Plantin v Sinclair
2009 NY Slip Op 30985(U)
April 17, 2009
Supreme Court, Nassau County
Docket Number: 2596/06
Judge: William R. LaMarca
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

KETTELYE PLANTIN,

Plaintiff,

-against-

INDEX NO: 2596/06

WALTER G. SINCLAIR and SHIRLEY M. SINCLAIR,

Defendants.

Appearances:
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DECISION AFTER TRIAL

Introduction

KETTELYE PLANTIN, (hereafter referred to as "PLANTIN") commenced this action against WALTER G. SINCLAIR and SHIRLEY M. SINCLAIR (hereinafter referred to collectively as "SINCLAIR") for damages resulting from a fall on January 29, 2004 at the driveway of 785 Park Avenue, Uniondale, New York, a property owned by SINCLAIR. PLANTIN alleges that she was injured due to the negligence of SINCLAIR for failing to maintain and repair the defective driveway and for not properly removing snow and ice.

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This matter was tried by the Court, without a jury over the course of two days: December 8, 2008 and December 9, 2008.

Background

At the time of the accident, SINCLAIR owned the premises known as 785 Park Avenue, Uniondale, New York, along with the adjoining property known as 779 Park Avenue, Uniondale, New York. On January 29, 2004, while SINCLAIR resided at 779 Park Avenue, he had tenants in two apartments at 785 Park Avenue, including the plaintiff, PLANTIN, who leased the first floor apartment. PLANTIN had been a tenant of SINCLAIR for approximately six years prior to the date of her injury. PLANTIN took occupancy of the apartment in May 1998.

The subject premises contained a driveway as well as a one car garage. The driveway consisted of two ribbons of concrete approximately 2 feet wide with a grass median dividing the concrete strips. Neither the driveway nor the garage was available to the tenants for use. It is undisputed that prior to the date of her injury, the driveway was defective. The parties both agreed that they were aware of the condition of the driveway which existed throughout the tenancy. PLANTIN described the condition as a hole in the driveway and SINCLAIR called it “an erosion” of the concrete.

PLANTIN left for work each morning at approximately 5:25 AM exiting the front door of the house and making her way over the area which encompassed the driveway and the lawn over to the curb where her car was parked. On the morning of January 29, 2004, when PLANTIN exited her apartment at 5:25 AM, it was dark and very cold. On January 28, 2004, there was a steady snow fall that started at 1:00 A.M. and ended at noon on the same day; it left an accumulation of 7 inches of snow. This information was provided and

certified by the National Climatic Data Center, Nashville, NC. The driveway was covered with snow and ice. Because of poor illumination she couldn't see icy patches that may have existed. PLANTIN testified that her only route to her car was to traverse the driveway as the lawns on both sides of the driveway were covered with snow that had accumulated during the snowstorm or was deposited there by SINCLAIR who attempted to clear the driveway of ice and snow after the cessation of the snowstorm.

SINCLAIR testified that he performed all maintenance on the house including snow and ice removal. He said it was his custom and practice to remove the snow immediately at the end of any snowstorm, if it occurred in the afternoon. If the snow continued through the night, he would address clearing the snow in the morning.

On the morning of January 29, 2004, as PLANTIN made her way down the driveway, she testified that her foot got caught in a hole which was covered by snow and ice, and as a result, she fell to the ground. After falling, PLANTIN attempted to stand up and she slipped and fell again because of the ice on the driveway.

PLANTIN described the hole as 5 inches long and 3 to 4 inches deep. The only evidence introduced at the trial to corroborate her statement was a copy of a photograph which was marked, by her, indicating the defect in the driveway. The Court, in examining the photograph found it difficult to ascertain the depth of what appears to be a depression in the concrete.

PLANTIN argues that the property owner must maintain the premises in a reasonably safe condition so as to avoid injury to others. She further argues that the duty of the landowner to use reasonable care in maintaining the property in a reasonably safe condition applies to ice and snow cases. Acknowledging that the landowner must be given

a reasonable time to clear the ice and snow from the property, PLANTIN argues that SINCLAIR had adequate time to clear the snow that fell on January 28, 2004 as the snow stopped falling at approximately noon on that day, but that he neglected to effectively remove the snow and ice from that driveway. PLANTIN also complained that the area where she fell was not adequately illuminated.

SINCLAIR admitted that he knew of the defective condition of the driveway for a number of years before the accident. SINCLAIR, contends that he didn't have adequate time to remove the ice and snow, as the storm continued overnight. In addition, he argued that the driveway condition was a trivial defect and thus not actionable. He claims that the accident alleged by PLANTIN could not have happened from PLANTIN's description of the event as the crack or hole in the driveway, as she alleges, would have been filled with ice and snow. Therefore, there would be no depression into which her foot was caught causing her to fall.

Finally, SINCLAIR argues that PLANTIN acted in a negligent manner because not only did she know of the defect and chose to walk down the driveway, but she alleged that the ice and snow in the driveway was an open and obvious condition.

This case was tried as a bench trial. A bench trial obligates the Court to that of finder of the facts and also the arbiter of the law. The Court, in deciding this case, considered among other matters the issue of credibility, negligence of the parties and the elements of foreseeability and proximate cause.

Discussion

Negligence is defined as the lack of ordinary care (PJI 2:10). It is the failure to use that degree of care that a reasonably prudent person would have used under the same

circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.

Further, a person is only responsible for the results of his or her conduct if the risk of injury is reasonably foreseeable.

