Garcia v City of New York
2015 NY Slip Op 30836(U)
May 12, 2015
Supreme Court, New York County
Docket Number: 151483/120
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 2

ANTONIA GARCIA,

Plaintiff,

-against-

THE CITY OF NEW YORK AND
NEW YORK CITY HOUSING AUTHORITY,

Defendants.

DECISION AND ORDER
Index Number 151483/120
Mot. Seq. No. 001

HON. KATHRYN E. FREED, J.S.C.:

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

PAPERS	NUMBERED
Notice of Motion and Aff. Attached	1,2 (Exs. A-H)
Cathy Nelson Griffith Aff. In Supp.	3 (Exs. 1-3)
Memo. of Law In Support	4
Aff. In Opp.	5 (Exs. A-B)
Reply Aff.	6

Upon the foregoing cited papers, this decision on the motion is as follows:

Defendant New York City Housing Authority ("NYCHA") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after consideration of the parties' motion papers and the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on January 27, 2011, in which plaintiff Antonia Garcia was allegedly injured when she slipped and fell on ice in front of the premises where she lived at 140 West 104th Street in Manhattan. Ex. A, at 6, 24; Ex. B, at par. 12; Ex. D, at par. 20; Ex. E, at 5.[1]

Plaintiff commenced this action by filing a summons and complaint against NYCHA and the co-defendant City of New York ("the City") on April 3, 2012. Ex. B.[2] In her complaint, plaintiff alleged that she was injured due to the negligence of the defendants. Ex. B. On April 20, 2012, NYCHA joined issue by service of its verified answer, in which it denied all substantive allegations of wrongdoing and asserted affirmative defenses of assumption of risk, culpable conduct, and the collateral source rule. Ex. C.

In her bill of particulars, plaintiff alleged that she was injured on January 27, 2011 at approximately 8:20 a.m. on an icy, slippery, and wet sidewalk in front of 140 West 104th Street due to the negligence of the defendants in filing to maintain the sidewalk in a safe condition. Ex. D.

At her deposition, plaintiff testified that her accident occurred on January 27, 2011 at approximately 8:20 am, after she left the front entrance of her building and took about 4-6 steps. Ex. E, at 11, 43, 45. She did not see ice until she was on the ground after she fell. Id., at 44. It had snowed earlier that morning and she fell on a path that had been cleared of snow. Id., at 12, 48-49, 54. The bottom of the path looked like mud. Id., at 54.

Irving Blaney, an assistant resident superintendent for NYCHA, testified at a deposition on behalf of that entity. Ex. F, at 7. As of the date of the alleged incident, his title was supervisor of

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[1]Unless otherwise noted, all references are to the exhibits annexed to the affirmation of Deborah Bass, Esq. Submitted in support of NYCHA's motion.

[2]By stipulation dated November 14, 2013, plaintiff discontinued her claims against the City.

grounds. Id., at 8-9. When he was promoted to supervisor of grounds in 2006, he was assigned to the Douglas Houses, which included 140 West 104th Street. Id., at 10, 14. Blaney and his crew generally cleared sidewalks and main walkways. Id., at 15-16. Blaney further stated that the area immediately in front of the building would be cleared of snow by the caretaker assigned to the building and that the grounds staff would usually not clear that area. Id., at 44.

Blaney's logbook for January 26, 2011 reflects that he worked until 7 pm that evening instead of the usual 4:30 pm because there was a snowstorm in progress. Id., at 19-20, 27. Although his snow removal and sanding log (Ex. B to Plaintiff's Aff. In Opp.) reflected that there were still icy conditions at 4 pm, it does not indicate whether he checked to see whether the location was properly sanded and he could not remember why the notation was missing. Id., at 34-35. He maintained, however, that he always performed a 4 pm check. Id., at 42. He further maintained that his usual inspection included, inter alia, ensuring that a "reasonable size walkway [was] cleared and salt and sand [were] spread." Id., at 32.

The following morning, he reported to work at 6 am instead of his usual start time of 8 am because there was snow on the ground. Id., at 29. His notes for January 27, 2011 reflected that there were a total of 19 inches of snow on the ground. Id., at 35. The walkway would have been sanded by 8:30 am if the snow had stopped by then. Id., at 53. His crew removed snow from 6 am until 8:30 pm on January 27. Id., at 36.

Cathy Nelson Griffith, one of two supervisors of caretakers at the Douglas Houses, also testified at a deposition on behalf of NYCHA. Ex. G, at 7. As of the date of the alleged accident, Nelson Griffith and Rene Perez were the supervisors of the caretakers of 140 West 104th Street, which was part of the Douglas Houses. Id., at 13-16. Nelson Griffith stated that caretakers would clear snow from the path in front of the building until they reached a wider path, at which point the

ground supervisors would use heavier equipment to move the snow. Id., at 23, 27-28. The caretaker assigned to the building was Jeffrey Young. Id., at 42. There is no documentation as to when Young last cleared or inspected the path prior to the alleged incident. Id., at 76.

