Stevens v St. Charles Hosp. & Rehabilitation Ctr.
2016 NY Slip Op 31947(U)
April 15, 2016
Supreme Court, Suffolk County
Docket Number: 11-23657
Judge: Joseph Farneti
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DUPLICATE ORIGINAL

SHORT FORM ORDER

INDEX No. 11-23657
CAL. No. 15-00197OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-18-15
ADJ. DATE 8-27-15
Mot. Seq. # 001 - MG; CASEDISP

SONYA STEVENS, Plaintiff, - against - ST. CHARLES HOSPITAL AND REHABILITATION CENTER and 806 EAST MAIN LLC, Defendants.	SIBEN & SIBEN, LLP Attorney for Plaintiff 90 East Main Street Bayshore, New York 11706 MONTFORT, HEALY, McGUIRE & SALLEY Attorney for Defendants 840 Franklin Avenue P.O. Box 7677 Garden City, New York 11530-7677

Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 15-31; Replying Affidavits and supporting papers 32-33; Other __; it is,

ORDERED that this motion by the defendants, St. Charles Hospital and Rehabilitation Center ("St. Charles") and 806 East Main, LLC, for summary judgment dismissing the complaint is granted.

This personal injury action arises from the alleged slip and fall by plaintiff, on December 29, 2010, on a patch of ice on the parking lot or walkway at the St. Charles Hospital and Rehabilitation Center located at 806 Main Street in Riverhead, in the County of Suffolk.

Defendants now move for summary judgment dismissing the complaint. In support of the motion, they submit, *inter alia*, their attorney's affirmation, the pleadings, the verified bill of particulars, the deposition transcript of plaintiff, the deposition transcripts of Mark Gugliotti as a witness for defendant St. Charles, the deposition transcript of John Woodson as a non-party witness, and an invoice to Bellflower Landscaping dated December 28, 2010. In opposition, plaintiff submits, *inter alia*, her attorney's affirmation, the complaint, the deposition transcript of plaintiff, the deposition transcripts of Mark Gugliotti, deposition transcript of John Woodson, one photograph, certified meteorological records, the affidavit of the plaintiff, sworn to on July 10, 2015, and the affidavit of Richard J. Westergard, sworn to on July 15, 2015.

Plaintiff testified that she arrived at St. Charles for a physical therapy treatment at approximately 8:00 a.m. on December 29, 2010. She was driven to the appointment by her father, John Woodson. He parked in the parking lot, approximately three stalls to the left of the walkway into the building. When they pulled in, the parking lot was clear. Plaintiff observed piled snow adjacent to the parking lot, but saw no ice or snow where they parked. Her father stayed in the car. Plaintiff testified it was about 25 steps to the walkway, and the walkway was about 10 steps to the building. She did not encounter snow or ice in the parking lot or on the walkway as she entered the building. She had her physical therapy session with her physical therapist, Mark Gugliotti, and then left the building. As she was walking on the walkway, she did not see any snow or ice. Plaintiff testified she slipped and fell on the concrete walkway when she was about two steps from the parking lot. Her right foot slipped and she hit the ground on her right hip and left hand. According to plaintiff's deposition testimony, she was lying on her right side for about eight minutes, and her father came over to her after about 10 minutes. He said he had seen her fall. Mark, her physical therapist, and another therapist came to her aid after about two minutes. Plaintiff testified she did not see any ice in the area where she fell until after her fall. Plaintiff stated that there was ice in "grooves" in the walkway in the area where she fell and icicles on the building itself. The nearest snow pile was about two car lengths from where she fell.

Plaintiff's father, John Woodson, testified that his daughter's accident occurred around 9:00 a.m. He drove plaintiff to her physical therapy appointment and parked in a stall next to the entrance ramp. He testified that though the sidewalk was "alright" when they arrived at the property, the weather warmed up and when she came out of the building after her therapy session it was icy, because water dripped down from the building. When they arrived, the parking lot was fine. Woodson testified plaintiff had no difficulty walking into the building and was in the building between half an hour and 45 minutes. He saw her come out of the building's main entrance, which was not more than two or three feet from where he was parked. It was two or three minutes before the accident occurred, and plaintiff was moving slowly. He testified he heard plaintiff yell, and he got out of his car immediately and found her flat on her back. Plaintiff told him she had slipped on the ice. Woodson testified the ice was smooth and you could not see it. He stated the ice was about three feet wide and two or three feet long and was very thin. He saw no salt or sand on the sidewalk where plaintiff fell.

Mark Gugliotti testified as a witness for St. Charles. At the time of plaintiff's alleged accident, he was the assistant manager of St. Charles' outpatient physical therapy facility in Riverhead, and had worked there since 2005. Plaintiff was one of his patients. At the time, she came for physical therapy treatments two or three times a week, with each session lasting on average 30 to 45 minutes. Gugliotti testified that St. Charles had the responsibility for maintaining day-to-day operation of the building, such as snow and ice removal. He was in charge of securing these services. Invoices for work performed by either garbage collectors or companies that performed snow removal for his building were sent to his attention. He testified the contractor at that time of plaintiff's accident was Bellflower Landscaping. They would come based upon the amount of snowfall, it would have to be perhaps two or more inches of snow. They would plow, clear the walkway, and put down salt and sand. He himself would occasionally put down salt or sand if it was warranted. He would inspect the work done, since he would pass through the parking lot and the walkway to enter the building. He always entered through the front door. If there were building repair issue he would contact a Mr. Israel from the real estate management. With regard to the building, he recalled periodic roof repairs during the years he had been there.

Gugliotti further testified he was not aware of anyone complaining about snow or ice on the walkway in December of 2010. There was large snowfall, with an accumulation of six to eight inches, either the 24th or 25th of December to the best of his recollection, and when he came back to work the next Monday, the lot had been plowed and the walkway had been cleared. He could see the asphalt, but there were small traces of snow on the parking lot. The walkway was safe and passable. Over the next couple of days he received no complaints about snow and ice on the parking lot or walkway. He did not recall of any complaints within the two years prior to the accident, by employees or anyone else about water dripping from the roof onto the walkway. He never saw icicles hanging from the roof above the walkway or falling onto the walkway in front of the entrance area, and then freeze when it got cold. On the day of the accident when he arrived at work at approximately 7:00 a.m., he saw patches of snow in the parking lot. He noticed small patches of snow on the walkway, like those which would occur if someone shoveled the walkway but did not get all the way down to the concrete, at best a quarter of an inch, but no ice. He did not recall if he saw any salt or sand. He did not put down any sand or salt. He did not see plaintiff fall and was unaware if anyone else did. Gugliotti went outside when he was informed that a patient had fallen and saw plaintiff was sitting on the asphalt holding her left ankle. Plaintiff told him that she slipped and fell. He did not see any patches of snow under plaintiff where she was walking. In the past he had seen water drip from the roof to the walkway and had seen it freeze and had complained to the management company. He saw workmen on the roof but did not know what repair they made. He had seen water freeze up on the roof in front of the main entrance, but did not recall it in front of the entrance area. Plaintiff's father told him that he had seen her fall on a patch of snow, which he later pointed out as ice; to his recollection the patch of snow was on the asphalt, not the walkway. During his deposition, Gugliotti also identified the invoice received from Bellflower Landscaping for services performed on the three days prior to plaintiff's accident, and stated such work would have been visually inspected by himself or one of his co-workers.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is noted the climatological records submitted by the defendants are uncertified and therefore inadmissible for purposes of this motion (*see* ***McBryant v Pisa Holding Corp.***, 110 AD3d 1034, 1036, 973 NYS2d 757 [2d Dept 2013]; ***Morabito v 11 Park Place LLC***, 107 AD3d 472, 967 NYS2d 694 [1st Dept 2013]).

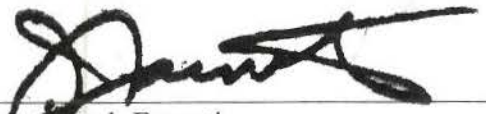
Fundamental to recovery in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). A defendant will be held liable for a slip and fall involving snow and ice on its property only when it created the dangerous condition that caused the accident or had actual or constructive notice thereof (***Edwards v Mantis, LLC***, 106 AD3d 689, 964 NYS2d 235 [2d Dept 2013]; ***Gushin v Whispering Hills Condominium I***, 96AD3d 721, 946 NYS2d 202 [2d Dept 2012]; ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]). To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; *see* ***Gauzza v GBR Two Crosfield Ave. Ltd. Liability Co.***, 133 AD3d 710, 20 NYS3d 147 [2d Dept 2015]; ***Baines v G & D Ventures, Inc.***, *supra*). On a motion for summary judgment to dismiss the complaint, the defendant bears the burden of proving the absence of notice as a matter of law (*see* ***Baratta v Eden Roc NY, LLC***, 95 AD3d 802, 943 NYS2d 230 [2d Dept 2012]; ***Baines v G & D Ventures, Inc.***, *supra*). The mere failure to remove all snow and ice from sidewalk or parking lot does not constitute negligence (*see* ***Gentile v Rotterdam Sq.***, 226 AD2d 973, 640 NYS2d 696 [3d Dept 1996]; *see also* ***Bi Fang Zhou v 131 Chrystie St. Realty Corp.***, 125 AD3d 429, 430, 3NYS3d 21[1st Dept 2015]; ***Wohlars v Town of Islip***, 71 AD3d 1007, 1009, 898 NYS2d 59 [2d Dept 2010]; ***Lenti v Initial Cleaning Servs., Inc.***, 52 AD3d 288, 290, 860 NYS2d 40 [1st Dept 2008]). Furthermore, a general awareness that an icy condition might exist is insufficient to constitute notice of a particular condition supporting negligence claim based on injuries sustained in slip-and-fall accident (***Boucher v Watervliet Shores Assoc.***, 24 AD3d 855, 857, 804 NYS2d 511 [2005]; *see* ***Fisher v Kasten***, 124 AD3d 714, 2 NYS3d 189 [2d Dept 2015]; ***Solazzo v New York City Tr. Auth.***, 6 NY3d 734, 735, 810 NYS2d 121 [2005]).

Defendants have established their *prima facie* right to summary judgment dismissing the complaint by submitting evidence, in admissible form, that they neither created nor had constructive notice of the ice condition which allegedly caused plaintiff's accident. There was large snowfall either the 24th or 25th of December. Defendants submitted an invoice indicating that their contractor, Bellflower Landscaping, had plowed the parking lot, cleared the walkways, and applied salt and sand on December 26, 27 and 28, 2010. Mark Gugliotti testified that he would inspect the work done by Bellflower, since he would pass through the parking lot and walkway to enter the building. Mark Gugliotti testified that when he came back to work the next Monday, the lot had been plowed and the walkway had been cleared. He could see the asphalt, and there were only small traces of snow on the parking lot; the walkway was safe and passable. Over the next couple of days, he received no complaints about snow and ice on the parking lot or walkway. He did not recall any complaints, within two years prior to the accident, by employees or anyone else about water dripping from the roof onto the walkway. He testified he never saw icicles hanging from the roof above the walkway and did not see icicles fall into the walkway in front of the entrance area, and then freeze when it got cold. On the day of the accident, when he arrived at work at approximately 7:00 a.m., he saw patches of snow in the parking lot and small patches of snow on the walkway. He saw no ice. He did not recall if he saw any salt or sand. When he was outside aiding plaintiff, he saw a small patch of snow with a little ice, larger than six inches in area. To his recollection it was on the asphalt, not the walkway where the plaintiff alleges she slipped and fell. This evidence is sufficient to establish that defendants neither created the alleged hazard or had notice and sufficient to correct the problem.

In response, plaintiff has failed to raise an issue of fact. Plaintiff's affidavit, submitted in opposition to the motion, presents apparent feigned issues of fact designed to avoid the consequences of his earlier deposition testimony and, thus, was insufficient to defeat the respondents' motion (*see* ***Carriero v Nazario***, 116 AD3d 818, 819, 983 NYS2d 422 [2d Dept 2014]; ***Cagliostro v McCarthy***, 102 AD3d 823, 824, 958 NYS2d 455 [2d Dept 2013]). In her deposition plaintiff testified that when they pulled in, the parking lot was clear. She saw no ice or snow where they parked. According to plaintiff's testimony, it was about 25 steps to the walkway, and the walkway was about 10 steps to the building. She did not encounter snow or ice in the parking lot or on the walkway as she entered the building. She did not see any ice in the area where she fell until after she fell. She also testified that were icicles on the building itself. Now, in her affidavit in opposition to the motion, plaintiff alleges that the parking lot was poorly plowed and that she observed large patches of compressed snow concealing most of the blacktop surface. She also states, for the first time, that after she fell she observed icicles which extended down from the overhang above most of the entry way, and that water from the icicles was dripping down upon the ice patch she was sitting on. This statement is an apparent attempt to match the testimony of plaintiff's father, who testified that sidewalks became icy after they arrived at the premises, because he thought water had dripped from the building from the time she went in. This testimony by Woodson and plaintiff's affidavit, however, are contradicted by the empirical weather data submitted by plaintiff herself, which indicates that the temperature dropped below freezing at approximately 5:00 p.m. the night before until sometime just before plaintiff's appointment, when it rose to 33 degrees and stayed there until after plaintiff's accident. Plaintiff even contradicts/alters her testimony as to how she initially entered the building to make it appear that she did not use the front of the walkway. Also, plaintiff's expert's affidavit is speculative and of no evidentiary value (*see* ***Constantino v Webel***, 57 AD3d 472, 869 NYS2d 179 [2d Dept 2008]). Plaintiff has, thus, failed to raise any issue of fact with regard to the imposition of liability on the defendants herein (*see* ***Edwards v Mantis, LLC***, *supra*; ***Gushin v Whispering Hills Condominium I***, *supra*).

In light of the foregoing, defendants' motion for summary judgment dismissing the complaint and all cross claims against them is granted.

Dated: April 15, 2016



Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION