Patino v City of New York
2013 NY Slip Op 31392(U)
May 28, 2013
Sup Ct, Queens County
Docket Number: 21741/11
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Manuel Patino and Orsalind D. Oross, Plaintiffs,	Index Number: 21741/11
- against -	Motion Date: 5/15/13
City of New York,	Motion Cal. Number: 84
Defendant.	Motion Seq. No.: 1

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The following papers numbered 1 to 11 read on this motion by defendant for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits................	1-4
Affirmation in Opposition-Affidavit-Exhibits.........	5-8
Reply-Exhibit....................................	9-11

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint is granted.

As a preliminary matter, contrary to plaintiffs' counsel's contention, the motion was timely made within the 120-day period set by the Preliminary Conference order issued by Judicial Hearing Officer Allen Beldock on December 6, 2011. Pursuant to said order, plaintiff was required to file a note of issue by November 9, 2012, and the parties were required to make summary judgment motions within 120 days thereafter. Plaintiff filed his note of issue on Friday, November 9, 2012. The 120th day thereafter was Saturday, March 9, 2013. Therefore, the parties had until Monday, March 11, 2013 to move for summary judgment, that date being the first business day following the 120th day, which fell on a Saturday (see General Construction Law §25-a).

A summary judgment motion is "made" for purposes of calculating the time period under CPLR 3212(a) when the notice of motion is served (see Russo v. Eveco Development Corp., 256 AD 2d

566 [2nd Dept 1998]). The instant motion was served on March 11, 2013 and is, therefore, timely.

Plaintiff allegedly sustained injuries as a result of slipping and falling upon snow and ice in Flushing Meadow Park in Queens County on January 21, 2011. Plaintiff testified in his 50-h hearing and deposition that he was a freelance photographer for the New York Daily News sent to photograph an ancient column erected in the Park. He drove to the Park and parked in the parking lot next to the museum. From there, he had to walk around the Unisphere to get to the column. There was a cobblestone walkway that connects from the parking lot to the Unisphere, but he did not traverse the walkway but instead cut across the grassy field. The grass and walkway were covered with snow, approximately six inches deep. It had snowed the night before. When he slipped and fell, some of the snow moved and he noticed part of the cobblestone. A gentleman who had accompanied him helped him get up. Plaintiff had felt some pain when he fell, but did not think he was hurt. So plaintiff continued walking to the column to photograph it.

When asked whether there was some ice that caused his accident, he stated that he could not tell exactly, and when asked if he saw a patch of ice, he answered in the negative. He only stated that when he was on his way back from the column he noticed that there were some pieces of ice in the snow.

Plaintiff speculated that he may have slipped when he stepped with his right foot from the grass onto the cobblestone area. However, he did not see the cobblestone. He surmised that he may have stepped onto the cobblestone area because while he was walking on the grass it felt soft but then he felt something hard and thereupon fell. He also knew that the cobblestone was "nearby". Nevertheless, he admitted that it was possible that he did not reach the cobblestones before his accident.

The City moves for summary judgment upon the grounds that it did not have a reasonable time after the cessation of precipitation for it to have removed the snow and ice, that its duty as the owner of the land where plaintiff fell to remove snow or ice had not arisen at the time that plaintiff fell, that it did not have either actual or constructive notice of the condition, that the condition was not dangerous and unusual and that it did not create the condition.

In order for property owners to be found liable for a defective or dangerous condition on their premises, it must be shown that they either created the condition or, where the

condition was not actually created by them but came about as a result of a failure to maintain the premises, that they had actual or constructive notice of the hazardous condition and that they had an adequate opportunity to remedy it but failed to do so (see Danielson v. Jameco Operating Corp., 20 AD 3d 446 2nd Dept 2005]).

The undisputed evidence presented on this record is that the City did no snow or ice removal after the storm. Indeed, plaintiff testified that the walkway and grassy area had not been shoveled at all. Therefore, the City has established that it did not create the allegedly icy condition that caused plaintiff to slip and fall.

Moreover, there is no evidence that the City had actual notice of the specific icy condition that caused plaintiff to slip and fall.

