Santana v SJ 48th St. Mgt., Inc.
2018 NY Slip Op 30530(U)
March 28, 2018
Supreme Court, New York County
Docket Number: 154291/16
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

HUMBERTO SANTANA and WALKIRIA SANTANA

INDEX NO. 154291/16

MOT. DATE

- v -

SJ 48TH STREET MANAGEMENT, INC.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 22-33
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 35-37
Replying Affidavits	NYSCEF DOC No(s). 40
Interim Order, Correspondence and Affidavit of Service	NYSCEF DOC No(s). 41-43

This is a personal injury action arising from a slip and fall on ice. Defendant is the owner of the building abutting the sidewalk where plaintiff's accident occurred. Defendant now moves for summary judgment. Plaintiffs oppose the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is denied.

The relevant facts are as follows. Plaintiff Humberto Santana ("Santana") testified at a deposition that he slipped and fell in front of the building located at 519 West 48th Street, New York, New York at approximately 9pm on February 15, 2016. Santana testified that he was familiar with the area where his accident occurred. Santana slipped and fell after he found a parking space in the middle of the block a little closer to Tenth Avenue. Thereafter, as plaintiff was walking, he slipped and fell on ice. Plaintiff was shown a picture depicting the building adjacent to the sidewalk plaintiff claims he slipped and fell upon. Plaintiff was asked to identify the accident location from that photo, and indicated that he could not. Thereafter, plaintiff testified that he when he got up after his accident, he "hailed a cab from across the street, the hotel." Plaintiff testified that the hotel was named "Comfort Inn, Best Western, something like that."

Plaintiff further testified:

Q. Do you know what you slipped on?

A. I slipped on some ice.

Q. How do you know it was ice?

A. Well, when I came out the car, I came out the car in front of the train tracks transfer area; there was snow there, it hadn't been shoveled. As I

Dated: 3/28/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

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walked west, the first building, there was a path that was shoveled, and as I was approaching this building, it looked like something, like crunchy ice, slippery ice, and I was very careful, and as I walked, there must have been a patch there, and I slipped and fell.

Q. You mentioned that there was a path and then there was a – a path that was shoveled?

A. Mm-hmm.

Q. Was there any ice in that path?

A. In the previous building, I want to say no.

Q. And when you say the previous building, looking at Defendant's Exhibit A, would that be the building that's like dark, gray, or was it a building before that?

A. It was the building before that. There's three buildings in that area, so it would be the first building right off the transfer.

Q. Okay. So you got out of your car.

A. Mm-hmm.

Q. And then there was snow in that area.

A. Mm-hmm.

Q. And then there was a path in front of a building three buildings down from 519.

A. Two buildings down.

Q. Two buildings down. And then after that, there was what?

A. It was gradually looking dirtier and dirtier, and as I approached this build (indicating), the – pretty much the ground looked like it was starting – like someone started to shovel, but it didn't look clear enough for like a path like the other two buildings. There was like crunchy ice, you could say, and ice that was a little hard.

Q. In front of 519?

A. In front of that building (indicating), yes.

Plaintiff further testified that on the date of his accident, it had rained, but the rain ceased by the time he had parked his car. Plaintiff also stated that it had snowed the day before.

Parties' arguments

Defendant first argues, based upon plaintiff's deposition testimony, that plaintiff cannot identify the location of his accident and therefore its motion must be granted. Plaintiff disputes defendant's characterization of his testimony.

Next, defendant has provided weather records for Central Park, New York from the website "Weather Underground" which shows that it snowed from 2:30pm to 6:51pm. At 7:12pm until 7:57pm, light freezing rain is recorded. The weather was "overcast" from 8:07 through 8:16pm. At 8:51pm, light rain was again recorded. Thereafter, weather conditions fluctuated between overcast, light rain and rain. Based upon this data, defendant contends that a storm was in-progress at the time of plaintiff's accident and the defendant therefore had no duty to remedy the icy sidewalk condition until a reasonable amount of time had passed. Defendant's submission includes two days prior which indicate that while it was below freezing, there was no precipitation on either day.

