

Rabinowitz v Marcovecchio

2013 NY Slip Op 33733(U)

March 26, 2013

Supreme Court, Suffolk County

Docket Number: 25502/10

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

PUBLISH

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
JACLYN RABINOWITZ, as Administratrix of the
Estate of PAUL ROSENTHAL,

Plaintiff,

-against-

LENORE MARCOVECCHIO,

Defendant.
-----X

INDEX NO.: 25502/10
CALENDAR NO.: 201200311OT
MOTION DATE: 3/8/13
MOTION SEQ. NO.: 003 CASEDISP

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Upon the following papers numbered 1 to 18 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-13; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14-16; Replying Affidavits and supporting papers 17-18; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant Lenore Marcovecchio (Marcovecchio) seeking an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the complaint is hereby dismissed.

On December 20, 2009 plaintiff/decendent Paul Rosenthal (Rosenthal) claims to have sustained injuries as a result of falling while attempting to climb over a snow bank in the driveway of the defendant's residential premises. Rosenthal leased a cottage which was located on Marcovecchio's premises and was returning home at approximately 9:45 p.m. when the incident occurred. Plaintiff's complaint alleges that Rosenthal fell as a result of the defendant's failure to remove the dangerous snow and ice condition which existed in the driveway area leading to the cottage.

Defendant's motion seeks an order granting summary judgment dismissing plaintiff's complaint claiming that the "storm in progress" doctrine applies which exonerates a landowner from liability for negligence where there is insufficient time between the conclusion of a storm and the incident within which to correct the hazards caused by the storm. Defendant claims that the December 19, 2009 blizzard dropped 24 inches of snow in the area and was accompanied by gusting winds until late in the afternoon of December 20, 2009. Defendant claims that the undisputed facts show that the defendant/homeowner did not have a reasonable amount of time to remove the snow and clear the driveway prior to the decedent's 9:45 p.m. arrival and as a matter of law the "storm in progress" rule relieves the homeowner from liability for plaintiff/decendent's injuries. In support the defendant submits an affidavit from a forensic meteorologist who reviewed meteorological records maintained by two nearby airports together with climatological data recorded by other government agencies concerning the late fall storm that revealed 23.9 inches of snow had fallen between December 19th and 20th ending at 11:34 a.m. at Islip's MacArthur airport. Drifting and blowing snow

caused by wind gusts of up to 35 miles per hour were recorded during the early morning hours of December 20th with lesser gusts continuing until after 9 p.m. It is the defendant's position that based upon the meteorological evidence submitted the defendant did not have sufficient time to have the driveway snow removed prior to the plaintiff's arrival on the night of December 20th and no basis therefore exists to find Marcovecchio responsible for Rosenthal's injuries.

In opposition plaintiff/administratrix submits an affidavit and an attorney's affirmation and claims that substantial issues of fact exist concerning defendant's negligent failure to remove the snow covering her driveway by 9:45 p.m. on December 20, 2009 sufficient to defeat defendant's summary judgment motion. Plaintiff claims that by the time Rosenthal returned to his apartment the major public roadways had been largely cleared of snow down to the blacktop and that the defendant failed to remove any of the three to four foot pile of snow blocking Rosenthal's path as a result of plowing from the street. Plaintiff asserts that national climatological data reveals that .01 inches of precipitation fell at MacArthur airport between 5:00 a.m and 8:00 a.m on December 20th and that trace amounts fell the rest of the day. It is the plaintiff's position that the defendant had a duty to maintain the driveway area in a reasonably safe condition and that the "storm in progress" doctrine does not apply in this case since the defendant unreasonably delayed removing the dangerous snow and ice condition for more than 13 hours after the snow had ended at 8:00 a.m.. Plaintiff contends that under these circumstances defendant's motion must be denied since substantial factual questions remain which can only be determined by a jury.

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 action. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v. 20th Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 (1957)). The moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851, 487 NYS2d 316 (1985)). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. NYU Medical Center, supra.*; *Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065, 416 NYS2d 790 (1979)). Once such proof has been offered the burden shifts to the opposing party, who, in order to defeat the motion for summary judgment must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR Section 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 (1980)). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v. Aeroxon Products*, 148 AD2d 499, 538 NYS2d 843 (2nd Dept., 1979)) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v. Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 (2nd Dept., 1981)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law.

