

Jones v Bank of N.Y.

2008 NY Slip Op 32572(U)

September 19, 2008

Supreme Court, Suffolk County

Docket Number: 0026162/2004

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**

P R E S E N T :

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 7-31-08
Mot. Seq. # 004 - MG; CASEDISP

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| -----X | | | |
| JACQUELINE JONES, | : | D'ERRICO DREEBEN, LLP | |
| | : | Attorneys for Plaintiff | |
| Plaintiff, | : | 1225 Franklin Avenue, Suite 245 | |
| | : | Garden City, New York 11530 | |
| - against - | : | | |
| | : | MURTAGH, COHEN & BYRNE | |
| THE BANK OF NEW YORK, | : | Attorneys for Defendant | |
| | : | 100 North Park Avenue | |
| Defendant. | : | Rockville Centre, New York 11570 | |
| -----X | | | |

Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9 - 13; 14; Replying Affidavits and supporting papers 15; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for summary judgment dismissing the complaint against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, when on the morning of February 4, 2004, she slipped and fell at defendant Bank of New York (hereinafter "the Bank"), which was located on Montauk Highway in Hampton Bays. The plaintiff had been walking toward the Bank's ATM machine, on the Bank's walkway, when she slipped and fell on black ice. The plaintiff commenced this action alleging that the Bank was negligent in failing to properly maintain, sand or salt the walkway, and in failing to warn the plaintiff of the dangerous condition.

The Bank now moves for summary judgment on the grounds that it did not create the condition, it did not have actual or constructive notice of the condition, and that it did not have a reasonable opportunity after the precipitation ended to remedy the condition. In support of its motion, the defendant submits, *inter alia*, the plaintiff's deposition, and points to the portion of testimony wherein the plaintiff stated that the accident occurred at approximately 8:30 or 9:00 in the morning. The plaintiff also

testified that she had been at a deli across the street from the Bank, and upon realizing that she had no cash, decided to go to the Bank's ATM machine. The plaintiff described the weather that morning as being wet and slick, that it had been snowing all night, that there was a light covering of snow on the grass, and that there was a black ice warning on the radio. The plaintiff testified, however, that by the time she was walking toward the Bank, it was no longer snowing. She explained that she walked diagonally across Montauk Highway and stepped over a mound of snow, onto grass, and then, because the sidewalk was wet and slick, she again stepped onto the grass. The plaintiff alleged that she proceeded on the grass, and then left the grass to walk on the Bank's walkway. She testified that before she stepped onto the walkway, she observed that "it was slick, wet. Looked like a puddle." The plaintiff alleged that she put one foot down and fell. Lastly, the plaintiff testified that no personnel from the Bank came to her aid at any time after the accident.

The Bank also submits the affidavit of Jeanne Tegins, who was the branch manager of the Hampton Bays branch on February 4, 2008. Ms. Tegins alleges that as branch manager she is the first to enter the building, arriving at approximately 8:15 a.m., and that she enters through a west-facing door that is closest to the parking lot at the rear of the building. Ms. Tegins states that this is a separate entrance from the north-facing door leading to Montauk Highway, which is not used by employees and not unlocked until 9:00 a.m. She explains that upon arrival, her duties include turning on the computers, processing night drop deposits, opening the vault and administrative paper work. Ms. Tegins states that snow removal at this branch during the winter of 2003-2004 was handled by Rapid Recovery, who would plow the parking lot and shovel the walkways following a storm. She alleges that Rapid recovery would return to salt any icy condition, on occasion, at her specific request. She also alleges that if, upon her arrival at the branch, she observed any ice on the grounds, she would call Rapid Recovery to do salting and sanding. In addition, Ms. Tegins alleges that the branch opened for business at 9:00 a.m., and at that time, the front door (facing Montauk Highway) would be unlocked. She alleges that the front walk would be visually checked at the point when the front door was opened. Ms. Tegins asserts that at no time prior to learning of the plaintiff's fall was she made aware of any icy conditions at the premises, particularly at the front entrance area. She further claims that she encountered no ice or snow accumulations as she entered the bank from the rear entrance on February 4, 2004, that would have warranted a call to the Bank's snow removal contractor. Lastly, Ms. Tegins alleges that there was no liquid discharged onto the front walkway from the bank building that would cause or create an ice condition on the front walkway.

The Bank again points out that the plaintiff testified that the accident occurred at 8:30/9:00 o'clock in the morning following a storm that had lasted all night. It argues that assuming these facts in the plaintiff's favor, it is clear that it did not have a reasonable opportunity after the alleged precipitation ended to discover and remedy the alleged condition. It contends that businesses are run by people who are not expected to get out of bed in the middle of the night to begin snow and ice removal activities. The Bank also maintains that the plaintiff herein did not see the patch of ice on the walkway where she fell and she testified that the walkway looked wet. Additionally, the Bank asserts that the affidavit of Ms. Tegins establishes that it did not create the alleged ice condition nor did it have any actual or constructive notice of its existence. The Bank argues that it is thus entitled to summary judgment.

The plaintiff opposes this motion and in opposition, submits the Bank's accident report which places the time of the accident at 9:00 a.m., and the report of the Hampton Bays Ambulance Co., which notes that accident was reported at 9:06 a.m. The plaintiff alleges that all the witnesses have testified that the accident occurred prior to the time the Bank opened its front door for business on the day in question, that is 9:00 a.m., and probably shortly before such time. The plaintiff also points out that the report of the Hampton Bays Ambulance Co. indicates that the plaintiff was "found on the ground- on a sheet of ice on a walkway." Additionally, the plaintiff submits the deposition testimony of Ms. Tegins and highlights that portion of Ms. Tegins' testimony wherein she stated that if, while she was entering the building, she noticed snow or ice, she would call the snow removal contractor, when the parking lot and walkway to the building seemed unsafe in her opinion. The plaintiff points to Ms. Tegins' testimony wherein she stated in pertinent part that on the morning of the accident she entered the bank at approximately 8:15, and that from the parking lot behind the bank, as well as from the west entrance from where she entered the bank, she could not see the front of the building. The plaintiff argues that Ms. Tegins never inspected the front of the building or walkway upon which the plaintiff fell at any time prior to this accident.

In further opposition, the plaintiff submits the deposition testimony of Grace Kiernan, who was employed as a customer service representative at the Bank's Hampton Bays branch at the time of the accident. The plaintiff alleges that Ms. Kiernan's testimony is important for two reasons: 1) she was the first employee of the Bank to become aware that the plaintiff had fallen; and 2) she had been previously been a branch manager for the Bank for ten years, albeit at another branch. The plaintiff highlights that portion of Ms. Kiernan's testimony wherein she testified to the effect that as a branch manager, if she observed ice along the walkways of her branch location she would call the Bank's facilities department to take care of the problem, and "If nobody was there and I was going to open the branch, I would go down and get what they left in the basement [such as salt] and scatter it." Ms. Kiernan also testified that on the morning of the accident something caught her attention out the front window the bank, perhaps an ambulance, and she saw that there was a woman on the ground. Ms. Kiernan stated that she went outside the front door, and she observed the woman on the ground, another woman, and an EMT. She explained that she started to walk toward the woman on the ground, walking about twenty feet, but when she got to within approximately ten feet of the woman, the EMT worker told her not to come any closer, it was very slippery. Ms. Kiernan stated that she went back inside, got her coat, went down to the basement and got salt, and started to spread it around so that no one else would fall. She testified to the effect that she did not spread the salt on the Bank's porch, as the porch was fine, but she spread the salt towards the front of the property. Ms. Kiernan alleged that she does not remember snow on the ground, and that she does not believe it snowed the day before the accident. She also stated that she did not recall there being any ice in the parking lot in the morning after she left her car and was walking to the bank. and that she did not have to walk gingerly.

Also in opposition, the plaintiff submits her affidavit and alleges in pertinent part that after her fall, as she was laying on the ground, she heard the EMT ask Ms. Kiernan why something was not done about the dangerous condition of the walkway, whereupon Ms. Kiernan responded, "The guy never showed up to salt and sand this morning."

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The plaintiff argues that from this evidence it is clear that the Bank's branch manager had a duty to make an inspection of the exterior of the branch to make sure it was safe for customers. She asserts that on the day in question, Ms. Tegins never took the opportunity to inspect the front of the bank or the walkway that approached from Montauk Highway to the front door. The plaintiff contends that Ms. Tegins had approximately 30 minutes within which she could have examined the front of the property, made a call to Rapid Recovery, and accessed the salt in the basement thereby attempting to make an icy situation safe. The plaintiff claims that this accident could have been avoided and that Ms. Tegins did nothing. She maintains that issues of fact exist as to whether the branch manager's failure to inspect the front of the building constitutes constructive notice and whether the bank had sufficient time to put down salt or warn people of this dangerous condition.

