

Zinner v 1329-37 Third Ave., LLC

2010 NY Slip Op 32454(U)

September 2, 2010

Supreme Court, New York County

Docket Number: 601865/08

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: _____ **J.S.C. Justice**

PART 2

Zimmer

INDEX NO. 601865/08

MOTION DATE 7/2/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -
1329-37 Third Avenue HC

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

FILED

SEP 08 2010

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 9/2/10

Lly

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

Index No: 601865/2008

IRA D ZINNER,

Plaintiff,

-against-

**1329-37 THIRD AVENUE, LLC, 1337 THIRD
AVENUE, LLC, MAUTNER-GLICK CORP.,
BR GUEST, INC. d/b/a ATLANTIC GRILL,
and SPH RESTAURANT ENTERPRISES, INC.**

Defendants

LOUIS B. YORK, J.:

Motion sequences 001 and 002 are consolidated for disposition.

In motion sequence 001 Defendants 1337 Third Avenue, LLC, BR Guest, Inc d/b/a Atlantic Grill and SPH Restaurant Enterprises, Inc. who operate the restaurant, Atlantic Grill, moved for summary judgment to dismiss plaintiff's complaint and all cross claims against them under CPLR 3212 in a slip and fall negligence action. Defendants assert that the restaurant had no obligation to remove the snow under the Storm in Progress rule.

Defendants 1329-37 Third Avenue and Mautner-Glick Corp., who own and manage the property, made a cross motion for summary judgment seeking dismissal. These Defendants adopt and incorporate the Storm in Progress Rule and assert they had no duty or responsibility to remove the snow and ice from the sidewalk and had no notice of these conditions.

Plaintiff asserts that the fall was due to a preexisting patch of ice in front of the Atlantic Grill and that all of the Defendants had a duty to remove it.

In motion sequence 002 Defendants 1329-37 Third Avenue and Mautner-Glick Corp., moved for summary judgment seeking dismissal. These Defendants argue they had no prior knowledge of the existing conditions and that they did not have a contractual obligation to remove the snow and ice. Plaintiff asserts Defendants had notice of the preexisting condition which caused his fall. Further, they argue the building owners had a duty to remove the snow and ice from the property.

SEQUENCE 001

MOTION FOR SUMMARY JUDGMENT

To grant summary judgment defendants must establish a *prima facie* case demonstrating they "did not create the condition that caused the fall and did not have actual or constructive notice of that condition in a reasonably sufficient time to remedy it," (See: *Musso v Macray Movers*, 33 A.D.3d 594,595; 822 N.Y.S.2d 305,306; (2d Dept 2006)).

On February 12, 2008 Dr. Ira Zinner, the Plaintiff, slipped and fell on the sidewalk in front of the Atlantic Grill Restaurant. Defendants attribute Dr. Zinner's fall to snow conditions and argue the Storm in Progress rule applies. The Storm in Progress rule relieves the landlord from taking measures to correct a dangerous condition caused by the storm while the storm is in progress. However, a reasonable time, after the storm ends, the landlord should take steps to remedy the condition.

"[A] landowner's duty to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and for a reasonable time after it has ceased," even if there is a lull in the course of the storm (citations omitted).

(See *Martin v Wagner* 30 AD3d 733, 734, 816 N.Y.S.2d, 243, 244-245 (3d Dept 2006)).

Defendants argue Dr. Zinner slipped on the accumulating snow. Their evidence includes a video showing people walking in front of the restaurant between 2:00 pm to 6:30 pm. The video includes footage of Dr. Zinner's fall at 4:26 pm. Defendants also offer a weather report for Central Park which states on February 12, 2008, it snowed two inches between 1:29 pm and 9:13 pm. Defendants argue the Storm in Progress rule applies because of the weather conditions when Dr. Zinner fell.

The Defendants established their *prima facie* defense by demonstrating there was a snow storm in progress when Dr. Zinner fell.