Relatedly, defendant contends that it did not have notice of the condition which caused plaintiff's accident, based upon the testimony of its witness. Defendant produced Ivica Jerkov, a member of defendant who also lives in the building and works as the superintendent and property manager, who testified that he removed snow from the sidewalks in front of defendant's building "in the afternoon." Jerkov described the weather and his snow removal efforts on February 15, 2016 as follows:

Q. Now, did it snow that day, February 15th?

A. I think it was dusting, you know, like afternoon. I clean up, I put salt.

Q. When had it started to snow? Are you saying it snowed, or how would you describe it?

A. It was not like a big snow, it was like a dusting, you know, down, it was on the sidewalk, it was maybe, you know, one-eighth, two-eighths, and I clean up and put salt, that's it.

...

Q. How did you clean in the afternoon on February 15th?

A. I sweep up, because, you know, is no was use for shovel (sic). I sweep up and put salt.

...

Q. And you swept the entire sidewalk?

A. Yes.

Q. And you did this sometime in the afternoon; correct?

A. Yeah.

Q. Did you do it just once that day?

A. Excuse me?

Q. You did it just once that day?

A. Because it was not snowing.

Jerkov also maintains that he did not receive any complaints about the condition of the sidewalks prior to plaintiff's accident. Defense counsel approximates that it has established that the sidewalk was clear of any icy conditions three and a half hours prior to plaintiff's accident, and therefore the subject condition did not exist for a sufficient time to discovery and remedy same.

Meanwhile, plaintiff has submitted print-outs purportedly from the National Weather Service containing a daily summary of the weather conditions for the month of February 2016. This document, however, is cut-off and is clearly missing certain information. In any event, plaintiff argues that the snow which fell on February 15, 2016 did not accumulate "because the temperature was above freezing from 7:29 pm on, so the ice plaintiff slipped and fell on was a longstanding condition that could only have been caused by the four (4) inches of snow the report indicates fell over the two weeks prior to the accident."

Plaintiff has also provided to the court excerpts from defendant's security video depicting the steps leading up to the doorway of the building and a small portion of the area in front of the building. Plaintiff maintains that the video depicts several pedestrians slipping on the subject sidewalk. Defendant contends that the video does not show plaintiff's accident which is further evidence that plaintiff did not fall in front of the building.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court will first address defendant's argument that plaintiff either does not know where he fell or did not actually fall in front of its building. Defendant bases this argument on two points: [1] that plaintiff couldn't describe the location of his accident from photos marked at his deposition; and [2] that plaintiff testified that he hailed a cab across the street by a hotel which defendant contends is further down the block. These arguments are unavailing.

The court does not find that plaintiff's inability to testify as to the accident location based upon the photos defendant marked at plaintiff's deposition establishes that plaintiff cannot identify the location of his accident. Indeed, plaintiff described the location of his accident during his deposition in sufficient detail from which a fact-finder could conclude that plaintiff fell on the sidewalk adjacent to defendant's building. Further, the fact that plaintiff testified about the hotel being across the street merely raises issues of how plaintiff's prior testimony should be interpreted, plaintiff's memory of the accident and/or credibility as to whether plaintiff actually fell in front of the defendant's building.

Defendant also argues that the security video does not show plaintiff's accident because he did not fall in front of defendant's building. The court notes that the parties' do not dispute that the video does not show plaintiff's accident, although only an excerpt has been provided to the court. In any event, the fact that plaintiff's accident is not observed in the video does not mean he did not fall in front of defendant's property since it only shows a small portion of the area in front of the defendant's building. Accordingly, that argument fails,

Defendants next argument is equally unavailing. Importantly, defendant has not submitted certified climatological records in support of its claim that a storm was in-progress. The print-out from a weather website about the conditions in Central Park which defendant has provided are not in admissible form and is therefore not properly before the court. Nor is plaintiff's climate data in admissible form.

