

**Elzahr v Palladino**

2009 NY Slip Op 31425(U)

June 24, 2009

Supreme Court, Richmond County

Docket Number: 103690/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No. 103690/07  
Motion No.:002**

**AMIRA ELZAHR and  
AZIZ ELZAHR,**

*Plaintiffs*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**CHRISTOPHER PALLADINO,**

*Defendant*

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The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant moves pursuant to CPLR § 3212 for an order granting summary judgment dismissing the plaintiffs complaint on the ground that the plaintiffs fail to make a *prima facie* case of negligence. The defendant's motion is denied in its entirety.

**Facts**

This is an action for personal injuries sustained by the plaintiff, Amira Elzahr allegedly from a slip and fall on snow and ice. The plaintiff alleges that on February 19, 2007 she slipped and fell on ice located in the front of her home at 1001 Rathbun Avenue, Staten Island, New York 10309, that she and her husband rented from the defendant. According to records from the National Weather Service the last snow storm recorded at Newark Liberty International Airport ("the Airport") was on February 14, 2007. On that date 3.1 inches of snow accumulated at the Airport. In the subsequent days leading up to the plaintiffs fall the highest temperature recorded

at the Airport was 35 degrees Fahrenheit recorded on February 17, 2007. On the date of the incident the high temperature recorded at the Airport was 28 degrees Fahrenheit with a low of 12 degrees Fahrenheit.

During her examination before trial the plaintiff, Amira Elzahr testified to the following:

- Q. The accident for which this lawsuit was commenced happened on the steps in front of your house?  
A. After the steps.  
Q. A little bit after the steps?  
A. The last step I went, finished it and then I slipped.<sup>1</sup>

Amira Elzahr testified regarding the condition of the walkway leading to her front steps as follows:

- Q. Was there any snow on that walkway?  
A. Yes.  
Q. Now, I'm not talking about on either side. I'm talking about on the walkway itself?  
A. It was full of snow.  
Q. The walkway itself was full of snow?  
A. Yes.  
Q. Approximately how deep was that snow?  
A. About two, three inches.  
Q. Did it have any footprints in it?  
A. Yes, I'm sure.  
Q. So, is it fair to say that the amount of snow that was on the walkway is approximately equal to the amount that was on the side of the walkway?  
A. No, I'm sure it's less because you're walking on it.  
Q. There was a little bit less?  
A. Less.<sup>2</sup>

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<sup>1</sup> Elzahr, Amira Transcript p. 34-35.

<sup>2</sup> *Id.* at 44 - 45.

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- Q. Did it appear to you that it had been shoveled at all?  
A. No.

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- Q. I'm talking about the walkway you were walking on that you took from the mailbox to the front entrance, was snow covering that walkway the full distance of the walkway from the mailbox to the front steps or was it some particular location?  
A. No, it was full.  
Q. It was covered the full length of the walk way?  
A. Yes.<sup>3</sup>

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- Q. Did you ever see Mr. Palladino shoveling snow during that three, four-day period of time since the snow fall?  
A. No.  
Q. Had you or your husband or your children shoveled the steps leading to your front walkway?  
A. No.<sup>4</sup>

According to Aziz Elzahr the defendant was aware that the plaintiffs had issues accessing the stairs to their home when it snowed. During his examination before trial Aziz Elzahr testified as follows:

- Q. Did your wife ever fall or slip or trip at the staircase at any time before this incident?  
A. Usually we have difficulty going up and down when there is snow there, but there is a rail we hold onto.  
Q. Did anyone ever fall?  
A. No.  
Q. Did you ever make a complaint about it to anybody?  
A. One time I told him if he is going to clean it up, the landlord. He was fixing the apartment upstairs, I just mentioned to him. He was a very nice guy, I wasn't demanding.  
Q. Which gentleman was this that you had the conversation?

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<sup>3</sup> Id. at 47-48.

<sup>4</sup> Id. at 56.

- A. One of them. They're both partners.  
Q. You don't remember which one?  
A. I don't remember which one.  
Q. Do you know when I was that you had this conversation?  
A. Maybe a few days before. It was a weekend, we were watching the super bowl, I remember that. . .<sup>5</sup>

Neither Aziz Elzahr, nor Amira Elzahr testified that they saw any ice prior to the time of the alleged accident. However, each testified that at the time of the alleged accident the walk was covered with snow.

