

Baumann v Dawn Liqs., Inc.
2016 NY Slip Op 30867(U)
May 9, 2016
Supreme Court, New York County
Docket Number: 153825/2014
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
BAUMANN, GABOR and TINA BAUMANN,

Plaintiffs,

Index No.: 153825/2014

-against-

DECISION AND ORDER

DAWN LIQUORS, INC., d/b/a DIPLOMAT
WINES & SPIRITS and THE STERLING
PLAZA CONDOMINIUM

Motions # 003, 004

Defendants.

-----X
CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this personal injury action, Defendant/landlord Sterling Plaza Condominium (“Sterling”) and Defendant/tenant Dawn Liquors, Inc. d/b/a Diplomat Wines & Spirits (“Diplomat”) (collectively “Defendants”) each move for summary judgment pursuant to CPLR 3212 dismissing the Complaint of Plaintiffs Gabor and Tina Baumann (“Gabor”; “Tina”) (collectively “Plaintiffs”), as well as any and all cross-claims. Sterling’s motion for summary judgment (003) is denied, and Diplomat’s motion for summary judgment (004) is granted.

*Background Facts*¹

A blizzard hit New York City on January 21, 2014, eventually resulting in an accumulated snowfall of approximately 11 inches (*Sterling Exh J ¶5; Diplomat Exh J ¶ 18*). At approximately 6:45 p.m. that evening, Gabor fell on the sidewalk, several feet in front of the

¹ On a motion for summary judgment, “facts must be viewed in the light most favorable to the non-moving party” (CPLR 3212[b]; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

liquor store located at 933 Second Avenue, New York, NY, (the “sidewalk”), owned by Sterling and leased by Diplomat (*Diplomat Exh L*).² By the time of Gabor’s accident, several inches of snow had fallen in the area, and continued until several hours after Gabor’s fall (*Sterling Exh J* ¶6; *Diplomat Exh J* ¶ 20; *Gabor EBT* 148:4-6³).

Between approximately 2 p.m., when Diplomat’s manager Christopher Anderson (“Diplomat’s manager”) arrived for his shift, and 6:45 p.m., when Gabor fell, Sterling employees used a snowblower to clear a 48-inch wide path on the sidewalk, including the area where Gabor fell (*Sterling EBT* 30:9-37:14⁴; *Diplomat EBT* 39:8, 40-42; 53:5-11⁵; *Gabor EBT* 62:17-63:6; *Tina EBT* 28:4-19). In the same timeframe, and before Gabor fell, Diplomat’s manager exited the liquor store to get coffee, and did not recall seeing any ice immediately outside the door (*Diplomat EBT* 44:25; 61:19). Diplomat’s manager did not, however, observe the area where Gabor later fell, which was further from the door (*Diplomat EBT* 61:14-19).

After Gabor fell, he saw underneath him a transparent sheet of black ice, measuring several feet wide, not covered by snow or treated with a melting or traction agent (*Gabor EBT* 43-45; *Diplomat Exh L*⁶). After Tina arrived at the scene of the accident, she observed the same condition on the sidewalk (*Tina EBT* 27:17-28:9⁷). Soon after Gabor’s fall, a Diplomat employee

² Tina, Gabor’s wife, brought a derivative claim, but did not witness the accident.

³ *Sterling Exh F*.

⁴ Michael Rabinovich, Sterling’s resident manager, testified on behalf of Sterling (*Sterling Exh I*). He did not specifically witness the use of the snowblower on January 21, 2014, and only testified as to Sterling’s general practice. However, Sterling does not dispute that its agents used the snowblower on that date (*see, e.g., Sterling Affirm in Support* ¶ 20; *Reply* ¶ 7).

⁵ Christopher Anderson, the liquor store’s manager, testified on behalf of Diplomat (*Sterling Exh H*).

⁶ The plastic cups in the photographs, taken on a different day, represent the outermost corners of the ice, and the circle and initials represent the location of Gabor’s fall.

⁷ *Sterling Exh G*.

exited the store and used a shovel (which had been resting against Diplomat's exterior) to shovel a curb cut in the snow which allowed Gabor and Tina to enter a cab that took them to the hospital (*Gabor EBT 60-62; 65:3; Tina EBT 29:21-23; Diplomat EBT 55-56*). No party recalled salt, sand, or any other melting/traction agent having been spread on the ground.

