Gutierrez v New York City Hous. Auth.
2019 NY Slip Op 30993(U)
April 8, 2019
Supreme Court, New York County
Docket Number: 157021/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** ***Justice*** **PART** **IAS MOTION 2EFM**

---X

YOSELIN GUTIERREZ,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

---X

INDEX NO. 157021/2015

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGMENT .

Upon the foregoing documents, it is ordered that the motion is denied.

Defendant New York City Housing Authority ("NYCHA") moves, in effect, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint in its entirety. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEEDURAL BACKROUND

Plaintiff Yoselin Gutierrez alleges that she was injured on January 18, 2015 at about 8:00 am, when she slipped and fell due an icy condition on a public sidewalk on East 124th Street between First and Second Avenues, which abuts Wagner Houses, a NYCHA property. She alleges that NYCHA is liable for her injuries due to its negligence in failing to maintain the sidewalks in a reasonably safe condition, including failing to remove snow and ice therefrom. Defendant denies that it was negligent and maintains that it cannot be held liable pursuant to the

New York City Administrative Code because the incident occurred while a storm was in progress.

This matter was commenced by the filing of the summons and complaint on July 10, 2015. Issue was joined on August 11, 2015. Doc. No. 4. NYCHA now moves for summary judgment dismissing the complaint. Doc. No. 39.

In support of its motion, NYCHA submits meteorological reports establishing that there was a winter storm on the morning of January 18, 2015. Defendant submits the local climatological data and the supporting affidavit of certified consulting meteorologist Steven Roberts. Doc. No. 53. Roberts states that "[f]reezing rain began at approximately 6:30 AM EST and continued through approximately 10:15 – 10:30 AM EST. Approximately 0.1 inch of ice accumulated on undisturbed, untreated, exposed outdoor surfaces." Id, ¶10. Roberts further states that the last measurable snow fall before January 18, 2015 was on January 12, 2015, which accumulation was approximately 1.6 inches. He additionally posited that "[d]ue to melting, no snow or ice cover remained at the end of the day [on January 12] (11:59 [p.m.]) on untreated, undisturbed, exposed outdoor surfaces." Id, ¶8.

Defendant also submits in support of its motion plaintiff's deposition transcript (Doc. No.45), the deposition transcript of Hashim Gittens, defendant's Supervisor of Caretakers (Doc. No. 47), his errata sheet (Doc. No 49), his log book pages for the days in question (Docs. No. 48 and 50), NYCHA's snow removal and sanding sheet (Doc. No. 51), and an affidavit from Marcus Brooks, defendant's Supervisor of Groundskeepers for the Wagner Houses at the time of the incident (Doc. No. 52).

In opposition, plaintiff argues that defendant fails to establish its prima facie entitlement to summary judgment. Plaintiff submits a meteorological report and affidavit from George

Wright, who avers that he is a certified Consulting Meteorologist in New York with expertise in the field and that he performed a weather and forensic analysis at the Wagner Houses and produced the annexed work product which he swears is accurate to a reasonable degree of meteorological certainty. Doc. No. 57. In his report, Roberts agrees that the last snowfall before the date of the incident, was on January 12, 2015. He notes melting and refreezing which occurred between January 12 and 18, 2015 and opines that the fluctuating temperatures would have caused the ice to melt and re-freeze. He also notes that plaintiff, at her deposition, had stated that the ice had formed where the sidewalk had cracks, which would have allowed water to pool and refreeze. His analysis is that, on the day of the incident, the precipitation was "very light and intermittent" and could not have produced the thick and dirty ice that plaintiff testified that she fell on. He further opines that the color of the ice reported by plaintiff could only be caused by "the deposition of automobile exhaust, soot and windblown dust." Wright concludes that plaintiff slipped on ice that had previously formed and had been present on the subject sidewalk…for more than 36 hours prior to her incident and was therefore a longstanding condition." Id., at ¶8.2 of the report.

POSITIONS OF THE PARTIES

NYCHA first argues that it is entitled to summary judgment as a matter of law because the evidence establishes that there was a storm in progress at the time of the accident, thereby suspending its duty as an owner of the sidewalk to clear away snow and ice for a reasonable period following the termination of the storm. NYCHA further asserts that the ice on which plaintiff slipped was created by the ongoing January 18th storm. In support of this contention, NYCHA refers to portions of plaintiff's deposition transcript, wherein she states that it was not

snowing or raining but she did have an umbrella with her. Doc. No. 40, p. 38, Ln 16-25, p. 39, Ln 1. Additionally, plaintiff stated that she had traversed the same section of sidewalk the Wednesday before the incident (January 14, 2015) and had not noticed any ice. Doc. No. 40, p. 55, Ln 13-19.

