Darbasie v Briad Wenco, LLC
2015 NY Slip Op 31338(U)
March 13, 2015
Supreme Court, Queens County
Docket Number: 24804/2012
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ZANIFFAH DARBASIE,

Plaintiff,

- against -

BRIAD WENCO, LLC and MAJESTIC EMPIRE HOLDINGS, LLC,

Defendants.

- x

Index No.: 24804/2012

Motion Date: 01/08/15

Motion No.: 30

Motion Seq.: 3

The following papers numbered 1 to 17 were read on this motion by defendants, BRIAD WENCO, LLC and MAJESTIC EMPIRE HOLDINGS, LLC for an order, pursuant to CPLR 3212, granting summary judgment in favor of said defendants and dismissing the plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 8
Affirmation in Opposition-Exhibits	9 - 13
Reply Affirmation	14 - 17

This is an action for damages for personal injuries sustained by plaintiff, Zaniffah Darbasie, on February 27, 2010, when she allegedly slipped and fell on black ice in the parking lot at a Wendy's Restaurant owned by the defendants located at 138-33/138-45 Jamaica Avenue, Queens County, New York.

The plaintiff commenced an action for negligence by filing a summons and verified complaint on December 13, 2012. Issue was joined by the service of defendants' verified answer on or about March 19, 2013. The plaintiff filed a Note of Issue on July 7, 2014. The matter is presently scheduled on the calendar of the Trial Scheduling Part for May 21, 2015. The gravamen of the complaint is that the defendants, as owners of the premises,

negligently allowed snow and ice to accumulate and/or failed to remove it or negligently undertook to do so, or to guard against the allegedly dangerous, hazardous and slippery conditions. Plaintiff contains that the defendants had actual and constructive notice of the condition in that the condition existed for a sufficiently long period of time that defedants knew or should have known of said condition. As a result of the plaintiff's slip and fall it is alleged that the plaintiff sustained, inter alia, a comminuted fracture of the left distal radius; disc bulges and disc herniations of the cervical and lumbar spines.

Defendants now move for an order granting summary judgment and dismissing the plaintiff's complaint on the ground that the defendants bear no liability to the plaintiff for negligence due to an allegedly dangerous condition in the parking lot because the record establishes that defendants did not cause, or have notice, either actual or constructive of the allegedly icy condition on its property sufficient to establish liability as a matter of law.

In support of the motion, defendants' counsel, Patricia A. Sullivan, Esq., submits her own affirmation; a copy of the pleadings; a copy of the plaintiff's verified Bill of Particulars and supplemental and second supplemental verified bills of particulars; a copy of the transcript of the examinations before trial of plaintiff, Zaniffah Darbasie; and defendant, by Adnan Ahmad; an affidavit of restaurant manager Adnan Ahmad; and an affidavit of restaurant employee, Berta Cruz.

Plaintiff, Zaniffah Darbasie, a home health aide, age 60, testified at an examination before trial on February 12, 2014. She stated that her slip and fall accident occurred on February 27, 2010. She finished her work schedule at 6:00 a.m that morning and took the bus to Hillside Avenue and 140th Street. She walked towards Jamaica Avenue to go to Wendy's to get breakfast. She stated that the weather was clear. It was not raining or snowing at the time. She did not recall the last time it had snowed prior to the accident. She was walking on the sidewalk and turned into the Wendy's parking lot. After she walked three and a half feet into the parking lot she slipped and fell on black ice. She fell backwards and braced her fall with her hands. She did not see the black ice until after she fell when she looked on the ground. She did not recall if there was any other snow or ice in the parking lot. After she got up she tried to enter the restaurant but it was not open at he time so she walked to the emergency room at Jamaica Hospital where she was told her left wrist was fractured. She did not notify Wendy's of her accident and no accident report was generated.

Adnan Ahmed, the general manager of Wendy's at the subject location testified at an examination before trial on April 25, 2014. On the date of the accident the restaurant was open from 10:00 a.m. to 4:00 a.m. the following morning. He states at 3:00 a.m an employee generally goes outside and sweeps the parking lot. If there is snow they spread salt all around, clean the sidewalk, sweep all around and pick up trash. The employees use shovels, brooms and garbage containers. He stated that Wendy's utilized a private contractor, Speed Wrench, Inc., to clear snow if there was more than one or two inches. He stated that Wendy's keeps records of the employees who opened the store and who inspected the parking lot in February 2010. He states that the usual procedure is that before they close at 4:00 a.m. someone goes outside and cleans the parking lot. If there is snow they remove it, and then apply salt to the ice. In addition, the morning manager walks around the building and inspects the parking lot. After the store opens someone walks around every 15 minutes and does a walk through which includes the parking lot.