According to Christopher Palladino's testimony he did not have a recollection as to shoveling the walk on February 19, 2007. He testified as follows:

- Q. Do you recall the last time it had snowed prior to that day?  
A. I remember having to shovel, it might have been a week or two weeks earlier. That was the last time. I remember it being a Saturday because I was receiving a delivery for the apartment upstairs. I went there Saturday morning, I shoveled, and I waited for the delivery. That was the last time I remember.  
Q. On that Saturday morning when you shoveled, was it snowing at that time, or had it stopped?  
A. No, it had snowed overnight.<sup>6</sup>

Based on this foregoing testimony the defendant moves for summary judgment arguing that the plaintiffs failed to demonstrate a *prima facie* case of negligence.

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<sup>5</sup> Elzahr, Aziz Transcript, 22-23.

<sup>6</sup> Palladino, Transcript, 16.

## Discussion

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. This is accomplished by submitting sufficient evidence to demonstrate the absence of a triable issue of fact.<sup>7</sup> The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues. Because summary judgment is a drastic measure that deprives a party of her day in court, it may be granted if no triable issue of fact is presented. If there is any doubt as to the existence of a triable issue, the motion should be denied.<sup>8</sup>

In slip and fall cases involving ice and snow, a property owner will not be liable unless he or she created the defect or had actual or constructive notice of its existence.<sup>9</sup> Furthermore constructive notice cannot be imputed onto the defendant because there is a general awareness that water turns into ice at freezing temperatures.<sup>10</sup>

The facts of this case demonstrate that there was a snow fall on February 14, 2007. According to the testimony of the plaintiffs the defendant property owner did not clear the walkway on which Amira Elzahr allegedly fell on February 19, 2007. Even the defendant cannot recall having cleared the walkway after the February 14, 2007 snowfall. Nevertheless, the defendant argues that the defendant's duty to clear the walkway was obviated because the plaintiffs failed to complain to the defendants. However, a plaintiff need not pursue a claim for injuries sustained from a slip and fall on snow and ice based solely on actual notice. In this case, the defendant offers no evidence that he cleared snow and ice that was deposit on the walkway

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<sup>7</sup> *Anwar v. Hellman Mgmt.*, 14 Ad3d 470 [2d Dep't 2005].

<sup>8</sup> *Grossman v. Amalgamated Hous. Corp.*, 298 AD2d 224, [1<sup>st</sup> Dep't, 2002].

<sup>9</sup> *Voss v. D & C Parking*, 299 AD2d 346 [2d Dep't. 2002].

<sup>10</sup> *Carricato v. Jefferson Valley Mall Ltd. Partnership*, 299 AD2d 444, [2d Dep't 2002].

during the nearly five days that elapsed from the end of the storm to the day of the accident.<sup>11</sup> In fact, the defendant's testimony is that he shoveled snow a week or two earlier that had fallen overnight on a Saturday morning. The snowfall on February 14, 2007 occurred on a Wednesday, thereby creating an issue as to whether the defendant satisfied his duty to clear the property of snow and ice after the snowstorm ceased.

### Conclusion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact" (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."<sup>12</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>13</sup> In this case the proof proffered by the defendant fails to demonstrate that he is entitled to judgment as a matter of law. The record, when reviewed in a light most favorable to the plaintiff, does not establish that the defendant did not have constructive notice of the snow storm. The issues of whether the snow and ice that remained on the walkway and whether the defendant had constructive notice of the snowstorm are best left to a trier of fact to determine at trial.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment of defendant, Christopher Palladino, is denied in its entirety; and it is further

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<sup>11</sup> *DeVivo v. Sparago*, 287 AD2d 535, [2d Dep't 2001].

<sup>12</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [App Div 2<sup>nd</sup> Dept 1990].

<sup>13</sup> *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [App Div 1<sup>st</sup> Dept 1994].

ORDERED, that the parties shall return to DCM Part 3 on **Monday, August 3, 2009 at 9:30 A.M.** for a pre-trial conference.

ENTER,

DATED: June 24, 2009

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Joseph J. Maltese  
Justice of the Supreme Court