Richardson v City of New York
2018 NY Slip Op 30764(U)
March 22, 2018
Supreme Court, Bronx County
Docket Number: 301736/2012
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX – IAS PART26

NAPOLEON RICHARDSON,

Plaintiff,

-against-

Index No. 301736/2012

THE CITY OF NEW YORK, CITY OF NEW YORK DEPARTMENT OF SANITATION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

MEMORANDUM DECISION/ORDER

Defendants.

HON. RUBEN FRANCO

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, who claims to have slipped and fallen on ice on a roadway adjacent to 665-667 East 234th Street, Bronx County. Defendants, The City of New York ("the City"), City of New York Department of Sanitation ("DOS") and New York City Department of Transportation ("DOT"), move for summary judgment, pursuant to CPLR 3212. DOS and DOT move to dismiss the Complaint, pursuant to CPLR 3211(a)(7), on the ground that they are not proper party defendants.

The facts, as culled from the pleadings, deposition testimony, and exhibits, are as follows: The parties agree that commencing on the morning of December 26, 2010, and continuing until approximately 7:00 A.M., on December 27, 2010, there was a winter storm or blizzard, which resulted in an accumulation of 20-21 inches of snow in the Bronx. According to plaintiff, on January 5, 2011, at approximately 5:30 P.M., he drove his motor vehicle to Bronx County, and parked it adjacent to 665-667 East 234th Street. While parking

his vehicle, plaintiff observed a large pile of snow, about knee high, next to the curb, which prevented him from parking flush with the sidewalk. He exited his vehicle, walked to the front of his vehicle, jumped over the snow pile in order to access the sidewalk.

When he returned to where his vehicle was parked, it appeared that there was a clearing in the snow near the rear of the vehicle and he determined that it would be safer to approach the vehicle from the rear, rather than attempt to jump over the snow pile in the front. The sidewalk he was walking upon was clear of snow, and there was no accumulation of snow where the curb meets the roadway. Plaintiff took one or two steps off of the sidewalk into what appeared to be a clean roadway, and began slipping and sliding, and fell on a thin sheet of black ice.

The bill of particulars, dated May10, 2012, alleges that the City was negligent, *inter alia*:....

> in failing to shovel/plow/remove snow and/or ice in a timely fashion; in failing to salt or otherwise remove an accumulation of ice and snow in a timely fashion; in failing to abate the accumulation of snow and ice; in negligently and improperly removing snow and ice; in causing and creating an icy snow condition; in failing to perform snow and ice removal with reasonable care; in causing or allowing to exist, or failing to prevent a dangerous condition; ... in having actual and constructive notice of the dangerous and hazardous condition and failing to correct same on a proper and timely basis . . .

Gerald Mariscal ("Mariscal") and Michael Alicea ("Alicea"), both supervisors with the DOS, were deposed. They testified that the streets of the City are divided into three zones for snow removal operations: primary, secondary, and tertiary, with primary routes being plowed first. The area of 234th Street, between Carpenter and White Plains Road, and

Bryan Avenue and Bronx Boulevard, where plaintiff's accident occurred, is designated as a primary route.

Snow is removed by plowing with sanitation trucks, and salting is used for ice, with salt spreaders spreading salt throughout the whole street. Clearing the streets and sidewalks of snow is a 24-hour operation and is not stopped until blacktop is reached. Snow cleared off of the sidewalks is eventually put into the street and broken down into small piles which are spread with a spreader before being salted. DOS maintains a "snow book" that is used to log snow assignments and document what is done. A "carting book" is also maintained, which documents what individuals do during each shift.

According to the deposition testimony of Mariscal and Alicea, with respect to the primary route in the area of the incident, snow removal operations commenced on December 26, 2010. The equipment used included a salt spreader and a holster (a utility truck that holds about one and one-half tons of snow), a reel loader (for plowing), and a plow truck. Plowing, salting and snow removal on this route were done on December 26, 2010 through January 4, 2011.

The City contends that there is no proof that the alleged black ice in the subject roadway was the result of its snow removal efforts, and that it did not have either actual or constructive notice of the condition. It also avers that the condition was not dangerous and unusual, and that it did not create the condition.

In opposition to the motion, plaintiff submits the affidavit of meteorologist George

Wright ("Wright"), the affidavit of snow and ice management expert, John Allin ("Allin"), and the relevant climatological data. Plaintiff asserts that there was no snow or ice on the ground at the accident location from previous storms.

Wright, analyzing the weather data, states that there was no significant precipitation subsequent to the snow storm of December 26, 2010, and the date of plaintiff's accident. He set forth the high and low temperatures for the period of December 28, 2010, through January 5, 2011, showing the fluctuation in temperatures, and opined that the patch of ice upon which plaintiff slipped was entirely formed due to the repeated melting and refreezing that occurred in the days following the December 26, 2010 snow storm, and that had salt been properly applied prior to plaintiff's slip and fall, ice would not have formed and plaintiff would not have been injured.