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (*Palka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 (1976); *Palsgraf v. LIRR*, 248 NY 339 (1928); Prosser, "Torts", 4th Edition Sections 30, 41-42 & 53)). He must further demonstrate that defendant's acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (*Sheehan v. City of New York*, 40 NY2d 496, 387 NYS2d 92 (1976)).

A landowner owes a duty to another on his land to keep it in a reasonably safe condition (*Basso v. Miller*, 40 NY2d 233, 241, 386 NYS2d 564 (1976); *Smith v. Taylor*, 279 AD2d 566, 719 NYS2d 686 (2nd Dept., 2001)). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (*Martinez v. Santoro*, 273 AD2d 448, 710 NYS2d 374 (2nd Dept., 2000); *Sadler v. Town of Hurley*, 288 AD2d 805, 720 NYS2d 613 (3rd Dept., 2001)).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present a party cannot be held liable for injury caused by the defective or dangerous condition on the property (*Balsam v. Delma Engineering Corp.*, 139 AD2d 292, 296-297, 532 NYS2d 105 (1st Dept., 1988); leave to appeal denied 78 NY2d 783 (1989); *Pappalardo v. NY Health & Racket Club*, 279 AD2d 134, 718 NYS2d 287 (1st Dept., 2000)).

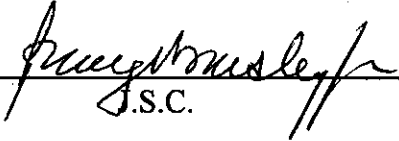
In a slip and fall case a plaintiff may only recover when he is able to show that the defendant either created the condition which caused the accident or had actual or constructive notice of the condition (*Anderson v. Klein Foods*, 139 AD2d 904, 527 NYS2d 897 (4th Dept., 1988); affirmed 73 NY2d 835 (1989); *Moss v. JNK Capital*, 211 AD2d 769, 621 NYS2d 679 (2nd Dept., 1995)). Constructive notice may be inferred where the alleged defect was visible and apparent for a sufficient length of time prior to the accident so as to permit the defendant to discover and remedy it (*Fasolino v. Fashion Bug*, 77 NY2d 847, 567 NYS2d 640 (1991)).

The duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not begin until a reasonable time after the storm has ended (*see Abramo v. City of Mount Vernon*, 103 AD3d 760, 2013 WL 616883 (2nd Dept., 2013); *Weinberger v. 52 Duane Associates, LLC*, 102 AD3d 618, 959 NYS2d 154 (1st Dept., 2013); *Brandon v. Hallivis*, 67 AD3d 618, 888 NYS2d 575 (2nd Dept., 2009); *Pippo v. City of New York*, 43 AD3d 303, 842 NYS2d 367 (1st Dept., 2007)). Under the "storm in progress" doctrine a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on her premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm (*see Cotter v. Brookhaven Memorial Hospital Medical Center, Inc.*, 97 AD3d 524, 947 NYS2d 608 (2nd Dept., 2012)).

The relevant, admissible evidence submitted shows that snow in excess of 23 inches fell in the area where the incident occurred beginning at approximately 11:50 a.m. on Saturday, December 19th and ending nearly 24 hours later on Sunday, December 20th. Following the cessation of snowfall, wind gusts in excess of 20 miles per hour persisted for the next 9+ hours causing significant blowing and drifting snow together with snow drifts. Plaintiff's injury occurred at approximately 9:45 p.m. on December 20th in the defendant's driveway area, the entrance of which had been blocked by an accumulation of snow deposited by snow plows which had removed snow from the abutting public highway. Although plaintiff claims that only trace amounts of precipitation fell since the mid-Sunday morning hours and therefore defendant had time to remove the snow from the driveway, the record is clear that this storm was a blizzard depositing very significant amounts of snow within a 24 hour period together with gusting winds which continued for hours after the snow had ended. Based upon these undisputed factors, the "storm in progress" doctrine exonerates the

defendant from liability for the injuries sustained by the decedent at 9:45 p.m. since the evidence proves that the homeowner did not have a reasonable period of time after cessation of the week-end storm to remove the snow which had accumulated blocking the entrance to the driveway and in the driveway itself. Defendant's motion seeking an order dismissing plaintiff's complaint must therefore be granted.

Dated: March 26, 2013



J.S.C.