

Kenny v Glaser

2013 NY Slip Op 33460(U)

November 20, 2013

Supreme Court, New York County

Docket Number: 100791/2012

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100791/2012

KENNY, RICHARD

vs

GLASER, DANIEL

Sequence Number : 001

SUMMARY JUDGMENT

PART 2

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *is decided in accordance with the accompanying decision.*

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

FILED

NOV 29 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/20/13

Lewy, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 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

LOUIS B. YORK
U.S.C.

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

-----X

RICHARD KENNY and LINDA KENNY,

Plaintiffs,

-against-

DANIEL GLASER and EMILY GLASER,

Defendants.

Index No.: 100791/2012

FILED

NOV 29 2013

-----X

YORK, J.:

COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiffs Richard Kenny and Linda Kenny seek to recover damages for personal injuries Richard Kenny suffered after he allegedly slipped on ice which accumulated on the sidewalk in front of the home of defendants Daniel Glaser and Emily Glaser. Defendants move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the plaintiffs complaint.

FACTUAL ALLEGATIONS

Richard Kenny (plaintiff) alleges that on February 3, 2011, at approximately 8:00 a.m., he was injured as a result of a slip and fall which occurred on the sidewalk adjacent to the property located at 33 West 95th Street, New York, New York, while he was working for the United Parcel Service. Plaintiff contends that he was delivering a package to 31 West 95th Street, when he exited his delivery truck, took two to three steps from the street onto the sidewalk in front of the home at 33 West 95th Street, and proceeded to slip and fall on ice located on the sidewalk. He maintains that his left foot slipped forward, and that his body fell back on top of his leg, causing injuries to his lower right leg.

Defendants Daniel and Emily Glaser are the sole owners of the single family brownstone building located at 33 West 95th Street, adjacent to the sidewalk where plaintiff allegedly was injured. Emily Glaser (Glaser) testified that she had hired two independent contractors to clear snow and salt in front of her home. Glaser testified that Doug Perna (Perna), one of the independent contractors, arrived at her home on the day of plaintiff's accident at 5:30 a.m., and shoveled the sidewalk and steps, cleared a path, and put down sand and salt.

Glaser testified that Brian Swan (Swan), the other independent contractor, arrived at her home at 7:00 a.m., shortly after Perna performed his work. Glaser testified that Swan shoveled the brownstone's stairs, shoveled the sidewalk down to the curb, and put a sand and salt mixture on the ground. Glaser testified that at the time of plaintiff's accident, the sidewalk did not have any ice on it. Defendants submit climatological data which states that during the two days prior to plaintiff's accident, the temperature never dropped below freezing, and that it had snowed 1.6 inches in the six days preceding plaintiff's accident.

On January 25, 2012, plaintiffs filed a complaint alleging that plaintiff suffered personal injuries as a result of the accident and that defendants were negligent in maintaining the sidewalk on which he fell. Linda Kenny, plaintiff's wife, alleges that, as a result of the accident, she was caused to sustain damages for loss of consortium. Defendants now move for summary judgment, dismissing the complaint.

DISCUSSION

Summary judgment is a "drastic remedy" which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). The burden then shifts to the motion's opponent to "present evidentiary

facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Defendants argue that summary judgment must be granted in their favor because plaintiffs fail to demonstrate that defendants created the alleged dangerous condition on which plaintiff fell, fail to demonstrate that a statute places an obligation to maintain the sidewalk on the owner, or that snow and ice removal from the sidewalk exacerbated any alleged defective condition in the sidewalk. Defendants also contend that there is no evidence that they had actual or constructive notice of the allegedly icy condition.

Section 7-210 (b) of the Administrative Code of the City of New York provides:

"[n]otwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes."

Here, defendants are exempt from liability imposed by section 7-210 because the property of defendants, a one-family home, was owner occupied and used exclusively for residential purposes. However, "defendants may be held liable for the hazardous condition on the sidewalk only if they undertook snow and ice removal efforts that made the naturally occurring condition more hazardous or caused the defect to occur because of a special use." *Lee v Ilyasov*, 95 AD3d 1205, 1206 (2d Dept 2013) (citations omitted); *see also Herrera v East 103rd St. & Lexington Ave. Realty Corp.*, 95 AD3d 463, 463 (1st Dept 2012).

The testimony of plaintiff and Glaser raise issues of fact as to whether the snow and ice removal efforts made the sidewalk more hazardous and whether defendants were on notice of the alleged slippery conditions. First, a dispute exists between the testimony of plaintiff and Glaser as to the condition of the sidewalk at the time of plaintiff's accident. It is unclear whether ice formed following the work of the independent contractors hired by Glaser. Plaintiff testified that he slipped on ice which was located on the sidewalk in front of 33 West 95th Street. However, when questioned about the condition of the sidewalk when plaintiff fell, Glaser testified:

"the sidewalk was fine. The sidewalk had no snow on it. It had the sand and grout mixture. Some of the snow had started, you know, forming a little glistening because it was morning time and it started to melt with the snow and sand on it. It was wet, it was actually wet because that's why I got the tarp to try to keep him dry. So the sidewalk was actually wet."

(Glaser EBT, at 35). Glaser further testified that the sidewalk did not have any ice on it at the time of plaintiff's accident.

It also remains disputed from the testimony whether plaintiff fell on the sidewalk or in the street. Plaintiff testified that he fell on ice located on the sidewalk. However, the testimony of Glaser contradicts that statement by stating that plaintiff was moved "onto the sidewalk" and that Glaser saw him "in the street between the two cars." (*id.* at 30-31).

There is also a dispute in the testimony as to whether plaintiff and Glaser conversed regarding the cause of the accident. When questioned at her deposition regarding whether she spoke to plaintiff following the accident, Glaser testified that she "didn't really speak to him." (*Id.* at 39). Conversely, plaintiff testified that a woman came out of 33 West 95th Street following the accident and stated that "she's been trying to clean the ice" and that "she showed me salt in her hand, she's been throwing salt down." (Kenny EBT, at 56).

Defendants submit a photograph of the sidewalk where the accident took place which was taken just after plaintiff's fall. However, the photograph also raises a question as to whether the snow piles adjacent to the sidewalk, which appear to have been shoveled, may have created the slippery conditions on which plaintiff fell.

The Court of Appeals has held that "[o]n a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S. J. Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974); *see also Psihogios v Stavropoulos*, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact).

As the deposition testimony of plaintiff and Glaser raise several questions of fact, including what the location was where plaintiff fell, whether plaintiff slipped on ice, whether defendants had notice of the conditions, and whether the work of the individuals who cleared the snow and ice removal efforts made the condition more hazardous, defendants motion for summary judgment must be denied.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that defendants Daniel Glaser and Emily Glaser's motion for summary judgment is denied.

Dated: 11/20/13

FILED

NOV 29 2013

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Ray
J.S.C.

LOUIS B. YORK
J.S.C.