

Moore v Herald Towers, LLC
2019 NY Slip Op 31208(U)
May 1, 2019
Supreme Court, New York County
Docket Number: 152694/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

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INDEX NO. 152694/2017

FREDRICK MOORE,

Plaintiff,

MOTION SEQ. NO. 002

- v -

HERALD TOWERS, LLC and JEMB REALTY CORP.,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for SUMMARY JUDGMENT

In this slip and fall action commenced by plaintiff Fredrick Moore, defendants Herald Towers, LLC (“Herald”) and JEMB Realty Corp. (“JEMB”) move, pursuant to CPLR 3212, to dismiss the complaint. After oral argument, and after a review of the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced this personal injury action by filing a summons and verified complaint on March 22, 2017. Doc. 1. In his complaint, plaintiff alleged that he was injured on February 13, 2017, when he slipped and fell on the sidewalk located in front of 50 West 34th Street in Manhattan (“the premises”), and that the occurrence was caused by the negligent ownership, operation, management, and/or maintenance of the premises by Herald and JEMB. Doc. 1 at pars. 19-21.

In his bill of particulars, plaintiff alleged that he was injured “when he slipped and fell due to the presence of snow and ice on the public sidewalk” in front of the premises. Doc. 25 at pars. 3-4. He further claimed that Herald and JEMB had actual and constructive notice of the snow and ice condition. Doc. 25 at pars. 6-8.

At his deposition, plaintiff testified that he was injured when he slipped on ice and fell sideways. Doc. 27 at p. 69, 72. Although he did not actually see any ice before or after his fall, and did not know how long the ice was present, he saw snow piled on the sidewalk in the vicinity of where he fell. Doc. 25 at p. 72-74.

Neal Gitlitz of JEMB testified that Herald owned the building and that JEMB managed it. Doc. 28 at p. 11, 15. Defendants were responsible for removing snow and ice from portions of the sidewalk in front of the residential entrances to premises, whereas the retail tenants performed this task in front of the stores they leased. Doc. 28 at p. 32-37.

The note of issue was filed on July 25, 2018. Doc. 26.

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that plaintiff’s claim that he fell on ice is based on sheer speculation since he never saw ice before or after he fell. They maintain that, although plaintiff testified that he fell on ice, he could have slipped on something else, such as something dropped by a pedestrian seconds before he fell.

In opposition to the motion, plaintiff argues that defendants failed to establish their prima facie entitlement to summary judgment by setting forth details about what steps, if any, they took to remove snow and ice from the premises. Plaintiff further asserts that he did not speculate about the cause of the fall, but rather testified that he fell sideways after slipping on ice in front of the premises. He testified that there was ice and snow piled about a foot high on the side of

the sidewalk. Plaintiff also appended to his opposition papers weather reports from Kennedy Airport reflecting that a wintery mix of precipitation, including freezing rain, had fallen the night before. The weather records also indicate that the temperature fluctuated between below and above freezing which, he claims, would have led to the ice and snow melting, thereby creating a hazardous icy condition which would have required that the sidewalk be salted. Doc. 31 at pars. 6-11.

In reply, defendants reiterate their argument that plaintiff's claim that he fell on ice is utterly speculative. They further assert that, since plaintiff did not observe any ice prior to his fall, he cannot establish constructive notice.

LEGAL CONCLUSIONS:

In order for a defendant to prevail on a motion for summary judgment in a slip and fall case, it must make a prima facie showing that it neither created the condition that caused the plaintiff's fall nor had actual or constructive notice of such a condition. *See Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-975 (2d Dept 2012), *lv dismissed* 20 N.Y.3d 965; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 (1st Dept 2011). Here, defendants offer no evidence based on the personal knowledge of any witness addressing whether ice was present on the sidewalk at the time of the alleged incident or whether they had knowledge of the same. Additionally, defendants submit no evidence showing that their cleaning routines were followed on the date of the accident, or when the area where plaintiff fell was last cleaned and inspected prior to the alleged occurrence. *See Bonilla v 191 Realty Assoc., L.P.*, 125 AD3d 470, 470 (1st Dept 2015).

Defendants primarily assert that the complaint must be dismissed because plaintiff's claim is based on conjecture. Specifically, they maintain that, since plaintiff did not see any ice before or after he fell, his testimony that he fell on ice is purely speculative. This argument is disingenuous, however, since defendants failed to question plaintiff at his deposition regarding why he concluded that he fell on ice despite not having seen any. Indeed, defendants' argument that "there could be a number of items that [p]laintiff could have slipped on" (Doc. 22 at par. 23) is in itself speculative. Thus, the motion must be denied.

In support of the motion, defendants rely on the case of *Ormsby v 750 Seventh Ave. LLC*, 139 AD3d 455 (1st Dept 2016). In that case, plaintiff alleged that she was struck on the head by a piece of ice that fell from a building owned and managed by defendants. At her deposition, however, plaintiff testified that she knew neither what object struck her nor where it came from, and her complaint was dismissed on the ground that her claim was entirely speculative. *Ormsby* is distinguishable from this case, however, since plaintiff herein specifically testified that he fell on ice at the premises. Thus, that decision does not warrant the granting of summary judgment dismissing the complaint.

In light of the foregoing, it is hereby:

ORDERED that the motion by defendants Herald Towers, LLC and JEMB Realty Corp. seeking summary judgment pursuant to CPLR 3212 is denied; and it is further

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

5/1/2019

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