After the defendants establish a *prima facie* defenses, the burden shifts to plaintiff to demonstrate that there is a triable issue of fact concerning defendants' negligence. In *Martin* the court found that in order for the plaintiff to raise a triable issue of fact the plaintiff, who claims that the fall did not result from the snow storm, must demonstrate that "the precipitation or snow accumulation from the ongoing storm was not the cause of the [plaintiff's] fall" (citations omitted) *Id.* at 735, 816 N.Y.S.2d at 245

The Plaintiff maintains the condition existed two days before his fall and Defendants negligently failed to remove ice on the sidewalk. Dr. Zinner claims two days before the accident he watched someone hose down the sidewalk in front of the Atlantic Grill where he subsequently fell. However, the Plaintiff admits he did not see any ice on the sidewalk in front of the Atlantic Grill then or **on the day before** he fell. The Plaintiff offers the affidavit of Pat Ryan who states he warned Dr. Zinner about the ice sheet *immediately* before he fell. Mr. Ryan estimated the ice at the time of the fall to be approximately 20 feet by 3 to 4 feet. To back up his argument that the ice sheet was

caused by the hosing down of the sidewalk, Plaintiff offers a meteorological report showing temperatures during that forty-eight hour period immediately preceding the storm were cold enough to cause water to freeze.

It is not enough to establish a "general awareness that icy conditions might have existed"; to prevail in a negligence action plaintiffs must "establish that defendant created or had constructive notice of such ice." (See: *DiGrazia v Lemmon*, 28 A.D.3d 926, 927, 813 N.Y.S.2d 560, 562 (3d Dept 2006)) In *Di Grazia* the plaintiff cited a meteorologist's report to demonstrate when the ice which caused the accident was formed; however, that court found that the plaintiffs had to "present evidence that ice existed, and that it was visible and apparent and had existed for a sufficient period of time prior to plaintiff's fall to permit defendant to discover and remedy it." *Id.*

The Plaintiff stated that forty-eight hours *before* he fell there was a large patch of ice in front of the Atlantic Grill. However, his so called proof, the ice formed when the sidewalk was hosed down and it was sufficiently cold to form a sheet of ice, is speculative. The courts have consistently found that

one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. (Citations omitted)

(*Zuckerman v. New York* 49 N.Y.2d 557, 563; 427 N.Y.S.2d 595, 598 (1980))

The day before he fell, Plaintiff did not see any ice on the sidewalk in front of the Atlantic Grill. Immediately before the accident Pat Ryan saw and described the ice on which the doctor fell; however, there was no evidence that particular ice was formed prior to the snow storm. Thus, the Plaintiff failed to raise a triable issue of fact and the Defendant's motion to dismiss shall be granted.

CROSS MOTION FOR SUMMARY JUDGMENT

Defendants 1329-37 Third Avenue and Mautner-Glick Corp. assert their co-defendants established a *prima facie* case showing there was a storm in progress when the Plaintiff fell. Under the Storm in Progress rule, these Defendants had no duty to undertake snow or ice maintenance efforts while the storm was in progress. For the reasons given in the decision on the main motion, Defendants 1329-37 Third Avenue and Mautner-Glick Corp.'s cross motion is to dismiss is granted.

SEQUENCE 2

This motion is denied as moot, as the relief requested here was granted in motion sequence No. 1.

Accordingly, it is

ORDERED that defendant's 1337 Third Avenue, LLC et al's motion (sequence 001) for summary judgment for dismissal of the action is granted; and it is further

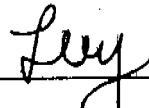
ORDERED that defendant's 1329-37 Third Avenue and Mautner-Glick Corp.'s cross motion (sequence 001) for summary judgment for dismissal of the action is granted ~~as moot~~; and it is further

ORDERED that defendants 1329-37 Third Avenue and Mautner-Glick Corp. sequence 002 motion for summary judgment for dismissal of the action is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: September 2, 2010

Enter:



Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
SEP 08 2010
NEW YORK
COUNTY CLERK'S OFFICE