Defendant also refers to the affidavits of Gittens and Brooks to further its argument that, since the ice and snow had been removed from the subject sidewalk, plaintiff could not have slipped on pre-existing ice. Doc. Nos. 47, 48, 49, 50 51 and 52.

Finally, defendant relies on the report of its meteorological expert, Roberts. Doc. No. 53. In his report, Roberts lists the records he reviewed in order to form his opinions. He analyzes the temperatures from January 5th through the 18th, and states that there was only a trace amount of snow on both January 9th and 12th, 2015. He additionally notes that, due to the above freezing temperatures, causing the snow to melt, "no snow or ice cover remained at the end of the day [on January 12]" Id. ¶ 5. Finally, he states that "On January 18, 2015, (date of the incident) there was no existing snow or ice cover present at the start of the day (midnight). Id. ¶ 5.

Given the foregoing, defendant argues that it has established its prima facie entitlement to summary judgment dismissing the complaint since it is well-established law in New York that liability for failure to remove ice from a storm does not arise until a reasonable time after the storm has ended. Doc. No. 40 Id. ¶ 5

Plaintiff, as noted above, countered with her own expert, who also analyzed the amounts of snowfall and temperatures and, unsurprisingly, came to the opposite conclusion. Additionally, plaintiff raises several unpersuasive arguments about defendant's failure to provide photographs, to have had its expert's report sworn, and to file an expert disclosure. As defendant notes, it was neither necessary to provide photographs which plaintiff could have provided herself nor to have

provided a sworn expert's report, since it also included the analytical data and charts to support the report. Defendant maintains that the report was sworn but, due to clerical error, the expert's signature was omitted from the report. It further asserts that it was not required to submit an expert disclosure.

More persuasive is plaintiff's argument regarding the storm in progress, which she disputes given the report of her expert. Additionally, plaintiff points out that defendant's expert did not opine on the issue of black ice, which her expert addressed at length. Plaintiff maintains that, based on the expert's analysis of the length of time the ice would have been on the sidewalk, it is clear that it pre-dated any precipitation on the day of the incident and therefore negates defendant's storm in progress defense.

Plaintiff further argues that factual questions exist regarding whether NYCHA had actual or constructive notice of the dangerous, slippery conditions and that neither the testimony of Gitten or Brooks, nor their log book entries, is dispositive of that question. First, plaintiff argues that any notations in the log book are hearsay, because they were not personal observations, but were relayed to the entrant by others. Docs No. 48, 50, 51. Additionally, Brooks admitted that he did not make entries on January 17 or 18th because he was not there. Doc. No. 52, ¶¶ 9,10. Plaintiff also points out that, at his deposition, Gittens admitted that there were icy conditions on the day of the incident but that he did not know whether they existed the day before (Doc. No. 47, p 63-65). He also admitted that the information in Gittens' logbook was hearsay and that he could not identify the persons who conveyed the information to him. Plaintiff argues that, given that admission, there could be no actual evidence of which sidewalks and walkways had been cleared or salted in the days before the incident, but only proof of a general pattern. Finally, plaintiff argues that, because they were not personal observations, they did not negate plaintiff's

contention that NYCHA had constructive notice since the icy condition had existed for a long enough time that it knew, or should have known, of its existence and should have remedied the condition.

In response, NYCHA reaffirms its position that plaintiff slipped on ice during an ongoing winter storm. According to NYCHA, plaintiff misinterprets both the climatological data report and the report of its expert. Specifically, NYCHA argues that the report reflects an ongoing January 18, 2015 storm. Defendant also argues that the reports of its employees, even if not personal observations, nevertheless negate plaintiff's claims that the ice existed prior to the January 18th storm.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

Under the "storm in progress" rule, "it is well settled 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].) This rule is "designed to relieve the worker(s) 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 the effort fruitless." (*Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345 [1st Dept 2002].) If the evidence establishes that the plaintiff's injury occurred while a storm was in progress, then dismissal of the complaint is warranted. (*See Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016] (dismissing complaint where defendant submitted uncontroverted evidence that there was an ongoing storm when plaintiff fell); *Krinsky v Fortunato*, 82 AD3d 409, 409 [1st Dept 2011] (same).)