With respect to constructive notice, the condition must have been visible or apparent for a sufficient period of time to have reasonably allowed the City, in the exercise of reasonable care, to have discovered and remedied it (Gjoni v. 108 Rego Developers Corp., 48 AD 3d 514 [2nd Dept 2008]; Scala v. Port Jefferson Free Library, 255 AD 2d 574 [2nd Dept 1998]; see also Danielson v. Jameco Operating Corp., 20 AD 3d 446 [2nd Dept 2005]). Awareness of the presence of snow or ice in general does not constitute either actual or constructive notice of the particular condition that caused plaintiff to fall (see Kaplan v. DePetro, 51 AD 3d 730, supra). Plaintiff did not see the alleged patch of ice that caused him to slip and, indeed, was not certain where he slipped - whether it was on the cobblestone walkway or on the grass. This testimony constitutes evidence that there was no constructive notice of the condition (see e.g. Kaplan v. DePetro, 51 AD 3d 730 [2nd Dept 2008]; Robinson v. Trade Link America, 39 AD 3d 616 [2nd Dept 2007]). In opposition, plaintiff presented no evidence that the ice patch was visible and apparent and had existed for a sufficient period of time prior to the accident so as to have afforded the City a reasonable opportunity to have discovered and remedied the hazard.

Even if the City had actual or constructive notice of the specific icy condition complained of, since the unrebutted evidence presented on this motion is that it did not actually create the condition, the only basis of liability against it would be if it had a reasonable opportunity to have cleared its property of snow and ice after the cessation of the snowfall but failed to do so.

It is well-established that a property owner may not be held liable for injuries resulting from an accumulation of snow or ice on its premises until after a reasonable time has passed for taking

protective measures after cessation of precipitation (Newsome v. Cservak, 130 AD 2d 637 [2nd Dept 1987]).

The unrebutted climatological data annexed to the moving papers establishes that it began snowing at approximately 2:00 a.m. on January 21, 2011 and that it stopped snowing at approximately 8:00 a.m. on January 21, 2011. A total of 4.3 inches of accumulation was measured. Therefore, the City did not have a reasonably sufficient time to have cleared the area of snow and ice within the one hour of time that elapsed from cessation of precipitation to the time when plaintiff allegedly slipped and fell, especially considering that the area where plaintiff allegedly slipped and fell was in a park and that it would be unreasonable to expect the City to have cleared its vast acreage within one hour after the cessation of the storm. The Court notes that plaintiff testified that he may have fallen on an unpaved grass area. Therefore, not only is it unreasonable to have expected the City to clear snow from all its walkways in the park within one hour after it had stopped snowing, but it is especially unreasonable to have expected it to clear snow from its unpaved grass and lawn, areas from which it had no obligation to remove snow since they are not sidewalks or walkways intended for pedestrian ambulation. However, even if plaintiff slipped and fell on a walkway, this Court finds that the City did not have a reasonable time to have cleared it of snow and ice at the time that plaintiff fell, as a matter of law.

The Court also notes, with respect to the question of what constitutes a reasonable time, pursuant to §16-123 of the New York City Administrative Code, an abutting property owner has four hours after precipitation ceases to remove snow or ice from the public sidewalk abutting its property, which period of time does not include the hours between 9 P.M. and 7 A.M. Although the area where plaintiff allegedly slipped and fell was not a public sidewalk abutting private property, and, therefore, §16-123 is not directly applicable to the present situation, the statute does indicate that the City Council considers any expectation that a property owner clear a public walkway abutting its premises any sooner than four hours after the cessation of precipitation, and in the night and early morning hours, to be unreasonable as a matter of law. This Court finds that it is likewise unreasonable to expect the City to clear its thousands of miles of streets, including its walkways in all of its parks any more expeditiously than is considered reasonable for an owner of a single property to clear a single area of sidewalk in front of its property. Therefore, the City cannot be held liable for plaintiff's injuries resulting from the icy condition at issue, as a matter of law (see Amplo v Milden Ave

Realty Assoc., 52 AD 3d 750 [2nd Dept 2008]).

The argument of counsel for plaintiff in his affirmation in opposition that plaintiff may have slipped on old accumulation of snow that had fallen on previous days, rather than on ice that formed during the storm that ended just one hour prior to plaintiff's accident, is speculative and fails to raise an issue of fact (see Chapman v City of New York, 268 AD 2d 498 [2nd Dept 2000]).

Since the evidence establishes that the City neither created the icy condition in question nor had a reasonable time after cessation of precipitation to have remedied it, the City is entitled to summary judgment as a matter of law.

The Court need not address, and will not decide, the remaining grounds advanced by the City in support of the motion.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: May 28, 2013

KEVIN J. KERRIGAN, J.S.C.