on the Green Owners Corp.

and Spire Management Corp. is granted. The action is severed and continued against the remaining defendant.

Dated: April 30, 2008
RIVERHEAD, NY

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**