

Kidermman v 605 Third Ave. Fee LLC

2014 NY Slip Op 31063(U)

April 28, 2014

Sup Ct, New York County

Docket Number: 109804/11

Judge: Debra A. James

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located in the public sidewalk in front of the defendants' building.

In support of their motion, the defendants argue that the accident occurred in the public roadway and not on the sidewalk, and that there was a snow storm in progress. In opposition, the plaintiff argues that he repeatedly testified that he fell on the sidewalk, and that it had completely stopped snowing 2 ½ hours before plaintiff fell.

"[T]he 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 issue of fact from the case (Smalls v AJI Indus., Inc., 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, 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 v City of New York, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (id.). "It is not the function of a court deciding a summary

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judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (Vega v Restani Constr. Corp., 18 NY3d 499, 505 [2012]).

Administrative Code of the City of New York § 7-210 provides in relevant part:

"a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
b. Notwithstanding 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."

Administrative Code of the City of New York § 16-123 provides in relevant part:

"a. Every owner, lessee, tenant, occupant, or other person, having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall, within four hours after the snow ceases to fall, or after the deposit of any dirt or other material upon such sidewalk, remove the snow or ice, dirt, or other material from the sidewalk and gutter, the time between nine post meridian and seven ante meridian not being included in the above period of four hours. Such removal shall be made before the removal of snow or ice from the roadway by the commissioner or subject to the regulations of such commissioner. . . .
b. In case the snow and ice on the sidewalk shall be

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frozen so hard that it cannot be removed without injury to the pavement, the owner, lessee, tenant, occupant or other person having charge of any building or lot of ground as aforesaid, may, within the time specified in the preceding subdivision, cause the sidewalk abutting on such premises to be strewed with ashes, sand, sawdust, or some similar suitable material, and shall, as soon thereafter as the weather shall permit, thoroughly clean such sidewalks."

The undisputed weather records submitted on the motion show that it had stopped snowing 2 ½ hours before plaintiff's accident. Defendants also submit the testimony of an eyewitness claiming that the plaintiff did not fall on the sidewalk, but fell in the middle of East 39th Street.

The evidence does not establish prima facie defendants' entitlement to judgment. The defendants as owners of the abutting property, owed Kiderman a nondelegable duty to clear the snow and ice from the sidewalk within a reasonable time. Although "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 commence until a reasonable time after the storm has ended" (Pippo v City of New York, 43 AD3d 303, 304, [1st Dept 2007]), here, there is a triable issue of material fact as to the applicability of the "storm in progress" rule (Powell v MLG Hillside Assoc., 290 AD2d 345 [1st Dept 2002]). The motion papers present triable issues as to whether, since the cessation of the storm, the defendants had a reasonable amount of time to remedy the icy condition at

the triangular depression where the plaintiff allegedly fell (Vosper v Fives 160th, LLC, 110 AD3d 544 [1st Dept 2013]).

Building workers commenced their clean-up at 6:00 a.m., and the sidewalk had been cleaned before Kiderman slipped and fell at 9:00 a.m. Defendants' own records raise issues of fact as to whether or not the defendants gratuitously and negligently performed snow and ice removal operations by failing to place ashes, sand, or sawdust on the icy depression, thereby creating or exacerbating a dangerous condition (Sanchez v City of New York, 48 AD3d 275 [1st Dept 2008]; Prenderville v. International Serv. Sys., Inc., 10 AD3d 334, 337-338 [1st Dept 2004]).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (Trincere v County of Suffolk, 90 NY2d 976, 977 [1997] [internal quotation marks and citation omitted]). There is a triable issue of fact as to whether the depression in the sidewalk appears to be a "trap or snare" by reason of adverse weather conditions (Burko v Friedland, 62 AD3d 462, 462 [1st Dept 2009]).

In addition, a triable issue of fact is presented as to whether plaintiff slipped and fell either in the middle of the street, or on the icy depression in the sidewalk. Plaintiff's consistent testimony, that he slipped on an icy triangular

depression in the sidewalk, "if believed, ... provide[s] a sufficient nexus between the condition of the [sidewalk], and the circumstances of [his] fall to establish causation" (Cherry v Daytop Vil., Inc., 41 AD3d 130, 131 (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]) [1st Dept 2007]). Whether or not plaintiff is being truthful goes to the weight, rather than the admissibility, of the evidence and is for the trier of fact to determine (Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint is denied.

This is the decision and order of the court.

Dated: April 28, 2014

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

FILED

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