Campoverde v Burnfort Mgt., LLC

2008 NY Slip Op 32924(U)

October 22, 2008

Supreme Court, Queens County

Docket Number: 11704/07

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

OLGA D. CAMPOVERDE,	Index No. 11704/07
Plaintiff, -against-	Motion Date August 5, 2008
BURNFORT MGMT., LLC AND GREENHILLMGMNT., LLC.,	Motion Cal. No. 5
Defendants.	Motion Seq. No. 1

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Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained on February 14, 2007 at about 11:00 a.m. due to a slip and fall on the sidewalk due to a snow/ice condition in front of premises located at 40-14 62nd Street, Woodside, in the County of Queens, City and State of New York.

Defendants Burnfort Mgmt., LLC (Burnfort) and Greenhillmgmnt., LLC (Greenhillmgmnt) move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint on the ground that there are no triable issues of fact as to any negligence on the part of defendants.

Contentions of the Parties

Defendants assert that defendant Burnfort is the owner and managing agent of the apartment building located at the subject address. Defendant Greehillmgmnt is a property management company which has no connection with the subject premises.

Defendants submit the plaintiff's deposition testimony. She testified that the accident occurred on February 14, 2007 at about 11:00 a.m. on a cold and windy day while she was walking from her apartment building, located at 39-75 62nd Street, in Woodside, towards Queens Boulevard. It had snowed during the night of February 13th leaving 8 to 10 inches of snow on the ground. It had stopped snowing at 6 a.m. on February 14th and did not snow again that day. She left her apartment at 11:00 a.m. and started to walk towards Queens Boulevard which was two blocks away. The sidewalk in front of her building had been shoveled and the street she crossed had been plowed. She walked on 62nd Street on a shoveled sidewalk for about one half of a block. As she passed the front address of the subject premises, she slipped with both feet at the same time on snow and ice located about six feet past the entrance. She was looking straight ahead while walking at a normal pace in the middle of the shoveled sidewalk. She saw no one shoveling snow and there was no evidence of any salt or sand on the sidewalk. The ice was covered with 3 inches of snow.

Defendants also submit the deposition testimony of Michael Walsh who was employed by defendants. He testified that only defendant Burnfort owns and operates the subject building. Defendant Greenhillmgmnt has no business relationship with defendant Burnfort and has nothing to do with the subject premises. The former superintendents, a husband and wife team, were responsible for the cleanliness, sanitation and light maintenance work with respect to the premises. The superintendent was responsible for the removal of snow in front of the building which had to be performed within four hours after a snowfall ceased. He specifically told the superintendent that the snow had to be removed as soon as it started to fall and he was to make multiple passages rather than wait for the snowstorm to stop. The superintendent used snow shovels, ice scrappers, brooms and salt, but not snow blowers. The snow was to be removed from the entire sidewalk and thrown either into the street or the gardens next to the building.

Mr. Walsh further testified that he also spoke to one of the former superintendents, Siobhan Galligan, after the accident. He stated that she told him that she did not know the plaintiff but that it did snow the entire day of February 14, 2007. In fact, Mr. Walsh also recalled that on February 14th there was an ongoing snowstorm throughout the day. It was snowing at 8:30 a.m. when he left his residence in Elmhurst and it was still snowing at 5:00 p.m. when he

left his office. He specifically remembered because it was Valentine's Day. When he spoke to Mrs. Galligan about the snowstorm she told him that the sidewalk was shoveled first by her husband and that she then cleaned the sidewalk several times throughout the day. Her husband also shoveled it in the evening of February 14th.

Defendants submit a certified record of the National Climatic Data Center for February 2007. It indicates that, on February 14, precipitation consisting of rain, freezing rain, snow, ice pellets, mist and blowing snow commenced to fall at 2:00 a.m. and continued through the day until at least 5:00 p.m. without ceasing. Temperatures ranged from 25 degrees F at 1:00 a.m. to 31 degrees F at 1:00 p.m., dropping to 20 degrees F by 11:00 p.m. and it never went above freezing.

Defendants argue that, contrary to plaintiffs' testimony, the certified weather reports and testimony of Mr. Walsh established that it was indeed snowing through February 14th especially at the time when plaintiff claims to have been walking on the sidewalk. There is no proof that defendants had a reasonable amount of time within which to clear the snow prior to plaintiff's accident. During the winter precipitation on that day, no duty had yet arisen to undertake any action to remove the snow. There is no liability for failure to remove accumulated snow until a reasonable time after the end of the snow.

