

Muniz v 625 Caton Ave. Owners Corp.

2008 NY Slip Op 31912(U)

June 19, 2008

Supreme Court, Kings County

Docket Number: 0012637/2006

Judge: Mark I. Partnow

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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of June, 2008.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

----- X

NELSON A. MUNIZ,

Index No. 12637/06

Plaintiff,

- against -

625 CATON AVENUE OWNERS CORP.,
KATZ MANAGEMENT, INC., AND DAVID KATZ,

Defendants,

----- X

The following papers numbered 1 to 7 read on this motion:

| | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____ | 1-2 _____ |
| Opposing Affidavits (Affirmations) _____ | 3-6 _____ |
| Reply Affidavits (Affirmations) _____ | 7 _____ |

Upon the foregoing papers, defendants 625 Caton Avenue Owners Corp. (625 Caton) and David Katz (Katz) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as against them.¹

¹ By stipulation dated July 14, 2006, this action against Katz Management, Inc. was discontinued with prejudice.

Factual Background

Plaintiff Nelson A. Muniz (the plaintiff) seeks to recover damages for personal injuries sustained on February 14, 2006,² at approximately 7:45 p.m., when he allegedly slipped and fell on a patch of ice on a public sidewalk adjacent to the residential apartment building, located at 625 Caton Avenue in Brooklyn, owned by 625 Caton and managed by Katz. As a result of the accident, the plaintiff sustained a fracture and dislocation of the ankle which required open reduction and internal fixation with screws and plate.

Local Climatological Data published and certified by the National Climatic Data Center of the United States Department of Commerce for the month in issue, submitted by the plaintiff, indicates that it snowed 15 inches on February 12th, that 14 inches of snow remained on the ground on February 14th, the day of the accident, and that the high and low temperatures for the days leading up to and including February 14th were 28/23 (February 12th), 34/20 (February 13th) and 39/28 (February 14th). On the day of the plaintiff's accident, the average temperature was 34 degrees, and at the time of the plaintiff's accident, 38 degrees.

In their motion for summary judgment, 625 Caton and Katz (the defendants) argue that they did not create or have actual or constructive notice of the alleged icy condition, or have a reasonably sufficient time to remedy it. The plaintiff counters that there is a material

² Unless otherwise noted, all dates refer to the year 2006.

issue of fact as to whether the defendants were negligent; hence, summary judgement must be denied.

Discussion

Liability will not be imposed against a property owner for snowy or icy conditions unless it (1) “had actual notice, or in the exercise of due care, should have had notice of the conditions, and had a reasonably sufficient time from the cessation of the precipitation to remedy the condition caused by it” (*Tsvivitis v Sivan Assocs., LLC*, 292 AD2d 594, 594-595 [2002]; *Powell v Volunteers of America-Greater New York, Inc.*, 2008 NY Slip Op 51150 [U], *3 [2008]), or (2) “created a dangerous condition” (*Cody v Dilorenzo*, 304 AD2d 705, 705 [2003]). In cases where the landowner is alleged to have created the dangerous condition, evidence of actual or constructive notice is not required (*see Fiperoa v Lazarus Burman Assocs.*, 269 AD2d 215, 217 [2000]).

The defendants argue that they did not create the alleged dangerous condition or have actual or constructive notice of it, by citing to the deposition testimony of the building superintendent, Erdogan Yalcin. Mr. Yalcin testified, through a translator, that: (1) he had been employed by the defendants at the time of the plaintiff’s accident; (2) in the event of a snowstorm, he shoveled the snow and cleaned the ice once the snow ceased falling; (3) his custom and practice was to shovel a path through the snow to “open a space [large] enough for people to pass by”; (4) he would check to see if any ice formed in the areas where he had

shoveled; (5) if there were ice on the sidewalk, he would apply more salt; and (6) he checked the sidewalk three times daily, by walking on it, to determine whether it was clean and non-slippery. Mr. Yalcin, however, kept no written log of his snow-cleaning/sidewalk-inspection activities. Other than the superintendent's self-serving testimony, the defendants have submitted no expert reports or weather-related data.

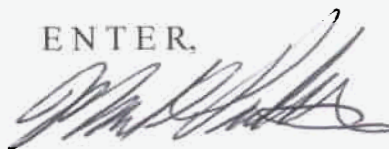
In opposition, the plaintiff contends that he provided proof that the alleged icy condition that caused his fall resulted either from the failure to adequately clean the sidewalk after the February 12th snowstorm or from the thawing and re-freezing of the snow accumulation of February 12th, since there was no further precipitation in the days leading up to and including the date of plaintiff's accident. Specifically, the plaintiff's meteorologist, Mr. Robert B. Cox, opined that the ice formation, which allegedly caused the plaintiff's accident, had been on the ground as of the evening of February 13, a time period of approximately 24 hours prior to the accident. In a detailed affidavit backed by certified Local Climatological Data, Mr. Cox explained that: (1) the low temperature dropped into the mid-20's shortly before 7:00 a.m. on February 14; (2) the high temperature reached 39 degrees in the late afternoon on that day and remained above freezing prior to midnight; (3) at the time of the accident (7:45 p.m. on February 14), the temperature was 38 degrees and some water on the ground would have been present due to melting snow; (4) with a temperature of 38 degrees, new ice was not forming; (5) the manner by which the sidewalk at issue was partially cleared of snow (as was depicted in the photographs taken by the plaintiff's

girlfriend shortly after the accident and as described in the plaintiff's deposition testimony) created two snow mounds, one on each side of the pedestrian path; and (6) this created the setting for snow-melt and re-freezing of standing water into ice in the pedestrian path.

Here, evidence that the last snowfall occurred two days prior to the accident, that at least 14 inches of snow remained on the ground on the day of the accident (according to the Local Climatological Data), and that the minimum temperature for the three consecutive days preceding the accident was below freezing, raises a question of fact as to whether the ice upon which the plaintiff fell was residue of that prior snow fall and whether the defendants had sufficient time to remedy it (*see Scott v Redl*, 43 AD3d 1031, 1033 [2007]; *Rivas v New York City Housing Auth.*, 261 AD2d 148, 148 [1999]; *Maldonado v New York City Transit Auth.*, 261 AD2d 515, 515 [1999]). Further, in light of the superintendent's testimony that the entire sidewalk had not been cleared of snow, but that only a shovel-width pedestrian path was created, and the deposition testimony of the plaintiff and his girlfriend that there was ice in the pedestrian path, a question of fact exists as to whether the defendant's superintendent negligently shoveled the snow and, by virtue of the snow-melt, caused the formation of the ice on which the plaintiff slipped (*see Ricca v. Ahmad*, 40 AD3d 728, 729 [2007]; *Knee v Trump Village Constr. Corp.*, 15 AD3d 545, 546 [2005]; *Cody*, 304 AD2d at 705; *Grillo v Brooklyn Hosp.*, 280 AD2d 452, 453 [2001]; *Grizzaffi v Paparodero Holding*

Corp., 261 AD2d 437, 438 [1999]). In view of the foregoing, the defendants' motion is denied.

This constitutes the decision and order of the court.

ENTER,


J. S. C.

HON. MARK I. PARTNOW J.S.C.