

Roger v Homestead Renovations, LLC

2012 NY Slip Op 33737(U)

October 10, 2012

Supreme Court, Dutchess County

Docket Number: 4357/11

Judge: Robert M. DiBella

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
DUTCHESS COUNTY**

-----X
HERBERT ROGER, JR.,

Plaintiff,

DECISION AND ORDER

-against-

**HOMESTEAD RENOVATIONS, LLC and CITY OF
POUGHKEEPSIE,**

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Defendants.

-----X
DIBELLA, J.

The following papers were read and considered on this motion by defendant Homestead Renovations, LLC for summary judgment, pursuant to CPLR 3212, dismissing the complaint:

- 1) Notice of Motion; Affidavit of Michael T. Cook, Esq.; Exhibit A–K;
- 2) Affirmation in Opposition of Joel S. Finkelstein, Esq.; Exhibit A;
- 3) Reply Affidavit of Michael T. Cook, Esq.; and
- 4) Sur-Reply Correspondence of Joel S. Finkelstein, Esq.

In this personal injury action, defendant Homestead Renovations, LLC moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it. Plaintiff opposes the motion contending defendant has failed to meet its *prima facie* burden and that there are material issues of fact. For the reasons set forth below, the motion is granted.

This action arises out of a slip and fall accident, wherein plaintiff alleges that he slipped on ice on the sidewalk adjacent to defendant’s property located at 56 Noxon Street, Poughkeepsie, New York on January 28, 2011. Plaintiff alleges that while walking home from a convenience store, his left foot slipped on ice causing him to fall. Plaintiff thereafter

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commenced this action against the owner of the property adjacent to the sidewalk, Homestead Renovations, LLC, and the owner of the sidewalk, the City of Poughkeepsie.¹

It is well settled that 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 demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

An owner of property adjacent to a public sidewalk is under no duty to remove snow and ice that naturally accumulates on the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so. *Blum v. City of New York*, 267 AD2d 341 (2d Dep't 1999). In the absence of such a statute or ordinance, the owner can be held liable only if a plaintiff establishes that the property owner created or increased an existing hazard by negligently removing the snow and ice that had accumulated on the sidewalk. *Id.*

Defendant contends that summary judgment is appropriate in this case because

¹ On May 2, 2012, the action was discontinued with prejudice solely against the City of Poughkeepsie.

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there is no applicable statute or ordinance imposing tort liability on defendant for its failure to remove snow and ice on the abutting public sidewalk. Defendant also contends that he did not make naturally-occurring conditions on a sidewalk more hazardous than if he had done nothing, by allowing melting snow on defendant's property on the sides of defendant's driveway to run off onto the sidewalk. Further, defendant contends that, even if there is any dispute as to whether it created or increased an existing hazard, defendant is not responsible for the snow removal acts of the independent contractor hired by defendant to do the work. *See Caracciolo v. Allstate Insurance Company*, 40 AD3d 798 (2d Dep't 2007).

In opposition, plaintiff contends that defendant has failed to demonstrate that its snow removal efforts did not create or exacerbate the icing condition which allegedly caused plaintiff's injuries. Further, plaintiff contends that there are triable issues of fact raised by the submission of testimony, photographs and meteorological data which demonstrate that the ice plaintiff fell on may have been formed as a result of the melting of snow that had been piled on either side of the driveway by defendant or its snow removal contractor. As to defendant's second argument, plaintiff contends that defendant can be held liable for negligent acts undertaken by the independent contractor hired to do the snow removal.

Defendant has met its burden of demonstrating that it is entitled to judgment as a matter of law in this case. The case decided by the Appellate Division, Second Department, *Bi Chan Lin v. Po Ying Yan*, 62 AD3d 740 (2d Dep't 2009), is factually similar

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to the case at bar. Therein, plaintiff slipped and fell on ice on an adjacent sidewalk to the property owner. The owner in that case indicated that when snow was cleared from his property, it was placed on both sides of the driveway. The appellate court held that even if ice formed on the sidewalk as a result of a melt and re-freeze from the snow on defendant's property, defendant was entitled to summary judgment because it did not make naturally occurring conditions on the public sidewalk abutting the owner's property more hazardous than if he had done nothing.

In this case, plaintiff also slipped and fell on ice on a public sidewalk that was adjacent to property owned by defendant. Defendant also supplied testimony that snow that was cleared from its property was placed on the sides of its driveway. Based on the above case, defendant has sufficiently demonstrated that summary judgment should be granted in its favor.

The burden now shifts to plaintiff to provide proof in evidentiary form that there are material issues of fact which warrant a trial. However, plaintiff has failed to meet his burden. Although an expert affidavit has been supplied by a meteorologist to support its position that the piles of snow on the sides of the driveway contributed to the amount of water available for melting and re-freezing processes to occur, which caused some or all of the ice that was present to have formed, the *Bi Chan Lin* case specifically held that ice formed on a public sidewalk from the melting and re-freezing of snow on defendant's property is not a basis of liability against defendant.

Further, the cases submitted by plaintiff are unavailing. For example, with regard

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to *Olivieri v. GM Realty Company LLC*, 37 AD3d 569 (2d Dep't 2007), that case deals with an entirely different situation, as the plaintiff fell on property that was actually owned by the defendant. As to *Orjuela v. Obidienzo*, 2008 NY Slip Op 33161U (Sup. Ct., Queens Co., 2008), that lower court decision was issued prior to the Appellate Division, Second Department's holding in the *Bi Chan Lin* case.

As such, defendant's motion for summary judgment dismissing the complaint against it is granted and the complaint is dismissed. The clerk of the court shall enter judgment accordingly, with costs and disbursements as taxed by the clerk.

This is the Decision and Order of the Court.

Dated: October 10, 2012
Poughkeepsie, New York


Hon. Robert DiBella, JSC

To: Cook, Netter, Cloonan, Kurtz & Murphy, P.C.
Michael T. Cook, Esq.
85 Main Street, PO Box 3939
Kingston, New York 12402

The Finkelstein Law Firm, PPLC
Joel S. Finkelstein, Esq.
14 Scotchtown Avenue, PO Box 72
Goshen, New York 10924