Here, NYCHA established its prima facie showing of entitlement to summary judgment as a matter of law. The weather reports submitted by NYCHA's expert witness, who is a licensed meteorologist (Doc. 64), establish that a freezing rain advisory was in effect on January 18, 2015, the day of the incident.

Therefore, this Court concludes that NYCHA satisfied its prima facie burden of establishing that there was a storm in progress at the time of plaintiff's alleged accident. (*See Powell*, 290 AD2d at 345 ("Such evidence is especially persuasive when based upon the analysis of a licensed meteorologist."); *Filius v New York City Hous. Auth.*, 156 AD3d 434, 434–35 [1st Dept 2017] (certified meteorological reports and plaintiff's testimony sufficient to demonstrate a storm was in progress).)

The burden thus shifted to plaintiff to raise a genuine, triable issue of fact. In attempting to meet this burden, plaintiff first submits the transcript of her own deposition testimony, the only personal account of the conditions on the day of the accident. At her deposition, plaintiff

denied that it was snowing when she fell. Additionally, she testified that there was "dark ice", indicating that it may have existed for a considerable time prior to the accident.

In addition, plaintiff submits meteorological data from her own expert, who also raises the argument that the ice pre-existed the incident, based on plaintiff's description, and should have been cleared before plaintiff's fall. NYCHA opposes plaintiff's argument by noting that, although Gittens noted that it was icy on the day of the accident, he was unable to say whether the icy condition existed the day before it occurred. Defendant also argues that entries of both Gittens and Brooks, stating that no snow removal had been done after January 12, 2015 proves that there was no snow or ice remaining on the sidewalks and pathways and therefore the ice which plaintiff fell on could not have pre-existed the storm.

The Courts have held that "a defendant moving for summary judgment must proffer evidence from a person with personal knowledge as to when the sidewalk was last inspected or as to its condition before the accident." *Rodriguez v Bronx Zoo Restaurant, Inc.*, 110 AD3d 412, 412 [1st Dept 2013] (see also *Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 [1st Dept 2009]; *Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]; *DeLa Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566 [1st Dept 2010]). The Courts have also found that plaintiff's description of dirty ice, accompanied by a climatological expert's opinion regarding the possibility that snow and ice may have remained on the ground for a sufficient time to have provided constructive notice to defendant, raises a question of fact to defeat a summary judgment motion. *See Jones v NYCHA*, 157 AD3d 426, 426 (1st Dept 2018); *see also Perez v NYCHA*, 114 AD3d 586 (1st Dept 2014); *Larkin v 171 E. 205th St. Corp.*, 118 AD3d 451 (1st AD3d 2014]).

Plaintiff has thus presented admissible evidence raising a question of material fact regarding whether the storm was ongoing at the time of her accident. *See Calix v New York City*

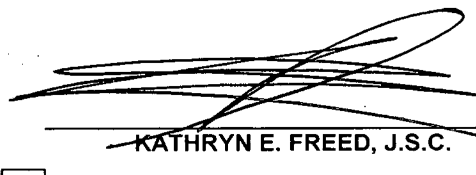
Tr. Auth., 14 AD3d 583, 584 (2d Dept 2005) (summary judgment denied where deposition and trial testimony conflicted with climatological data). Plaintiff has also submitted admissible evidence that, at the very least, raises the possibility that the icy condition which allegedly caused her accident pre-existed the day of the incident, including a meteorological report that potentially connects the icy condition to earlier storms, including plaintiff's testimony that there were piles of snow alongside the sidewalk which could have caused runoff that refroze to form that ice. Thus, there are questions of fact as to both whether there was a storm in progress on the day of the accident and whether NYCHA had actual and/or constructive notice of an icy condition which pre-existed the day of the incident.

Because plaintiff has raised triable issues of fact, this Court concludes that defendant NYCHA is not entitled to summary judgment dismissing the claims against it.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendant New York City Housing Authority's motion for summary judgment is denied; and it is further

ORDERED that this constitutes the decision and order of this Court.



4/8/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	☐ CASE DISPOSED			☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☒ DENIED		☐ GRANTED IN PART		☐ OTHER
APPLICATION:	☐ SETTLE ORDER			☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN			☐ FIDUCIARY APPOINTMENT		☐ REFERENCE