

Ferrer v North Hudson Realty
2015 NY Slip Op 32872(U)
February 23, 2015
Supreme Court, New York County
Docket Number: 113758/2011
Judge: Lucy Billings
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JOSEPH FERRER and PARVEEN FERRER,

Index No. 113758/2011

Plaintiffs

- against -

DECISION AND ORDER

NORTH HUDSON REALTY, SPYROS FOOD
VENDING CORP., and SPYROS INDUSTRIES,
LLC,

Defendants

FILED

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NEW YORK

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue to recover damages for personal injuries and loss of services sustained January 21, 2011, when plaintiff Joseph Ferrer slipped and fell on the sidewalk abutting a delicatessen owned by defendants Spyros Food Vending Corp. and Spyros Industries, LLC, on premises leased to them by defendant North Hudson Realty. Defendants move for summary judgment dismissing the complaint, C.P.L.R. § 3212(b), on the grounds that they are not liable for a fall on snow or ice during an ongoing storm. For the reasons explained below, the court denies defendants' motion.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, defendants must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18

N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). Only if defendants satisfy this standard does the burden shift to plaintiffs to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of defendants' motion, the court construes the evidence in the light most favorable to plaintiffs. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). If defendants fail to meet their initial burden, the court must deny summary judgment despite any insufficiency in plaintiffs' opposition. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

III. DEFENDANTS FAIL TO MEET THEIR INITIAL BURDEN.

Defendants are not liable for a hazardous accumulation of snow or ice until a reasonable time to remedy the condition has elapsed after the precipitation ceased. Solazzo v. New York City Tr. Auth., 6 N.Y.3d 734, 735 (2005); Clement v. New York City Tr. Auth., 122 A.D.3d 448, 449 (1st Dep't 2014); Moscoso v. Overlook Towers Corp., 121 A.D.3d 438 (1st Dep't 2014); Kinberg v. New York City Tr. Auth., 99 A.D.3d 583, 584 (1st Dep't 2012). See Krinsky v. Fortunato, 82 A.D.3d 409 (1st Dep't 2011). Joseph

Ferrer testified at his deposition that snow was falling heavily when he slipped on the sidewalk where it joined a ramp leading to defendants' store. This testimony demonstrates defendants' defense of an ongoing storm, even without climatological reports. Gleeson v. New York City Tr. Auth., 74 A.D.3d 616 (1st Dep't 2010); Mosley v. General Chauncey M. Hooper Towers, Hous. Dev. Fund Co., Inc., 48 A.D.3d 379, 380 (1st Dep't 2008). See Pippo v. City of New York, 43 A.D.3d 303, 304 (1st Dep't 2007).

Defendants fail to present any evidence, however, that, even if they bore no duty to remove snow or ice before Joseph Ferrer fell, they actually had refrained from removing or treating the snow or ice in the area where he fell, to demonstrate that they did not create or exacerbate the condition causing his injury. Pipero v. New York City Tr. Auth., 69 A.D.3d 493 (1st Dep't 2010); De Los Santos v 4915 Broadway Realty LLC, 58 A.D.3d 465, 466 (1st Dep't 2009); Garcia v. New York City Tr. Auth., 40 A.D.3d 399, 399-40 (1st Dep't 2007); Suntken v. 226 W. 75th St., 258 A.D.2d 314, 315 (1st Dep't 1999). See Mike v. 91 Payson Owners Corp., 114 A.D.3d 420 (1st Dep't 2014). While Joseph Ferrer testified that he did not observe signs of recent snow removal in front of the delicatessen, that testimony falls short of establishing as a matter of law that defendants had not engaged in snow or ice removal or treatment, particularly when that fact, were it true, would be easily established through first hand knowledge of defendants' witnesses.

IV. CONCLUSION

Since defendants fail to eliminate the material factual issue of whether their snow or ice removal or treatment created or exacerbated the condition that caused Joseph Ferrer's injury, the court denies their motion for summary judgment dismissing the complaint. C.P.L.R. § 3212(b). The court need not consider plaintiff's affidavit in rebuttal that he slipped on ice under the recently accumulated snow, and when he was lying on the ground he noticed that the ice was thick and dirty, with frozen imprints and embedded debris, indicating that the ice had formed long before the snow in progress began. E.g., Mike v. 91 Payson Owners Corp., 114 A.D.3d 420; Santiago v. New York City Health & Hosps. Corp., 66 A.D.3d 435 (1st Dep't 2009); Wallace v. Goodstein Mgt., LLC, 48 A.D.3d 319 (1st Dep't 2008). See Simmons v. Metropolitan Life Ins. Co., 84 N.Y.2d 972, 973 (1994). This decision constitutes the court's order.

DATED: February 23, 2015

Lucy Billings

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