Fabian v Mutual Redevelopment Houses, Inc.

2012 NY Slip Op 31379(U)

May 15, 2012

Supreme Court, New York County

Docket Number: 110552/10

Judge: Joan M. Kenney

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SCANNED ON 5/23/2012
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. *Justice*

PART 8

Index Number : 110552/2010
FABIAN, LUCRECIA
vs.
MUTUAL REDEVELOPMENT HOUSES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 110552/10
MOTION DATE 4/27/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 18, were read on this motion to/for SJ

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1-11
Answering Affidavits — Exhibits | No(s). 12-15
Replying Affidavits | No(s). 16-18

Upon the foregoing papers, it is ordered that this motion is

MOTIONCASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED
MAY 23 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 15, 2012

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

---X

Lucrecia Fabian,

Plaintiff,

-against-

Mutual Redevelopment Houses, Inc.,
and Dallas BBQ.,

Defendants.

---X

DECISION AND ORDER
Index Number: 110552/10
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motions to dismiss.

FILED
MAY 23 2012
NEW YORK
COUNTY CLERK'S OFFICE

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-11
Opposition Affirmation, and Exhibits	12-15
Reply Affirmation, Exhibits	16-18

In this personal injury action, defendants, Mutual Redevelopment Houses, Inc. and Dallas BBQ, move for an Order, pursuant to CPLR § 3212, dismissing the complaint.

Factual Background

On January 11, 2009, at approximately 7am, Lucrecia Fabian was walking on the sidewalk from the subway at 23rd St. and 8th Ave. in Manhattan when she slipped and fell on some ice and snow (the accident). The building that abuts this corner is owned by Mutual Redevelopment Houses, Inc. and leased by Dallas BBQ (owner and tenant, respectively). At the time of the accident, plaintiff claims it was dark and cold, but not snowing or raining and that there was approximately 1 ½ ft of snow on and around the sidewalk.

Plaintiff further asserts that in the area where she fell, there was an 18-inch-wide path that allegedly had been created by the tenant's employees the day before the accident. As plaintiff was walking, she noticed a patch of dirty looking ice, and in an attempt to detour around the ice patch she went to climb onto the piled up snow on either side of the sidewalk. It was as plaintiff was

attempting this, that plaintiff's feet slipped out from under her and she fell, suffering a fracture to her wrist.

At defendants' examination before trial (EBT) the tenant's general manager, Luis Alvarado, stated that it was tenant's business practice to clean snow and ice conditions off of the side walk around the store. (Alvarado EBT at 16). In general, as soon as it begins snowing, the tenant's busboys will shovel out paths on the sidewalk. (Alvarado EBT at 29-30). The snow that is removed from the sidewalk is then piled on both sides of the path. (Alvarado EBT at 31). Alvarado further testified that on January 10, 2009, the day before the accident, it was snowing. (Alvarado EBT at 23). Aditionally, defendants claim that there was a "storm in progress" from January 10th into the morning of January 11th, ceasing at 4:51am. Although Alvarado stated that there was snow the day before, he did not recall whether or not there were busboys sent to shovel that day. (Alvarado EBT at 23, 26). Defendants' assertion of the storm in progress is reliant on certified climatological records, submitted without an expert opinion. (see Exhibit I to moving papers.)

Arguments

Defendants argue that plaintiff's claim should be dismissed because no duty of care is owed to plaintiff as there was a storm in progress which had ended only 2 hours prior to the accident.

Plaintiff contends that defendants failed to meet their burden as to creation and/or notice of the dangerous condition, and the storm in progress rule does not apply because defendants created the dangerous condition that caused her to slip and fall.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the

material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "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." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Torterello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition (*Aviles v. 2333 1st Corp.*, 66 A.D.3d 432, 887 N.Y.S.2d 18 [1st Dept. 2009]; *Baez-Sharp v. New York City Tr. Auth.*, 38 A.D.3d 229, 830 N.Y.S.2d 555 [1st Dept. 2007]).

NYC Code § 16-123, titled Removal of Snow, Ice and Dirt From Sidewalks; Property Owners' Duties states: "Every owner, lessee, tenant, occupant, or other person...shall, within four hours after the snow ceases to fall..., remove the snow or ice," not including the hours between 9pm and 7am. Simply, building owners and/or occupiers have 4 hours after a snowfall stops to

remove snow and ice from sidewalks; excluding the 9pm-7am hours. (*Rodriguez v. NYC Hous. Auth.*, 52 A.D.3d 299, 859 N.Y.S.2d 186 [1st Dept. 2008]).

"Summary judgment is proper in a personal injury action involving snow or ice where defendant demonstrates, through climatological data ***and*** expert opinion, that the weather conditions would preclude the existence of snow or ice at the time of the accident." (emphasis added; *Massey v. Newburgh W. Realty, Inc.*, 84 A.D.3d 564, 923 N.Y.S.2d 81 [1st Dept. 2011]). Dismissal of a complaint is warranted when the accident occurs while a "storm is in progress." (*Krinsky v. Fortunato*, 82 A.D.3d 409, 918 N.Y.S.2d 40 [1st Dept. 2011]).

"Even during an ongoing storm, while ordinarily there would be no duty to remove snow, if one takes steps to remove snow and ice, liability may result if those efforts create a more hazardous condition or exacerbate a natural hazard created by the storm." (*Suntken v. 226 W. 75th St.*, 258 A.D.2d 314, 685 N.Y.S.2d 217 [1st Dept. 1999], triable issues of fact raised as to what effect the snow removal had on the condition of the sidewalk where either side of the path had accumulations of old snow of up to 3 inches; *Rector v. City of NY*, 259 A.D.2d 319, 686 N.Y.S.2d 426 [1st Dept. 1999]; *Jimenez v. Cummings*, 226 A.D.2d 112, 640 N.Y.S.2d 61 [1st Dept. 1996]). To recover, a plaintiff must show that a hazard was increased by what was done in the process of snow/ice removal. (*Rector*, 259 A.D.2d at 320). "A jury could readily conclude that a defendant's snow removal efforts increased the hazard to pedestrians, producing a surface that is considerably more slick, difficult to discern and inherently dangerous than the natural state of the fallen snow." (*Joseph v. Pitkin Carpet, Inc.*, 44 A.D.3d 462, 843 N.Y.S.2d 586 [1st Dept. 2007]).

Here, the Court is presented with a number of triable issues of fact. Plaintiff claims that it was not raining or snowing at the time of the accident, while defendants contend that it was snowing the night prior, and that the storm continued until approximately 4:51am. Even with

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defendants' climatological data, the lack of expert opinion renders the report inadmissible and/or inconclusive on the issue of whether or not a storm was in fact in progress. In sum, at most, there is a factual dispute regarding whether or not the storm in progress rule applies here.

Furthermore, defendant tenant admits that their snow removal process consists of shoveling the sidewalk, and placing the excess snow to either side of the walking area. Here, it is up to the finder of fact to conclude whether defendants' snow removal efforts created the alleged dangerous condition that purportedly caused plaintiff to fall, or if the condition that allegedly caused plaintiff to fall was just part of an inherently dangerous natural occurrence. Accordingly, it is

ORDERED, that defendants' summary judgment motion, is denied, in its entirety; and it is further

ORDERED that the parties proceed to mediation, forthwith.

FILED

MAY 23 2012

Dated: May 15, 2012

ENTER:

Joan M. Kenney, J.S.C.