Nelson Griffith maintained a logbook regarding the condition of the grounds. Id., at 53. However, she generally would not put information regarding snow removal in the book. Id., at 55. Rather, Blaney, the grounds supervisor, put this information into his log. Id., at 55-56.

According to Nelson Griffith, at some point prior to 8:20 am on January 27, 2011, a path had been cleared in front of the building but she did not know how often it was cleared or how much, if any, salt or sand was spread in the area. Id., at 83.

NYCHA now moves for summary judgment dismissing the complaint. In support of its motion, NYCHA submits, inter alia, plaintiff's 50-h hearing testimony, the pleadings, the bill of particulars, and deposition testimony. Additionally, NYCHA submits a certified weather record from the National Climatic Data Center. Ex. H. The record reflects 8.3" of rain, freezing rain and snow on January 26 and 6.7" of snow on January 27, 2011. Id. The snow began at 8 am on January 26 and ended before 7 am on the 27th. Id.

In an affidavit submitted in support of NYCHA's motion for summary judgment, Nelson Griffith states that, on January 27, 2011, she reported to work at 6:26 am, instead of her usual time of 8 am. (Ex. 2 to her Aff.). Young, the caretaker assigned to the premises on the day of the incident, reported to work at 7:25 am, earlier than his usual starting time of 8 am (Ex. 3 to her Aff.), and began clearing a path on the walkway in front of the building. Nelson Griffith 's logbook (Ex. 1 to her Aff.) reflected "everything looking good" which meant either that paths had been cleared and salt and sand had been applied by the caretakers or that the caretakers were doing so by the time of her inspection. If Young had not begun these tasks, Nelson Griffith would have noted this

omission in her logbook.

In opposition to the motion, the plaintiff submits the note of issue and Blaney's snow removal and sanding log. Exs. A and B to Plaintiff's Aff. In Opp., respectively.

THE PARTIES' CONTENTIONS:

NYCHA argues that it is entitled to summary judgment dismissing the complaint because an insufficient amount of time elapsed following the cessation of the storm to allow liability to be imposed on it for the plaintiff's accident. Further, urges NYCHA, its snow removal operations did not render the walkway where plaintiff fell more dangerous.

In opposition to the motion, plaintiff argues that NYCHA's motion must be denied because issues of fact exist regarding whether NYCHA's snow removal efforts made the path in front of plaintiff's building more hazardous.

It its reply affirmation, NYCHA reiterates its argument that it commenced snow removal operations within a reasonable time after the snowfall ended. It further asserts that plaintiff failed to raise an issue of fact regarding whether NYCHA caused or contributed to the alleged incident.

LEGAL CONCLUSIONS:

"The proponent of a summary judgment motion must demonstrate that there are no materials of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept. 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. *See Zuckerman v City of New York*, 49 NY2d 557 (1989). "Mere

conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation." *Morgan v. New York Telephone*, 220 AD2d 728, 729 (2d Dept. 1985).

Here, NYCHA is entitled to summary judgment dismissing the complaint against it.

Initially, plaintiff does not address NYCHA's meritorious argument that it had a reasonable time after the cessation of the storm to begin snow removal efforts. It is well settled that "'a municipality is not liable in negligence for injuries sustained by a pedestrian who slips and falls on an icy sidewalk unless a reasonable time has elapsed between the end of the storm giving rise to the icy condition and the occurrence of the accident' (*Valentine v City of New York*, 86 AD2d 381, 383 [1982], affd 57 NY2d 932 [1982])." *Rodriguez v New York City Hous. Auth.*, 52 AD3d 299, 300 1st Dept 2008). Pursuant to Admin. Code of the City of New York § 16-123(a), a building owner has four hours from the end of a snowfall to remove snow and ice from abutting sidewalks, excluding the hours of 9 pm and 7 am. *Id.*

Since the certified weather records submitted by NYCHA reflect that the snowfall in question began at about 8 am on January 26, 2011 and did not end until before 7 am on January 27, 2011 (Ex. H), and plaintiff's alleged accident occurred on January 27 at approximately 8:20 am (Ex. D; Ex. E, at 11), NYCHA had until approximately 11 am on January 27 to remove ice and snow from sidewalks at the subject premises. For this reason alone, NYCHA is entitled to summary judgment dismissing the complaint.

Even assuming that NYCHA did not have the protection of § 16-123(a), it would still have had a reasonable time after the cessation of the storm to take reasonable measures to address dangerous conditions on its premises. *See Clement v New York City Trans. Auth.*, 122 AD3d 448 (1st Dept 2014). Since it stopped snowing less than two hours prior to the alleged accident,

NYCHA did not yet have an obligation to commence snow removal measures at the time the incident occurred. *Id.*

Given plaintiff's failure to address this argument, she has failed to raise a triable issue of fact as to whether NYCHA's snow removal efforts began a reasonable time after the cessation of the storm.

Additionally, plaintiff's contention that NYCHA's snow removal efforts somehow made the path outside plaintiff's building more dangerous is utterly devoid of merit. *See Sevilla v The Calhoun School*, ___ AD3d ___ , 4 NYS3d 520 (1st Dept 2015).