In support of its motion for summary judgment (003), Sterling relies upon the parties' testimony, certified weather data, and a meteorologist affidavit to argue that a significant winter storm was in progress, thus relieving Sterling of liability and shifting the burden to Plaintiffs to demonstrate that Gabor's fall was caused by something other than the storm in progress. To that end, Sterling argues that Plaintiffs fail to satisfy their burden because there was no evidence that ice was present or, if ice was present, how it was created; Sterling's snow removal efforts were performed reasonably and did not create or exacerbate a dangerous condition; and Sterling did not have notice of the dangerous condition.

In support of its own motion for summary judgment (004), Diplomat also relies upon the testimony and its own meteorologist affidavit to argue that a storm was in progress, that Plaintiff fails to demonstrate that ice existed or was created or exacerbated by Diplomat, and that Diplomat did not have notice of the ice. Diplomat also argues that there is no evidence that it was involved in snow removal operations, and thus it could not have created or exacerbated the icy condition which caused Gabor's fall.

In a consolidated opposition to both motions, Plaintiffs acknowledge that a storm was in progress and that Defendants "were under no obligation to clear [the Premises]" during the storm, but argue that a triable issue of fact exists as to whether Defendants, once they elected to undertake snow removal, did so negligently. Specifically, expanding upon their Bills of

Particulars, Plaintiffs allege that Defendants created or exacerbated a dangerous condition by clearing snow (which would have provided traction) from a layer of ice and failing to spread rock salt or calcium chloride after removing the snow (*Sterling Exh E*;⁸ *Diplomat Exh C*). Plaintiffs also argue that Defendants should have had notice of the icy condition through Diplomat's manager's trip to get coffee, and based on the precipitation and falling temperatures.

In reply, Sterling notes Plaintiffs' acknowledgment that a storm was in progress, and further argues that Plaintiffs fail to demonstrate that Sterling created or exacerbated a dangerous condition by failing to salt. Sterling argues that Plaintiffs did not explain the origin of the ice which caused Gabor's fall, or demonstrate that Plaintiffs created or exacerbated the ice.

In their reply, Diplomat reiterates that Plaintiffs have not introduced any evidence demonstrating that Diplomat engaged in snow removal activities, meaning that Diplomat could not have created or exacerbated the ice which caused Gabor's fall. Diplomat also disputes Plaintiffs' notice argument, arguing that Diplomat's manager did not have notice of the ice, and that Plaintiff's evidence is insufficient to explain the ice's origin.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a

⁸ Sterling inadvertently identified both Gabor's EBT transcript and Plaintiffs' Bill of Particulars as Exhibit E, but e-filed only the former. Sterling subsequently e-filed the Bill of Particulars separately as a supplement to Exhibit E (*NYSCEF* 85).

motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] and *Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]; see also *Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” for this purpose” (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014] citing *Zuckerman*, 49 NY2d at 562).

The opponent “must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] *lv to appeal den*, 24 NY3d 917 [2015] citing *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). In other words, the “issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; see also *Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Storm in Progress

“[I]t is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended” (*Pippo v City of N.Y.*, 43 AD3d 303, 304, 842 NYS2d 367, 368 [1st Dept 2007]; see *Solazzo v N.Y.C. Tr. Auth.*, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 [2005]; *Simeon v City of N.Y.*, 41 AD3d 344, 344, 838 NYS2d 560, 561 [1st Dept 2007]). The rule is designed to relieve workers of any obligation to shovel snow while continuing precipitation simply re-cover the walkways as fast as they are cleaned, thus rendering the effort fruitless (*Powell v MLG Hillside Assoc., L.P.*, 290 AD2d 345, 345 [1st Dept 2002]).