Allin also reviewed the weather data for the period following the snow storm through the date of plaintiff's accident, and stated that the persons charged with addressing snow and ice management at the crosswalk should have known about "thaw and refreeze", but failed to address this "treacherous and dangerous" condition. According to Allin, defendants failed to properly perform de-icing of the area, and should have observed the snow build-up and ice condition as a result of their numerous visits to the area.

The moving party in a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital et.al.*,

68 NY2d 320, [1986]; *Winegard v New York Univ. Med Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, [1957]). Failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition *(Winegard v New York Univ. Med. Center*, *supra*, at 853). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial of the action (*Gaddy v Eyler*, 79 NY2d 955 [1992]; *Alvarez v Prospect Hospital, et al.*, *supra*; *Zuckerman v City of New York*, *supra)*.

A municipality cannot be held liable for a defective snow/ice condition unless it is established that it is unusual, exceptional, or different in character from those conditions that exist during the winter (*Gaffney v City*, 218 NY 225, 227 [1916] [Plaintiff's action for a fall on the sidewalk due to slush dismissed insofar as the slush was neither unusual or exceptional and was instead a condition naturally to be expected during the winter.]; *Williams v City of New York*, 214 NY 259, 264 [1915]; *Saez v City of New York*, 82 AD2d 782, 783 [1st Dept 1981] ["On the facts before this Court the plaintiff failed to show that the defendants permitted an unusual and dangerous accumulation of ice and snow (-ice patches-) to remain on the sidewalk for an unreasonable period of time."]; *McGuire v City of New York*, 24 AD2d 496, 497 [2d Dept 1965] ["In our opinion, plaintiff failed to establish that the patch of ice upon which he slipped was dangerous or unusual or exceptional."]).

The definition of "unusual or exceptional" in this context is, a condition of snow or ice that is "different in character from conditions ordinarily and generally brought about by the winter weather prevalent in the given locality" (*Williams v City of New York*, supra at 264). The rationale for this rule is that the City cannot possibly, or reasonably, be expected to maintain its hundreds of miles of streets and sidewalks entirely clear of snow and ice at all times and that "[t]he danger arising from the slipperiness of ice and snow lying in the streets is one which is familiar to everybody residing in our climate and which everyone is exposed to who has occasion to traverse the streets of cities and villages in the winter season" (id., citing, *Harrington v City of Buffalo*, 121 NY 147, 150 [1890]). Therefore, it would be unreasonable to impose liability upon the City for failing to remove snow or ice that, while perhaps hazardous, is not extraordinary.

After consideration of the parties' submissions, this Court finds that defendant City met its burden of showing that it did not create, or have actual or constructive notice of the icy condition that allegedly caused plaintiff's accident, as a reasonable amount of time had not elapsed since the fluctuation of freezing and melting temperatures. "Courts have consistently taken into account the attendant difficulties which municipalities face in removing snow and ice during freezing weather (citations omitted)" *(Valentine v City of New York*, 86 AD2d 381 [1st Dept 1982]).

This Court finds that plaintiff failed to raise an issue of fact as to whether the City was negligent in clearing the crosswalk of ice and snow *(Cf. Acar v Ecclesiastical Assistance*

Corp., 125 AD3d 464 [1st Dept 2015] [plaintiff's expert meteorologist failed to raise a triable issue of fact as to whether ice was a result of melting and refreezing of runoff]; *Slates v New York City Housing Authority*, 79 AD3d 345 [1st Dept 2010] [defendant did not have constructive or actual notice of the black ice]; *Gerber v City of New York*, et al., 280 AD2d 289 [1st Dept 2001] [City properly granted summary judgment where it did not have a reasonable time to clear the sidewalk of any black ice within days of inclement weather]). Furthermore, plaintiff's assertions are too speculative to allow an inference that plaintiff fell on pre-existing ice created by defendants' snow removal efforts, or that defendants had actual or constructive notice of any such hazard (*Granato v Bella Vista Group Assoc.*, 239 AD2d 781 [1997]).

Lastly, Chapter 17, section 396, of the New York City Charter provides that "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not that of any agency except where otherwise provided by law." DOS and DOT are agencies of the City of New York and thus, are not suable entities (see *Lopez v New York City Dept. of Education*, 43 Misc.3d 1204 [Sup Ct., Bronx Cty., 2014]; *Davis v City of New York*, 2000 WL 1877045, n 1 [SDNY 2000]).

Accordingly, the motion to dismiss brought by DOS and DOT is granted, without opposition, and the Complaint as against DOS and DOT is dismissed.

The City's motion for summary judgment is granted, and the Complaint is dismissed against the City of New York.

This constitutes the decision of this Court.

Dated: March 22, 2017
Bronx, New York

Ruben Franco, J.S.C.

HON. RUBEN FRANCO