Mr. Ahmed also submits an affirmation dated August 28, 2014. He states that he is employed by Briad Wenco, LLC. He states that the morning manager and morning employees arrive at 7:00 a.m. To prepare for opening at 10:00 a.m. He states that the restaurant did not serve breakfast at hat time. Part of the morning routine involved the inspection of the parking lot and, if necessary, clearing the parking lot of snow and ice and spreading rock salt. In addition, the closing manager inspects the parking lot at 4:00 a.m. In the event of a major snow accumulation the manager would notify an independent snow removal service to be sure they arrived as per the contract. He states that in the event an isolated patch of ice was observed, the opening manager would assign an employee to break up the ice with a shovel and then salt the area. He states that on February 27, 2010, the morning manager was Ms. Berta Cruz. He states that on the date of the accident no complaints were made to Berta Cruz or any other Wendy's employee regarding snow or ice in the parking lot. He states that neither Berta Cruz or any other Wendy's employees were notified or aware of any snow or ice condition in the parking lot on February 27, 2010. He also states that neither Berta Cruz nor any other employee witnessed the defendant's fall in the parking lot nor did they see anyone approach the restaurant windows for assistance.

Ms. Berta Cruz submits an affidavit dated August 28, 2014, stating that on the date in question she was working the opening shift from 7:00 a.m. until 4:00 p.m. At that time the restaurant did not serve breakfast and was not open to the public until 10 a.m. She states she entered the restaurant via the parking lot

entrance. She states that it was the custom and practice of Wendy's to salt the area of the parking lot when the restaurant closed at 4:00 p.m. She stated that she inspected the parking lot that morning and did not observe any unusual snow or ice condition in the parking lot. She states that no complaints were made to her regarding snow and ice on that morning and she did not witness nor was she approached by anyone who fell in the parking lot.

Defendants contend that there they are entitled to summary judgment dismissing the complaint because as a property owner they may be held liable for injuries sustained in a slip and fall accident involving snow and ice on its property only if it created the dangerous condition or had actual or constructive notice of the condition. Counsel relies on the affidavit of Ms. Cruz who states that based upon her visual inspection at 7:00 a.m. she did not observe any snow and ice in the parking lot. Counsel contends that the affidavits of Mr. Ahmed and Ms. Cruz demonstrate that the defendants did not cause the ice condition to occur and that the condition did not occur due to the defendants' failure to take proper precautions.

In addition counsel contends that there is no proof in the record that the restaurant was given actual notice of the condition prior to the accident. In that regard, Ms. Cruz states that no complaints were made to her prior to the accident and that no one from the restaurant was actually informed prior to the accident regarding ice in the parking lot. Counsel argues that since the plaintiff claimed she slipped on black ice the condition was not visible or apparent and they could not therefore have had constructive notice of the condition. Counsel also asserts that there is no proof in the record that the ice condition was in existence for a sufficient length of time prior to the accident to permit defendants employees to discover and remedy the condition. It is claimed that the defendants performed a thorough inspection of the premises 10 minutes prior to the accident and that the inspection did not reveal an ice condition in the parking lot.

In opposition, counsel for the plaintiff argues that the defendant did cause and create the dangerous condition, had notice of it, and failed to take adequate steps to remove the condition. Counsel contends, based upon an affidavit from the plaintiff and from a meteorological expert that there was a major winter storm that ended on February 26, 2010, the day before the plaintiff fall, in which the parking lot at Wendy's received at least 12 inches of snow. Counsel submits that the defendants' caused and created the condition by improperly and inadequately

removing snow and ice from the parking lot and inadequately treating the parking lot with salt.

In support of the opposition, the plaintiff submits her own affidavit dated December 12, 2014, in which she states that there are no pedestrian walkways around the restaurant and the only way to approach the entrance to the restaurant is through one of the driveways and through the parking lot. She states that on the morning in question, "there was snow, several feet high and several feet wide, plowed and/or shoveled in the northeast corner of the parking lot, just inside the driveway, and to my right as I entered." She states that although there was a major snow storm that ended on February 26, 2010, the day before her accident, she does not deny that the parking lot had been cleared on snow from the storm the day before.

Plaintiff also submits an affidavit from forensic meteorologist Mark L. Kramer. In order to arrive at his opinion Mr. Kramer reviewed the EBT testimony, the complaint, the Supplemental Bill of particulars, the affidavits of Mr. Adnan and Ms. Cruz, color photographs of the parking lot identified by the plaintiff at the EBT as well as additional photographs and video taken of Wendy's parking lot after and during rainfall on December 3 and 8, 2014, four years subsequent to the accident. He also analyzed the certified records obtained from the National Climatic Data Center. Based upon his review of the records he states that there was a snowstorm on February 26, 2010 the day before the accident which added 8.5 inches and brought the two-day storm total to 11.4 inches of snow and ice pellets. He states that the general manager testified that the snow removal contractor put the snow in one corner of the parking lot and the plaintiff observed the snow the northeast corner of the parking lot. Mr. Kramer states that based upon the air temperatures following the snowstorm the snow could have melted and the runoff flowed towards a storm drain in the middle of the parking lot and refroze in the area where the plaintiff allegedly fell. He states that the defendants should have been aware that the natural drainage of melting water from snow piles in the corner of the parking lot drained towards the area where the plaintiff fell. Moreover he states that the National Weather Service sent out an alert that night warning of a black ice condition at the time that the plaintiff fell. The expert concludes that the employees should have been aware of the weather alerts and should therefore have paid special attention to the areas where water accumulated on its route to the storm drain and adequately treated those areas with salt.

Plaintiff submits that the report of the expert meteorologist shows that the Wendy's lot received 12 inches of snow from February 25 - 26, 2010. When the storm ended in the afternoon of February 26, 2010 temperatures rose above freezing and melting occurred. The National Weather Service sent an alert in the early morning of February 27, 2010 that air temperatures would fall below freezing and that any water remaining would turn to black ice. Therefore, it is claimed that the Wendy's employees were on notice of the necessity of inspecting the parking lot for ice before closing at 4:00 a.m. and again upon arriving at 7:00 a.m. Counsel asserts that based upon the report the employees should have been aware that natural drainage is toward the storm drain in the middle of the parking lot. Plaintiff also contends that there is a question of fact as to the defendants' constructive notice because the expert stated that without the melting water from the snow piles, the ice would not have been present in the parking lot at the time of the accident and that the black ice was the result of the water melt from residual snow left on the parking lot after the plowing and by inadequate treatment by rock salt. (Citing Grillo v. Brooklyn Hosp., 280 AD2d 452 [2d Dept. 2001]; Grizzaffi v Paparodero Holding Corp., 261 AD2d 437 [2d Dept. 1999]; Reidy v EZE Equip. Co., 234 AD2d 593 [2d Dept. 1996]; Kay v Flying Goose, 203 AD2d 332).

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and defendant's reply thereto, this court finds as follows:

A real property owner or person in possession or control of real property will be held liable for a slip-and-fall accident involving snow and ice on his or her property only when the defendant created a dangerous condition or had actual or constructive notice thereof (see Simmons v Metropolitan Life Ins. Co., 84 NY2d 972 [1994]; Feola v City of New York, 102 AD3d 827, [2013]; Cody v DiLorenzo, 304 AD2d 705

This Court finds that the defendant made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that it neither created nor had actual or constructive notice of the icy condition alleged to have caused the plaintiff's fall (see Butler v Roman Catholic Diocese of Rockville Ctr., 123 AD3d 868 [2d Dept. 2014]; Cuillo v Fairfield Prop. Servs., L.P., 112 AD3d 777 [2d Dept. 2013]; Spinoccia v Fairfield Bellmore Ave., LLC, 95 AD3d 993 [2d Dept. 2012]; Christal v Ramapo Cirque Homeowners Assoc., 51 AD3d 846 [2d Dept. 2008]).

However, in opposition the evidence submitted by the defendants including the affidavit of the plaintiff and the affidavit of Mr. Kramer, an expert meteorologist, raised questions of fact as to whether the patch of black ice upon which the plaintiff allegedly slipped and fell was created by the contractor piling the snow in an area where the melting water from the snow would have run down into the area where the plaintiff fell and refroze (see Smith v New York City Hous. Auth., 124 AD3d 625 [2d Dept. 2015]; Wei Wen Xie v Ye Jiang Yong, 111 AD3d 617 [2d Dept. 2013]; Cotter v Brookhaven Mem. Hosp. Med. Ctr., Inc., 97 AD3d 524 [2d Dept. 2012]; Kantor v Leisure Glen Homeowners Assn., Inc., 95 AD3d 1177 [2d Dept. 2012]).

The plaintiff's expert submission also raises a question of fact as to whether the ice upon which the plaintiff slipped was formed when snow piles created by the defendant's snow removal efforts melted and refroze and whether the defendants took adequate precautions to salt the parking lot in view of the National Weather Service warnings regarding the formation of black ice (see Herskovic v 515 Ave. I Tenants Corp., 124 A.D.3d 582 [2d Dept. 2015]; Viera v Rymdzionek, 112 AD3d 91 [2d Dept. 2013]; Smith v County of Orange, 51 AD3d 1006 [2008]; Ricca v Ahmad, 40 AD3d 728 [2d Dept. 2007]; Grizzaffi v Paparodero Holding Corp., 261 AD2d 437 [2d Dept. 1999]).

Accordingly, for all of the above stated reasons and viewing the evidence in the light most favorable to the non-moving party (see Stukas v Streiter, 83 AD3d 18 [2nd Dept. 2011]; Judice v DeAngelo, 272 AD2d 583 [2nd Dept. 2000], it is hereby,

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

Dated: March 13, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.