Where a defendant establishes such a circumstance, such defendant has no duty to remedy the storm-related snow and ice conditions alleged to have caused the plaintiff’s injuries (see *Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541, 542 [1st Dept 2015] [defendants established entitlement to summary judgment because meteorologist affidavit and certified weather records established storm in progress]; *Weinberger v 52 Duane Associates, LLC*, 102 AD3d 618, 959 NYS2d 154 [1st Dept 2013] [dismissal warranted where there was sleeting and a “slow rain” at the time of plaintiff’s fall]; *Kinberg v N.Y.C. Transit Auth.*, 99 AD3d 583, 583-84, 952 NYS2d 540, 541 [1st Dept 2012] [finding property owner not liable for injuries sustained by plaintiff when she slipped and fell on ice and snow on stairs, where a snowstorm was in progress at the time of the accident, absent evidence “that a reasonable time elapsed from the cessation of the storm sufficient to impose a duty on defendant to remedy the condition”]).

Both Defendants meet their burden of demonstrating that a storm was in progress by

introducing certified meteorological records, affidavits of experts, and deposition testimony (*Sterling Exhs J-L; Diplomat Exhs J-K; Diplomat EBT 38:21, 70-72*⁹; *Gabor EBT 20, 24-25*¹⁰; *Tina EBT 14-16*¹¹; *Pls Opp ¶¶ 20-21*). Plaintiffs do not dispute that a storm was in progress (*Pls Opp ¶¶ 4-5, 20-21*).¹²

Thus, the burden shifts to Plaintiffs to raise a triable issue of fact as to whether Defendants created or exacerbated a dangerous condition, or Defendants' actual or constructive notice thereof (*Burniston v Ranric Enterprises Corp.*, 134 AD3d 973, 974 [2d Dept 2015]; *Nadel v Cucinella*, 299 AD2d 250, 251 [1st Dept 2002]; *Sanders v City of N.Y.*, 17 AD3d 169 [1st Dept 2005] [liability can be imposed only upon evidence that attempts at snow removal rendered the sidewalk more hazardous]).

With respect to Diplomat, Plaintiffs do not introduce any evidence that Diplomat had any involvement with the snow removal that allegedly caused the ice to form. Anderson denied sending employees to engage in snow removal (*Diplomat EBT 45-46*), and the only evidence submitted by Plaintiffs of Diplomat's involvement is meager: a shovel leaning against the liquor store's exterior, which was later used by a Diplomat employee to create a curb path that allowed Plaintiffs to enter a taxi after he fall (*Gabor EBT 61:11-17, 62:10-24; 64:23-65:2; Sterling EBT 57:22-58:2*). There is no evidence that, prior to Gabor's fall, Diplomat's employee had used the

⁹ References the deposition of former Diplomat employee Christopher Anderson (*Sterling Exh H*).

¹⁰ References the deposition of Plaintiff Gabor Baumann (*Sterling Exh F*).

¹¹ References the deposition of Plaintiff Tina Baumann (*Sterling Exh G*).

¹² To the extent that Gabor testified that it was not snowing heavily at the time they went outside (*Gabor EBT 25:16*), the storm-in-progress rule also applies in situations where there is some type of less severe, yet still inclement, winter weather (*Glover v Botsford*, 109 AD3d 1182, 1184 [4th Dept 2013]).

shovel at all, let alone exposed the ice which caused Gabor's fall. Gabor observed the shovel and a bucket but "didn't observe people working" (*Gabor EBT* 64:12-13). Sterling's employee Rabinovich, who lived in the condominium above the Premises, had a general recollection of having previously seen a Diplomat employee clear snow in front of the Premises, but no specific recollection of snow removal efforts on the date of Gabor's fall (*Sterling EBT* 30:9-16). Thus, viewing the evidence in the light most favorable to Plaintiffs, there is no evidence that Diplomat engaged in snow removal efforts, and consequently no evidence that Diplomat created or exacerbated the condition which caused Gabor's fall.

By contrast, with respect to Sterling's role, Plaintiffs create an issue of fact through testimony that Sterling owned and operated a snowblower that was used to clear snow in the location where Gabor fell (*Sterling EBT* 30:9-37:14; *Diplomat EBT* 39:8, 40-42) and that ice was present in the location where Gabor fell after snow had been cleared there (*Gabor EBT* 43-45; *Tina EBT* 28:4-19; *Diplomat EBT* 53:3-11), as well as the absence of any testimony indicating that a deicing agent had been used (*Sterling EBT* 37:10-14). Gabor's testimony identified and described the location and characteristics of the ice (*Gabor EBT* 43-48; *Diplomat Exh L*), and weather data from Defendants' own experts (*Diplomat Exh J*; *Sterling Exh J*) indicated freezing temperatures that could lead to a jury inference of ice formation (*Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 567 [1st Dept 2011] [plaintiff's testimony regarding location and nature of ice and submission of weather data indicating freezing temperatures sufficient to create an issue of fact]).