Here, defendant's witness testified that there was a "dusting" and such little snow that he only used a broom. Meanwhile, plaintiff claimed that it had rained on the date of his accident and by the time he parked his car the rain had stopped. Plaintiff denied that it snowed on the date of his accident, and further claimed that it had snowed the day prior. Here, the court cannot resolve the issue of whether the storm-in-progress rule should be applied because the rationale for the rule may not warrant its application.

A property owner is under a duty to use reasonable care to keep their property in a reasonably safe condition. Further, under Administrative Code § 7-210, property owners have an affirmative duty to maintain any sidewalk abutting their property "in a reasonably safe condition." The storm-in-progress rule, however, shields a property owner from liability for accidents caused by snow or ice which accumulates "during an ongoing storm or for a reasonable time thereafter" (*Sherman v. New York State Thruway Authority*, 27 NY3d 1019 [2016]; see also *Solazzo v. New York City Tr. Auth.*, 6 NY3d 734 [2005]).

As the First Department explained, the storm-in-progress rule was designed to relieve workers of "any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering their effort fruitless" (*Powell v. MLG Hillside Associates, L.P.*, 290 AD2d 345 [1st Dept 2002]). The *Powell* Court specifically stated that "if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and common sense would dictate that the rule not be applied" (*id.* at 345-346). Without admissible evidence such as certified climatological records or the analysis of a licensed meteorologist, defendant has not met its burden on this motion.

Assuming *arguendo* that admissible evidence reflected what the documents defendant has provided show, summary judgment might still not be appropriate on this record. Plaintiff testified that it only snowed the day before the accident, that it was "drizzling" earlier the day of his accident, and shortly before his accident, after he got out of his car, it was no longer raining. Here, plaintiff has raised a triable issue of fact as to whether a storm was in-progress which would shield defendant from liability. Indeed, defense counsel's argument that only three and a half hours had transpired between when Jerkov swept and salted the sidewalk and plaintiff fell highlights a triable issue of fact as to whether defendant had a reasonable period of time to clear the subject sidewalk (see i.e. *Ndiaye v. NEP West 119th West Street LP*, 124 Ad3d 427 [1st Dept 2015] [triable issues of fact whether storm was in progress, whether there was a significant lull in the storm and whether three hours that elapsed between last freezing rain and plaintiff's accident afforded defendant a reasonable opportunity to clear the subject area]; *cf. Clement v. New York City Transit Auth.*, 122 AD3d 448 [1st Dept 2014]).

Plaintiff has also raised a triable issue of fact, based upon his own testimony, as to whether the snow and ice that he claims he observed in front of the defendant's building was caused by the snow he claims fell the day before his accident, or earlier, given the parties' testimony that it either didn't snow and/or snowed very little on the date of plaintiff's accident, and plaintiff's claims regarding the condition of the property. Further, contrary to defense counsel's assertion, the dispute between plaintiff and Jerkov about the condition the sidewalk on the date of the accident does not establish as a matter of law that plaintiff didn't fall in front of defendant's building. Rather, this highlights a factual dispute between the parties which cannot be resolved on this motion.

Defendant next contends that plaintiff cannot establish notice, because defendant's witness denied receiving any complaints about an icy condition on the sidewalk and otherwise "took preventative measures to remove the ice and snow." While it is undisputed that defendant did not have actual notice of an icy condition on the sidewalk on the date of the accident, constructive notice remains a triable issue of fact. While Jerkov claims that he "clean[ed] up" and "put salt", the issue of whether Jerkov's efforts were sufficient to keep the sidewalk in a reasonably safe condition can only be resolved by a fact-

finder. Indeed, this issue of fact is highlighted by security video of the front of the premise depicting unknown persons slipping on the sidewalk in front of the subject premises. Accordingly, this last argument must also be rejected.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendant's motion for summary judgment is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3/28/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.