Defendants assert that according to NYC Admin. Code § 16-123(a), the duty with respect to the removal of snow or ice on a sidewalk arises within four hours after the snow ceases to fall. The section further states that the time between nine post meridian(pm) and seven ante meridian(am) is not being included in the above period of four hours. Since the snow continued all during February 14th and the time period to start snow removal, between 9:00 p.m. and 7:00 a.m. is excluded, defendants had no duty to undertake any snow removal until 4 hours after 7:00 a.m. on February 15th that is by 11:00 a.m. on the next day. While snow or ice removal actions if undertaken during the storm may be actionable if performed negligently, i.e., they either create a hazardous condition or exacerbate the naturally hazardous condition created by the storm, there is no testimony that defendants either created or increased any hazard on the sidewalk.

The motion by defendants is granted solely to the

extent that summary judgment is granted in favor of defendant Greenhillmgmnt., LLC and the complaint is hereby dismissed as against said defendant. The motion is denied as to defendant Burnfortmgmt., LLC.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

As to Greenhillmgmnt, said defendant has sustained its initial burden of establishing its entitlement to judgment as a matter of law. In his deposition, Mr. Walsh testified that he was employed simultaneously by both defendants as a managing agent for property. He testified that defendant Greenhillmgmnt was a property management company which did not manage the subject premises and had no business relationship to defendant Burnfort although some of the principals may be the same. In opposition, plaintiff does not argue or raise any issues with respect to defendant Greenhillmgmnt's relationship to the subject premises.

However, defendant Burnfort has failed to sustain its initial burden.

It is well settled that: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see, Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404, NE2d 718; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649, 444 NYS2d 305; Greenberg v Manlon Realty, 43 AD2d 968, 969, 352 NYS2d 494)." (Winegrad v New York University Medical Center, 64 NY2d 851 at 853).

Defendant Burnfort's reliance on case law where a snow storm is still in progress is misplaced. As noted by the court in Salvanti v. Sunset Industrial Park Associates, 27

AD3d 546: "A defendant may be held liable for a slip and fall incident involving snow and ice on its property only upon a showing that the defendant created a dangerous condition or had actual or constructive notice of it [citations omitted]. Generally, a defendant has no duty to remove snow and ice during an ongoing storm. However, once the defendant undertakes snow removal efforts, it must do so in a reasonable manner and may be held liable for creating or exacerbating a dangerous condition [citations omitted]."

In the Salvanti case, the defendant also submitted climatological data which indicated that temperatures remained below freezing and that snow removal procedures had been undertaken. Further, it was noted that: "according to the testimony of one of the defendants' principals, it was the defendants' practice to keep snow removal equipment and salt spreaders on hand for the immediate removal of snow and ice, and that for an ice condition, a salt spreader was the only thing that was effective. While their records indicate that snow was removed that day, there was no record of their having used their salt spreaders. The defendants also submitted a copy of the plaintiff's deposition testimony. He testified that he slipped and fell on a 10 to 15 foot area of ice. After he got up he noticed ice shavings on his hands. However, he did not notice any salt on the ground."

In the instant case, Mr. Walsh testified as to the snow removal equipment which was kept on the subject premises and the instructions he had given to his superintendents to remove snow as it begins to fall. No maintenance records concerning the snow removal efforts undertaken on the date of the alleged accident were submitted. Mr. Walsh merely testified that he was told by Mrs. Galligan that the sidewalk had been shoveled by her husband and herself. Nothing was presented to show that salt had been used on that date. Plaintiff's testimony, submitted by defendants, indicates that the area where she fell had been shoveled, there was about three inches of snow on the ice and she did not see any sand or salt on the sidewalk in front of the building. Defendant Burnfort, having undertaken the performance of snow removal, has failed to demonstrate its freedom from negligence via the submission of admissible evidence.

Accordingly, the motion by defendants is granted solely to the extent that summary judgment is granted in favor of defendant Greenhillmgmnt., LLC and the complaint is hereby dismissed as against said defendant. The motion is denied

as to Burnfortmgmt., LLC.

Dated:October 22,2008

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HON. DAVID ELLIOT