

Diaz v Lewis
2017 NY Slip Op 32413(U)
October 16, 2017
Supreme Court, Bronx County
Docket Number: 302040/14
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF THE BRONX

-----X **Index No. 302040/14**

Ramon Pena Diaz,

Plaintiff,

-against-

DECISION & ORDER

Sylvia Lewis,

Defendants.

Present:
 Hon. Julia I. Rodriguez
 Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review defendant's motion for summary judgment, dismissing the complaint.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation & Exhibits	3

In the instant action, plaintiff alleges he was injured when he slipped and fell on snow/ice on the sidewalk abutting defendant's property on February 20, 2014 at approximately 10:00 a.m.

Defendant now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint on the grounds that: (1) she did not have actual or constructive notice of the alleged dangerous condition, (2) her voluntary snow removal efforts did not create or exacerbate the alleged hazardous condition on the sidewalk.

In support of summary judgment, defendant submitted, *inter alia*, her deposition testimony and affidavit, the deposition testimony of plaintiff, photographs and climatological reports. At her deposition, defendant testified as follows: She is the owner of the single-family residence which abuts the sidewalk at the subject location. It had snowed two days before plaintiff's accident and the snow on her sidewalk was shoveled at that time. It was not shoveled again in the two-day period prior to plaintiff's accident. However, she and her son salted the sidewalk during that two day period twice a day. She became aware of the incident when she heard plaintiff moaning and then saw him laying on the ground on the sidewalk in front of her

house. She and her son went outside to see what had happened and to assist plaintiff. It was not raining or snowing. She took photos of the location while plaintiff was laying on the ground waiting for an ambulance. She remained with plaintiff for a half-hour until the ambulance arrived. In her affidavit, defendant states as follows: Prior to the accident, she last inspected the sidewalk on the side of her home at 3:00 a.m. that day. At that time, there was a shoveled path down the middle of the sidewalk with no snow or ice on the path. She put salt on the sidewalk at that time. The concrete of the sidewalk was visible on the path and it was dry. She viewed the photographs she took shortly after the accident which depict a clear and dry path on the sidewalk. In one photo, plaintiff is seen laying on the ground on the sidewalk.

At his deposition, plaintiff testified as follows: At the time of the accident, it was not raining or snowing and it was a clear day. Before he fell, he did not see any ice on the sidewalk at the location where he fell. Snow was piled up on both sides of the sidewalk. In an Errata sheet, plaintiff clarified that he fell in the middle of the sidewalk on a thin layer of ice and snow which he felt with his leg and hand after he fell.

In his affidavit, meteorologist James R. Nobile states that he reviewed the certified weather records for the period of February 16, 2014 through February 20, 2014 and the photographs taken by defendant at/near the time of the accident. Nobile concluded that the temperatures at the time of defendant's accident "were not supportive of ice formation or maintenance" in the area where defendant fell. The temperatures were above freezing for much of the 48 hour period prior to the accident. In Nobile's opinion, by shoveling the snow on the sidewalk, defendant did not cause or create any type of hazardous condition which would have been in existence on the day in question on the sidewalk where plaintiff claims he slipped and fell.

In opposition to summary judgment, plaintiff contends that issues of fact exist as to whether shoveling of any snow/ice was done, whether or not salt was applied, and whether any snow and/or ice removal operations that defendant allegedly engaged in ^{were} ~~where~~ reasonable and did not create ^{or} ~~ex~~ exacerbate a hazardous condition. In support of his contentions, plaintiff points to his deposition testimony and defendant's deposition testimony, discussed above. Plaintiff also

submitted the affidavits of Gilberto Santiago and meteorologist Steven Roberts. In his affidavit, Gilberto Santiago states as follows: On the morning of the accident, he was working at Hot Spot Delia on Barnes Avenue when a man whose name he cannot recall came into the store and told him the one of the store's "usual customers" was badly hurt and needed help right away. The man said the injured party's name was Ramon. He left the store and went to the location of the accident. When he attempted to walk near Ramon's body, he almost fell on the sidewalk due to the presence of ice. The ice was a "layer of shiny mixed cloudy and clear ice." The layer of ice covered the whole sidewalk path that was made in between the snowbanks shown in the photographs. From the time he arrived until after the ambulance took Ramon away, and he left, he never felt "with [his] feet, or saw any salt, sand or any other substance that was applied to the ice on the sidewalk.

In his affidavit, Steven Roberts states as follows: He reviewed and relied upon all of the deposition testimony, affidavits, photographs and certified weather data in forming his opinions. During the period February 18-20, there was one distinct melting and freezing cycle of the existing snow and ice cover, from approximately 12:30 p.m. on February 18th through 1:30 a.m. on February 19th the air temperature was approximately 33-40 degrees causing melting of the existing snow and ice cover. The air temperature was at or below freezing, 28-32 degrees, from approximately 1:30 a.m. through 7:30 a.m. on February 19th causing the water from the prior melting period to freeze into ice in untreated exposed outdoor areas during this time period. "Assuming the testimony in evidence that there was ice present on the sidewalk at the time and location of the incident," he opined that snow and ice piled on the sides of the sidewalk in question would have been subject to melting and freezing on February 18th and February 19th. Any ice present at the time and location of plaintiff's fall formed as a result of that melting and freezing cycle, and prior, that did not melt completely by the time of the incident.

* * * * *


It is common law in this state that an owner of real property, even if required by municipal ordinance to remove snow or ice from a public sidewalk in front of his or her premises, is not liable in tort for injuries sustained by a pedestrian who slips and falls on a

natural accumulation of snow or ice on that sidewalk. *See Rios v. Acosta*, 8 A.D.3d 183, 779 N.Y.S.2d 469 (1st Dept. 2004). In any event, here, defendant established that, as the property is a single family residence, she is exempt from Administrative Code §7-210(b). As such, defendant may only be held liable for plaintiff's injuries if her attempts at snow removal made the sidewalk more hazardous. *See id.* At 185. Based upon the photographs taken while plaintiff was lying on the ground waiting for the ambulance and within 20 minutes thereafter, defendant established that her snow removal efforts did not make the sidewalk more hazardous.

In opposition, plaintiff failed to raise an issue of fact. Significantly, the photographs submitted by defendant depict a clear, dry path with snow on both sides of the sidewalk where plaintiff fell. This is confirmed by plaintiff's own testimony that he saw no ice at the location where he fell prior to his fall. Also, the photographs belie Santiago's statements and plaintiff's deposition testimony regarding the presence of a sheet of ice on the entire sidewalk. Further, plaintiff's meteorologist expressly conditioned his conclusions on the "assumption" that there was ice present on the sidewalk at the time and location of plaintiff's fall. He also opined that refreezing would occur on "untreated" areas whereas, here, defendant testified that she applied salt to the sidewalk at 3:00 a.m. on the date of the accident, and twice on February 19th. As such, his conclusions lack probative value.

Based upon the foregoing, defendant's motion, pursuant to CPLR 3212, to dismiss the complaint, is **granted** and the complaint is hereby dismissed.

Dated: Bronx, New York
October 16, 2017



Hon. Julia I. Rodriguez, J.S.C.