Sarr v Gateway Props., L.P.
2008 NY Slip Op 32741(U)
September 23, 2008
Supreme Court, New York County
Docket Number: 101135/06
Judge: Shirley Werner Kornreich
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SCANNED ON 10/7/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHIRLEY WERNER KORNREICH PART 54

Index Number : 101135/2006
SARR, BAFFA
VS.
GATEWAY PROPERTIES, L.P.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 101135/06
MOTION DATE 6/5/08
MOTION SEQ. NO. 2
MOTION CAL. NO.

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/23/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

--- X

BAFFA SARR,

Plaintiff,

Index No.: 101135/06

-against-

DECISION and ORDER

GATEWAY PROPERTIES, L.P., JANUS PARTNERS, LLC and GIRLS INCORPORATED OF NEW YORK,

Defendants.

FILED OCT 07 2008 COUNTY CLERK'S OFFICE NEW YORK

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KORNREICH, SHIRLEY WERNER, J.:

This action arises out of a slip and fall that occurred on January 24, 2004, on a sidewalk in front of property located at 214-216 West 116th Street, New York, N.Y (the Premises). Defendants now move for summary judgment, pursuant to CPLR § 3212, on the grounds that it neither created the condition which caused plaintiff's accident nor had actual or constructive notice. Plaintiff opposes.

I. Background

In support of its motion, defendants submit the examinations before trial of the plaintiff Baffa Sarr and of Doris Rowley-Hoyte, an executive assistant/office manager for defendant Girls Incorporated of New York (Girls Incorporated). Plaintiff Baffa Sarr avers the following. On January 24, 2004, at approximately 4 p.m., while on her way to work, she slipped and fell on a patch of ice located in front of the Premises. Ms. Starr avers that while she was walking she did not notice any snow or ice on the ground in the area where she fell. However, she avers that following her fall, she noticed a patch of ice to her immediate left. It did not rain or snow on the day of the accident. The last snowfall occurred approximately four or five days prior. At the time of the accident, plaintiff was walking by herself and there were no witnesses.

Doris Rowley-Hoyte avers that her administrative duties at Girls Incorporated included making sure that the Premises were kept clean and in "good working order" including arranging for snow and ice removal. She avers that Girls Incorporated leased its space from defendant Gateway Properties, L.P. (Gateway). According to Ms. Rowley-Hoyte, John Montague, the Premises' super, an unidentified individual "at the church on the corner" or Laquin Green would clean and remove any snow or ice in front of the Premises on an as needed basis. She further avers that Girls Incorporated did not keep any records of snow removal.

Ms. Rowley-Hoyte states that she inspected the sidewalk in front of the Premises three times a day (in the morning, noon, and prior to leaving for the day) and that she does not remember seeing any ice on the sidewalk in front of the Premises during her inspections. In addition, she testified that she has never received any complaints regarding snow or ice removal. Ms. Rowley-Hoyte did not remember if she was working on the day of the accident. She did not learn about plaintiff's fall and subsequent injuries until one month prior to her deposition.

II. Conclusions of Law

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman,*

supra, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion. *Zuckerman, supra*, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Liability in a slip and fall action requires proof of a dangerous condition and that the defendant had actual or constructive notice of the condition prior to the fall. *Navedo v. 250 Willis Avenue Supermarket*, 290 A.D.2d 246, 247 (1st Dept 2002). For constructive notice to exist, the condition must be visible, apparent, and exist for a sufficient length of time prior to the accident so the defendant's employees can discover and remedy it. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986). One who attempts to remove snow from a sidewalk is not to be held liable simply due to a failure to remove all of the snow. *Joseph v. Pitkin Carpet, Inc.*, 44 A.D.3d 462, 463 (1st Dept 2007). However, liability will attach where snow removal efforts made the sidewalk more dangerous, i.e., by creating or exacerbating the hazard posed by the snow. *Id.*; *Nadel v. Gucinella*, 299 A.D.2d 250, 251 (1st Dept 2002).

Here, defendants offer the testimony of the plaintiff and Ms. Rowley-Hoyte as proof that they neither had notice nor created or exacerbated any hazard posed by the snow. Ms. Rowley-Hoyte testified that she does not remember seeing any ice or snow on the sidewalk during her daily inspections. She also testified that she never received any complaints regarding snow or ice removal. However, Ms. Rowley-Hoyte could not recall if she was working on the day of the

accident. Nevertheless, plaintiff testified that it did not snow on the day she fell and that the last snowfall occurred four or five days prior. She also stated that she did not see any snow or ice on the sidewalk prior to her fall. After her fall, Ms. Sarr claims she saw ice to her immediate left. The facts must at a minimum permit an inference that the defendants snow removal efforts caused the plaintiff's injury. *Nadel*, 299 A.D.2d at 251. Here, such an inference does not exist. *See Id.* (denial of defendants motion for summary judgment reversed and defendants held to not have engaged in careless snow removal where last snow fall occurred approximately 5 days prior to accident, defendant did not recall removing any snow on day of plaintiff's fall and plaintiff could not recall seeing any snow on ground at time of fall). Thus, defendants have offered enough evidence to meet their initial burden of entitlement to summary judgement.

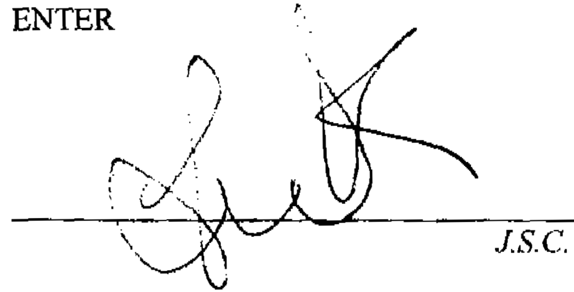
In opposition, the only evidence offered by plaintiff regarding notice of the alleged hazardous condition posed by the sidewalk is the affidavit of professional meteorologist William Sherman. In his affidavit, Mr. Sherman testified as to the general conditions that existed in the "vicinity of Central Park Station" in New York City from January 1 through January 31, 2004. Mr. Sherman did not proffer any opinion as to the origin of the specific ice in front of the Premises. Nor was his statement backed up by meteorological data. Such expert testimony is considered too speculative on the issue of notice to withstand summary judgment. *Gilbert v. Evangelical Lutheran Church in America*, 43 A.D.3d 1287 (4th Dept 2007) (affidavit of plaintiff's expert merely addressing general conditions in vicinity rather than origin of specific ice on which plaintiff fell is too speculative on issue of notice to withstand summary judgment). Plaintiff offers no other admissible evidence to support her claim besides Ms. Rowley-Hoyte's testimony as to the general snow removal habits that existed. Plaintiff does not offer any other evidence as to notice or whether the defendants created and exacerbated any hazard the ice may have posed. Consequently, plaintiff has failed to raise an issue of fact warranting a trial. *Nadel*,

299 A.D.2d at 252 (mere evidence of property owner's general habits regarding snow removal insufficient to raise an issue of fact as to whether defendant may have engaged in snow removal that led to accident); *Joseph*, 44 A.D.3d at 464 (plaintiff's claim that defendants snow removal efforts created a hazardous condition on sidewalk without any evidence in support constitutes rank speculation insufficient to defeat a motion for summary judgment). Accordingly, it is

ORDERED that defendants motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER



J.S.C.

DATE: September 23, 2008
New York, NY

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