

Bazan v New York City Tr. Auth.
2019 NY Slip Op 31559(U)
April 1, 2019
Supreme Court, Queens County
Docket Number: 704222/2016
Judge: Joseph Risi
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 3

-----X
VERONICA BAZAN,

Index Number 704222/2016

Plaintiff,

DECISION/ORDER

--against--

NEW YORK CITY TRANSIT AUTHORITY,

Motion Sequence Nos. 4 and 5

Defendant,
-----X

The following papers numbered 1 to 15 read on defendant New York City Transit Authority's motion (seq. no. 4) an order, pursuant to CPLR §§3211 and 3212, dismissing plaintiff's complaint for failure to state a cause of action and for summary judgment in favor of said defendant and plaintiff Veronica Bazan's motion (seq. no. 5) for an order, pursuant to CPLR §3126, striking the answer of defendants New York City Transit Authority ("NYCTA") and the City of New York¹.

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Upon the foregoing papers, it is ordered that these motions are consolidated and decided as follows:

Plaintiff Veronica Bazan ("Bazan") commenced this action by the filing of a summons and complaint on April 8, 2016 seeking to recover for-injuries she allegedly sustained on January 26, 2015, as the result of a slip and fall on the stairway located at the 103rd Street - Corona Plaza subway station located in Queens County, City of State of New York due to the alleged negligence of defendant NYCTA.

Defendant NYCTA now moves for order dismissing the complaint for failure to state a cause of action and for summary judgment on the grounds that the incident occurred while the

¹The action was dismissed as to the City of New York by Order dated March 31, 2017 (Lane, J.)

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weather conditions which created the condition were ongoing, giving defendant insufficient time to cure the alleged condition, asserting that it lacked actual or constructive notice of the condition, and further, did not create the condition. In support of its motion, defendant submits a copy of the pleadings, plaintiff's deposition testimony and an unsigned 50-h transcript, and a Local Climatological Data sheet issued by the National Oceanic and Atmospheric Administration ("NOAA"), National Centers for Environmental Information.

On a motion for summary judgment, the movant bears the initial burden of establishing, *prima facie*, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324[1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). The movant's burden on a summary judgment motion is a heavy one, as the court must view the evidence in the light most favorable to the nonmoving party, and all inferences must be resolved in favor of the nonmoving party (see *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v. Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v. City of New York*, 49 NY2d at 557; CPLR 3212[b]).

A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only when it created the alleged dangerous condition or had actual or constructive notice of its existence (see *Dhu v New York City Hous. Auth.*, 119 AD3d 728 [2nd Dept 2014]; see also *Denardo v Ziatyk*, 95 AD3d 929 [2nd Dept. 2012]). Thus, a defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for sufficient length of time to discover and remedy it (see *Santoliquido v Roman Catholic Church of the Holy Name of Jesus*, 37 AD3d 815 [2nd Dept. 2007]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (see *Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973 [2nd Dept. 2012]; see also *Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610 [2nd Dept. 2011]).

"Under the so-called 'storm in progress' rule, a property owner will not be held responsible 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 ameliorate the hazards caused by the storm" (*Marcheses v Skenderi*, 51 AD3d 642, 642 [2nd Dept. 2008]; see *Anderson v Landmark at Eastview, Inc.*, 129 AD3d 750 [2nd Dept. 2015]). On a summary judgment motion, the question of whether a reasonable period of time has elapsed may be decided as a matter of law by the court based upon the circumstances of the case (see *Valentine v City of New York*, 57 NY2d 932 [1982]; see also *Sie v Maimonides Med. Ctr.*, 106 AD3d 900 [2nd Dept. 2013]). While a lull in a storm does not impose a duty to

remove the accumulation of snow or ice before the storm ceases in its entirety (*see Mazzella v City of New York*, 72 AD3d 755 [2nd Dept. 2010]), “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 commonsense would dictate that the rule not be applied” (*Mazzella* at 756 [internal quotation marks omitted]; *see Rabinowitz v Marcovecchio*, 119 AD3d 762 [2nd Dept. 2014]). Furthermore, even if a storm is ongoing, once a property owner elects to remove snow, it must be done with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm (*see Kantor v Leisure Glen Homeowners Assn., Inc.*, 95 AD3d 1177 [2nd Dept. 2012]; *Salvanti v Sunset Indus. Park Assoc.*, 27 AD3d 546 [2nd Dept. 2006]).

In this case, defendant fails to meet its initial burden of establishing their *prima facie* entitlement to judgment as a matter of law. Defendant seeks summary judgment on the grounds that it did not create the alleged hazardous condition or have actual or constructive notice of its existence, and that it is not liable based on the “storm in progress” rule. Defendant asserts that it is not liable since the subject accident occurred while it was still snowing or as indicated on the local climatological data sheet issued by NOAA, there was snow, fog and freezing mist throughout the day of plaintiff’s accident and continued through the next day (January 27, 2015). Defendants fail to make a *prima facie* showing that it did not create or have actual or constructive notice of the alleged hazardous condition which caused plaintiff to fall. Defendant has offered no evidence as to if and when the subject staircase was last inspected or cleaned (*see Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409 [2nd Dept 2004]). There is also no testimony before this Court by a representative of defendant who inspected the stairway before the plaintiff’s accident or who performed or oversaw any snow or ice removal at the subject premises.

Accordingly, defendant’s motion for summary judgment is denied.

Plaintiff moves to strike defendants’ NYCTA and the City of New York’s answers for failure to produce any witnesses for deposition despite being ordered to do so. As noted above, the action was dismissed against the City of New York in March of 2017, a year before the making of this motion, accordingly, the branch of the motion seeking depositions of a witness on behalf of the City of New York is denied as moot.

Plaintiff asserts that defendant has failed to produce a witness for depositions pursuant to the Preliminary Conference Order dated December 22, 2016, the Compliance Conference Order dated June 26, 2017 and a So-Ordered Stipulation dated March 8, 2018.

Accordingly, it is

ORDERED that defendant NYCTA shall produce a witness with actual knowledge of the maintenance of the stairway in question on the day of the accident, January 26, 2015, for the 103rd Street - Corona Plaza subway station within fifteen (15) days of service of this Order with Notice of Entry. Defendant’s failure to provide a witness may result in it being precluded from offering any evidence at trial.

ORDERED that all other applications not specifically addressed herein are denied; and it is further

This is the decision and order of the Court.

Dated: April 1, 2019

4/1/19 Joseph Risi

Hon. Joseph Risi, A.J.S.C.

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