Hsia v Valle
2015 NY Slip Op 32136(U)
October 26, 2015
Supreme Court, Queens County
Docket Number: 705315/14
Judge: Timothy J. Dufficy

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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MING HSIA,

Plaintiff,

-against-

IRVING VALLE AND REYNA E. VALLE,

Defendants.

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Index No.: 705315/14
Mot. Date: 8/4/15
Mot. Cal. No. 47
Mot. Seq.: 2

The following papers numbered EF 22 to 31 and EF 33 to 55 read on this motion by defendants **IRVING VALLE AND REYNA E. VALLE** for summary judgment dismissing the complaint and the cross-motion by plaintiff **MING HSIA** for an order granting summary judgment in his favor.

	Papers Numbered
Amended Notice of Motion.....	EF 33
Affidavits - Exhibits	EF 22-31
Notice of Cross Motion - Affidavits - Exhibits	EF 34-52
Reply Affidavits	EF 53-55

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

This is an action to recover for personal injuries that the plaintiff allegedly sustained on February 11, 2010, in a slip-and-fall accident. Plaintiff Ming Hsia has alleged that he slipped and fell on ice on an uneven sidewalk abutting defendants' property, located at the intersection of 213 Street and 47 Avenue, in the County of Queens.

Both defendants and plaintiff have moved for summary judgment on the complaint. On a motion for summary judgment, the movant has the burden of demonstrating the absence of any material issues of fact (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The existence of genuine issues of material fact preclude summary relief (*see id.*). The defendants have argued that they did not have a duty to perform snow and ice removal on the subject sidewalk because they are

exempt under the provisions of the Administrative Code of the City of New York § 7-210, for owner-occupied one, two, or three family residential property, and that there is no evidence that their snow and ice removal efforts created or exacerbated the alleged dangerous condition of the sidewalk. The plaintiff has argued that the defendants are not exempt under the Administrative Code because the premises was not owner-occupied, and that the defendants' negligent actions exacerbated the alleged condition.

An owner of property has a duty to maintain it in a reasonably safe condition (*see Martinez v Santoro*, 273 AD2d 448 [2000]; *Meyer v Tyner*, 273 AD2d 364 [2000]). "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; *James v Blackmon*, 58 AD3d 808 [2009]). Since 2003, the Administrative Code of the City of New York § 7-210 (a) has provided that it is "the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition" (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-521 [2008]). However, Section 7-210 also contains an exception in which the City retains responsibility for sidewalks abutting a "one, two, or three family residential real property that is ... owner occupied" (Administrative Code § 7–210[b]). Liability may also be placed on the owner of property abutting a public sidewalk where he or she "either affirmatively created the dangerous condition, voluntarily but negligently made repairs to the sidewalk, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance expressly imposing liability on the abutting landowner for a failure to maintain the sidewalk" (*James v Blackmon*, 58 AD3d at 808; *Jacobs v Village of Rockville Ctr.*, 41 AD3d 539, 540 [2007]).

The record contains, among other things, the deposition testimony of defendant Irving Valle (Valle), and the affidavit of Jessica Baron (Baron), an employee of plaintiff's counsel. Valle testified that the defendants owned the subject property, which included a two-family, residential home, and that the defendants resided at the subject premises. Baron stated that, after performing an investigation as part of her employment, based upon various documentary evidence, some of which is included in the record, she concluded that the defendants did not reside at the subject premises. The Court also notes, although not dispositive, that defendants' insurance carrier, Tower Insurance Group, investigated

the subject claim and their investigation revealed that the place of the subject accident was not owner-occupied. In fact, Tower issued a letter, dated July 8, 2010, disclaiming coverage on that basis. Based upon that fact, it surprises the Court that defense counsel would move on the "owner-occupied" exception. Based upon the conflicting evidence, at the very least, there remains a genuine issue of material fact as to whether the subject premises was owner-occupied at the time of the accident, and thus, whether the defendants had a duty to maintain the sidewalk (Administrative Code § 7–210[b]; *see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Furthermore, an issue of fact exists regarding whether the defendants' snow and ice removal efforts did or did not exacerbate the alleged dangerous condition of the sidewalk. Where a property owner undertakes the removal of snow or ice on a sidewalk abutting his or her property, "[l]iability will only result if it is shown that negligent or improper shoveling made the sidewalk more hazardous" (*Arzola v Doneca*, 272 AD2d 422, 423 [2000]). Valle testified that he did not specifically recall the snow storm preceding the subject accident, but that following the end of a snowfall, he would normally shovel the sidewalk of snow and apply ice melt. Plaintiff's statements from his affidavit, also in the record, reflected that the sidewalk had been cleared of snow, but that "black ice" was present which, along with raised sidewalk flags, caused his fall. This evidence has raised issues regarding whether snow removal was, in fact, performed prior to the subject accident, and if so, whether those efforts were or were not negligently performed. In light of the above determinations that genuine issues of material fact exist, neither the defendants nor the plaintiff are entitled to summary relief at this juncture (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

The plaintiff has also cross-moved for sanctions against the defendants and their counsel. 22 NYCRR 130-1.1 (a) provides that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." However, in support of this branch of their cross-motion, the plaintiffs have failed to adequately demonstrate that defendants' conduct in this matter rose "to the level of high moral culpability, which must be reached in order to support a claim for costs and/or sanctions" (*Velasquez v Long Island Power Authority*, 16 Misc3d 1138[A], *9 [2007];

22 NYCRR 130-1.1 (c); *see S&B Petroleum, Inc. v Gizem Realty Corp.*, 8 AD3d 550 [2004]). Therefore, the plaintiff is not entitled to sanctions.

Accordingly, the motion and cross motion are both denied in their entirety.

Dated: October 26, 2015

TIMOTHY J. DUFFICY, J.S.C.