Rusin v City of New York
2013 NY Slip Op 34085(U)
July 23, 2013
Supreme Court, Kings County
Docket Number: 13166/11
Judge: Johnny L. Baynes
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At a Special Term Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, at 360 Adams St, Brooklyn, New York, on the 23rd day of July, 2013

PRESENT:

HON. JOHNNY L. BAYNES

Justice

----------x **Index No. 13166/11**

ADAM RUSIN and RUTH RUSIN,

Plaintiff,

DECISION AND ORDER

-against-

THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF SANITATION,

Defendant.

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Defendants, City of New York (hereinafter "the City") and New York City Department of Sanitation (hereinafter "Sanitation") (collectively "Defendants") move by Notice of Motion, dated December 18, 2012, for Summary Judgment pursuant to CPLR § 3212. After oral argument, said Motion was submitted to the Court for determination.

Plaintiff Adam Rusin and Ruth Rusin (hereinafter "Plaintiff") alleges personal injuries arising from Mr Rusin falling on snow and/or ice while walking in the north crosswalk of the intersection of Homecrest Avenue and Gravesend Neck Road, Brooklyn, New York. Plaintiff testified at his deposition that at approximately 4:15 pm on December 29, 2010, when he fell, he

had not noticed the ice prior to falling. He also stated there were 15 inches of snow on the ground that day. Affirmation of Peter A. Mancuso, Esq., dated December 8, 2012, p.4, ¶ 3. (hereinafter "Mancuso Affirmation")

Defendant Sanitation produced its employee, Supervisor Jerry Rea (hereinafter "Rea"), for deposition on the same day. Rea testified that based on the records he reviewed on behalf of the City, that on the date of the accident, there were 25 trucks plowing in Brooklyn District 15, which includes the location of plaintiff's fall. Rea also testified that the roadways in Brooklyn are classified by Sanitation as primary, secondary and tertiary based upon their importance. Rea further stated that Sanitation begins snow removal procedures prior to the cessation of snow storms. Mancuso Affirmation p. 4, ¶ 4.

In order to impose liability on defendants for injury caused by the presence of snow and ice on the streets, plaintiff must establish that "the condition constitutes an unusual or dangerous obstruction to travel and that either the municipality caused the condition or a sufficient time had elapsed to afford a presumption of the existence of the condition and an opportunity to effect its removal". *Mazzella v City of New York*, 72 AD3d 755 [2d Dept 2010], *citing*, *Gonzalez v City of New York*, 138 AD2d 668, 670 [2nd Dept 1989]. See also, Valentine v New York, 86 AD2d 381, 383-84 [1st Dept], aff'd 52 NY2d 932 [1982] ("Responsibility for ice conditions arises, at the most, only after the lapse of a reasonable time for taking protective measures and never while a storm is still in progress").

What constitutes a reasonable time as a matter of law has been the subject of much litigation. In this particular instance, it is defendants' assertion that two and one half days, or fifty seven hours, was insufficient where snowfall was measured at 20 inches and the last snowfall was on December 27, 2010 at 7:00 a.m. The Second Department has held that failure to clear

snow after a large snowfall three days prior to an accident did not give rise to liability. *Hooghuis v City of New York*, 264 AD2d 816 [2d Dept 1999].

Since the time elapsed was not unreasonable, there can be no liability against defendants absent a showing that the City created the condition complained of or had actual or constructive notice of same. Simmons v Metropolitan Life Insurance Co., 84 NY2d 972 [1994]It is plaintiff's burden to prove such actual or constructive notice to the defendant. See, *Cirigliano v UA Theatre Circuit, Inc.*, 232 AD2d 602 [2d Dept 1996]. No such proof has been presented herein. Nor has any evidence been presented that defendants caused or created a dangerous or hazardous condition. Timcoe v State of New York, 267 AD2d 375 [2d Dept 1999].

Absent such a showing on the part of plaintiff, this Court is compelled to grant defendant's motion and grant Summary Judgment dismissing the Complaint. *Ivanic v Olmstead*, 66 NY2d 349 [1985]; *Zino v City of New York*, 111 AD2d 847 [2d Dept 1985]

Summary judgment is warranted when there are no factual disputes to be resolved by the trier of fact. *Mallard Construction Corp v County Fed Savings*, 32 NY2d 285 [1973], whether all issues to be resolved are strictly issues of law, *Long Island RR Co v Northport Industrial Corp.*, 42 NY2d 455 [1977], or when the uncontroverted facts can only be determined in one fashion as a matter of law. *Alvord and Swift v Stewart and Miller Constr. Co., Inc.*, 46 NY2d 276 [1978].

Once this showing is made, the burden shifts, as stated above, to the party opposing the motion for Summary Judgment. *See, Sisko v The New York Hospital*, 647 NYS2d 191 [1st Dept 1996]. Plaintiff has failed to produce any such evidence.

WHEREFORE, it is hereby

ORDERED and ADJUDGED that defendant's Motion for Summary Judgment

dismissing the Complaint is granted in all respects and this action is dismissed, with prejudice, pursuant to CPLR § 3212.

The foregoing constitutes the Decision and Order of this Court.

ENTER

HON. JOHNNY LEE BAYNES

JOHNNY L. BAYNES, JSC