Although Blaney admitted that his logbook was missing an entry regarding whether any sanding had occurred as of 4 pm on January 26, 2011, he maintained that he performed a 4 pm check, that his inspection would have included, inter alia, ensuring that a "reasonable size walkway [was] cleared and salt and sand [were] spread", and that he worked until 7 pm that evening, instead of until his usual time of 4:30 because there was a snowstorm in progress. *Id.*, at 19-20, 27, 32, 42. Additionally, whether snow had been removed the day before had little relevance to removal on January 27, 2011, after an additional 6.7" of snow had fallen.

Nelson Griffith testified at her deposition that, prior to 8:20 am on January 27, 2011, a path had been cleared in front of the building. Ex. G, at 83. In an affidavit in support of NYCHA's motion, Nelson Griffith states that, on January 27, 2011, she reported to work at 6:26 am, instead of her usual time of 8 am. (Ex. 2 to her Aff.). Young, the caretaker assigned to the premises on the day of the incident, reported to work at 7:25 am, earlier than his usual starting time of 8 am (Ex. 3 to her Aff.), and began clearing a path on the walkway in front of the building. Nelson Griffith's logbook (Ex. 1 to her Aff.) reflected "everything looking good" which meant either that paths had been cleared and salt and sand had been applied by the caretakers or that the caretakers were doing

so by the time of her inspection.

Therefore, Blaney and Nelson Griffith established that NYCHA made prompt efforts to remove snow from the premises. "Absent a statute to the contrary, one who attempts to remove snow from a sidewalk is not subject to liability simply because he or she failed to remove all of the snow (*Sanders v City of New York*, 17 AD3d 169, 169 [2005], citing *Spicehandler v City of New York*, 303 NY 946 [1952], *affg* 279 App Div 755 [1951])." *Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 463 (1st Dept 2007). Thus, plaintiff's claim that NYCHA should be liable because the area where she fell was not "fully cleared" (Plaintiff's Aff. In Opp., at par. 26) is without merit.[3]

In asserting that NYCHA made the path outside her home more dangerous by its snow removal operations plaintiff relies, rather curiously, on *Joseph, supra*, the facts of which are similar to those herein. In that case, as here, the defendant made a prima facie showing that its snow removal efforts, while incomplete, did not exacerbate the condition of the sidewalk. In dismissing the complaint, the Appellate Division, First Department held, in language particularly applicable to the facts herein, that:

> In opposition [to defendant's motion for summary judgment], plaintiff, who offered only her attorney's affirmation in response to the motion, failed to raise a triable issue of fact. Plaintiff's claim that defendant's snow removal efforts made the condition of the sidewalk more hazardous is unsupported by any evidence, constitutes rank speculation and is insufficient to defeat defendant's motion for summary judgment (citations omitted).

Id., at 464.

In opposing NYCHA's motion, plaintiff also relies on the case of *Rector v City of New York*, 259 AD2d 314 (1st Dept 1999). In that case, the Appellate Division, First Department held that the

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[3]This Court notes that plaintiff's representation that she fell on "packed snow and ice" (Plaintiff's Aff. In Opp., at par. 26) is unsubstantiated by her deposition transcript. Ex. E.

defendant store was not entitled to summary judgment where it cleared 9-14 inches of snow from an abutting sidewalk, leaving just enough snow to obscure a layer of ice underneath. The court held that "[o]n this record, a jury could readily conclude that defendant's snow removal efforts increased the hazard to pedestrians, producing a surface that is considerably more slick, difficult to discern and inherently dangerous than the natural state of the fallen snow (citation omitted)." *Id.*, at 321. *Rector* is distinguishable, however, since the plaintiff in that case said that he fell on a hard sheet of ice. Here, plaintiff stated that, although she saw ice on the ground after she fell, she also saw mud. Ex. E, at 54-56. This supports the NYCHA's argument that it was clearing the area of snow when the alleged incident occurred.

Further, plaintiff relies on *Suntken v 226 West 75th St., Inc.*, 258 AD2d 314 (1st Dept 1999). In that case, plaintiff fell while walking in a 2-3 foot snow-covered path in front of defendant's store. The store moved for summary judgment and its motion was denied on the ground that issues of fact existed regarding whether its snow removal measures increased the dangerous condition, where a store employee testified that it was routine practice for store managers to shovel a path for customers when it snowed, and there was evidence of accumulations of up to 3 inches of old snow on either side of the path. Here, however, there was no evidence of any old accumulations of snow. On the contrary, plaintiff testified that she was able to see mud (Ex. E, at 54-56), thereby indicating that NYCHA had cleared a path all the way to the ground.

Joseph, *Rector*, and *Suntken* each support NYCHA's entitlement to summary judgment on the ground that it did not cause or exacerbate any dangerous condition which led to the alleged accident. The fact that this result is warranted becomes more apparent to this Court when it considers plaintiff's failure to introduce the opinion of an expert explaining how and why NYCHA

was liable in any way for creating or exacerbating a dangerous condition in front of her building.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant New York City Housing Authority is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: May 12, 2015

ENTER:

HON. KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT