

Conrad v City of New York

2015 NY Slip Op 32126(U)

October 15, 2015

Supreme Court, New York County

Docket Number: 113264/11

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

FILED

PART 5

WINTHROP B. CONRAD, JR.

INDEX NO. 113264/11

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MOT. DATE

- v -

MOT. SEQ. NO. 001, 002

THE CITY OF NEW YORK et al.

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RECEIVED

The following papers, numbered 1 to _____ were read on this motion of for 15

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

No(s). 1, 6

Notice of Cross-Motion/Answering Affidavits — Exhibits

No(s). 2, 3, 7, 8

Replying Affidavits

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No(s). 4, 5, 9, 10, 11

Upon the foregoing papers, it is hereby ORDERED that

In this action, plaintiff seeks to recover due to an alleged slip and fall on the sidewalk adjacent to the premises located at 360 Central Park West, New York, New York. Defendant Rockledge Scaffold Corp. ("Rockledge") moves for summary judgment in its favor dismissing all claims and cross-claims (motion sequence number 001). Defendants Argo Realty, LLC, Cenpark Realty Company, LLC and Cenpark Realty Company (collectively "Argo") also move for summary judgment in their favor (motion sequence number 002). Defendant The City of New York (the "City") and plaintiff oppose both motions. The motions are hereby consolidated for the court's consideration and disposition in a single decision/order. The court's decision follows.

Plaintiff testified as follows at his deposition. At approximately 7pm on February 23, 2011, plaintiff fell on the sidewalk where it came into contact with the curb cut on the 96th Street side of the sidewalk at the corner of 96th Street and Central Park West. Plaintiff fell on black ice and landed on a ramp. Plaintiff

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Dated: October 15, 2015

COUNTY CLERK'S OFFICE
NEW YORK

[Signature]
HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:

SETTLE ORDER SUBMIT ORDER DO NOT POST

FIDUCIARY APPOINTMENT REFERENCE

described the ice as being like “glass, smooth with ice” and “not bumpy or rigid.” Plaintiff further testified as follows:

Q. Do you have any knowledge as to the source of the ice that was in the location where you fell?

A. While I was lying on the sidewalk, I noticed there was active dripping of water from the scaffolding down on the sidewalk.

It had snowed in the city, I think the day before, or one or two days before that, so I did notice there was snow on the scaffolding. Whether I noticed it at that precise moment lying down, or whether I saw the snow on the scaffolding, or my wife reported it on the scaffolding, or somebody reported it on the scaffolding, I don’t remember. But there was snow accumulation on the scaffolding.

It had been above freezing during the day that day, and sunny, as I recall, and so some of the snow water had been dripping during the day, I assume, because it was still dripping when I was lying there. It had ben probably in the 0s or high 30s. I don’t know the precise weather record, but it was quite cold at 7:00 and water was dripping from the scaffolding and hitting the ground. And it was coming down fairly actively.

Meanwhile, in May 2009, Rockledge installed a sidewalk bridge over the sidewalk at Central Park West and 96th Street, pursuant to an agreement with The Argo Corporation/Cenpark Realty Company. Pursuant to the terms of that agreement, Rockledge was not required to install gutters or drain pipes, and any accumulation of water, snow or ice was the sole responsibility of the customer/building owner. Rockledge did not otherwise perform any work on or in the area where plaintiff slipped and fell. Rockledge argues that it is entitled to summary judgment because it did not owe plaintiff a duty of care and did not have actual or constructive notice of the patch of ice which allegedly caused plaintiff’s accident.

Similarly, Argo contends that it did not have actual or constructive notice of the allegedly defective condition. Marina Higgins, Vice President of Argo Real Estate, LLC, testified on behalf of Argo as follows. Ms. Higgins managed the building located at 360 Central Park West, adjacent to the sidewalk where plaintiff’s accident occurred. Superintendent Jacob De La Cruz also testified on behalf of Argo. He testified that at approximately 7pm on the date of the accident, he went outside with the porter and observed that someone had fallen at the location described by plaintiff. It had not snowed that day. When it snowed, Mr. De La Cruz and his workers would shovel the entire sidewalk, including the curb cut for the ramp, and would remove any ice and put down salt. Mr. De La Cruz prepared an accident report in connection with plaintiff’s accident. According to that report, Mr. De La Cruz wrote the following:

On Wednesday February 23, 2011 around 7PM, I went outside and found out a man had failed on the sidewalk outside the building. Water from melting snow on the scaffold dripped down onto the sidewalk next to the curb cut. This is where the man slipped....

...

I put salt on all the posts because water continues to fall from the scaffold.

The porter for the building, Juan Vasquez, also testified at an EBT on behalf of Argo. He stated that he had previously seen water dripping from the scaffold. Marina Higgins also testified on behalf of Argo. Marina Higgins was Vice President of Argo Real Estate, LLC, and she described the routine inspections Mr. De La Cruz and his staff would perform upon the accumulation of snow. Ms. Higgins further stated that she did not recall water dripping from the scaffold/sidewalk bridge at the location of plaintiff's accident, nor had she seen an accumulation of water there as well. Argo has also provided meteorological evidence showing that: [1] a snow storm occurred on February 21, 2011 from 1am to 9am, resulting in a total accumulation of 3.2 inches of snow; [2] that on February 23, 2011, the temperature was 25 degrees Fahrenheit at 12am, cooling to a low of 21 degrees Fahrenheit around 8am; and [3] on February 23, 2011 the temperature rose that day above freezing between 11am and 12pm, with a high of 40 degrees Fahrenheit, which fell to about 37 degrees Fahrenheit by 7pm. Argo's forensic meteorologist expert, Thomas Downs, opines that at the time of the incident, the temperature was 37 degrees Fahrenheit, and approximately one inch of snow left on undisturbed and untreated ground surfaces. Mr. Downs maintains that the conditions prior to plaintiff's accident were not conducive to the formation of ice.

Argo has also provided an affidavit by Jeffrey Schwalje, P.E., a licensed professional engineer. Mr. Schwalje performed an inspection of the premises, along with the sidewalks and sidewalk bridge adjacent to the building. Mr. Schwalje states in pertinent part that any melt from the scaffolding would drain toward the building and not toward the curb.

Argo contends it is entitled to summary judgment because it is undisputed testimony that it did not snow on the date of plaintiff's accident, and Argo's employees inspected the sidewalks twice a day and Mr. De La Cruz did not see any ice on the day of plaintiff's accident.

Both plaintiff and the City argue that triable issues of fact exist as to whether Rockledge caused and/or created the allegedly defective condition and as to whether Argo had constructive notice of the water which allegedly dripped from the scaffolding and caused the subject condition.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Here, Rockledge has met its burden in establishing that it did not owe plaintiff a duty as an independent contractor, nor did it have actual or constructive notice of the allegedly defective condition. While both plaintiff and the City argue that Rockledge can be held liable because it caused and/or created the allegedly defective condition by installing a sidewalk bridge/scaffolding which permitted water to drip down and presumably cause the patch of ice that plaintiff slipped on, there are no facts on this record which would lead a reasonable jury to draw such a conclusion (compare *Schnur v. City of New York*, 298 AD2d 332 [1st Dept 2002], which affirmed the denial of summary judgment in favor of an independent contractor where there was testimony that water dripped from a *hole in the tin roof of the sidewalk bridge*). Here, there are no facts concerning the alleged defect concerning the scaffolding/sidewalk bridge which thereby caused water to drip, and Rockledge's agreement with Argo specifically exempted gutters and drains and provided that "[a]ny accumulation or occurrence of water and/or snow and/or ice is the sole responsibility of the Customer/Building Owner."

As for Argo, its motion must be denied. Here, there is a triable issue of fact as to whether Argo had constructive notice of the dripping water. Further, the meteorological data and opinions of Mr. Schwalje do not establish as a matter of law that the dripping water could not have caused and/or contributed to the allegedly defective condition which caused plaintiff's accident.

Accordingly, Rockledge's motion is granted and the claims and cross-claims against it are hereby severed and dismissed and Argo's motion is denied in its entirety.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Rockledge's motion for summary judgment is granted; and it is further

ORDERED that all claims and cross-claims against Rockledge are hereby severed and dismissed; and it is further

ORDERED that Argo's motion for summary judgment is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision/order of the Court.

Dated: October 15, 2015
 New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.

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