> There is negligence if a reasonably prudent person could foresee injury as a result of his or her conduct, and acted unreasonably in light of what could be foreseen. On the other hand, there is no negligence if a reasonably prudent person could not have foreseen any injury as a result of his or her conduct, or acted reasonably in light of what could be foreseen (PJI 2:12).

An act or omission which reasonable people would regard as a cause of an injury is the proximate cause. There may be more than one cause, be it slight or trivial; however, in order for it to be considered the proximate cause, it must be a substantial factor in causing the injury.

A landowner has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable. PJI 2:90 (Third Edition). The Court must consider whether the plaintiff can prove that the premises were not reasonably safe, that the owner was negligent in not keeping the premises in a reasonably safe condition and that the owner's negligence was a substantial factor in causing the plaintiff's injury.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably prudent owner of land would use under the same circumstances. Negligence includes both a foreseeable risk of injury to another and conduct that is unreasonable in proportion to the danger.

> A landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk

Peralta v Henriquez, 100 NY2d 139, 790 NE2d 1170, 760 NYS2d 741 [2003] *citing Basso v Miller*, 40 NY2d 233, 241, 352 NE2d 868, 386 NYS2d 564 [1976].

The general duty to use reasonable care to maintain the premises in a reasonably safe condition also applies to cases involving snow and ice (*Bell v H.M.C. Corp.*, 18 AD2d 1038, 238 NYS2d 592 [3rd Dept. 1963]). As to snow and ice, the following factors are relevant: a) use of the premises by the injured party was foreseen; b) the condition of the driveway was dangerous as a result of the accumulation of ice and snow; c) the owner knew of the dangerous condition which a reasonable person would conclude was dangerous; d) the owner did not use reasonable care in removing the snow and ice; and e) the dangerous condition was a substantial factor in causing the injury. Consideration must also be given to the length of time between the end of the snow fall and the plaintiff's injury, the prevailing weather conditions and what action the owner took to correct the condition.

In the matter of *Hahn v Wilhelm*, 54 AD3d 896, 865 NYS2d 240 [2nd Dept. 2008], the Second Department, citing the Court of Appeals and other authorities, held:

> The issue of whether a dangerous condition exists on real property depends on the particular facts and circumstances of each case, and generally presents a question of fact for the jury (see *Trincere v County of Suffolk*, 90 NY2d 976, 688 N.E.2d 489, 665 N.Y.S.2d 615; *Portanova v Kantlis*, 39 AD3d 731, 833 N.Y.S.2d 652; *Mishaan v Tobias*, 32 AD3d 1000, 821 N.Y.S.2d 640; *Herring v Lefrak Org.*, 32 AD3d 900, 821 N.Y.S.2d 624). However, injuries resulting from trivial defects are not actionable, and in determining whether a defect is trivial, a court must take account of all "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place, and circumstance' of the injury"

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(Trincere v County of Suffolk, 90 NY2d 976, 978, 688 N.E.2d 489, 665 N.Y.S.2d 615, quoting Caldwell v Village of Is. Park, 304 NY 268, 107 N.E.2d 441; see Portanova v Kantlis, 39 AD3d 731, 833 N.Y.S.2d 652; Herring v Lefrak Org., 32 AD3d 900, 821 N.Y.S.2d 624).

In *Hawkins v Carter Community Housing Development Fund Corporation*, 40 AD3d 812, 835 NYS2d 731 [2nd Dept. 2007], the Court, in discussing whether a sidewalk defect constitutes a trap or snare, listed a number of elements, some not present in the case, but did note that adverse weather and lighting conditions are relevant which certainly are germane to this case.

SINCLAIR acknowledges that as the property owner, he has a duty to maintain the premises in a safe manner. However, he argues that the driveway defect and the snow and ice were open and obvious conditions, of which the plaintiff had full and complete knowledge.

Should the Court find the defendant negligent it must next consider whether the plaintiff was also negligent. The defendant must prove the negligence of the plaintiff. If both are deemed negligent then the Court must apportion of the negligence of the parties based on their degree of fault.

The Court has considered all of the factors discussed above and concludes that both SINCLAIR and PLANTIN were negligent.

The rationale for such conclusion is the fact that both parties knew of the defective driveway for a considerable period of time prior to the injury, yet SINCLAIR did not repair the dangerous condition of the driveway knowing that PLANTIN would traverse the area. SINCLAIR's attempt to clear the driveway of ice and snow after the snow fall stopped, also created a dangerous ice and snow condition. Also contributing to the injury was the lack

of illumination as testified to by PLANTIN. The factors described above established the negligence of both parties. The injury was certainly foreseeable and neither party acted reasonably in light of what could be foreseen.

Conclusion

The Court concludes the percentage of fault as follows:

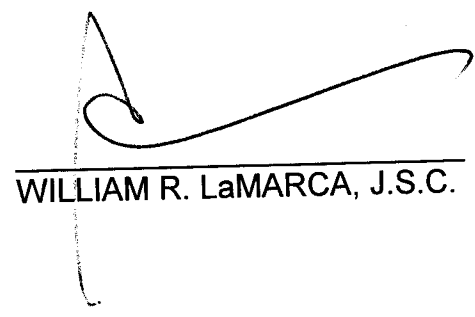
PLANTIN - 30%

SINCLAIR - 70%

This constitutes the decision of the Court.

Settle Judgment on Notice.

Dated: April 17, 2009



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