

Rios v Spelman

2019 NY Slip Op 31317(U)

March 20, 2019

Supreme Court, Queens County

Docket Number: 703512/2015

Judge: Leslie J. Purificacion

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 39

-----X
CARLOS RIOS,

Plaintiffs,

Index No. 703512/2015

-against-

DECISION/ORDER

ROBERT SPELMAN, VIRGINIA SPELMAN,
BALTAZAR CAJAMARCA and DOLORES
CAJAMARCA,

Motion Seq. No. 3

Defendants.
-----X

The following papers numbered 1 to 9 read on defendants BALTAZAR CAJAMARCA and DOLORES CAJAMARCA's motion pursuant to CPLR §3212 dismissing the complaint.

	<u>Papers Numbered</u>
N.M., Affirmation, Exhibits and Service.....	1-4
Opp. Aff., Exhibits and Service.....	5-7
Reply Aff. and Service.....	8-9

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained on March 1, 2015, as a result of a slip and fall on black ice located on the public sidewalk abutting a two-family home located at 93-20 103rd Street, Ozone Park, New York. Defendants Baltazar and Dolores Cajamarca, who own the premise abutting the sidewalk where the accident took place, now move for summary judgment on the issue of liability.

In support of their application, defendants submit the deposition transcript testimony of defendant Baltazar Cajamarca. Mr. Cajamarca testified that he and his wife Dolores are co-owners of the two-family home located at 93-20 103rd Street . His family resides on the

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first floor and they rent the second floor apartment. Mr. Cajamarca alleged he personally shoveled and salted the area where the plaintiff fell within 24 hours of the accident because of snow. Mr. Cajamarca stated that he left the morning of the accident to go to work at around 10 a.m. and he could not recall if it had been snowing at that time. He further states that his wife informed him that evening that someone had fallen by their garage entrance around 12 p.m. that afternoon.

Defendants also submit the deposition transcript of Dolores Cajamarca. Mrs. Cajamarca testified that on the day of the accident she was leaving her home around 1 p.m. when she saw the plaintiff laying on the sidewalk behind her carport. Mrs. Cajamarca claims that she spoke with the plaintiff and inquired if he needed help and he declined. Mrs. Cajamarca alleges that there was no ice on the sidewalk and it had been snowing all day. She described the snow as "a little snow". Mrs. Cajamarca stated that she knew it had been snowing because she could see it out the window and because her husband was cleaning the snow with a shovel and putting down salt before he left for work.

In his deposition transcript, plaintiff claims that he was walking to work on the date of the accident. He testified that the accident occurred on 94th Street, just before its intersection with 103rd Avenue at approximately 12:00-12:15 p.m. He claims that when he left his home around 11:50 it was not snowing and it was a bright clear day. He further claims that there had not been any snowfall in the 24 hours prior to the accident and that it had not snowed for 3 days. Plaintiff testified that as he was walking down 94th Street he did not see any snow or ice on the sidewalk. He further testified that he slipped on either ice or water or something "like ice" the width of the sidewalk. Plaintiff stated that it appeared the area by where he fell had been previously shoveled.

Defendants also submit certified copies of the local climatological data compiled by the National Climate Data Center from February 2015 and March 2015. The data indicates that the last snowfall prior to March 1, 2015 was on February 26, 2015, when it snowed trace amounts. On March 1, 2015, the data shows that trace amounts of snow started falling around 12:00 p.m and at 1 p.m. approximately .03 inches of snow had fallen.

A defendant moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, prima facie, that it neither created the snow and ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition (see Talamas v. Metropolitan Transportation Authority, 120 A.D.3d 1333). Movant may sustain this burden by presenting evidence that there was a storm in progress at the time of the plaintiff's accident. Under this storm in progress rule, the courts have held that a property owner will not be held liable for accidents occurring as a result of the accumulation of snow and ice on its premise until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to remedy the hazard caused by the storm (see Aronov v. St. Vincent's Housing Development Fund Co., 145 A.D. 3d 648)

Here, the defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law. Mr. And Mrs. Cajamarca testified that Mr. Cajamarca had shoveled and salted the accident site within 24 hours of the accident. While it is unclear why he was "cleaning" the area, since it had not snowed within those 24 hours, there are triable issues of fact as to whether he created or exacerbated the hazardous condition that caused plaintiff to slip and fall and whether he had notice of said condition. In addition, the storm in progress rule is inapplicable here. The certified climatological data indicates that it had

just started to snow approximately 12 minutes before the accident and that it had not snowed for several days prior to the accident. This evidence, coupled with the plaintiff's testimony that it had not started to snow at the time of the accident and that he slipped on ice is insufficient to establish that the storm in progress rule applies and that the ice upon which the plaintiff slipped was the result of the ongoing storm as opposed to an accumulation of ice from the prior snowfall (see McBryant v. PISA Holding Corp., 110 A.D.3d 1034).

Accordingly, the motion is denied.

This is the decision and order of the court.

Date:

MAR 20 2019

Hon. Leslie J. Purificacion, J.S.C.

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