

Caracciolo v Guillen

2009 NY Slip Op 30135(U)

January 9, 2009

Supreme Court, Nassau County

Docket Number: 009644/05

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

DANIEL CARACCIOLO

Plaintiff,

-against-

FABIAN GUILLEN,

Defendant.

**Motion Sequence #1
Submitted September 12, 2008**

INDEX NO: 009644/05

The following papers were read on this motion:

**Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3**

Requested Relief

Defendants, FABIAN GUILLEN (hereinafter referred to as "GUILLEN") , moves for an order, pursuant to CPLR §3212, dismissing the complaint of the plaintiff, DANIEL CARACCIOLO, on the ground that defendant has no liability for the accident. Plaintiff opposes the motion, which is determined as follows:

Background

Plaintiff, commenced this action to recover for personal injuries allegedly sustained on February 9, 2003, when he slipped and fell on ice in front of an Allstate office located

at 1850 Merrick Road, Merrick, New York. At his deposition, plaintiff testified that the accident occurred shortly before midnight in front of a mini strip mall comprised of approximately six (6) stores that faced Merrick Road. Plaintiff testified that, on the night of the accident, he was a patron of one (1) of the stores, Union Square, which was a nightclub, and had parked his car in the back of the strip mall and entered Union Square through the back door entrance that abuts the rear parking lot. He claims that, when he was leaving, he exited the back door of the night club shortly before midnight, and walked around to the front of the mini strip mall by using a sidewalk located on the side street of the strip mall, and when he turned the corner and passed the Allstate store, he saw ice in front of him and slipped. Although he testified that he could not recall what made him slip, he stated that, after falling to the ground, he observed black ice 2X2 ½ feet in dimension. In his bill of particulars, plaintiff alleges that the accident occurred as a result of a dangerous condition at the accident site, namely an improperly shoveled sidewalk in front of the Allstate office, that was left in an icy condition where snow had accumulated on top of the ice preventing the reasonable viewing of the ice by a pedestrian. Plaintiff claims that the sidewalk was not properly lit and that no warning was given about the black ice.. He asserts that defendant's negligence caused his serious injuries, including fractures, a dislocated left ankle, painful surgeries and severe anxiety, that he was confined to bed for thirteen (13) weeks and that he was fired from his job as a senior financial consultant because of his injuries.

In support of the motion to dismiss, counsel for defendant states that the deposition testimony of the defendant reflects that he was employed as a landscaper and was a patron of the barber shop located in the strip mall and was asked by the store's owner to

remove the snow from the rear parking lot so his customers could park their cars. Defendant testified that, when he removed snow, he would do it with this truck at 5:30 A.M., when there was no one in the parking lot, that he performed snow removal only for the barber shop in the back of the strip mall, and that he did not remove snow from the front of the stores where the plaintiff fell, either with his truck or with a shovel. Counsel urges that defendant cannot be held responsible for the alleged ice condition in the front of the store where plaintiff fell because there is no evidence that defendant had a duty to plaintiff or that defendant caused or created the dangerous condition. In his affidavit, defendant confirms that he did not enter into any contract or agreement to shovel the snow on the sidewalk in the front of the stores, and only agreed with the barber shop owner to plow the parking lot in the rear of the stores with his truck. He asserts that he is not responsible for the accident or the injuries sustained by plaintiff.

In opposition to the motion to dismiss, counsel for plaintiff states that defendant was employed to clear snow and ice from the strip mall, both in the front and back of the stores, and that he negligently performed same. Counsel points to the deposition transcripts in an action entitled *Daniel Caracciolo v. Allstate Insurance Company, County of Nassau, The Rosenberg Agency, Inc., Bradan Inc., BM Sonquest, Davidaoff Beauty Salon and Yura Davidoff*, under Index No. 5713/04, in which the defendant owners of the various stores identified defendant, FABIEN GUILLEN, as the contractor who cleared the accident site. The deposition transcript of Yura Davidoff reflects that each merchant of the six (6) stores contributed \$25.00 , for a total price of \$150.00, for the defendant to remove the snow "including the front and back and all around" (Exhibit "D", p. 28.) , which did not include putting salt down, a job that was done by each merchant if necessary. Although Mr.