Thus, plaintiff raised an issue of fact as to whether Sterling's removal of snow created or exacerbated the dangerous condition (*Diplomat Exh C* ¶¶ 10-11; *Sterling Exh E* ¶¶ 10-12; see

Rector v City of N.Y., 259 AD2d 319 [1999] [a jury could conclude that removal of snow from atop a pre-existing layer of ice 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”]; *Genen v Metro-N. Commuter R.R.*, 261 AD2d 211, 214 [1st Dept 1999] [an issue of fact existed as to whether contractor’s affirmative acts – improperly plowing and sanding a railroad after a two-inch snow fall– left dangerous icy patches on its surface]; *Prenderville v Intl. Serv. Sys., Inc.*, 10 AD3d 334, 338 [1st Dept 2004] [issue of fact where plaintiff testified that she slipped on slushy ice present on a marble curb cut where no salt or sand had been spread, thus creating a reasonable inference that incomplete snow removal operations had created or exacerbated the hazardous condition on the curb cut]; *Chaudhry v E. Buffet & Rest.*, 24 AD3d 493, 494 [2d Dept 2005] [reversing grant of summary judgment denied where removal of snow without also spreading salt may have created or exacerbate a hazardous condition on the premises]; compare *Kay v Flying Goose, Inc.*, 203 AD2d 332, 333 [2d Dept 1994] [defendants did not increase the natural hazards created by the storm because plaintiff fell on a patch of ice concealed by a layer of snow which had neither been shoveled nor treated with salt or sand]).

Defendants’ argument that the ice could not have been present fail to eliminate the issue of fact raised by plaintiff. First, that argument conflates the *creation* of the ice with its *exposure* through removal of snow, the latter of which is actually the dangerous condition which Defendants are alleged to have created or exacerbated. Second, Sterling’s citation to the deposition of Diplomat’s manager is inconclusive; when asked if he had “observe[d] any icy condition on the sidewalk in front of the Diplomat liquor store,” the manager testified that he did not recall (*Sterling Affirm* ¶ 22, citing *Diplomat EBT* 82:19-23); however earlier, he testified

explicitly that he never had an opportunity to examine the area where Gabor had fallen (*Diplomat EBT* 61:10-19).

To the extent that there is expert testimony that no ice could have been present on the sidewalk prior to the snow on January 21, 2014, and that it could not have formed on that date, (*Diplomat Exh J* ¶ 25), the testimony of Plaintiffs, who both observed ice at the location of Gabor's fall, creates an issue of fact (*see Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013] [on summary judgment, court's role is issue finding rather than issue determination, and the evidence is construed in the light most favorable to the non-moving party]). On this record, a jury could readily conclude that Sterling's snow removal efforts could have increased the hazard to pedestrians by producing a slicker surface that was more difficult to discern and inherently dangerous than the natural, untouched state of the fallen snow (*see Rector v City of N.Y.*, 259 AD2d 319, 320-21 [1st Dept 1999] *citing Glick v City of N.Y.*, 139 AD2d 402, 403, 526 NYS2d 464 [1st Dept 1988]; *compare Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 463 [1st Dept 2007] [defendant made a *prima facie* showing that its snow removal efforts did not exacerbate the condition of the sidewalk by demonstrating that its snow removal efforts were simply incomplete]).

Notably, Sterling is unable to distinguish either *Salvanti v Sunset Indus. Park Assoc.* (27 AD3d 546, 547 [2d Dept 2006] [where plaintiff slipped on ice and record indicated that snow had been removed but no salt had been spread, defendants failed to establish that snow removal did not create or exacerbate a dangerous condition])¹³ or *Chaudhry v E. Buffet & Rest.* (24 AD3d

¹³ Sterling's attempt to distinguish *Salvanti* on the basis that the storm in that case had ended is insufficient to warrant a different result.