It is well settled that an owner of real property may be liable for hazardous snow or ice conditions on their property as a result of the natural accumulation of snow or ice only upon a showing that the property owner had actual or constructive notice of such hazardous condition and that a reasonably sufficient period of time elapsed since the cessation of the precipitation to permit the property owner to correct the condition (*Lee-Pack v 1 Beach 105 Associates, LLC*, 29 AD3d 644, 814 NYS2d 275 [2006]). In addition, "[t]o 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 [a] defendant's employees to discover and remedy it" (*Altro v Wal-Mart Stores, Inc.*, 282 AD2d 487, 488; 723 NYS2d 213, 214 [2001], *lv appeal denied* 97 NY2d 612 [quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837]).

Viewing the evidence in a light most favorable to the plaintiff, as a court must on a defendant's motion for summary judgment, the court nevertheless finds that the Bank has demonstrated its entitlement to summary judgment dismissing the complaint against it (*see, Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 834 NYS2d 503 [2007]). First, there is no evidence herein that the Bank had actual notice of the icy walkway. Ms. Tegins' affidavit establishes that at no time prior to plaintiff's fall was she made aware of icy conditions at the premises, nor did she encounter any ice as she entered the bank. In addition, there is no evidence of constructive notice. "Black ice" is a term generally used to describe ice that is difficult to see (*Lewis v Bama Hotel Corporation*, 297 AD2d 422, 745 NYS2d 627 [2002]). The plaintiff's deposition testimony described the walkway as looking wet, "like a puddle," and the plaintiff's response to the demand for a bill of particulars described the walkway as being coated with black ice, "which could not be readily detected." Such description establishes that the ice was not visible and apparent (*see, Carricato v Jefferson Valley Mall Limited Partnership*, 299 AD2d 444, 749 NYS2d 575 [2002]). Moreover, accepting as true for the purposes of this motion the plaintiff's deposition testimony that it had been snowing "all night" and that it was not snowing at the time she was walking toward the bank, there is no evidence to establish when the precipitation actually ended. Without such evidence there is no rational basis to support a finding that the Bank had a reasonable opportunity to remedy the alleged hazardous condition following the cessation of the precipitation, or that the Bank had constructive notice of the condition (*see, Brunson v National Amusements, Inc.*, 292 AD2d 413, 739 NYS2d 407 [2002]). If the precipitation ended right before dawn on February 4th, the Bank's employees would not have had reasonably sufficient time to remedy the condition prior to the plaintiff's fall (*see, Urena*

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v *New York City Transit Authority*, 248 AD2d 377, 669 NYS2d 662 [1998]).

The plaintiff's submissions in opposition fail to raise a triable issue of fact. Ms. Kiernan's deposition testimony, supports the defendant's contention that the icy condition was not visible and apparent, since Ms. Kiernan testified that she walked to within ten feet of the plaintiff and had to be warned of the ice by the EMT worker. As to the plaintiff's argument that had Ms. Tegins inspected the front walkway when she first arrived at work she would have noticed the black ice, on this record, any finding that the ice was present at 8:15 a.m. would be pure speculation (*see, Urena v New York City Transit Authority, supra*). Furthermore, simply because the Bank kept salt on hand in case of icy conditions, is insufficient to defeat the Bank's prima facie case. The Bank's general awareness that icy conditions may occur is insufficient as a matter of law to charge it with constructive notice of the specific condition, that is, this patch of black ice (*see, Voss v D&C Parking*, 299 AD2d 346, 749 NYS2d 76 [2002]). Finally, the plaintiff's allegation that after her fall she heard Ms. Kiernan state that, "The guy never showed up to salt and sand this morning" is a feigned issue of fact designed to defeat the Bank's motion (*Makaron v Luna Park Housing Corporation*, 25 AD3d 770, 809 NYS2d 520 [2006]). At her deposition, the plaintiff did not even remember anyone from the Bank coming to her aid. Accordingly, the plaintiff failed to rebut the Bank's prima facie showing that it had no actual notice or constructive notice of the icy condition of the walkway, and that it was not afforded a sufficient period of time to remedy that condition (*McKeown v Stanan Management Corporation*, 274 AD2d 460, 710 NYS2d 633 [2000]). Therefore, the Bank's summary judgment motion dismissing the complaint against it is granted.

Dated: _____

9/19/08

Emily Pines
J.S.C.