Davidoff testified that he never saw the defendant do his work and did not know if he used a shovel, he stated that, when he arrived at work after a snow event, the premises was clean. The transcript of the Allstate witness, Brad Rosenberg, corroborates the merchants understanding that "when it snowed we all contributed to whatever the removal was" (Exhibit "C", p.38). Furthermore, the transcript reflects that, though he had both a snow shovel and salt on his premises, Mr. Rosenberg did not recall shoveling the sidewalk during the week before February 9, 2003, the night of the accident (Exhibit "C", p. 40). The Court notes that the prior action by the plaintiff against said store owners was dismissed by Honorable Justice Dana Winslow, by Short Form Order dated September 30, 2005, on the ground that there was no evidence that the defendants or their agents did anything to affect the sidewalk on which plaintiff fell and that they were not liable for plaintiff's injuries, as a matter of law. In essence, the Court upheld the general rule that a landowner or lessee is not liable for the negligence of an independent contractor.

In opposition to the instant motion, counsel for plaintiff asserts there is a question of a fact as to who cleared the snow and ice from the accident site. Indeed, on the basis of defendant's deposition testimony in the instant action, counsel for plaintiff has moved to renew the denial of the appeal dismissing the prior action against the merchants. It is counsel's position that the only reasonable conclusion is that the defendant in this case, or a defendant in the prior action has perjured himself. Counsel urges that there are issues of material fact that preclude the granting of summary judgment, as a matter of law.

The Law

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is,

therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 822 [C.A. 1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626, 620 NYS2d 500 [2nd Dept. 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A. 1993]).

If defendant created the dangerous and defective condition, he owes a duty of care to non-contracting third-parties because, while affirmatively engaged in discharging a contractual obligation, he created an unreasonable risk of harm to others or increased that risk. *Espinal v. Melville Snow Contractors*, 98 NY2d 136, 746 NYS2d 120, 773 NE 2d 485 (C.A. 2002). If defendant undertook to clear the snow on the sidewalk in the front of stores, he had a duty to exercise due care in the execution of his work. *Flynn v. Niagra University* 198 AD 2d 262, 603 NYS2d 874 (2nd Dept. 1993) and *State University Construction v. Kipphut*, 159 AD 2d 1003, 552 NYS2d 471 (4th Dept. 1990). "... [T]he rule is well established that a defendant can be held liable in tort to an incidental beneficiary for the negligent performance of contractual duties if the defendant's conduct amounts to misfeasance as opposed to nonfeasance. . . ." *Flynn v. Niagra University, supra*. Therefore, defendant may be liable for his affirmative acts of negligence if those acts created or increased a hazard and were the proximate cause of plaintiff's injuries. *Genen v. Metro-North Commuter RR*, 261 AD2d 211, 690 NYS2d 213 (1st Dept. 1999).

Summary judgment is seldom appropriate in a negligence action (*Vanderwater v Sears*, 277 AD2d 1056, 716 NYS2d 495 [4th Dept. 2000]) since the very question of whether or not a defendant's conduct amounts to negligence is a question for the trier of fact in most instances and can rarely be decided as a matter of law (*Johannsdottir v Kohn*, 90 AD2d 842, 456 NYS2d 86 [2nd Dept. 1982]). Moreover, the credibility of the witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662, 839 NYS2d 773 [2nd Dept. 773]; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397, 662 NYS2d 766 [2nd Dept. 1997]).

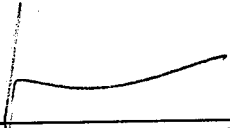
After a careful reading of the submissions herein, it is the judgment of the Court that, notwithstanding the assertion of the defendant to the contrary, the plaintiff has raised a question of fact as to whether or not the defendant cleared the front sidewalk at the accident site and whether defendant was negligent in the performance of his snow removal duties. Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment dismissing the complaint against him is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 9, 2008



WILLIAM R. LaMARCA, J.S.C.

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ENTERED
JAN 16 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE