Sutherland v 212 Realty Corp.
2017 NY Slip Op 32267(U)
October 25, 2017
Supreme Court, New York County
Docket Number: 153547/2015
Judge: Erika M. Edwards

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

KATRINA SUTHERLAND,

Plaintiff,

-against-

212 REALTY CORP., SLAVIK GOFMAN, VICTORIAN MANAGEMENT REAL ESTATE INC., VICTORIAN MANAGEMENT CORP.,

Defendants.

Index No.: 153547/2015

DECISION/ORDER

Motion Sequences 003

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1
Opposition Affidavits/Affirmations and Memo of Law annexed	2
Reply Affidavits/Affirmations/Memos of Law annexed	3

ERIKA M. EDWARDS, J.S.C.:

Plaintiff Katrina Sutherland ("Plaintiff"), brought this action against Defendants 212 Realty Corp., Slavik Gofman, Victorian Management Real Estate Inc. and Victorian Management Corp. (collectively "Defendants") for injuries she sustained on January 5, 2014, at approximately 9:50 a.m., when she slipped and fell on ice while walking down the steps in front of the building where she resides, located at 212 West 80th Street, New York, New York.

Defendants move for summary judgment dismissal of Plaintiff's amended complaint under motion sequence 003. For the reasons set forth herein, the court denies Defendants' motion for summary judgment.

Plaintiff testified that on the date of the accident, which was a Sunday morning, she woke up around 9:15 a.m., left her apartment at 9:45 a.m. and slipped and fell shortly thereafter. Plaintiff had not left her apartment the day before her accident. She also testified that she had not looked out of her window to see if it was snowing before she left the apartment, it was not snowing at the time of her accident and she does not know when it had last snowed prior to her accident. In her affidavit submitted in opposition to this motion, Plaintiff described the ice as being thick, hardened and it appeared to have been there for some time.

Plaintiff's former roommate/friend testified that she was inside of the apartment at the time of Plaintiff's accident and she did not know whether it was snowing at the time of the accident. The witness also testified that when she left the building after the accident around noon, she saw black ice on the stairs. Plaintiff's current roommate/friend testified in substance that it was snowy and icy on the Friday before Plaintiff's accident and the week leading up to the accident, but she could not recall whether there was ice on the steps on the date of the accident.

Defendants argue in substance that the evidence from their meteorologist expert demonstrated that there was a storm in progress because the meteorological records, which included analysis from the National Weather Service Forecast Office and the Central Park observatory, which was approximately .6 miles away from the location of this accident, indicated that at 9:50 a.m. a front with freezing rain stalled over the Tri-State area. At 9:51 a.m. at Central Park it was 32 degrees, overcast with light precipitation and mist, and the precipitation occurred intermittently beginning at 9:08 a.m. Additionally, the temperature was at or below freezing since before midnight. At 7:47 a.m., the National Weather Service issued a freezing rain advisory for Manhattan and later, all of New York City, calling for a light glaze of ice and icy conditions on untreated surfaces. The advisory was later extended from 10:00 a.m. to 1:00 p.m. and then 4:00 p.m. Defendants' expert opined that there was an ongoing storm of freezing rain in the vicinity of Plaintiff's apartment from 9:08 a.m. continuing into the afternoon, which likely left a glaze of ice on untreated concrete surfaces, including the time of Plaintiff's accident. Therefore, Defendants argue that the alleged icy condition was a result of the freezing rain from the ongoing storm and Defendants had no duty to clear the ice until a reasonable time after the storm ended.

Plaintiff opposes the motion and Plaintiff submitted its own meteorological expert report which stated in substance that the minimal amount of precipitation on the date of Plaintiff's accident could not have created the icy condition which caused Plaintiff's accident. The records indicated that 6.4 inches of snow fell on January 2 and 3, 2013, at Central Park, which was .7 miles away from Plaintiff's apartment. On the date of the accident about 4 inches of snow remained on the ground on untreated surfaces. The temperature remained at below freezing from the storm until the date of the accident. At 9:08 a.m. on the date of the accident there was "unknown precipitation" which means that the precipitation was either mixed or too light to determine the type of precipitation. The precipitation at Central Park from 9:08 a.m. to 10:00 a.m. was only .02 inches and such slight precipitation could not have caused the icy condition that was described in this case.

Plaintiff argues in substance that as a result of this data and the other evidence in this case, material questions of fact remain to preclude summary judgment dismissal. The disputed facts include whether the alleged trace precipitation shields Defendants from liability; whether the icy condition was caused by a prior snowfall or precipitation at the time of the incident; and whether Defendants created the icy condition from their failure to adequately remove the snow and ice. Plaintiff further argues in substance that the .02 inches of precipitation between 9:08 a.m. and 10:00 a.m. at Central Park on the morning of Plaintiff's accident. Such trace amounts of precipitation are insufficient to give rise to the storm in progress defense. Additionally, Defendants' expert failed to provide an estimated amount of precipitation at the actual time of Plaintiff's accident or that the icy condition which caused Plaintiff's accident was caused by the alleged storm in progress and not from ice which remained from prior snowfalls.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). Under the "storm in progress" doctrine, it is well established 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 New York*, 43 AD3d 303, 304 [1st Dept 2007] [internal citations omitted]). Once a defendant demonstrates that a plaintiff's accident occurred during a snowstorm, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact concerning defendant's negligence (*id.*). Although a defendant has no obligation to remove any snow or ice during the storm, liability may result if the efforts it did take created a hazardous condition or exacerbated the natural hazards created by the storm (*Wheeler v Grande'Vie Senior Living Community*, 31 AD3d 992, 992 [3d Dept 2006] [internal citations omitted]).

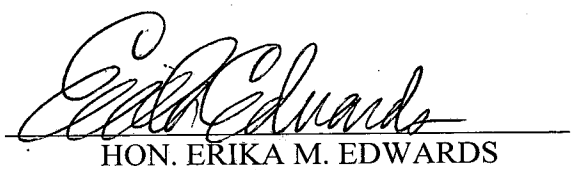
In applying these legal principles to the facts of this case, the court determines that Defendants failed to meet their burden of demonstrating their entitlement to summary judgment dismissal of Plaintiff's amended complaint as a matter of law and even if they did, Plaintiff raised several material questions of fact sufficient to preclude summary judgment dismissal. Such disputed material facts include, but are not necessarily limited to, whether the small amount of precipitation rose to the level of a storm in progress in the area of Plaintiff's accident at the time of the accident; whether the alleged icy condition which caused Plaintiff's accident was caused by precipitation occurring at the time of the accident or whether it remained from the previous snowfall a couple of days before Plaintiff's accident; and whether Defendants were negligent in creating or exacerbating the icy condition by failing to adequately remove the

alleged icy condition from the stairs prior to Plaintiff's accident. Therefore, the court denies Defendants' motion for summary judgment dismissal of Plaintiff's amended complaint.

As such, it is hereby

ORDERED that the court denies Defendants 212 Realty Corp.'s, Slavik Gofman's, Victorian Management Real Estate Inc.'s and Victorian Management Corp.'s summary judgment motion to dismiss Plaintiff's amended complaint with prejudice and without costs.

Date: October 25, 2017



HON. ERIKA M. EDWARDS