

Szoke v Weinberg Props., L.P.

2015 NY Slip Op 30678(U)

April 27, 2015

Supreme Court, New York County

Docket Number: 157041/2013

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS Part 8

-----X
 Margit Szoke,

Plaintiff,

-against-

Weinberg Properties, L.P.,

Defendant.
 -----X

DECISION AND ORDER
 Index Number: 157041/2013
 Motion Seq. No.: 003, 004

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

Papers	Numbered
Notice of Motion (003); Affirmation, and Exhibits	1-5
Opposition Affirmation, and Exhibits	6-9
Reply Affirmation, Exhibits	10-11
Notice of Motion (004), Affirmation, and Exhibits	12-21
Opposition Affirmation, and Exhibits	22-23
Reply Affirmation, Exhibits	24

In motion sequence number 003, plaintiff moves for an Order, pursuant to CPLR 3212, granting summary judgment on the issue of liability.

In motion sequence number 004, defendant moves for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint.

Motion sequence numbers 003 and 004 are consolidated herein for disposition.

Factual Background

On May 29, 2012, plaintiff Margit Szoke (Szoke) was walking southbound on First Avenue in Manhattan when she slipped and fell in front of the entrance of the building located at 360 East 57th Street, New York, New York (the premises). The entrance of the building is located on First Avenue.

Plaintiff alleges that the sidewalk in front of the premises was wet and slippery from having been hosed down with soap and water. Plaintiff alleges that she was walking at a normal pace, and that it was dry and not raining the day of her accident. Plaintiff stated at her examination before trial (EBT) that the water was soapy because she saw bubbles mixed with the water on the sidewalk. (Plaintiff's EBT, pg. 41, lines 6-13).

Glenn Casey (Casey), a porter employed by Weinberg Properties, was hosing down the sidewalk on the date of plaintiff's accident. Casey stated in his EBT that he began washing the sidewalk in front of the building at approximately 8 a.m., but that he did not use any soap or other cleaning agent. (Casey EBT, pg. 58, lines 17-24; pg. 38, lines 9-15). Casey further stated that while hosing down the sidewalk, he placed orange cones on either side of the black awning in front of the entrance to the building; when he was finished washing, he removed the cones from the sidewalk. (Casey EBT, pg. 43, lines 24; pg. 44, lines 2-25; pg. 45, lines 2-10). Casey testified that he witnessed the plaintiff fall outside the front of the building beneath the black canopy where he had just washed the sidewalk, and that immediately after plaintiff's fall, he went out to assist her. (Casey EBT, pg. 29- 33).

Arguments

Plaintiff contends that she is entitled to summary judgment because it is undisputed that defendant caused and created the dangerous condition of the wet sidewalk which caused her fall, and that defendant failed to warn of the condition by removing the orange cones.

Defendant argues that summary judgment for the plaintiff should be denied, but that the same should be granted in favor of defendant, because the mere presence of water on the sidewalk does not constitute a dangerous or defective condition for which the adjoining landowner may be liable.

Plaintiff opposes defendant's motion for summary judgment on the grounds that the presence of water on a sidewalk is a dangerous condition for which the adjoining landowner can be liable, and that such condition was undisputedly created by the defendant.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "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 case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving part (*Sosa v 46th Street Development, LLC*, 101 Ad3d 490 [1st Dept 2012]). Once a movant meets his initial burden, the

burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). When deciding a summary judgment motion, the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Corp.*, 18 NY2d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v Saint Claire's Hospital*, 82 NY2d 738 [1993]).

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 969, 646 NE2d 795, 622 NY2d 493 [1994]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). When a property owner creates a dangerous condition by its own affirmative act, the “usual questions of notice of the condition are irrelevant since the defendant created the condition” (*Cook v Rezende*, 32 NY2d 596, 599 [1973]). If a hazard or dangerous condition is open and obvious, the owner of the property has no duty to warn a visitor of the danger. The question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel

such a conclusion (see *Tagle v Jakob*, 97 NY2d 165, 168 [2001]).

Defendant argues that the wet sidewalk, regardless of how it was created, is not inherently dangerous, as a matter of law, and does not constitute a dangerous condition for which it may be liable. The determination of whether a certain condition is or is not inherently dangerous “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, 665 NYS2d 615, 688 NE2d 489). Here, plaintiff stated in her affidavit and her deposition testimony that she saw soapy bubbles in the water on the sidewalk at the time of her accident. The porter, however, testified that he did not use any soap or washing detergent when he was cleaning the sidewalk. This presents a factual dispute as to the condition of the sidewalk upon which plaintiff fell.