493, 494 [2d Dept 2005] [failure to salt ice exposed by snow removal created an issue of fact as to creation or exacerbation of a dangerous condition]).¹⁴ Accordingly, notwithstanding that a storm was in progress when Gabor fell, the Court finds that Plaintiffs have sufficiently raised an issue of fact exists as to Sterling's creation or exacerbation of a dangerous condition.

Actual/constructive notice

Though Plaintiffs have not met their burden of demonstrating that Diplomat created or exacerbated the icy condition, they can survive summary judgment by demonstrating that Diplomat had actual or constructive notice of the condition which caused Gabor to fall (*Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011] [reversing grant of summary judgment to defendant because it did not submit an affidavit or testimony as to when its employees last inspected the sidewalk]).¹⁵

The mere presence of ice does not establish negligence on the part of the entity responsible for maintaining the property (*Lenti v Initial Cleaning Services, Inc.*, 52 AD3d 288, 288 [1st Dept 2008]). Rather, there must be evidence that the ice on which he slipped was present on the sidewalk for a long enough period of time before the accident that the party responsible for the sidewalk would have had time to discover and remedy the dangerous condition (*Lenti*, 52 AD3d at 288, citing *Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972, 622 NYS2d 496, 646 NE2d 798 [1994]). Speculation regarding an ice patch's origin will not suffice (*Lenti*, 52 AD3d at 288; see also *Rodriguez v City of N.Y.*, 49 Misc 3d 1211(A) [Sup Ct

¹⁴ Sterling does not address this case.

¹⁵ Though Plaintiffs successfully raised an issue of fact as to Sterling's creation or exacerbation of the icy condition, Sterling's actual or constructive notice is also discussed for the sake of completeness.

Bronx County 2015] [“a plaintiff seeking to establish constructive notice of an icy condition . . . must establish the origins of such condition”]; *compare Massey*, 84 AD3d at 568 [1st Dept 2011] [plaintiff’s description of the ice, photo, and climatological data showing freezing temperatures could lead to an inference that the old accumulation of ice was attributable to a *prior* storm]).

Plaintiffs’ argument that constructive notice to both Defendants can be assumed because the snow and below-freezing temperatures “would naturally form” ice (*Pls Opp* ¶ 46) is insufficient and speculative. Moreover, neither Defendant’s testimony reveals actual notice. Viewing the evidence in the light most favorable to Plaintiffs, there was an approximately four-hour long window between 2 p.m., when Diplomat’s manager arrived for his shift, and 6:45 p.m., when Gabor fell. In that time, Diplomat’s manager observed Sterling employees use a snowblower to clear the area where Gabor fell (*Sterling EBT* 30:9-37:14; *Diplomat EBT* 39:8, 40-42; 53:5-11; *Gabor EBT* 62:17-63:6; *Tina EBT* 28:4-19), and also exited the liquor store to get coffee and returned before Gabor fell.

However, Diplomat’s manager did not recall seeing any ice immediately outside the door and did not observe the area where Gabor had fallen, which was further from the door (*Diplomat EBT* 61:14-19). Thus, Plaintiffs fail to meet their burden of demonstrating that either Diplomat or Sterling had actual or constructive notice of the ice which caused Gabor’s fall.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of Defendant Dawn Liquors, Inc., d/b/a Diplomat Wines & Spirits (004) for summary judgment pursuant to CPLR 3212 dismissing the Complaint of Plaintiffs is hereby **granted**; and it is further

ORDERED that the Complaint and all cross-claims against Defendant Dawn Liquors, Inc., d/b/a Diplomat Wines & Spirits are hereby dismissed and severed; and it is further

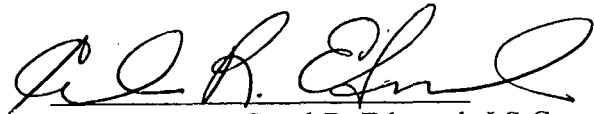
ORDERED that the Clerk may enter judgment in favor of Defendant Dawn Liquors, Inc., d/b/a Diplomat Wines & Spirits accordingly; and it is further

ORDERED that the motion of Defendant Sterling Plaza Condominium's for summary judgment (003) dismissing the Complaint of Plaintiffs is hereby **denied**; and it is further

ORDERED that Defendant Dawn Liquors, Inc., d/b/a Diplomat Wines & Spirits shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 9, 2016



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMOAD
J.S.C.