Defendant also argues that the fact that a sidewalk may be “inherently slippery” when wet does not give rise to a cause of action for negligence. It is well settled that absent proof of the reason for plaintiff’s fall other than the “inherently slippery” condition of the floor, no cause of action for negligence can properly be maintained (*Murphy v. Conner*, 84 NY2d 969, 622 NYS2d 494, 646 NE2d 796). Defendant cites to numerous cases in which plaintiff’s complaint based on wet and slippery sidewalks has been dismissed on summary judgment, but in those cases the sidewalks were either wet from natural causes or defendant lacked actual or constructive notice. In *Cook v. Rezende*, the Court of Appeal distinguished the difference in such cases:

Citing *Kraus v. Wolf* (253 NY 300), the Trial Judge granted defendant’s motion for nonsuit because “[t]he condition is no different if the stoop and steps get wet or soaked from a heavy rainfall or whether they get soaked from having water from a hose sprayed on them.” We pause here to note that *Kraus*, a classic slip-and-fall case, has no applicability here, for in that case the wet condition was occasioned by natural causes, creating a small pool of water in a slight depression. In the present case not only were the steps covered with water, but the entire situation was created by the

deliberate and intentional act of the defendant. Neither his duty nor his potential liability is to be predicated upon his “permitting” a dangerous condition to exist, but rather is based upon his own affirmative act in creating the condition complained of (cf. *Brand v. Interborough R.T. Co.*, 273 NY 658; *Miller v. Gimbel Bros.*, 262 NY 107; *Kraus v. Wolf*, *supra*; *Nevošo v. Putter-Fine Bldg. Corp.*, 18 AD2d, at pg. 320); and of course, usual questions of notice of the condition are irrelevant since the defendant created the condition. Unlike the precedent urged by the defendant and accepted by the trial court, the owner here was not subject to the unpredictable vagaries of the weather. It was, minimally, within the owner’s power to prevent the presence of water and the creation of a dangerous condition. 32 NY2d 596, 598-99, 300 NE2d 428, 429 (1973).

Here, the sidewalk was caused to be wet by the direct and deliberate actions of the defendant hosing down the sidewalk, and thus the question of notice, actual or constructive, is irrelevant since defendant created the condition. The only question is whether the condition of the sidewalk at the time of plaintiff’s fall constitutes a dangerous and hazardous condition for which defendant may be liable. Here there are differing accounts as to whether the sidewalk was wet with a soapy substance or not.

Defendant then points to the expert testimony of Mr. Jeffrey J. Schwalje, who concluded that the sidewalk is slip-resistant under wet or dry conditions, to support its contention that the wet sidewalk cannot constitute a dangerous or defective condition, and is not inherently dangerous. (*See Defendant’s Exhibit 1, Affidavit of Mr. Schwalje*). Mr. Schwalje based his conclusion on a Whiteley slip tester equipped with a Neolite sensor to act as a surrogate for common shoe material on dry surface conditions. (*Id.*) In opposition, plaintiff submitted its own expert testimony of Mr. Nicolas Bellizzi, P. E., who concluded that the sidewalk’s surface, when wet or wet with a soapy liquid substance, was not anti-skid, but was slippery. (*See Plaintiff’s Exhibit A, Affidavit of Nicolas Bellizzi, PE*). Because Mr. Bellizzi did not have permission to test the sidewalk under wet conditions, he based his

conclusion on a friction test of a similar sidewalk that was being cleaned and hosed off. (*Id.*) It should be noted here that plaintiff was under no obligation to rebut defendant's expert's conclusion with an expert of her own, since expert testimony is not required where the question of whether there is an unsafe condition is within the common knowledge and experience of jurors (*see Chafoulias v. 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211, 533 NYS2d 440 [1988]).

Defendant's contention that the water on the sidewalk does not constitute an actionable condition does not warrant summary judgment dismissing the complaint. Slippery conditions created by defendants in the course of cleaning premises can give rise to liability. Here, there remains a question of fact whether in the course of cleaning the sidewalk, the porter used soap which created a slippery condition. Accordingly, it is hereby

ORDERED, that plaintiff's motion, is denied, in its entirety; and it is further

ORDERED, that defendant's motion, is denied, in its entirety; and it is further

ORDERED, that the parties proceed to mediation/trial forthwith.

Dated: April 27, 1015

ENTER:



Joan M. Kenney, J.S.C.